BEFORE THE SUPREME COURT CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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KHIEU Samphan's Appeal Brief (Case 002/02)

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Before:

The Supreme Court Chamber
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Judge Florence Ndepele MWACHANDE-MUMBA
Judge MONG Monichariya
Judge Maureen HARDING CLARK
Judge YA Narin

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

§	Paragraph(s)
1JD Worksite	1st January Dam
AB 002/01	KHIEU Samphan's Appeal Brief [Case 002/01], 29 December 2014 (F17)
Case 002/01 Appeal Judgement	Appeal Judgement in Case 002/01, 23 November 2016 (F36)
AuKg	Au Kanseng Security Centre
BP	Base People
CAH	Crimes against humanity
CB 002/02	KHIEU Samphan's Closing Brief (Case 002/02), 2 May 2017, amended 2 October 2017 (E457/6/4/1)
CC	Central Committee
SC	Standing Committee
CCP	Code of Criminal Procedure
Chamber	Trial Chamber (of the ECCC)
CIJ(s)	Co-Investigating Judges/ Co-Investigating Judge
CIL	Customary international law
CO	Closing Order, 15 September 2010 (D427)
CPK	Communist Party of Kampuchea
CZ	Central Zone
DC	Democratic centralism
DC-Cam	Documentation Centre of Cambodia
Defence	KHIEU Samphan's Defence
DK	Democratic Kampuchea
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights (formerly the Convention for the Protection of Human Rights and Fundamental Freedoms)
ECtHR	European Court of Human Rights

Ex-KR	Former Khmer Republic soldiers and officials
EZ	East Zone
FBIS	Foreign Broadcast Information Service
fn	Footnote
FORTRA	Foreign Trade Company of Cambodia
FULRO	United Front for the Liberation of Oppressed Races
FUNK	National United Front of Kampuchea
GC	Geneva Conventions of 12 August 1949 on international humanitarian law
GRUNK	Royal Government of the National Union of Kampuchea
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICT	International Criminal Tribunals
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IMT	Nuremberg International Military Tribunal
IR	Internal Rules
IRMCT	International Residual Mechanism for Criminal Tribunals
ISCP	Introductory Submission filed by the Co-Prosecutors, 18 July 2007, (D3)
JCE	Joint criminal enterprise
JCE I	Basic category of joint criminal enterprise
JCE II	Systemic category of joint criminal enterprise
JCE III	Extended category of joint criminal enterprise
Case 002/01 Trial Judgement	Trial Judgement in Case 002/01, 7 August 2014 (E313)

KCA	Kampong Chhnang Airfield
KK	Khmer Krom
CPNLAF	Cambodian People's National Liberation Armed Forces
KPRA	Kampuchean People's Representative Assembly
KR	Khmer Republic
KR	Khmer rouge (not to be abbreviated; check at the end)
RAK	Revolutionary Army of Kampuchea
KTC	Kraing Ta Chan
MFA	Ministry of Foreign Affairs
WRI	Written Record of Interview
MOP1	Movement of population, phase 1
MOP2	Movement of population, phase 2
MOP3	Movement of population, phase 3
NEZ	Northeast Zone
NP	New people
NWZ	Northwest Zone
NZ	North Zone
OIA	Other inhumane acts
PK	Phnom Kraol or Phnom Kraol Security Centre
MOP	Movement of population
PRG	Provisional Revolutionary Government of the Republic of South Vietnam
Reasons for Judgement	Judgement rendered at the conclusion of [Case 002/02], 16 November 2018 (E465)
RF	Revolutionary Flag (publication)
RPE	Rules of Procedure and Evidence
RY	Revolutionary Youth
SCSL	Special Court for Sierra Leone
SIHANOUK	NORODOM Sihanouk

SRV	Socialist Republic of Vietnam
STL	Special Tribunal for Lebanon
Supreme Court	Supreme Court Chamber (of the ECCC)
SWB	Summary of World Broadcasts
SWZ	Southwest Zone
T.	Transcript of hearing
TK	Tram Kak or Tram Kak cooperatives
TTD	Trapeang Thma Dam
UDHR	Universal Declaration of Human Rights
UN	United Nations
WZ	West Zone

MAY IT PLEASE THE SUPREME COURT CHAMBER

INTRODUCTION

BRIEF PROCEDURAL OVERVIEW

1. On 15 September 2010, at the conclusion of the investigation opened by the Prosecution on 18 July 2007,[1] after three years in provisional detention, KHIEU Samphan was indicted for a number of crimes[2] and sent for trial on 13 January 2011 in Case 002.[3]

2. Having been seised of the case, the Trial Chamber (hereinafter the "Chamber") ordered the severance of the charges on several occasions before reducing their scope. On 22 September 2011, the Chamber initially defined the scope of a first trial, Case 002/01.[4] On 4 April 2014, after the conclusion of the substantive hearings in Case 002/01, the Chamber defined the scope of a second trial, Case 002/02.[5] On 27 February 2017, after the conclusion of the substantive hearings in Case 002/02, the Chamber finally reduced the scope of the proceedings by terminating those that concerned facts not included in Case 002/01 and Case 002/02.[6]

3. On 7 August 2014, in Case 002/01, the Chamber found KHIEU Samphan guilty of crimes against humanity (CAH) and sentenced him to life imprisonment.[7] On 23 November 2016, towards the end of the substantive hearings in Case 002/02, the Supreme Court Chamber (the "Supreme Court") affirmed certain convictions and reversed others, whilst affirming the sentence.[8]

4. On 16 November 2018, in Case 002/02, the Chamber found KHIEU Samphan guilty of the crime of genocide (of the Vietnamese), CAH and grave breaches of the Geneva Conventions (GC), and

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[1] Introductory Submission, 18.07.2007, **D3** (ISCP)
[2] Closing Order, 15.09.2010, **D427** (CO).
[3] Decision on Khieu Samphan's Appeal against the Closing Order, 13.01.2011, **D427/4/14**. Full details concerning references to decisions, findings and other judicial documents can be found in the Annex to this brief. With respect to decisions, where there is no explicit information concerning the Court that rendered it, it is a decision of the Chamber. As regards case law, where there is no explicit information concerning the Court that rendered it, it may be assumed to be ECCC case law.
[4] Severance Order Pursuant to Internal Rule 89 *ter*, 22.09.2011, **E124** with Annex defining the scope of Case 002/01 (amended) of 18.10.2012, **E124/7.3**; Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February, 2013, 26.04.2013, **E284**.
[5] Decision on Additional Severance of Case 002 and Scope of Case 002/02, 04.04.2014, **E301/9/1** with Annex Setting the Scope of Case 002/02, 04.04.2014, **E301/9/1.1**.
[6] Decision on Reduction of the Scope of Case 002, 27.02.2017, **E439/5**.
[7] Case 002/01 Trial Judgement, 07.08.2014, **E313**.
[8] Case 002/01 Appeal Judgement, 23.11.2016, **F36**.

sentenced him to life imprisonment (the "Judgement").[9] The Chamber stated that the full written reasons for its Judgement would be made available "in due course".[10]

5. On 19 November 2018, the Khieu Samphan Defence (the "Defence" and/or the "Appellant") requested the Supreme Court to set aside the Judgement rendered (the disposition) for procedural defect and lack of reasoning.[11] On 13 February 2019, the Supreme Court found the appeal inadmissible.[12] On 20 March 2019, the Defence requested that the decision be set aside on the ground that the panel of judges had been improperly constituted at the time.[13] The request was notified on 3 July 2019,[14] and on 16 August 2019,[15] the Supreme Court found that it had no merit.

6. On 28 March 2019, the parties were notified of the full written Reasons for Judgement, backdated to 16 November 2018 (the "Reasons for Judgement"),[16] totalling 4,101 pages in Khmer, 2,828 pages in French and 2,387 pages in English (including annexes), and 14,446 footnotes ("fn").

7. On 3 April 2019, the Defence requested that it be granted eight months and 100 pages to file its notice of appeal in two languages, stating that it intended to file a request seeking the disqualification of the judges of the Supreme Court at the earliest possibility.[17] On 26 April 2019, the Supreme Court granted all parties three months and 60 pages.[18] On 3 May 2019, the Defence requested a review of that decision.[19] More than a month later, on 7 June 2019, the Supreme Court dismissed the request.[20]

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[9] Transcript of trial proceedings (T.), 16.11.2018, **E1/529.1**, pp. 53-57, between 11.25.43 and 11.37.57 (Judgement).
[10] T. 16.11.2018, **E1/529.1**, before 09.36.02. See also: Scheduling Order for Pronouncement of the Judgement in Case 002/02, 26.09.2018, **E462**, p. 2.
[11] Khieu Samphan's Urgent Appeal against the Judgement Pronounced on 16 November 2018, 19.11.2018, **E463/1**.
[12] Decision on Khieu Samphan's Urgent Appeal against the Summary of Judgement Pronounced on 16 November 2018, 13.02.2019, **E463/1/3**.
[13] Khieu Samphan's Request for Annulment of Decision E463/1/3 on His Urgent Appeal against the Judgement of 16 November 2018, 20.03.2019, **E463/1/4**.
[14] The request, filed on 20.03.2019 at 11:52 a.m., was not notified until more than three months later, on 03.07.2019 at 10:28.
[15] Decision of the Supreme Court Chamber of 16.08.2019, **E465/1/5**.
[16] Case 002/02 Judgement, 16.11.2018, **E465** ("Reasons for Judgement").
[17] KHIEU Samphan's Request, 03.04.2019, **F39/1**.1.
[18] Decision on Nuon Chea and Khieu Samphan's Requests for Extensions of Time and Page Limits on Notices of Appeal, 26.04.2019, **F43**.
[19] Khieu Samphan's Application for Review of Decision on Requests for Extensions of Time and Page Limits on Notices of Appeal, 03.05.2019, **F44**.
[20] Decision on Khieu Samphan's Application for Review of Decision on Requests for Extensions of Time and Page Limits on Notices of Appeal, 07.06.2019, **F44/1**.

8. On 23 June 2019, the Prosecution filed its notice of appeal.[21]

9. On 1 July 2019, the Defence filed its notice of appeal, and restated its intention to file an application for disqualification as soon as possible.[22]

10. On 10 July 2019, the Defence requested that it be granted 10.5 months and 950 pages to file its appeal brief, initially in one language only. The Defence also requested leave to file its response to the Prosecution's appeal brief within 40 days of filing its own appeal brief.[23]

11. On 20 August 2019, the Prosecution filed its appeal brief.[24]

12. On 23 August 2019, the Supreme Court ordered the Defence to file its appeal brief, not exceeding 750 pages and initially in one language only on 27 February 2020, and to respond to the Prosecution's appeal within 30 days from the notification of its decision.[25]

13. On 23 September 2019, the Defence filed its response to the Prosecution's appeal brief.[26]

14. On 8 October 2019, the Defence filed a request for admission of additional evidence.[27] The request was granted by the Supreme Court on 6 January 2020.[28]

15. On 31 October 2019, the Defence applied for the disqualification of the six judges (out of seven) of the Supreme Court who had adjudicated in Case 002/01, arguing that they were biased because they had already ruled on issues similar to those to be considered in Case 002/02.[29] The decision on this application has not yet been issued.

16. The Defence hereby submits its Appeal Brief.

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[21] Co-Prosecutors' Notice of Appeal of the Trial Judgement in Case 002/02, 21.06.2019, **E465/2/1**.
[22] KHIEU Samphan's Notice of Appeal, 01.07.2019, **E465/4/1**.
[23] Khieu Samphan's Request for an Extension of Time and Page Limits for Filing his Appeal Brief, 10.07.2019, **F45**.
[24] Co-Prosecutor's Appeal Against the Case 002/02 Trial Judgement, 20.08.2019, **F50** (French translation notified on 09.09.2019).
[25] Decision on KHIEU Samphan's Request for Extensions of Time and Page Limits for Filing his Appeal Brief, 23.08.2019, **F49**.
[26] KHIEU Samphan Defence Response to the Prosecution's Appeal in Case 002/02, 23.09.2019, **F50/1**.
[27] KHIEU Samphan's Request for Admission of Additional Evidence, 08.10.2019, **F51**.
[28] Decision on Khieu Samphan's Request for Admission of Additional Evidence, 06.01.2020, **F51/3**.
[29] KHIEU Samphan's Application for Disqualification of the Six Appeal Judges Who Adjudicated in Case 002/01, 31.10.2019, **F53** (or **1**).

PRESENTATION OF THE BRIEF

17. This brief is not structured in the same way as the notice of appeal, for which, owing to lack of time, the Defence simply followed the outline of the Reasons for Judgement. However, the connection between the two documents is readily apparent as the Defence has retained the same numbering of errors, appearing in text boxes summarising its arguments. As indicated in the notice of appeal, many of the errors identified in different parts of the Reasons for Judgement overlap and have therefore been grouped together under common grounds for appeal.[30]

18. For reasons of space, the Defence has made extensive use of abbreviations, which are listed at the beginning of the brief. At times, it has also cross-referenced its previous submissions in order to avoid repetition,[31] such as its appeal brief in Case 002/01 ("AB 002/01") and its closing brief in Case 002/02 ("CB 002/02").[32] As the English translations of the above documents are sometimes inaccurate, the original French text should always be considered authoritative.

STANDARDS FOR APPELLATE REVIEW

19. Pursuant to Internal Rule 104, the Defence raises different types of errors committed by the Chamber.

Errors on a question of law invalidating the judgement or decision

20. An error of law arises from the application by the Chamber of a wrong legal standard.[33] A judgement is invalidated by an error of law if, in the absence of the error, a different verdict, in whole or in part, would have been entered.[34]

21. In order to establish that such an error has been committed, the appellant may, *inter alia*, raise arguments that were previously put before the Pre-Trial Chamber and/or the Chamber.[35] In this

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[30] A summary of the grounds for appeal is provided in Annex A and includes a detailed recital of the corresponding errors in the notice of appeal. Errors not set in text boxes were disregarded during the drafting of this brief because they were redundant, found to be ultimately non-prejudicial, deemed secondary, or due to a lack of time and/or space.
[31] Decision on Co-Prosecutors Request for Page and Time Extensions to Respond to The Defence Appeals of The Case 002/01 Judgement, 21.04.2015, **F23/1**, §9 ("to any arguments by NUON Chea or KHIEU Samphan that may be incorporated by reference to earlier submissions, the Supreme Court Chamber considers this to be an efficient way of avoiding repetition [...]".
[32] Khieu Samphan's Defence Appeal Brief Against the Judgement in Case 002/01 [(002/01)], 29.12.2014, **F17** ("AB 002/01"); KHIEU Samphan's Closing Brief (002/02), 02.05.2017, amended 02.10.2017, **E457/6/4/1** (CB 002/02").
[33] Case 002/01 Appeal Judgement, 23.11.2016, §86.
[34] Case 002/01 Appeal Judgement, 23.11.2016, §99; *Bemba* Appeal Judgement (ICC), 08.06.2018, §36.
[35] *Bemba* Appeal Judgement (ICC), 08.06.2018, §64.

matter, the burden of proof on appeal is not absolute. Even if the arguments put forward are insufficient to support the contention of an error of law, the Supreme Court may find other reasons and find in favour of the appellant. In order to make a determination as to the issues on appeal, the Supreme Court also reviews those legal findings of the Chamber which constitute necessary predicates for the impugned decision.[36]

Errors of fact occasioning a miscarriage of justice

22. An error of fact results from a finding which no reasonable trier of fact could have reached because he or she would not have accepted the evidence on which the Chamber relied or because the evaluation of that evidence is wholly erroneous.[37] A judgement is void for procedural defect as a result of an error of fact which has occasioned a miscarriage of justice (a grossly unfair outcome in judicial proceedings). To that end, the error must have been critical to the verdict reached.[38]

23. The review of an alleged error of fact entails determining whether a reasonable chamber, properly directing itself to the applicable standard of proof, could have been satisfied beyond reasonable doubt as to the finding in question, based on the evidence that was before it.[39]

24. The starting point for the Supreme Court's assessment of the reasonableness of the Chamber's factual findings is the reasoning provided for the factual analysis, as related to the items of evidence in question. In particular when faced with conflicting evidence or evidence of inherently low probative value (such as out-of-court statements or hearsay evidence), it is likely that the Chamber's explanation as to how it reached a given factual conclusion based on the evidence in question will be of great significance for the determination of whether that conclusion was reasonable. As a general rule, where the underlying evidence for a factual conclusion appears on its face weak, more reasoning is required than when there is a sound evidentiary basis.[40]

25. Ultimately, the Supreme Court must be satisfied that factual findings that are made beyond reasonable doubt are clear and unassailable, both in terms of evidence and rationale. Accordingly, when the Supreme Court is able to identify findings that can be reasonably called into doubt, it

[36] *Duch* Appeal Judgement, 03.02.2012, §15.
[37] Case 002/01 Appeal Judgement, 23.11.2016, §88-89.
[38] Case 002/01 Appeal Judgement, 23.11.2016, §99.
[39] *Bemba* Appeal Judgement (ICC), 08.06.2018, §42.
[40] Case 002/01 Appeal Judgement, 23.11.2016, §90.

must overturn them. This is not a matter of the Supreme Court substituting its own findings for those of the Chamber. It is merely an application of the standard of proof.[41]

26. To show that an error of fact has been committed, the appellant must explain in particular why the Chamber's findings were unreasonable. The appellant cannot merely repeat submissions made before the trial chamber as to how the evidence should be assessed, if such submissions simply put forward a different interpretation of the evidence.[42]

27. However, assessing whether or not the Chamber applied the standard of proof correctly is the responsibility of the Supreme Court. The accused does not have to prove that the Chamber erred in fact. It suffices for him or her to identify sources of doubt about the accuracy of the Chamber's findings to oblige the Supreme Court to independently review the Chamber's reasoning on the basis of the evidence that was available to it. If the Chamber fails to accompany its finding with reasoning of sufficient clarity, which unambiguously demonstrates both the evidentiary basis upon which the finding is based as well as the Chamber's analysis of it, the Supreme Court has no choice but to set aside the affected finding, since the lack of adequate reasoning renders the finding unreviewable, thereby constituting a serious procedural error. It is also important that the duty to substantiate errors in the conviction decision should not lead to a reversal of the burden of proof.[43]

Challenges to decisions of a procedural nature

28. Whilst the Chamber often enjoys discretion with respect to procedural matters, that discretion must be exercised properly. The Supreme Court's interference to correct the Chamber's exercise of discretion is permissible only in the following broad circumstances: i) where the exercise of discretion is based on an erroneous interpretation of the law; ii) where it is exercised upon a patently incorrect finding of fact; or iii) where the decision constitutes an abuse of discretion.[44]

29. **In this brief**, the Defence's **main submission** is that the Chamber committed an error of law rendering its Judgement void for procedural defects by failing to comply with the legal requirement to provide written reasons on the same day that the Judgement was announced. **In the alternative**,

[41] *Bemba* Appeal Judgement (ICC), 08.06.2018, §45-46 (after referring to §43-44 and the Case 002/01 Appeal Judgement, 23.11.2016, §90).
[42] *Bemba* Appeal Judgement (ICC), 08.06.2018, §65.
[43] *Bemba* Appeal Judgement (ICC), 08.06.2018, §66.
[44] Case 002/01 Appeal Judgement, 23.11.2016, §97; *Bemba* Appeal Judgement (ICC), 08.06.2018, §48.

the Chamber committed such errors that the convictions and sentence must be reversed. **In the further alternative**, the Chamber erred in imposing sentence.

MAIN SUBMISSION

30. By failing to issue the Reasons for Judgement on the day the Judgement was announced,[45] 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).

I. JUDGEMENT VOID FOR PROCEDURAL DEFECT BECAUSE IT WAS UNLAWFULLY ANNOUNCED

31. At the ECCC, a judgement must be reasoned and issued in writing on the day it is announced (A) and the judges must comply with the requisite legal requirements (B), failing which, the judgement is illegal and arbitrary (C).

A. At the ECCC, a judgement must be reasoned and issued in writing on the day it is announced

1. The legal requirements are very clearly set out in the Internal Rules

32. According to the Internal Rules, it is clear that at the ECCC, judgements must be prepared in writing prior to announcement.[46] The Chamber is required to issue its judgements in writing setting out the reasons for the judgement and signed by the judges and the Greffier on the same day that the judgement is issued "at the latest". On that day, a copy of the judgement must be provided to the parties and published.[47] If the accused is present, the period of appeal starts to run from that date. As in Cambodian law,[48] it is only where the accused is absent that the period of appeal starts to run with notification of the judgment.

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[45] Judgement Pronounced on 16 November 2018 (T. 16.11.2018, **E1/529.1**, pp. 53-57, between 11.28.58 and 11.37.34); The Reasons for Judgement were delivered on 28 March 2019 (**E465**).

[46] Internal Rules 101, 102 and 107.

[47] In the English version of the Internal Rules, such obligations are worded using the auxiliary verb "shall".

[48] The Cambodian Code of Penal Procedure is also extremely clear as to the starting date of the time period for appeal. According to Article 381, the Co-Prosecutors' time period for appeal "is calculated from the date the judgement was pronounced". According to Article 382, the Accused's appeal "shall be made within one month. Where the judgement is non-default, the time period for an appeal shall be calculated from the day the judgement was pronounced. Where the judgement is deemed to be non-default, the time period for an appeal shall be calculated from the day the writ of notification was made regardless of the means." Under the terms of the same Code, a judgement is non-default "if the accused appears at trial" (Article 360(1)). It is deemed to be non-default "if the accused does not appear for trial and there is no proof that he had knowledge of his citation or summons" (Article 361(1)).

33. The requirements set out in the IR are not mere formalities that the Chamber can disregard at will. They are an expression of the specificities and importance of a judgement and are instrumental in ensuring that fundamental rights are respected.

2. Legal requirements imposed by reason of the importance of a judgement

34. A judgement differs from other decisions in that it is the final decision of the trial court, by which it decides on the guilt or innocence of the accused. Its effects are very specific and crucial as it may entail that the accused be placed/maintained in detention or released/"remain" at liberty. To be lawful and legitimate, the determination of any criminal charge must, *inter alia*, be announced in public by a tribunal established by law and must be open to review by a higher tribunal.[49]

35. That is why the IR explicitly stipulate all those formalities with regard to judgements only and not with respect to other decisions. Moreover, the Supreme Court has recalled that, unlike other decisions, the lack of the written form for a judgement results in nullity.[50]

36. The Supreme Court also recalled then that "it is established ECCC practice for decisions open to appeal to be released in written form", in particular, given the complexity of issues handled by the ECCC:

> "This practice, although not required by law, serves legal certainty and transparency of proceedings as required by Rule 21 and enables an effective review process. Further, as held by the Trial Chamber on a different occasion, all judicial decisions – whether oral or written – must comply with a court's obligation to provide adequate reasons as a corollary of the accused's fundamental fair trial rights. Indeed, the right to receive a reasoned decision forms part of the right to be heard."[51]

37. It is also because of its effects on the liberty or detention of the accused (Internal Rule 99) and because it is open to immediate appeal (Internal Rules 107(4) and 102(1)), that the judgement, unlike other decisions, cannot be announced in two stages (Internal Rule 101).

38. Albeit under very different circumstances, there have been instances where each chamber of the ECCC first issued the disposition of some of its decisions (with or without a summary of its

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[49] ICCPR, Article 14.
[50] Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Application for Summary Action, 14.09.2012, **E176/2/1/4**, fn 78 (to §25): "Under the ECCC legal framework the lack of the written form for the decision other than the judgement does not result in nullity".
[51] Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Application for Summary Action, 14.09.2012, **E176 /2/1/4**, §25 and fn 78

reasons), and then issued the reasons at a later time. In each case, however, those were decisions which had a direct impact on the course of the proceedings (the disposition having the authority of *res judicata* and producing its legal effects, unlike the reasons) and were either not open to immediate appeal or not open to appeal at all.[52] Thus, to paraphrase the Supreme Court, the deferral of the issuance of the reasons did not affect the rights of the parties since no procedural action to be undertaken was legally dependent on their immediate availability.[53]

39. Thus, it is certainly not the case as regards a judgement, nor even a closing order, which also concludes a phase of the proceedings and is subject to immediate appeal.[54] This was recalled by the Pre-Trial Chamber in Case 004/1, in which it stated *proprio motu* that the delivery of reasons at a later date was an approach that "cannot apply to closing orders," a "procedural act, which officially concludes the judicial investigation," and also recalling that the Co-Investigating Judges are immediately *functus officio* after having signed the disposition of a closing order.[55]

40. Thus, the importance of the decision as to the guilt or innocence of an accused is such that under no circumstances may judges dispense with the formalities specifically enacted by the lawmakers.

B. <u>At the ECCC as elsewhere, judges must respect and apply the law</u>

41. According to Article 129 (new) of the Constitution of the Kingdom of Cambodia:

> "Justice is rendered in the name of Khmer People in accordance with the legal procedures and the laws in force.
>
> Only the judges are vested with the judicial function. The judges shall fulfil their duties in strict respect of the law, in all honesty and conscientiousness."

42. Article 33 (new) of the ECCC Law states very clearly that:

> "The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted <u>in accordance with existing procedures in force</u>, with full respect for the rights of the accused and for the protection of victims and witnesses. [...] [The Extraordinary Chambers of the

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[52] See the examples listed and fully referenced in Khieu Samphan's Urgent Appeal against the Judgement Pronounced on 16 November 2018, **E463/1**, §40-43. For the definition and effects of a disposition, see also *Réplique de KHIEU Samphân*, 20.12.2018, **E463/1/2/1**, §18-22.

[53] Decision on Nuon Chea's Request for Reconsideration of the Decision of 21 October 2015 on Requests for Additional Evidence, **F2/10/3**, pp. 3-4, last recital. The original text, in English, is clearer than the French translation (see p. 3, last recital).

[54] Internal Rule 67(5): "The Co-Prosecutors, the Accused and Civil Parties must be immediately notified upon issue of a Closing Order, and receive a copy thereof. The order is subject to appeal as provided in Rule 74."

[55] Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons) 28.06.2018, **004/1-D308/3/1/20**, §33.

trial court] shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights" (emphasis added).

43. The Chamber must therefore comply with the procedures and formalities as set out in the IR, "the purpose of which is to consolidate applicable Cambodian procedure for proceedings before the ECCC" as well as with articles 14 and 15 of the ICCPR.[56]

44. Article 14(1) of the ICCPR provides that the determination of any criminal charge must be made by a tribunal "established by law". The ECtHR notes that this phrase, which also appears in Article 6(1) of the ECHR, reflects the principle of the rule of law.[57] In its view, the phrase "established by law" refers not only to the legal basis of the tribunal's very existence, but also to the tribunal's compliance with the specific rules by which it is governed.[58]

45. Whilst such rules may differ from tribunal to tribunal, judges are expected to respect the rules of the tribunal in which they sit.

46. As regards the form of the judgement, the rules of some ICTs empower trial judges to provide the reasons for their judgement at a later date, whilst others do not. Where this is the case, as it is before the IRMCT, the rules provide that the period of appeal only starts to run from the date on which the written reasons is filed.[59] However, like at the ICC and the ECCC, the rules leave no discretion

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[56] Internal Rules, Preamble, p. 4, fifth and final recital.

[57] *Kontalexis v. Greece*, Judgement (ECtHR), 31.05.2011, §38; *Pandjikidzé et al v. Georgia*, Judgement (ECtHR), 27.10.2009, §103; *Gorguiladzé v. Georgia*, Judgement (ECtHR), 20.10.2009, §67; *Lavents v. Latvia*, Judgement (ECtHR), 28.11.2002, §114.

[58] *Pandjikidzé et al v. Georgia*, Judgement (ECtHR), 27.10.2009, §105; *Gorguilazé v. Georgia*, Judgement (ECtHR), 20.10.2009, §69; *Sokurenko and Strygun v. Ukraine*, Judgement (ECtHR), 20.07.2006, §24. For example, the ECtHR held that the applicant's right to a court established by law had been breached due to a flagrant failure to comply with the relevant national provisions, which required that the record of the hearing indicate the reason for which one of the sitting judges had been unable to sit and had been replaced by a substitute judge on the day of the hearing. It further noted that the lack of detailed information regarding the reason for the judge's absence was sufficient to raise doubts as to the transparency of the substitution procedure and the accuracy of the reasons given for it: *Kontalexis v. Greece*, Judgement (ECtHR), 31.05.2011, §42-44.

[59] Rules of Procedure and Evidence of International Residual Mechanism for Criminal Tribunals (IRMCT), Article 122(C) ("The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing.); Article 133 ("A Party seeking to appeal a judgement shall, not more than thirty days from the date on which the written judgement was filed, file a notice of appeal, setting forth the grounds", emphasis added).

to the trial judges, who are required to provide the written reasons at the same time that the decision is issued.[60] The rules of the STL have recently been amended to that end.[61]

47. The choice is made by the lawmakers, not by the judges. Had the lawmakers of the ECCC wished to follow the model set by the *ad hoc* tribunals at the time the IR were adopted or in subsequent amendments, they would have done so.[62] While the lawmakers have amended the IR in order to authorise the Supreme Court to issue full reasons on an immediate appeal at a later date,[63] they did not do so with regard to a judgement. While the lawmakers have amended the IR in order to authorise the Chamber to reduce the scope of the trial or separate the proceedings,[64] at no time did they authorise the Chamber to reduce the scope of or sever the judgement.

48. On the contrary, the ECCC lawmakers have thus far chosen to require that the Chamber issue its reasoned judgement in writing "at the latest" on the day of its issuance, and to set the commencement of the period of appeal from the time of the announcement of the judgement if the accused is present when the judgement is announced.

49. The Supreme Court recently recalled two established Latin maxims which apply to the drafting and interpreting statutes and deeds:

> "*Expressio unis est exclusio alterius*": express mention of one thing excludes an alternative or expression provision for one meaning excludes alternative meanings and also "*expressum facit cessare tacitum*" -- what is expressed makes what is implied silent or what is clearly provided excludes implication of other provisions."[65]

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[60] Rome Statute of ICC, Article 74(5) ("The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court."); ECCC Internal Rule 101.

[61] Rules of Procedure and Evidence of the Special Tribunal for Lebanon (STL), amended 10 April 2019, Article 168(B): "The judgement shall be rendered by a majority of the Judges. It shall be accompanied by a reasoned opinion, in writing, to which any separate or dissenting opinions shall be appended." The previous version of the Article reads: "The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion, in writing, to which separate or dissenting opinions may be appended."

[62] The Internal Rules of the ECCC were adopted on 12 June 2007 whereas the rules adopted by ICTs have existed since 1995: ICTY RPE, Article 98 *ter* (A) and (C), added as Article 88 (A) and (C) in the amended version of 30 January 1995; ICTR RPE, Article 88 (A) and (C), was part of the first version dated 29 June 1995; IRMCT RPE, Article 122 (A) and (C), was part of the first version dated 8 June 2012; STL RPE, Article 168 (A) and (B), was part of the version dated 5 June 2009 up to the amendment dated 10 April 2019.

[63] Internal Rule 108(4) *bis*, amended in this regard on 3 August 2011.

[64] Internal Rule 89 *ter* (Severance), adopted on 23 February 2011; Internal Rule 89 *quater* (Reduction of the Scope of the Trial), adopted on 16 January 2015.

[65] Decision on Urgent Request concerning the Impact on Appeal Proceedings of Nuon Chea's Death prior to the Appeal Judgement, 22.11.2019, **F46/2/4/2**, fn 73 (to §37).

50. Under the principle of the separation of powers, the Chamber had a duty to respect the choice made by the lawmakers of the ECCC, a choice that was explicitly and clearly stated. The only legal option available to the Chamber was to propose an amendment to the IR as it is so authorised by Internal Rule 3.[66]

C. The conviction of KHIEU Samphan is unlawful and arbitrary

51. Under the applicable law, the Chamber was required to provide its judgement in writing on the day it was announced. The Judgement had to be reasoned and signed on 16 November 2018, "at the latest". A copy had to be provided to all parties and published on 16 November 2018.

52. The Chamber has never had the discretion nor the inherent jurisdiction to infringe the IR. By acting against the will of the lawmakers of the ECCC, it acted outside the law and *ultra vires*. Its judgement has no legal basis and therefore no legal validity. It is basically null and void. KHIEU Samphan's guilt has not been lawfully established.

53. Furthermore, the Chamber has never bothered to explain and justify its approach. A decision to acquit might perhaps have explained it (but then again), this was not the case. In any event, the Chamber has acted in a wholly arbitrary manner.

54. It has seriously undermined not only the trust that litigants and the public might have had in it, but also the trust that they might have had in the ECCC. Indeed, its action suggests that judges who are capable of disregarding basic procedural rules are *a fortiori* capable of disregarding rules of law and evidence, and that judges may act as they wish at the ECCC, a forum where the rule of law is supposed to prevail.

55. In addition to undermining the legitimacy of the ECCC, the error committed by the Chamber renders the judgement void for procedural defects and violates the right to a tribunal established by law, to legal and procedural certainty and transparency of proceedings and to reasoned decisions.

56. The issuance of the Reasons for Judgement at a later date does not lessen this error. On the contrary.

[66] Internal Rule 3(1): Requests for amendment of these IRs may be made to the Rules and Procedure Committee by a Judge, a Co-Investigating Judge, [...]."

II. THE ISSUANCE OF THE REASONS AT A LATER DATE DID NOT CURE THE DEFECT

A. The issuance of the Reasons at a later date does not retroactively validate the Judgement that was announced

57. The issuance of the Reasons after the announcement of the Judgement cannot validate a decision that is null and void in and of itself. They only serve to support the fact that the procedural rules of the IR have been breached.

58. Furthermore, the reasons for a decision, whether or not they are provided at the same time as the disposition, do not give any effect to the decision. Indeed, only the disposition has the authority of *res judicata* that enables it to have effect,[67] not its reasoning, which is merely a statement of the reasons that led the judge to decide the matter in one way or another.

59. Moreover, the Reasons neither enable us to turn back the clock nor to erase the time that followed the announcement of the Judgement. There was total legal uncertainty (indeed, a legal void) throughout that period, a period moreover whose very length could not be ascertained until the day the Reasons were notified, some 4.5 months (132 days) later.

60. During that time, no date was set for the issuance of the Reasons (which were to be provided "in due course"),[68] the verdict itself remained unsubstantiated, and no remedy could be sought against the conviction and sentence that had been publicly announced.

61. When the Supreme Court held that the urgent appeal of the Defence from the conviction and sentence was not admissible, its decision raised more questions than it answered. First, the Supreme Court considered that it was an appeal against the summary of the reasons that had been read out at the hearing (as can be confirmed by the procedural history in its recent decisions),[69] whereas it was clearly an appeal from the disposition that had been announced.[70] Second, the Supreme Court

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[67] *Dictionnaire du vocabulaire juridique*, Rémy CABRILLAC, ed.; Éditions LexisNexis Litec, 3rd edition (2008), p. 149, **E463/1/2/1.1.4**. All decisions delivered at the ECCC in two stages produced their effects from the time the disposition was issued: see above, §38.

[68] Scheduling Order for Pronouncement of the Judgement in Case 002 02, 26.09.2018, **E462,** p. 2; T. 16.11.2018, **E1/529.1**, before 09.36.02.

[69] Decision of the Supreme Court, 13.02.2019, **E463/1/3**, title and §6, 12, 18. *See also*: Decision on Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea's Death Prior to the Appeal Judgement, 22.11.2019, **F46/2/4/2,** §2 (where the Defence requested that the Supreme Court "annul the summary delivered on 16 November 2018 for lack of form"); Decision on Khieu Samphan's Request for Admission of Additional Evidence, 06.01.2020, **F51/3**, §3 (where the Defence requested that the Supreme Court "annul the summary delivered on 16 November 2018 for lack of form").

[70] In particular: Khieu Samphan's Urgent Appeal against the Judgement Pronounced on 16 November 2018,

was content to state that the Chamber had made it clear that the full written reasons would be notified in due course and that the time limits for appealing would commence to run as from that notification.[71] The Supreme Court was silent regarding the Chamber's misreading of the IR, which require it to provide the written reasons "at the latest" on the day the judgement is issued and clearly state that the period of appeal starts to run from the day of announcement if the accused is present and with notification only where the accused is absent.[72] The Supreme Chamber was equally silent regarding the fact that it is not within the jurisdiction of the Chamber to postpone the starting date of a period of appeal from any of its decisions.[73] Only the Supreme Court could do it, and yet it has done no such thing.[74]

62. It would appear therefore that the Supreme Court considered that all this procedural anarchy was normal and that, in the absence of the written reasons, the disposition announced on 16 November 2018 was of no legal validity nor effect. It is as if what happened that day was of no consequence.

63. Nevertheless, KHIEU Samphan, the national and international media as well as the public all understood that he had been found guilty and sentenced to life imprisonment on 16 November 2018, even though the written reasons were not provided on that day.[75]

19.11.2018, **E463/1**, §2-3 (and fn 2 which refers only to the disposition), 11, 37; *Réplique de KHIEU Samphan,* 20.12.2018, **E463/1/2/1**, §17-22. In the two instances where the Defence mentioned the summary, it noted that the summary was of no legal value because, as it was not even authoritative, it lacked any legal authority (Khieu Samphan's Urgent Appeal against the Judgement Pronounced on 16 November 2018 **E463/1**, §61; *Réplique E463/1/2/1*, §52).

[71] Decision on Khieu Samphan's Urgent Appeal against the Summary of Judgement Pronounced on 16 November 2018, 13.02.2019, **E463/1/3**, §11-12, 14-15, 18.

[72] Khieu Samphan's Urgent Appeal against the Judgement Pronounced on 16 November 2018, 19.11.2018, **E463/1**, §6-7, 15-16, 49; *Réplique de KHIEU Samphan,* 20.12.2018, **E463/1/2/1**, §12.

[73] *Réplique de KHIEU Samphan,* 20.12.2018, **E463/1/2/1**, §40-48; KHIEU Samphan Defence Request for Extension of Time and Number of Pages to File Notice of Appeal, 03.04.2019, **F39/1.1**, §13 and fn 18.

[74] The Supreme Court has never addressed the Defence request to defer the commencement of the time limit for appeal until notification of the full written reasons for judgement: Khieu Samphan's Urgent Appeal against the Judgement Pronounced on 16 November 2018, 19.11.2018, **E463/1**, §70-71 and 73; KHIEU Samphan Defence Request for Extension of Time and Number of Pages to File Notice of Appeal, 03.04.2019, **F39/1.1**, §11-15 and 44.

[75] KHIEU Samphan was not the only one to protest. See, for example: Another Trial – A review of Case 002/02: The Second Trial of NUON Chea and KHIEU Samphân at the [ECCC], by Caitlin McCaffrie and Daniel Mattes, Revised version published on 14 November 2018, Report for the WSD HANDA Center for Human Rights and Internal Justice at Stanford University and the East-West Center (p. 1: "[I]t is disappointing that the Trial Chamber has decided to issue only a summary judgment on 16 November 2018. The ECCC was developed in part as an institution to serve as a model for Cambodia's weak domestic judiciary which so often issues summary judgments without full reasons. […] The Tribunal's opportunity for establishing a real judicial legacy is diminished by this decision of the Trial Chamber."; p. 30: "Now, in late 2018, we are still waiting for a reasoned judgment. Almost four years after hearings in Case 002/02 began, the fact that only a summary of the judgment will be made available is disappointing to many. The ECCC was established in Cambodia in part in order to bolster the capacity of the local courts, which consistently rank low in global independence measures and are known for issuing summary judgments without full reasons. The Judges of the

64. During the ensuing 132 days, KHIEU Samphan bore the burden of his conviction without knowing the reasons for it, without being able to review it and without being able to have it reviewed on the merits by a higher tribunal.[76] Even his urgent appeal regarding both the procedural and formal aspects has not be considered on the merits, thus rendering the violation of his right to be heard and his right to an effective defence absolute.

65. The fact that the notification of the Reasons for Judgement does not have any retroactive effect in no way alters those 132 days of uncertainty, or indeed of legal void that furthermore caused an unjustified delay in the duration of the proceedings. While the Supreme Court has now intervened and appears willing to hear KHIEU Samphan, the fact remains that the procedural and legal confusion created by the Chamber has yet to be resolved. It has even been exacerbated by the Reasons for Judgement themselves.

B. Reasons issued at a later date are invalid in and of themselves

66. First, the IR do not provide that written reasons for a judgement may be issued after the date the judgement was announced nor do they provide that the reasons are subject to appeal, unlike reasoned written judgements announced and signed on the same day.[77] As such a document lacks any legal existence within the ECCC legal framework, it lacks any validity, *a fortiori* where the lawmakers of the ECCC have clearly and specifically expressed their intention that it should not exist.

Trial Chamber need to release a fully reasoned judgment as soon as possible. Cambodians deserve to know the full reasons for any convictions. They have waited long enough.")
https://krttrialmonitor.files.wordpress.com/2018/11/anothertrial_c00202report_mccaffriemattes_112018.pdf.

[76] In the words of the Human Rights Committee, the right to appeal within the meaning of Article 14(5) of the International Covenant on Civil and Political Rights is the right substantially to have the conviction and sentence reviewed "both as to sufficiency of the evidence and of the law." (*Bandajevsky v. Belarussia*, Communication No. 1100/2002, views adopted by the Human Rights Committee on 28 March 2006, §10.13). "To ensure the effective use of this right, the convicted person is entitled to have access to duly reasoned, written judgments in the trial court" (*Van Hulst v. The Netherlands*, Communication No. 903/1999, views adopted by the Human Rights Committee on 1 November 2004, §6.4). A review "having been limited to the formal or legal aspects of the conviction, means that the guarantees provided for in article 14, paragraph 5, of the Covenant have not been met" (*Gómez Vázquez v. Spain,* Communication No. 701/1996, views adopted by the Human Rights Committee on 20 June 2000, §11.1).

[77] See above, §32. The time period for appeal against the judgement "pronounced" starts to run upon notification when the accused is absent does not alter the fact that the judgement must have been delivered in writing and signed "at the latest" on the day of pronouncement. Moreover, unlike the IRMCT, the IR does not require that the judgement be "written": IRMCT Rules of Procedure and Evidence, Article 122(C) ("The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible."); Article 133 ("A Party seeking to appeal a judgement shall, not more than thirty days from the date on which the written judgement was filed, file a notice of appeal, setting forth the grounds." (emphasis added).

67. Second, the Reasons for Judgement are the result of the Chamber exceeding its authority, given that after 16 November 2018, it no longer had the jurisdiction to draft and issue them. Indeed, on that day, the Chamber announced the disposition of its judgement, and hence the judgement itself. It decided the substantive dispute with which it was seised, thereby exhausting its adjudicative jurisdiction. The effect of being *functus officio* as it pertains to a judgement is expressed by the Latin maxim *lata sententia, judex desinit esse judex*: once judgement is announced, the judge ceases to be a judge. He or she has exhausted his or her jurisdiction over the matter.

68. In requiring that trial judges to issue their judgement in writing on the very day of its announcement and stipulating that the period of appeal starts to run from that day, the lawmakers of the ECCC did not make allowance for any exceptions to this basic principle (as in the IRMCT). Furthermore, the Pre-Trial Chamber has recalled this principle in Case 004/1, where it stated that the CIJs were immediately *functus officio* after they had issued the disposition of their closing order.[78]

69. Third, although not issued until 28 March 2019, the Reasons for Judgement were backdated to 16 November 2018.[79] Affixing that official date, which predates the actual date on which the Reasons for Judgement were in fact drafted and signed, constitutes a misrepresentation of reality since it is clear that as of 16 November 2018 the Reasons for Judgement had neither been finalised nor signed, otherwise the Chamber would have had no difficulty in issuing them at the same time as the disposition. This is a shocking, unexplainable and unexplained act, quite apart from the fact that it was unprecedented at the ECCC.[80]

70. Accordingly, not only are the Reasons for Judgement of no legal validity nor indeed of any adjudicative validity, in addition they are backdated and therefore deeply flawed. Their existence and the manner in which they were issued cast doubt on the integrity of the judicial decision-making process.

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[78] Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons) 28.06.2018, **004/1-D308/3/1/20**, §33.

[79] The phrase preceding the signatures is: "Done in Khmer, English and French. Dated this 16th day of November 2018 at Phnom Penh Cambodia": Reasons for Judgement, p. 2232; in Khmer ("រជ្ជីរជ្ជីតជាភាសាខ្មែរ អង់គ្លេស និងបារាំង ថ្ងៃនៅថ្ងៃទី១៦ ខែវិច្ឆិកា ឆ្នាំ២០១៨ នៅភ្នំពេញ ក្នុងព្រះរាជាណាចក្រ ប្រទេសកម្ពុជា") and in French (*Fait en khmer, en anglais et en français. Le 16 Novembre 2018 À Phnom Penh (Cambodge)": Motifs du Jugement*, p. 2657"). The same date is also affixed to the cover page of the Reasons for Judgement and appears in the footer of every (initialled) page in each one of the language versions.

[80] The Defence has found no reasons for judgement or for a decision issued subsequent to the disposition in this manner by any of the chambers of the ECCC and backdated to the date of the disposition. In all cases, the date on the document is the date on which it was issued.

C. The integrity of the judicial decision-making process is questionable

71. Both as a matter of principle and a matter of logic, it is the reasoning that determines the decision. In requiring that judges issue their reasoned judgement in writing and signed "at the latest" on the day the judgement is announced, the lawmakers of the ECCC intended to ensure that both the reasoning underlying the decision as to the merits of the criminal charges and the sentence, as the case may be, had been fully developed and finalised, and be perceived as such on the day the judgement was announced.

72. Whilst the date of 16 November 2018 affixed to the Reasons for Judgement might lead non-parties to the proceedings to believe that that was indeed the case here, it is not, since it is clear that had the reasoning been finalised prior to that date, it would have been made available to the parties and the public on that date and not on 28 March 2019, that is, four and a half months or 132 days later.

73. Similarly, the fact that on 16 November 2018 the President of the Chamber read a lengthy summary before announcing the disposition may create the impression that deliberations had been effectively concluded and that the reasons had indeed been finalised before that date. That being said, the summary was very vague. No reference was made to the factual and legal basis of the decision. Nor did it specify precisely for what KHIEU Samphan had or had not been convicted for each crime site.[81] Most importantly, however, the Chamber stated that its summary was not authoritative, unlike the full written Judgement that was to be made available in due course.[82] Although the Chamber distributed the summary in writing following the hearing, it did not sign it.[83] Hence, by no means was this a definitive summary of the reasons.

74. The fact that the Chamber neither justified the postponement of the issuance of the full written reasons, nor indicated a delivery date, strengthens the possibility that the reasoning may have undergone changes. However, if judges have completed their assessment of the facts, evidence and law, they should be in a position to provide a fully reasoned decision, or at the very least they should be able to specify a strict time frame within which the reasons for the decision would be issued, and be able to justify the delay.

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[81] T. 16.11.2018, **E1/529.1**, between 09.34.35 and 11.25.43.
[82] T. 16.11.2018, **E1/529.1**, before 09.36.02.
[83] The summary was subsequently published on the ECCC website and has been revised (https://www.eccc.gov.kh/fr/document/public-affair/resume-du-jugement-de-la-chambre-de-premiere-instance-rendu-dans-le-deuxieme).

75. It can be inferred from the fact that the doors were left open with no justification, together with the lengthy period of time that elapsed, that this was not simply a matter of editing the document, a process that would have required far less than 132 days. Nor could it have been caused by the time required for translation, given that the Reasons for Judgement were issued as originals in the ECCC's three working languages. Had it been a matter of verifying or harmonising the different language versions, it would have taken less time and should have been done during the deliberations. Indeed, the discovery of discrepancies between the different language versions of a piece of evidence supporting the reasoning could result in a reconsideration of the reasoning and potentially of the decision itself. As the Supreme Court stated:

> "The probability of conviction may vary dependent of each piece of evidence presented as a result the level of proof at trial can graphically be represented as a sine wave with crests and troughs."[84]

76. Moreover, the composition of the panel of judges during the period between the announcement of the Judgement and the issuance of the Reasons for Judgement is confusing and raises questions as well. Although Judge Lavergne had returned to his judicial duties in France at the end of his secondment to the ECCC, which had been extended to 30 November 2018,[85] he resigned from his post as a "full-time" judge at the ECCC on 29 March 2019.[86]

77. In any event, due to the Chamber's lack of transparency regarding its actions and the secretiveness surrounding the timing and duration of the deliberations, it will never be known what really happened nor whether the Judgement announced was indeed the result of the Judges' previous reasoning in its entirety.

78. Had it recognised the legal validity of the disposition and found the Defence urgent appeal admissible, the Supreme Court could have resolved the matter. It could have invalidated the Judgement announced and ordered the Chamber to issue a new decision in compliance with the IR. However, it did not do so, and now it is no longer possible to go back.

79. **IN CONCLUSION**, through its failure to comply with the will of the lawmakers of the ECCC, expressed with abundant clarity in the IR, the Chamber has committed an error of law which

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[84]Decision on Immediate Appeal Against the Trial Chamber's Decision on Khieu Samphan's Application for Immediate Release, 22.08.2013, **E275/2/3**, fn 71 (to §35)
[85] *Décret du 9 juillet 2018 portant maintien en détachement (magistrature) – M. LAVERGNE (Jean-Marc), JORF n° 0158 du 11 juillet 2018, texte n° 60* (https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037172176&categorieLien=id).
[86] Order designating Reserve Judge to replace Sitting Judge, 05.04.2019, **E466**.

invalidates the convictions and sentence. The Supreme Court must find that the Judgement is void for procedural defect, that the Reasons for Judgement are invalid and that there has been a violation of KHIEU Samphan's rights to a tribunal established by law, to legal and procedural certainty, to transparency of proceedings, to reasoned decisions, to be heard, to an effective defence and to be tried without undue delay.

IN THE ALTERNATIVE

INTRODUCTION

80. Throughout the proceedings in Case 002 (002/01 and 002/02), the KHIEU Samphan Defence has always endeavoured to emphasize the rules that must prevail when assessing facts and reviewing the law with proper regard to trial fairness. This submission does not detract from this rule, although the procedural framework in which it is filed is atypical. Indeed, due to the unprecedented severance of Case 002, KHIEU Samphan is making his submissions before a Supreme Court that has already heard and adjudicated much of the facts for which he was convicted by the Chamber on 16 November 2018.[87]

81. After two trial proceedings conducted by a Chamber composed of the same panel of judges, and after two sentences to life imprisonment, one of which has been upheld by the Supreme Court, there was a need for a submission that would reflect the peculiar manner in which this atypical case was conducted. The Appellant's application for disqualification, filed on 31 October 2019, was still pending at the time of filing of this brief.[88] However, it was written with a view that it would be read by judges free from any prejudice towards the Appellant.

82. The first misconception that should be dispelled is the notion that because crimes were committed, they were necessarily the result of a policy. Yet, that indeed was the Chamber's initial premise which underpinned the manner in which it stated and applied the law as well as its approach to the assessment of facts.

83. The armed conflict that served as the cauldron of the crimes charged, the requisite background for understanding the actions and conduct of the actors involved in that period of Cambodian history, was overlooked. The context of the Cold War and ideological struggle that dominated the era was viewed exclusively through the lens of a schematic and reductive interpretation of what could have been the ideals of a generation of nationals of formerly colonised territories who were seeking to bring about change in their country, as was the case in Cambodia.

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[87] With respect to those matters already decided by the Supreme Court, see the annexes to the Application for Disqualification **F53.2** à **F53.17** (or **1.2** to **1.17**).

[88] KHIEU Samphan's Application for Disqualification of the Six Appeal Judges Who Adjudicated in Case 002/01, 31.10.2019, **F53** (or **1**).

84. More than 40 years after the events, an impartial scrutiny of that painful and complicated period of Cambodian history was not an easy task. Nor was it easy to do what was necessary to place oneself at the time of the events in order to assess the applicable law. Those are two pitfalls that the Chamber failed to overcome in its Reasons for Judgement.

85. As we come to the end of this marathon and unorthodox case file both in terms of the nature and number of the crimes charged as well as in the sheer volume of testimonial and documentary evidence considered, the Defence's conclusion remains the same as stated in its Appeal Brief in Case 002/01: "In contrast to what a reasonable and fair judge would do, 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."[89]

86. In order to reach this finding of guilt and conviction, the Chamber's *modus operandi* was the same as in its judgement in Case 002/01: systematically violating the principle of legality by ignoring the law that was applicable at the relevant time as well as its accessibility, 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.

87. The errors of law committed by the Chamber in support of its decision to convict sought to broaden the definition of the crimes, notably with *dolus eventualis*, leading to a lessening of the *mens rea*. Similarly, the mode of liability of joint criminal enterprise ("JCE"), which in and of itself is already a weakening of individual criminal liability, was also expanded through the notion of common purpose, a concept that was ill-defined and interpreted every which way. Indeed, criminalising the CPK's political project, which was not criminal in and of itself, was the only avenue available for finding KHIEU Samphan responsible.

88. It is readily apparent from a reading of the Reasons for Judgement that KHIEU Samphan was far removed from the crimes and crime sites and that the Chamber was only able to link them to him through an intellectual construct and/or based on evidence that no reasonable trier of fact would have found credible or sufficient.

[89] AB 002/01, §4.

89. This submission is intended to dissect the reasoning that led to KHIEU Samphan's conviction, to show the different steps by which the Chamber erred in law and in fact. Faced with a judgement with such dense and complex reasons, choices had to be made in light of the import of the errors identified. The approach adopted by the Defence was to select the original fundamental errors which then triggered a cascade of errors both in the application of the law and the assessment of the facts.

90. Hence, this appeal brief is structured in such a way that it addresses, step by step, the various violations of the law that resulted in a flawed legal framework within which the facts were assessed. Next, the errors that the Chamber committed in its assessment of the facts disputed by KHIEU Samphan – and here it should be noted that the Appellant did not dispute all of them – will also be highlighted by underlining the selective inculpatory approach to the evidence on the case file.

91. Thus, after setting out the violations of fair trial rules (Part I), this submission will address the errors committed by the Chamber regarding the scope of the case (Part II), the crimes (Part III), the project to bring about a socialist revolution (Part IV) and KHIEU Samphan's responsibility (Part V).

Part I. ERRORS COMMITTED IN VIOLATION OF THE FUNDAMENTAL RULES OF THE RIGHT TO A FAIR TRIAL

92. Article 12(2) of the 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 (the "ECCC Agreement") provides that "[t]he Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law". Article 13(1) specifies that the basic rights of the accused must be respected "throughout the trial process". Thus, the Chambers must respect fundamental rights both at trial and on appeal.

93. It is therefore the duty of the Supreme Court to respect those rights and not to start from the preconceived notion that the Chamber has [UNOFFICIAL TRANSLATION] "fully applied" the rights of the Accused to a fair trial.[90] As an appellate instance, the Supreme Court must assess the matters raised by the Appellant regarding the violations of his rights (as it did in Case 002/01),[91] and to do so with the utmost objectivity.

94. In Case 004/1, Co-Investigating Judges ("CIJs") Michael BOHLANDER and YOU Bunleng stressed the crucial importance of the application of the principles of *in dubio pro reo* and of strict construction of criminal law before the ECCC, where the law was not fully settled.[92] They described the pitfalls that should be avoided particularly in the case of this special court with its narrowly tailored temporal, personal and subject-matter jurisdiction, based on contentious negotiations, and which began operations 30 years after the events in question.[93] They noted that the charges and their legal content often had the appearance and nature of "moving targets".[94] They described the case of the ECCC as a prime example for the need for interpretational judicial restraint,[95] and added:

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[90] Decision on Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea's Death Prior to the Appeal Judgement, 22.11.2019, **F46/2/4/2**, §37, where the Supreme Court states that, following the death of an appellant before judgement has been rendered, "nullifying the entire trial record and findings following the full application of fair trial rights to the accused would also fundamentally disregard the interests of Civil Parties and victims" (emphasis added).
[91] Case 002/01 Appeal Judgement, 23.11.2016, §109.
[92] Closing Order (Reasons), 10.07.2017, **004/1-D308/3**, §26-27.
[93] Closing Order (Reasons), 10.07.2017, **004/1-D308/3**, §27.
[94] Closing Order (Reasons), 10.07.2017, **004/1-D308/3**, §27.
[95] Closing Order (Reasons), 10.07.2017, **004/1-D308/3**, §27.

> "This is true not least because of the pressure exerted by the public's expectations and the media on the grounds of concerns around the concept of impunity for mass atrocities, political agendas as well as previous historical research into the underlying events. In other words, in scenarios of this kind, the guilt of suspects, charged persons and accused often seems beyond debate *ab initio* and the judicial proceedings are not infrequently expected simply to attach the seal of official approval and confirmation of the pre-existing general view of history."[96]

95. The CIJs also recalled the ultimate principle that you must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty.[97] They described as "odious" the view that in cases of the most serious offences the boundaries set by the law may be disregarded because of the enormity of the crimes.[98]

96. In their view, if the ECCC exercises selective justice in the objective sense of the word,[99] this should in no way lead to the presumption that those few persons brought before the tribunal by the allegations of the Prosecution are guilty.[100] They stated:

> "If at all, any such presumption must operate the other way. The fact that after such a long time some of the crucial evidence, through witnesses or otherwise, may have deteriorated to a point where reliable details, and indeed witnesses, may become difficult to come by, is not something which can ever be laid at the feet of the defence in criminal investigations or give rise to a lesser standard of proof for indictment or conviction. The defence are entitled to a dispassionate evaluation of the evidence and interpretation of the law at all levels of the ECCC's judicial hierarchy, beginning with the OCIJ."[101]

97. In the case at hand, the fact of the matter is that the Chamber has failed to avoid the pitfalls so aptly described by the CIJs. KHIEU Samphan's fundamental rights, as recognised under the legal framework of the ECCC (Title I), have not been respected as a result of the Chamber's biased approach to the guiding principles of criminal proceedings (Title II) and the rules of evidence (Title III). The cumulative effect of these violations renders the trial unfair in and of itself (Title IV).

Title I: APPLICABLE LAW

98. The legal framework applicable before the ECCC requires that the fundamental rights of the accused be respected,[102] in particular the right to be tried without undue delay, the right to a tribunal

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[96] Closing Order (Reasons), 10.07.2017, **004/1-D308/3**, §28.
[97] Closing Order (Reasons), 10.07.2017, **004/1-D308/3**, §29.
[98] Closing Order (Reasons), 10.07.2017, **004/1-D308/3**, §30.
[99] Closing Order (Reasons), 10.07.2017, **004/1-D308/3**, §31, 35.
[100] Closing Order (Reasons), 10.07.2017, **004/1-D308/3**, §35.
[101] Closing Order (Reasons), 10.07.2017, **004/1-D308/3**, §36 (emphasis added).
[102] Constitution of the Kingdom of Cambodia, Agreement between the United Nations and the Royal Government,

that respects the scope of the indictment/established by law, the right to be informed of the nature and cause of the charge against him or her, the right to legal and procedural certainty, the right to an independent and impartial tribunal, the right to be presumed innocent, the right to have adequate time and facilities for the preparation of his or her defence, the right to an adversarial trial, the right to be heard, the right to an effective defence, the right to transparency of proceedings, the right to reasoned decisions and judgements, the right to equality of arms, and the right not to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted.

99. It is intended to "guarantee not rights that are theoretical or illusory but rights that are practical and effective".[103]

Title II. BIASED APPROACH TO THE GUIDING PRINCIPLES OF CRIMINAL PROCEEDINGS

Chapter I. A FLAWED AND BIASED CONCEPTION OF CRIMINAL LAW

100. Instead of carrying out its duty to objectively and strictly apply the rules of criminal law, the Chamber stepped out of its role as judge. Faced with the seriousness of the crimes to be tried, the Chamber drifted towards the pitfall of setting criminal policy and combating impunity.

101. This is evidenced by the errors of law that the Chamber committed with regard to the principles of legality and sentencing, which are discussed below.

102. In particular, the Chamber has indeed transformed compliance with the requirements of foreseeability and accessibility required for adherence to the principle of legality into a mere formality by giving precedence to the seriousness of crimes over the following objective criteria: quality of the law, definition of the elements of the crimes and the modes of liability.[104] It also applied law that did not exist at the relevant time, which was defined in such a way as to enable conviction.[105]

ECCC Law, ICCPR, IR, Code of Criminal Procedure of the Kingdom of Cambodia. As the ICCPR contains provisions similar to the ECHR on which it is modelled, ECtHR case law is also quite relevant.

[103] *Airey v. Ireland*, Judgement (ECtHR), 09.11.1979, §24.

[104] See below, §550-574.

[105] See below, §575-636, 642-655, 658-671, 1938-1965, 2120-2123.

103. The Chamber also decided the sentence based on its view that, as it was mandated to try crimes of considerable gravity and scope, it was primarily a duty to show the victims and the public at large that it had done so.[106]

104. In so doing, not only did the Chamber commit errors of law invalidating its decision, it also demonstrated its inability to try KHIEU Samphan impartially.

Chapter II. A FLAWED AND BIASED CONCEPTION OF CRIMINAL PROCEEDINGS

105. Rather than strictly carrying out its duty to decide criminal charges against individuals, which alone constitute the crimes with which it was seised, the Chamber erred and drifted towards the pitfall of judging the political history of Cambodia under DK. It conducted an ill-defined marathon trial (Section I) in order to turn it into a trial for the history books (Section II).

Section I. AN ILL-DEFINED MARATHON TRIAL

106. Faced with "the length and complexity" of the Closing Order ("CO"),[107] the Chamber severed the charges in Case 002 before ultimately reducing them and terminating some of them.[108] In practice, its approach did not make it possible to focus on specific charges but resulted in confusion allowing the introduction of irrelevant facts.

107. Thus, the Chamber has erred in law by not paying the "special" attention[109] and ensuring the meticulousness necessary for the delineation of the charges with which it was seised and by always leaving the door open, in particular, to the detriment of the Accused's right to be informed "promptly" and "in detail" of the nature and cause of the charge against him.[110]

108. Case 002/02, which was held while Case 002/01 had not yet been finally concluded and without information about the outcome of the charges not included in those two trials, was not properly delineated by the Chamber, which should have redoubled its meticulousness and be extremely clear in these complex and unprecedented circumstances. Rather than doing this, the Chamber failed to

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[106] See below, §2144-2147.
[107] Reasons for Judgement, §4.
[108] Reasons for Judgement, §13; Decision on Reduction of the Scope of Case 002, 27.02.2017, **E439/5**.
[109] *Pélissier and Sassi v. France*, Judgement (ECtHR, Grand Chamber), 25.03.1999, §51; *Mattoccia v. Italy*, Judgement (ECtHR), 25.07.2000, §59.
[110] ICCPR Article 14(3)(a).

clearly delineate the charges included in or excluded from Case 002/02 and even added to the charges set out in the indictment.

109. **First**, the scope of Case 002/02 was not delineated in a manner that was sufficiently understandable to the Defence, and maybe even to the Chamber itself.

110. While it seemed clear to the Defence that the Chamber was not going to consider facts related to the movement of population ("MOP") as these facts had been adjudicated in Case 002/01, it was on reading the Reasons for Judgement that it discovered that this was not the case. The Chamber 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."[111] The Chamber noted that the defence teams and the Civil Parties had not advanced any submissions with respect to the charged population movement policy,[112] and then proceeded to consider it at length.[113]

111. However, the Chamber had stated in its decision on additional severance that it was including the movement of population policy in Case 002/02 "only insofar as the Closing Order alleges that it was implemented through movement of the Cham minority".[114] It was stated in the annex to this decision that: "implementation [would be] limited to the treatment of the Cham during movement of population (phase two)".[115] It was all the more clear to the Defence that the Chamber was not going to examine any crimes other than those relating to the treatment of the Cham during movement of population phase 2 (MOP2) when, at the hearing, the Chamber spontaneously interrupted the parties who asked questions about movement of population phase 1 (MOP1).[116] Under the circumstances, it is not surprising that the Defence did not advance any submissions with respect to the population movement policy, which it would have done had it known that the Chamber was going to consider it.

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[111] Reasons for Judgement, §3867 (emphasis added).
[112] Reasons for Judgement, §3869-3871.
[113] Reasons for Judgement, §3877-3883, 3892, 3903, 3908, 3915-3916, 3918.
[114] Decision on Additional Severance of Case 002 and Scope of Case 002/02, 04.04.2014, **E301/9/1**, §43 (emphasis added).
[115] Annex Setting the Scope of Case 002/02, **E301/9/1.1**, p. 1. See also p. 2: "3. Factual findings of crimes – Movement of population – i) Phase two (266, 268, 281) (limited to the treatment of the Cham)".
[116] For example: T. 03.02.2016, **E1/387.1**, between 10.54.44 and 10.56.52 (President: "Lead co-lawyer, […], your question may be related to the scope of 002/01 which was already concluded. (…)").

112. What's more, the Defence did not have (and still does not have) the same understanding as the Chamber of its delineation of the charges concerning the Cham during movement of population phase 2.[117]

113. Moreover, the Chamber's lack of attention in clearly and meticulously delineating the charges arises from inconsistencies in the Annex setting out the scope of Case 002/02, in particular regarding certain charges concerning the Vietnamese.

114. Although the treatment of the Vietnamese fell within the scope of Case 002/02 and it was alleged in the CO that [the legal elements of] enforced disappearances had been established in this regard,[118] the Chamber did not list this charge in the Annex setting out the scope of Case 002/02.[119] While the Defence did not understand why, it was certainly not going to complain about it and simply requested the exclusion of the evidence received and heard in this regard.[120] If this was an error on the part of the Chamber, it nonetheless attempted to make up for it by unlawfully re-introducing these matters with respect to sites for which the crime was alleged.[121]

115. Nor did the Defence understand why the charge of deportation in relation to Tram Kak did not appear in the annex setting out the scope of Case 002/02.[122] It was only when preparing its response to the briefs of the other parties for the purpose of closing statements that the Defence realised that the charge did not appear in the French version of the annex but that it did in fact appear in the English and Khmer versions. The Defence was careful to bring this up in court.[123] In the Reasons for Judgement,[124] the Chamber disregarded both what the Defence said in the closing statements and the fact that the decision on additional severance and its annex were issued in the three languages as originals.[125] Accordingly, the French version is as authentic as the English and Khmer versions.[126] Of course, the Defence could have discovered the discrepancy earlier, but the Chamber

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[117] See below, §538-546.
[118] CO, §1470.
[119] Annex Setting the Scope of Case 002/02, **E301/9/1.1**, pp. 4-5.
[120] CB 002/02, §1930-1931.
[121] See below, §547-549.
[122] CB 002/02, §228 and 965.
[123] T. 20.06.2017, **E1/525.1**, between 10.42.03 and 10.11.59.
[124] Reasons for Judgement, §169.
[125] See cover page of the Decision on Additional Severance of Case 002 and Scope of Case 002/02, 04.04.2014, **E301/9/1**.
[126] Case 002/01 Appeal Judgement, 23.11.2016, footnote ("fn") 937 (in §380).

was first and foremost responsible for paying greater attention to the information on the delineation of the charges that it had decided.

116. Nor has the Chamber taken care to avoid confusion surrounding the charge of unlawful deportation of civilians which should not have appeared in the annex setting out the scope of Case 002/02, or in the Reasons for Judgement.[127] In fact, the Chamber had decided not to include the crimes committed by the KRA on Vietnamese territory, which are the only ones that could be constitutive elements of such a charge.[128] Nonetheless, the Chamber took the time to state the applicable law before stating that it could consider the evidence relating to these facts excluded from Case 002/02 as long as they had relevance regarding other charges.[129] It used this incorrect approach and source of abuse several times.[130] If the Chamber had made things clear right from the start, it would have avoided any confusion and saved time.

117. **Second**, far from wishing to decide only the charges of which it had been properly and strictly seised, the Chamber had a very expansive approach to the delineation of the charges in the CO. As developed below, it even went so far as to extend them to facts detailed in the evidence in a footnote and not in the charges themselves. The Chamber therefore ended up convicting KHIEU Samphan of crimes with which he was not properly charged.[131] Even when it did not convict him, it wasted time considering these facts without purpose.[132]

118. **Third**, and as developed below, the Chamber maintained and added to the confusion surrounding the understanding of its jurisdiction and the charges by admitting and hearing irrelevant evidence throughout the trial,[133] by turning it into a (long) trial for the history books.

Section II. A TRIAL FOR THE HISTORY BOOKS

119. The Chamber's approach which was more historical than legal followed a consistent pattern: even when it recognised that it had not been seised of facts with which the Accused had not been charged, it considered that the evidence regarding these facts was relevant (I); and even when it found that

[127] For example: Reasons for Judgement, §16, 324, 326, 774-778, 2073.
[128] CB 002/02, §1177 and 204-212.
[129] Reasons for Judgement, §778.
[130] See below, next section.
[131] See below, §334-530.
[132] For example: §1161-1163; §809 and 1167; §1139 and 1146; §1794-1798; §159-161 and 3017-3018; §3132-3135.
[133] See below, next section and §175-226.

there was not sufficient evidence regarding certain facts, it made findings [UNOFFICIAL TRANSLATION] "in passing" that were completely unnecessary (II).

I. "OUT-OF-SCOPE BUT RELEVANT EVIDENCE"

120. In those instances where the Chamber recognised that it had not been seised of certain facts, it nonetheless erred in law by considering that the evidence concerning these facts was relevant for something else.[134]

121. This approach is inconsistent with its role and the purpose of criminal proceedings noted in the IR: the Chamber must examine whether the charges against the accused, for which he was indicted, amount to a crime and whether or not he can be held responsible for them. The judgement shall be limited to these facts (Internal Rule 98). The accused shall only defend himself against these facts.

122. However, throughout the trial and instead of focusing on the facts of which it was seised, the Chamber admitted and heard evidence that was "out-of-scope but relevant". The Defence continually denounced the resulting confusion and objected to it. In its closing brief it discussed at length the principles and factual scope of the jurisdiction of a trier of fact, which determines the information to be provided about the charges against the Accused.[135]

123. Despite this, the Chamber persisted in its approach that was a source of abuse and ended up using this evidence about facts of which it had not been seised against KHIEU Samphan, facts against which he did not have to defend himself. In violation of the guiding and fundamental principles of criminal law, it used them to establish the constitutive elements of other crimes, the mode of liability and even the gravity of the crimes committed to determine the sentence.[136]

124. The Chamber thus rendered meaningless the existence and rationale of indictments and its severance of the charges. KHIEU Samphan did not have to and could not defend himself about everything that happened in Cambodia during DK.

125. The Chamber erred in law and violated KHIEU Samphan's rights to be informed of the nature and cause of the charge against him, to have adequate time and facilities for the preparation of his

[134] Reasons for Judgement, §60, 177-178, 181-185, 186-188, 189-190. See also the next parts of the brief.
[135] CB 002/02, §59-299.
[136] See below, §757, 1262-1263, 2148-2150.

defence, to a tribunal that respects the scope of its jurisdiction/established by law, to legal and procedural certainty, to an impartial tribunal and to be tried without undue delay.

II. *OBITER DICTA*

126. In those instances where the Chamber recognised that there was insufficient evidence to establish certain facts, it nonetheless took the time to make findings that were, however, irrelevant to the outcome of the case.[137] These *obiter dicta*[138] were gratuitous, especially where the Accused had been in detention since 2007, where the substantive hearings had lasted more than two years, where the closing statements were heard in June 2017 and where the Judgement had only been announced on 16 November 2018 without the Reasons, which were only issued 4.5 months later. As such, the Chamber violated KHIEU Samphan's right to be tried without undue delay and demonstrated its partiality.

Chapter III. FLAWED AND BIAISED APPROACH TO CASE 002/02 AFTER JUDGING CASE 002/01

Section I. JUDGES WHO WERE NOT FREE FROM PARTIALITY

127. The Chamber erred in law by not addressing or not sufficiently addressing the allegations of partiality due to the fact that they had previously judged Case 002/01.[139] It should have done so and acknowledged that after judging Case 002/01, it was not free from bias to be able to judge Case 002/02. In fact, it was not humanly possible for the Chamber not to disregard the factual and legal findings that it had already reached in Case 002/01, influencing Case 002/02. It violated KHIEU Samphan's rights to reasoned decisions and a reasoned judgement, to the presumption of innocence and to an impartial tribunal.

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[137] For example: §1137, fn 4289 (in §1256), 2173.

[138] *Vocabulaire juridique*, G. CORNU, PUF, 8th edition 2007, [UNOFFICIAL TRANSLATION]*"Obiter dictum"*: Latin expression […] used to designate, in a judgement, a remark that the judge says in passing, for information purposes, an incidental indication which, unlike the reasons, even when they are plentiful, is not intended to justify the decision containing it, but merely to make known in advance, for all relevant purposes, the feelings of the judge on a matter other than those that are required to be settled by the solution of the dispute in question".

[139] Reasons for Judgement, §113-115. The Chamber did not recall and did not refer to the arguments developed by the Defence in its CB 002/02 in §651-658. It merely mentioned the rejection of some of the arguments by the Special Panel which decided the applications for disqualification (§115).

128. The Defence refers to its previous submissions on the matter[140] and to the applicable law set out in its application for disqualification of the Supreme Court judges who adjudicated in Case 002/01.[141]

129. A reading of the Reasons for Judgement supports the fact that the defence teams' applications for disqualification of the judges of the Chamber should have been granted before the commencement of the substantive hearings in Case 002/02. Not only did the Chamber decide Case 002/02 in the same manner on similar matters to those it had already adjudicated in Case 002/01,[142] it obviously also followed the findings that it had reached in advance for Case 002/02.[143] In the Case 002/01 Appeal Judgement, the Supreme Court had considered that these findings had the value of *dicta,* which, as such, were not subject to appellate review.[144] It should be noted that in Case 002/02, the Chamber held the same opinion on certain matters that were charged in Case 002/02 and which it had made known in advance.

130. One need only take the example of the finding made in Case 002/01 on the existence of a CPK forced marriage policy,[145] after the Chamber had found that there was some evidence in this respect and other instances in which it found that there was evidence to the contrary.[146] Thus, even before considering the evidence in Case 002/02, the Chamber had already decided on the direction towards which it was leaning. It was obvious that it was going to decide in the same way in Case 002/02.[147] In fact, how could it have humanly done otherwise?

131. Moving away from such significant findings was not humanly possible, especially for Judges who severed the charges and judged Case 002/01 (and approached Case 002/02) considering that Case

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[140] Mr. Khieu Samphan's request for reconsideration of the need to await final judgement in Case 002/01 before commencing Case 002/02 and the appointment of a new panel of trial judges, 25.08.2014, **E314/1**; Renewed application for disqualification of the current judges of the trial chamber who are to hear Case 002/02, 10.10.2014, **E314/8**; AB, 002/01, §12, 47 and fn 116, 197, 581-582; CB 002/02, §650-658.
[141] KHIEU Samphan's Application for Disqualification of the Six Appeal Judges Who Adjudicated in Case 002/01, 31.10.2019, **F53**, §25-39.
[142] In particular with respect to matters relating to the general conditions of CAH, the common purpose of the JCE, the MOP, KHIEU Samphan's roles and his support for the socialist revolution of the CPK.
[143] In particular with respect to matters relating to the common purpose of the JCE, cooperatives and worksites, marriage and KHIEU Samphan's roles throughout DK.
[144] Case 002/01 Appeal Judgement, 23.11.2016, §229.
[145] Case 002/01 Trial Judgement, 07.08.2014, §130.
[146] Case 002/01 Trial Judgement, 07.08.2014, §128-129.
[147] Reasons for Judgement, sections 3.5 and 14.

002/01 would serve as a "general foundation" for other future trials,[148] which for them were merely the "continuation" of the first one and not separate trials.[149] In fact, in 2011, they stated:

> "[I]t is envisaged that the first trial will provide a general foundation for all the charges, including those which will be examined in later trials".[150]

132. It is difficult to see in this anything other than the deeply rooted intention of the Chamber to set in Case 002/01 the general foundation for its opinion on the charges against the Accused and that Case 002/02 would merely be the continuation of Case 002/01.

133. In 2014, the Supreme Court specifically drew the attention of the Chamber to the "inappropriateness of treating findings from one case as the 'foundation' for another".[151] While the Chamber announced that it was taking this into account,[152] a reading of the Reasons for Judgement shows that the Chamber never really strayed away from its very deeply rooted vision of the trials as a single trial.

Section II. JUDGES WHO CONSIDERED THE TRIALS AS A SINGLE TRIAL

I. ILLUSTRATION FROM A LEGAL PERSPECTIVE

A. *Bis in idem*

[148] Decision on Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chamber's Severance Order (E124/4) and Related Motions and Annexes, 18.10.2011, **E124/7**, §10; Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26.04.2013, **E284**, §15; Trial Chamber memorandum entitled "Clarification Regarding the Use of Evidence and the Procedure for Recall of Witnesses, Civil Parties and Experts for Case 002/01 in Case 002/02", 07.02.2014, **E302/5**, §5; Decision on Additional Severance of Case 002 and Scope of Case 002/02, 04.04.2014, **E301/9/1**, §23.
[149] Trial Chamber memorandum entitled "Clarification Regarding the Use of Evidence and the Procedure for Recall of Witnesses, Civil Parties and Experts for Case 002/01 in Case 002/02", 07.02.2014, **E302/5**, §5 and 7 (quote taken from §7).
[150] Scheduling Order for Opening Statements and Hearing on the Substance in Case 002, 18.10.2011, **E131**, §3.
[151] Case 002/01 Appeal Judgement, 23.11.2016, §228: "As to the potential complications caused by an overlap of factual findings in the situation where the same accused are being tried once again by the same trial panel for crimes stemming from a common factual background, and as to the inappropriateness of treating findings from one case as the "foundation" for another, the Supreme Court Chamber has repeatedly flagged the issue and recalls its findings in the appeal decisions concerning the severance. This issue, however, has no impact on the present case. Therefore, the Supreme Court Chamber sees no need to assess the matter any further.". In fn 560, the Supreme Court referred to several of its decisions, including the Decision on Khieu Samphan's immediate appeal against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope of Case 002/02, 29.07.2014, **E301/9/1/1/3** (which goes into a lot more detail on the matter but was issued only one week before the Case 002/01 Trial Judgement and therefore had no effect on it). In these decisions, it recommended that a new trial panel be set up for Case 002/02.
[152] Reasons for Judgement, §36 and fn 83.

134. As will be explained below,[153] despite the severance of the charges, the Chamber convicted KHIEU Samphan in Case 002/02 of crimes of which he had already been finally convicted in Case 002/01, in violation of the principle of *non bis in idem*. The Supreme Court should reverse these new convictions and find that KHIEU Samphan's trial was unfair.

B. Unlawful legal recharacterisation

135. The Chamber considered that it was permissible, without violating the right to a fair trial, to recharacterise the facts characterised in the CO as extermination as facts constituting the crime of murder with *dolus eventualis*, which it then did on several occasions.[154] In so doing, it committed an error of law invalidating its decision.

136. In fact, although the Chamber correctly recalled the rules applicable in this regard, it did not apply them correctly. It did indeed recall Internal Rule 98(2) according to which it may recharacterise "as long as no new constitutive elements are introduced". It also recalled the rules of fairness according to which the Accused must have been put on notice of a possible re-characterisation.[155] It recalled that the facts in question had been legally characterised in the Closing Order only as extermination and that their recharacterisation as murder with *dolus eventualis* "would only be permissible if there were no breach of the fair trial rights of the Accused".[156] But it wrongfully considered that because the Supreme Court had made this type of recharacterisation in the Case 002/01 Appeal Judgement, the Accused were "effectively" put on notice of the possibility of such a recharacterisation in Case 002/02 (1). It did not say anything about the introduction of a new constitutive element that it had effected (2).

1. Lack of information about the recharacterization envisaged

137. The Chamber considered that the Case 002/01 Appeal Judgement served as notice of a possible recharacterisation in Case 002/02 since Cases 002/01 and 002/02 "are based on the same Closing Order", that the Case File as well as the Parties and their representatives remained the same in both cases and given "the specific relationship between the two cases and the fundamental similarity of the factual circumstances".[157]

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[153] See below, part II title IV chapter III, §538-546.
[154] Reasons for Judgement, §153-157; see below, part III.
[155] Reasons for Judgement, §153.
[156] Reasons for Judgement, §154.
[157] Reasons for Judgement, §155-157 (citations taken from §156 et 157).

138. This reasoning takes no account of the fundamental difference between Case 002/01 and Case 002/02 following the severance of the proceedings, which was supposed to involve a separation of the charges against the Accused and against which they had to defend themselves. The recharacterisation carried out in another case by another chamber could not in any way exempt the Chamber from its obligation to notify the Accused of its own intention to possibly modify the characterisation in Case 002/02 of which it was then seised, the charges in which were different.

139. It was therefore the Chamber's responsibility in Case 002/02 to notify the Accused of a possible modification of the charges in Case 002/02 so that the Accused could defend themselves against those charges in Case 002/02.

140. It did not do so, in violation of the rules of fairness and the "need for special attention to be paid to the notification of the "accusation" to the defendant".[158] The accused must be informed "promptly" and "in detail" of the charges against him.[159] Thus, the "provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair".[160] In the event of "changes in the accusation, including changes in his "cause", the accused must be duly and fully informed thereof and must be provided with adequate time and facilities to react to them and organise his defence on the basis of any new information or allegation".[161]

141. Therefore, the tribunal must give the accused the opportunity of preparing his defence to the new charge "in a practical and effective manner and, in particular, in good time". Mere information about the possibility of recharacterisation is not enough; the accused must also be afforded the opportunity to subject the recharacterisation to adversarial argument and defend himself against it.[162]

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[158] *Pélissier and Sassi v. France*, Judgement (ECtHR, Grand Chamber), 25.03.1999, §51 (emphasis added); *Mattoccia v. Italy* (ECtHR), 25.07.2000, §59.
[159] ICCPR Article 14(3)(a); ECHR Article 6(3)(a).
[160] *Pélissier and Sassi v. France*, Judgement (ECtHR, Grand Chamber), 25.03.1999, §51-54 (quote taken from §52, emphasis added).
[161] *Mattoccia v. Italy*, Judgement (ECtHR), 25.07.2000, §61.
[162] *Pélissier and Sassi v. France*, Judgement (ECtHR, Grand Chamber), 25.03.1999, §62. ("The Court accordingly considers that in using the right which it unquestionably had to recharacterise facts over which it properly had jurisdiction, the Aix-en-Provence Court of Appeal should have afforded the applicants the possibility of exercising their defence rights on that issue in a practical and effective manner and, in particular, in good time. It finds nothing in the instant case capable of explaining why, for example, the hearing was not adjourned for further argument or, alternatively, the applicants were not requested to submit written observations while the Court of Appeal was in

142. In this case, the Chamber never informed the Defence about the possibility of recharacterisation of extermination as murder with *dolus eventualis* and never invited it to subject it to any adversarial argument so that it may defend itself against it.

143. First of all, it could have done so at the beginning of the trial when it asked the parties to state at the initial hearing whether they intended "to seek any recharacterisation of the crimes and forms of responsibility included in the Closing Order with regard to [Case 002/02]".[163] It did not say anything about it at the hearing and only the Prosecution asked it to consider JCE-3 as a mode of responsibility.[164] The Defence had then clearly stated that if any recharacterisation was planned, it would like to be afforded the opportunity of legally and factually replying to it in writing.[165]

144. Secondly, the Chamber could have done so during the trial, particularly after becoming aware of the Case 002/01 Appeal Judgement at the end of the substantive hearings, not least when it asked the parties to make submissions on the impact, if any, of the Case 002/01 Appeal Judgement focusing in particular on issues that may immediately affect evidentiary proceedings in Case 002/02.[166] While it considered that the Defence should have been able to anticipate the recharacterisation envisaged at that point, it should *a fortiori* have been able to anticipate the possibility and duly notify the Defence accordingly as it should (and if we follow the Chamber's

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deliberation. On the contrary, the material before the Court indicates that the applicants were given no opportunity to prepare their defence to the new charge, as it was only through the Court of Appeal's judgment that they learnt of the recharacterisation of the facts. Plainly, that was too late."); Cass. Crim., 26.10.2020, No. 09-87.853 [UNOFFICIAL TRANSLATION] ("Whereas, while it is the responsibility of the criminal court judge to restore to the facts of which he is seised their genuine characterisation, this is on the condition that the Accused has been in a position to defend himself against the new planned characterisation; (…) if it results from the terms of the order that the public prosecutor has "invited the court to recharacterise the events as violence committed against persons charged with a public service mission" and "the possibility of recharacterisation has been made known to the Accused", it does not result either from the details of the order or from the proceeding documents that Mr X...was invited to defend himself against the characterisation that was finally used; therefore, by declaring as it did, the court of appeal was ignorant of the above-mentioned texts and the principle recalled above; it therefore follows that cassation is incurred"). See also: *Drassich v. Italy*, Judgement (ECtHR), 11.12.2007, §34 and 36.

[163] Trial Chamber memorandum entitled "Agenda for Further Initial Hearing in Case 002/02" (30 July 2014), 07.07.2014, **E311/1**, §9.

[164] T. 30.07.2014, **E1/240.1**, between 10.10.35 and 10.20.15

[165] T. 30.07.2014, **E1/240.1**, before 10.18.13 (Ms GUISSÉ: "On behalf of the defence of Mr Khieu Samphan, it goes without saying that the Accused will not be requesting any characterization – re-characterization of the crimes. However, we do wish to reserve the possibility, as is customary before all other international tribunals – that is, to make any written submissions for any – over the re-characterization of findings and also to make any filings should new evidence be adduced.").

[166] Reasons for Judgement, §157.

reasoning, it was also involved in Case 002/01). However, neither the Chamber nor the Prosecution mentioned any possible recharacterisation at the time.

145. Finally, it could have done so during the deliberations,[167] by reopening the proceedings and asking the parties for submissions on the matter. It failed to do so.

146. Thus, it was only on the day the Judgement was announced that the Defence became aware of the change of the characterisation of certain charges of extermination to murder with *dolus eventualis*,[168] when neither the Prosecution nor the Chamber ever raised such a possibility at any previous stage and the Defence was not invited to discuss it.[169]

147. Had it been, the Defence would not only have defended itself against the charge of extermination (the only charge mentioned in the indictment in this regard) as it did.[170] It would have raised other defences, particularly in view of the introduction of a new constitutive element which is prohibited by the IR.

2. Introduction of a new constitutive element

148. As the Chamber itself stated:

> "Although the Chamber may change the legal characterisation of a crime as set out in the Closing Order *as long as no new constitutive elements are introduced* (Internal Rule 98(2)), the Chamber has no authority to add new facts or charges to the Closing Order that were dismissed by the Co-Investigating Judges, a decision that was not disturbed by the Pre-Trial Chamber."[171]

149. A legal recharacterisation of facts charged as extermination to the crime of murder with *dolus eventualis* amounts to introducing a new constitutive element in the indictment. In fact, these two crimes are clearly distinguishable by their constitutive elements and have different requirements.

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[167] Internal Rule 96(2): "During the course of the deliberations, the judges may reopen the proceedings.".
[168] T. 16.11.2018, **E1/529.1**, 11.29.49.
[169] As in *Drassich v. Italy*, Judgement (ECtHR), 11.12.2007, §36 ("The Court observes that the contentious recharacterisation took place at the time of the deliberation of the Court of Cassation. Furthermore, it does not appear that the public prosecutor or any of the judges making up the panel of the high court mentioned the possibility of recharacterising the facts of the case in an earlier stage of the proceeding. In these conditions, it is not established that the petitioner was informed about the possibility of recharacterisation of the charges brought against him, nor did he have the opportunity to submit adversarial argument regarding the new charges.", references omitted).
[170] For example: CB 002/02, §994-997; 1038-1045; 1082-1087, 1139-1146.
[171] Trial Chamber memorandum entitled "Further Information Regarding Remaining Preliminary Objections", 25.04.2014, **E306**, §3 cited in §187 of the Reasons for Judgement (in italics in the original, emphasis added).

As noted by the Supreme Court, ""[m]urder" and "extermination" are separate crimes and their respective definitions should be determined independently".[172]

150. Although both murder and extermination involve taking the lives of human beings, they consist of two very distinct criminal conducts. Extermination may be differentiated from murder in that it is directed against groups of individuals or a population. The aim of extermination is thus to eliminate individuals who are part of a group. This "is incompatible with the notion of *dolus eventualis*".[173]

151. Thus, unlike murder, the *actus reus* of extermination consists in killing persons on a massive scale.[174] Regarding the *mens rea*, the perpetrator or perpetrators must have had the direct intent to kill persons on a massive scale or to subject them to living conditions calculated to bring about death.[175]

152. In fact, changing the initial charge from extermination to murder with *dolus eventualis* involves the introduction of a new charge with a new constitutive element: *dolus eventualis*, a non-intrinsic element of the initial charge but foreign to and even excluded from it.

153. Faced with a charge of extermination, the Defence can only respond by raising the lack of direct intent to kill on a massive scale.[176] It does not defend itself against a *mens rea* of a lesser degree which does not exist in the definition of the crime and is even inconsistent with it.

154. Thus, faced with a charge of murder with *dolus eventualis*, KHIEU Samphan would have raised very different defences, particularly to defend himself against the reality of *dolus eventualis* in the commission of the crime.

155. Not only did KHIEU Samphan not have notice of the recharacterisation contemplated by the Chamber and was unable to debate it, but he was convicted in violation of the IR of charges for which he was not indicted. These convictions should be invalidated.[177]

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[172] Case 002/01 Appeal Judgement, 23.11.2016, §516.
[173] Case 002/01 Appeal Judgement, 23.11.2016, §519-521.
[174] Case 002/01 Appeal Judgement, 23.11.2016, §517.
[175] Case 002/01 Appeal Judgement, 23.11.2016, §517-522.
[176] For example: CB 002/02, §994-997; 1038-1045; 1082-1087, 1139-1146.
[177] See below, part III, title I chapter III section II, and title II on TK, TTD, 1JD, KCA, S-21, KTC and PK.

156. The Appellant also notes that following the example of the Supreme Court in Case 002/01,[178] the Chamber effected the recharacterisation during the deliberations without informing anyone about it due to a lack of evidence of the direct intent to kill on a massive scale, without which it was not possible to arrive at grounds for conviction. This approach reveals a lack of impartiality from these chambers.

157. Accordingly, the Chamber violated KHIEU Samphan's rights to be informed of the nature and cause of the charge against him, to have adequate time and facilities for the preparation of his defence, to an adversarial trial, to legal and procedural certainty, to transparency of proceedings and to an impartial tribunal.

II. ILLUSTRATION FROM AN EVIDENTIARY PERSPECTIVE

158. At paragraph 36 of the Reasons for Judgement, the Chamber stated that no importation of criminal responsibility is made between cases and factual findings are not transposed from Case 002/01 to Case 002/02. The Chamber was careful to specify that where it used "language similar or identical to" Case 002/01, "this simply reflect[ed] that the Trial Chamber's conclusion following its analysis of the evidence afresh in Case 002/02 is the same as the one it reached in Case 002/01".[179] It also stated that when evaluating material from Case 002/01 in relation to issues in Case 002/02, it "satisfie[d] itself that the right to full adversarial debate [wa]s preserved". It rejected "as unsubstantiated the [Defence']s contention that "oral evidence from Case 002/01 [had] become[…] (via transcripts) documentary evidence in Case 002/02". However, the Chamber did not consistently apply the principles laid down.

159. First, certain "language similar or identical" to that used in the Case 002/01 Trial Judgement was not used following a new analysis of the evidence in Case 002/02. Proof of this lies not least in the fact that the Chamber continued to attribute to KHIEU Samphan the inaugural speech of the KPRA on 11 April 1976 based on a document from which this finding could not be made, a finding which had been set aside by the Supreme Court.[180]

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[178] See the Defence arguments on this point in KHIEU Samphan's Application for Disqualification of the Six Appeal Judges Who Adjudicated in Case 002/01, 31.10.2019, **F53**, §93-109.
[179] Reasons for Judgement, fn 83 (in §36).
[180] Case 002/01 Trial Judgement, 07.08.2014, §985; Case 002/01 Appeal Judgement, 23.11.2016, §1023; Reasons for Judgement, §598 and 3739.

160. Second, the Chamber erred in law since it did not always satisfy itself that the right to "full" adversarial debate had been preserved when evaluating material from Case 002/01 in relation to issues in Case 002/02.

161. At the outset, it rejected Defence arguments on the value of Case 002/01 hearing transcripts in Case 002/02 by truncating them. Specifically, while the Defence did indeed state that "oral evidence from Case 002/01 [had] become [...] (via transcripts) documentary evidence in Case 002/02", it had immediately added:

> "With two exceptions:
>
> – where witnesses in Case 002/01 returned as witnesses in Case 002/02,
>
> – where witnesses in Case 002/01 also testified in relation to facts under review in Case 002/02 and were cross-examined on [those] facts".[181]

162. Absent confrontation, it is obvious that the statement of a witness who could not be examined by the Defence has the same value as a written statement.[182]

163. Then, despite its headlining statement that it would consider whether the Parties were prevented from examining in court persons heard in Case 002/01 on matters within the scope of Case 002/02 in order to satisfy itself that the right to full adversarial debate was preserved,[183] the Chamber used the statements of people heard only in Case 002/01 on matters within the scope of Case 002/02 while the Defence had not been able to examine them on those matters. This is the case, for example, for parts of the testimony of CHHAOM Sé concerning Au Kanseng,[184] or of EM Oeun concerning marriages and Buddhists.[185]

164. It is also worthy of note that the Chamber used a large number of parts of the testimonies of people heard in Case 002/01 as if they had been heard in Case 002/02 to find in Case 002/02 that a policy against the Buddhists existed throughout DK,[186] while these people were supposed to have testified

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[181] CB 002/02, §552. See also the developments below in §553-556.
[182] Reasons for Judgement, §68-70; Case 002/01 Appeal Judgement, 23.11.2016, §226.
[183] Reasons for Judgement, §36.
[184] See below, §842-847.
[185] See below, §1168, 1172, 1185, 1335 (marriage) and Reasons for Judgement, §4015 (fn 13301, 13310), §4016 (Buddhists).
[186] Reasons for Judgement, §4015-4017, fn 13300 to 13314. In addition to EM Oeun: PEAN Khean, YUN Kim, KHIEV En, HUN Chhunly, PIN Yathay, NOU Mao, SIM Hao, ONG Thong Hoeung, KLAN Fit, KIM Vannady, SOPHAN Sovany. The Defence notes that the Chamber listed the hearing transcripts in chronological order, before the written

in Case 002/01 about Buddhism only in the historical context and therefore before the period of DK. The Defence therefore 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 it for examination to examine them about Buddhism after 1975, which was not within the scope of the ongoing trial. Which was obviously the case in general for all appearances on all matters that were not within the scope of Case 002/01…

165. It was indeed because it had been unable to examine in Case 002/01 certain people who could testify on multiple issues within the scope of Case 002/02 that the Defence asked for them to be recalled in Case 002/02.

166. Thus, before the trial began, the Defence had filed a very short list of seven people whose appearance in Case 002/02 it was requesting.[187] Four of them had been heard and considered credible in Case 002/01 and they were highly relevant for Case 002/02: CHUON Thy, Stephen HEDER, François PONCHAUD and Philip SHORT. Although the Chamber decided to recall CHUON Thy, it nonetheless refused to call the other three again on the ground… that they had already appeared in Case 002/01.

167. During the trial, in view of the fact that the Chamber only issued its decisions on the requested appearances as the trial progressed and without providing reasons while granting requests for new appearances from other parties during the trial,[188] the Defence stressed on several occasions the importance of the appearance of the witnesses that it had proposed, in particular François PONCHAUD and Stephen HEDER.[189] Towards the end of the substantive hearings, the Chamber rejected the request for them to appear "[i]n light of the topics that were already covered during the[ir] testimony" in Case 002/01 (including "various topics also relevant to Case 002/02") and

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statements (written records of interview). It therefore placed testimonies from Case 002/01 on the same level as those from 002/02, as if they had the same probative value, higher than that of written statements (and as if Case 002/01 and Case 002/02 were one and the same trial).

[187] Witnesses and Experts Proposed by KHIEU Samphan, 09.05.2014, **E305/5** and annex **E305/5.2** (summaries).

[188] See below, §175-215.

[189] For example: *Réponse de KHIEU Samphân*, 25.09.2015, **E366/1**, §26-28; T. 06.01.2016, **E1/371.1**, between 09.44.28 and 09.49.07 (Mr KONG Sam Onn); *Demande de KHIEU Samphân*, 09.08.2016, **E408/6**; T. 16.08.2016, **E1/458.1**, between 10.25.30 and 10.31.36 (Mr GUISSÉ; *Demande*, 13.10.2016, **E408/6/1**.

that "it would be repetitious" to call them to testify again in Case 002/02. The Chamber found that "recalling these individuals would cause an undue delay to the proceedings".[190]

168. Thus, although the Chamber acknowledged that these testimonies were highly relevant for Case 002/02, it completely disregarded the fact that the Defence had not been able to examine them in Case 002/01 on matters within the scope of Case 002/02. However, before the trial, while clarifying the procedural framework for the recall of witnesses due to the additional severance:

> "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]."[191]

169. The refusal to recall HEDER and PONCHAUD to be heard each on several matters within the scope of Case 002/02 due to the so-called delay to the proceedings was much less justified in that the Chamber decided *proprio motu* to recall witnesses who had testified in Case 002/01, such as PHAN Van and SAO Sarun,[192] even though the latter was one of the very few people heard in Case 002/01 who could be examined on all matters within the scope of Case 002 to avoid their being recalled.[193]

170. It was also for the reason (given after the conclusion of the substantive hearings) that the parties in Case 002/01 would have been allowed to "more extensive[ly] question[…]" Philip SHORT "within his unique area of expertise in order to avoid recalling him unnecessarily" that the Chamber decided not to recall him in Case 002/02.[194] However, the Chamber reversed itself on this authorisation to

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[190] 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) (E408/6)", 03.11.2016, **E408/6/2**, §6. The Chamber added that it had chosen and heard another expert, Stephen MORRIS, to testify regarding the armed conflict. However, it never explained why it had chosen him rather than Mr HEDER (capable of testifying on the armed conflict and other matters in Case 002/02, unlike Mr MORRIS), the request for whom was supported by the NUON Chea Defence and even by the Prosecution (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) (E408/6)", 03.11.2016, **E408/6/2**, §1). In the reasons for its decision concerning the appearance of Mr MORRIS, the Chamber simply stated that it had taken account of the unavailability of Nayan CHANDA and Michael VICKERY (Decision on Designation of 2-TCE-98, 27.09.2016, **E445**).

[191] Trial Chamber memorandum entitled "Clarification Regarding the Use of Evidence and the Procedure for Recall of Witnesses, Civil Parties and Experts for Case 002/01 in Case 002/02", 07.02.2014, **E302/5**, §8. See also Decision on Additional Severance of Case 002 and Scope of Case 002/02, 04.04.2014, **E301/9/1**, §42 and fn 91, in which the Chamber stated that certain matters may not have been fully examined in Case 002/01 and could also be relevant in Case 002/02 and recalled that it had stated "(that it would mainly give detailed factual consideration in the first trial to those charges expressly included within the scope of Case 002/01)".

[192] Decision on Witnesses, Civil Parties and Experts Proposed to be Heard During Case 002/02, 18.07.2017, **E459**, §95 and fn 242-243 (referring to an email from 06.09.2016).

[193] Memorandum of 10.05.2012, **E194** (TCW-604).

[194] Decision on Witnesses, Civil Parties and Experts Proposed to be Heard During Case 002/02, 18.07.2017, **E459**,

ensure the expeditiousness of the trial.[195] Furthermore, it refused to admit documents regarding genocide in view of his appearance on the ground that genocide was not part of the charges of which it was then seised.[196] It also spontaneously interrupted the testimony of the expert who was addressing the matter by saying: "But it's not something in this particular part of the Trial that we are considering".[197]

171. It is therefore on fallacious grounds that the Chamber refused to recall PONCHAUD, HEDER and SHORT, who were however very important for the Defence.

172. In its Closing Brief, the Defence pointed out that out of a total of 186 people heard in Case 002/02, only two had been proposed by the Defence (i.e. 1.07%), in favour of more appearances for the Prosecution.[198] The Chamber replied that it did not consider that the Defence had established a violation of the principle of equality of arms because it had applied to all requests for appearance "the same standard based on relevance to all requests".[199] However, if it had really applied this standard, it would have recalled PONCHAUD, HEDER and SHORT, whom it had acknowledged as relevant for testifying each on several matters within the scope of Case 002/02.

173. However, the Chamber unfairly exercised its discretion by choosing rather to admit and hear, throughout the trial, *proprio motu* or at the request of the Prosecution, new inculpatory testimonial or documentary evidence that was often irrelevant and of no probative value, unjustifiably delaying the proceedings.[200]

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§193 (and fn 536 referring to the Decision on Assignment of Experts, 05.07.2012, **E215**, §4). The Chamber added that as a result hearing Mr SHORT's evidence a second time was "likely" to be substantially "repetitive" of the transcripts of the testimonies of PONCHAUD, HEDER and CHANDLER in Case 002/01.

[195] Decision on Assignment of Experts, 05.07.2012, **E215**, §4: "As these individuals were proposed prior to the severance of Case 002 into a number of trials and to avoid their unnecessary recall, the Chamber had previouslydetermined that they may be questioned on all matters within their knowledge or expertise relevant to the entirety of the Closing Order in Case 002. In view of the Chamber's wish to ensure an expeditious trial, and as previous dispensation to question beyond the scope of Case 002/01 has frequently resulted in lengthy examination, the parties are reminded that the principal focus of their examination should remain on the subject-matter of Case 002/01. Questioning on matters beyond this scope should be limited to areas which the parties consider these individuals to be uniquely qualified to answer." (emphasis added).

[196] Memorandum of 18.01.2013, **E260**, §7-8.

[197] T. 06.05.2013, **E1/189.1**, before 11.54.06 (Judge CARTWRIGHT).

[198] CB 002/02, §663-665.

[199] Reasons for Judgement, §126-127 (quote taken from §127).

[200] See below, §182-226.

174. In conclusion, the Chamber violated KHIEU Samphan's rights to an adversarial trial, to reasoned decisions and a reasoned judgement, to be heard, to equality of arms, to an impartial tribunal and to be tried without undue delay.

Title III. PARTIAL APPROACH TO EVIDENCE

Chapter I. ERRORS REGARDING THE ADMISSION OF EVIDENCE DURING THE TRIAL

Section I. DECISIONS ABOUT APPEARANCES MADE AS THE TRIAL PROGRESSED

175. On 12 September 2014, while setting out the sequence in which it was going to consider the matters within the scope of Case 002/02, the Chamber stated:

> "The Chamber will issue an order on the sequence of the witnesses that will be heard in relation to each topic in due course. An order fixing the trial start date and the initial trial schedule will also be issued in the near future."[201]

176. Although it did issue an order fixing the trial start date and the initial trial schedule, it did not, however, issue the order it had mentioned regarding the appearance of the persons proposed. It did in fact disclose in a number of emails the disposition of its decisions on the appearances proposed before the trial as the trial progressed, and only provided the reasons for those decisions at the conclusion of the substantive hearings.[202] In so doing, the Chamber committed a discernible error in the exercise of its discretion which resulted in prejudice to the Appellant.

177. In fact, when denouncing the Chamber's lack of transparency during the course of the trial and calling on several occasions for a comprehensive list of the witnesses to be called,[203] the Defence

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[201] Decision on Sequencing of Trial Proceedings in Case 002/02, 12.09.2014, **E315**, §12.

[202] Dispositions: Emails, 19.09.2014 at 14:06, 10.10.2014 at 14:35, 10.12.2014 at 9:00, 19.01.2015 at 12:37, 20.01.2015 at 11:59, 27.02.2015 at 10:02, 27.02.2015 at 11:45, 06.03.2015 at 15:25, 28.04.2015 at 10:58, 12.05.2015 at 14:01, 22.06.2015 at 16:29, 07.08.2015 at 15:34 **E366/1.2**, 18.09.2015 at 10:39 **E381.1.1**, 20.10.2015 at 14:36, 06.11.2015 at 11:33 **E381.1.3**, 24.12.2015 at 10:05 **E364/1.1**, 11.01.2016 at 13:34 **E380/2.2**, 13.01.2016 at 14:23, 14.01.2016 at 15:15, 22.01.2016 at 14:03, 05.02.2016 at 13:33 **E390/1.1.1**, 12.02.2016 at 12:45 **E405.1.1**, 07.03.2016 at 16:25 **E392.1.1**, 08.04.2016 at 10:44 **E408/6.1**, 03.06.2016 at 13:51 **E431/2.2**, 30.06.2016 at 14:01 **E434.1.2**, 06.09.2016 at 8:54, 13.09.2016 at 14:06 **E448.1.1**, 14.09.2016 at 16:15 **E453/1.2**, 06.12.2016 at 15:13; reasons in Decision, 18.07.2017, **E459**. Emails without a document number are attached in the annex.

[203] See, for example: Submissions of the Defence for Mr KHIEU Samphan on the Co-Prosecutors' Disclosure Obligation, 24.08.2015, **E363**, §48; *Opposition de KHIEU Samphân du 03.09.2015,* **E364**, §11; *Réponse et demande incidente de KHIEU Samphân du 25.09.2015*, **E366/1**; *Demande du 23.10.2015*, **E374**, §17; *Demande de KHIEU Samphân du 05.07.2016*, **E421/2**; *Demande de KHIEU Samphân du 09.08.2016*, **E408/6**; T. 08.09.2016, **E1/471.1**, between 11.23.27 and 11.27.06; *Demande de KHIEU Samphân du 13.10.2016*, **E408/6/1**. The Defence also expressly refers to the arguments in its CB 002/02, §660-665.

explained the difficulties caused to its preparation in the long and short term by the lack of visibility. Given that the people called could testify on all matters within the scope of 002/02 about which they might have knowledge, if a comprehensive list had been available to the Defence, it would have been able to prepare for this and examine them according to all those who were going to appear or not (if only in terms of presentation of statements from other people or of documents, for example). All the parties would have been able to make requests for admission of documents relevant to examinations at the beginning of the trial and not as the trial progressed and very shortly before the appearances.[204] The parties' countless requests for appearances marred the hearing of the evidence and led to a considerable amount of time being wasted.

178. The Chamber's approach also left the door open to a number of abuses. In particular, it allowed the Prosecution to submit new requests for appearances depending on the evidence that had already been heard when that evidence was not to its liking.[205] This tendency of the Prosecution to parade as many witnesses as possible as long as it was not obtaining in court the confirmation of the theory of its case was quite obvious from the start of the trial and had been noted by the Defence.[206] Not

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[204] See, for example, Decision on Yim Tith's Request to Set a Timetable for Disclosure Requests from Case 004, 31.10.2016, **E319/62** (or **004-D193/102**), §13 and 15, where it is stated that the International Co-Prosecutor pointed to the difficulties encountered with respect to the disclosure of documents from Cases 003 and 004: "The ICP submits that the Trial Chamber selects witnesses often two weeks or even days before the witnesses are to appear making it impossible for the ICP to request disclosure in any more organised manner." (§15).

[205] For example, regarding the Cham: International Co-Prosecutor's Request to Call Additional Witnesses During the Case 002/02 Trial Segment on Treatment of the Cham, 15.05.2015, **E366** (*Réponse de KHIEU Samphân du 25.09.2015*, **E366/1**; Memorandum of 01.10.2015, **E372** (disposition), Decision on International Co-Prosecutor's Request to Call Additional Witnesses During the Case 002/02 Trial Segment on Treatment of the Cham, 24.12.2015, **E366/3** (reasons)); regarding the Vietnamese: Co-Prosecutors Request to Summon 2-TCW-843, 2-TCW-957, 2-TCCP-245, 2-TCW-939, 2-TCW-849, and 2-TCW-905 in Relation to the Vietnamese Segment of Case 002/02, 15.09.2015, **E381** and International Co-Prosecutor's Request pursuant to Rules 87(3) & 87 (4) to Admit Documents and to Hear an Additional Trial Witness Relating to the Vietnamese Segment of Case 002/02, 24.12.2015, **E382** (Oral answer from KHIEU Samphan, T. 06.01.2016, **E1/371.1**, between 09.17.08 and 09.49.13; Memorandum of 12.01.2016, **E380/1** (disposition); Decision on Motions 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), 25.05.2016, **E380/2** (reasons)); regarding marriages: International Co-Prosecutor's Request for Clarification regarding Proposed Witnesses for the Regulation of Marriage Segment, 26.07.2016, **E425** (*Réponse de KHIEU Samphân du 08.08.2016*, **E425/1**; Memorandum of 07.09.2016, **E425/2**).

[206] Objection by the KHIEU Samphan Defence to the Calling of Certain Persons to Give Evidence in the Trial in Case 002/02 and Request for Clarification on the Exact Scope of the Proceedings Following the Decision on Additional Severance E301/9/1, 30.05.2014, **E305/9**, §34, 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, 09.05.2014, **E305/6**, §11 (in which the Co-Prosecutors provided notice to the Chamber that they might request the appearance of "alternative" individuals in the event that those proposed could not appear or were "unable to establish the facts contained in their written statements") and §13 ("More generally, if as the trial progresses the Co-Prosecutors believe that further witnesses need to be called on any particular issue in order to satisfy their burden of proof, they reserve the right to propose further such witnesses to the Trial Chamber at that time.").

only did the Chamber allow this to go on, it also took advantage of this process to spontaneously call people whose statements taken in the judicial investigations in Cases 003 and 004 were unlawfully disclosed in bulk by the Prosecution throughout the case.[207]

179. Moreover, by not providing reasons for its decisions at the time they were issued, the Chamber fostered uncertainty around the delineation of Case 002/02, particularly on the matter of "internal purges", a new topic that appeared during the trial.[208]

180. During the substantive hearings, the disposition of its decisions only provided insight into the fact that the Chamber considered the testimony relevant on one topic in particular. After the substantive hearings, the reasons for its decisions did not provide any more information about the decisions, apart from the fact that the Chamber had called to be questioned individuals "considered to be most conducive to ascertaining the truth".[209] Beyond this, the Chamber only provided the reasons why it had not chosen the other people proposed by the parties, mainly because their testimony was probably likely to be repetitious in relation to that of those who had already been heard.[210] Thus, the Chamber never explained why it had originally chosen certain people rather than others, which seems in the end to be proof of its preference for inculpatory evidence without having to explicitly spell this out as it made its selection during the trial.

181. The Chamber's error resulted in the violation of KHIEU Samphan's rights to have adequate time and facilities for the preparation of his defence, to transparency of proceedings, to reasoned decisions, to be informed of the nature and cause of the charge against him, to legal and procedural certainty, to be tried without undue delay and to an impartial tribunal.

Section II. FAILURE TO ACKNOWLEDGE THE EXCEPTIONAL NATURE OF INTERNAL RULE 87(4)

182. In the Reasons for Judgement, after recalling that the admission of evidence during the trial was in line with the special framework of Internal Rule 87(4),[211] the Chamber specified that "some"

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[207] See below, §198-215.
[208] *Requête de KHIEU Samphân du 22.06.2016*, **E420**; CB 002/02, §277-293.
[209] Decision on Witnesses, Civil Parties and Experts Proposed to be Heard During Case 002/02, 18.07.2017, **E459**, §20.
[210] Decision on Witnesses, Civil Parties and Experts Proposed to be Heard During Case 002/02, 18.07.2017, **E459**, §22-194.
[211] Reasons for Judgement, §43.

evidence had been admitted on this basis in Case 002/02.[212] In actual fact, a very large number of new witnesses and new documents were admitted again and again throughout the trial.

183. Despite a long judicial investigation and a pre-trial stage during which thousands of items of evidence had already been placed on the case file, the Chamber preferred quantity over quality and expeditiousness. It disregarded its previous jurisprudence acknowledging the exceptional nature of the introduction of evidence in the course of trial, making this the rule rather than the exception. In so doing, the Chamber committed an error of law and a discernible error in the exercise of its discretion which resulted in prejudice to the Appellant.

184. According to the Internal Rules, the admission of evidence is regulated differently depending on the stage of the trial: the admission of evidence during the trial (Internal Rule 87(4)) is an exception to the rule that evidence is submitted during the pre-trial phase of the case (Internal Rules 80 and 87(3)).

185. In fact, before the ECCC, after the Prosecution's introductory submission is sent, evidence is gathered by the Co-Investigating Judges.[213] It is on the basis of the judicial investigation case file that the parties and then the Chamber prepare for the trial.[214] During the pre-trial stage, the parties provide the lists of evidence that they propose, whether it is evidence already on the judicial investigation case file or new evidence. These lists should simply contain a brief description of the contents of the proposed evidence and the relevant points of the indictment.[215] The Chamber determines any such request in accordance with the criteria set out in Rule 87(3) (relevance, non-repetitiousness, etc.).[216]

186. Once the hearing is opened, while the parties can still propose new evidence, it is then Internal Rule 87(4) which applies. Under this rule, a party making such a request must do so by a reasoned submission in order to satisfy the Chamber that the requested evidence was not available before

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[212] Reasons for Judgement, §56.
[213] Internal Rules 53 and 55 of the.
[214] Internal Rules 55(11), 67, 69, 79(1) and 80.
[215] Internal Rule 80.
[216] "The Chamber may 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; or d) not allowed under the law, or e) intended to prolong the proceedings or is frivolous".

the opening of the trial and that it is conducive to ascertaining the truth. The evidence proposed must also comply with Internal Rule 87(3).[217]

187. The rationale for the exceptional nature of Internal Rule 87(4) and its additional requirements during the trial is simple: after a long judicial investigation and a long pre-trial stage, the parties can no longer prepare for the trial while the trial is ongoing, especially because "[p]roceedings before the ECCC shall be brought to a conclusion within a reasonable time".[218]

188. At the start of Case 002/01 and during the pre-trial stage in Case 002/02, the case law of the Chamber was consistent both with the letter and the spirit of Internal Rule 87(4). At those times, the Chamber considered that the requesting parties had to meet the "extremely high threshold" of showing that the documents were not available before, and that their "late" admission was "vital" or "essential" in the interests of justice.[219] It explained that "the heightened standard set out in Internal Rule 87 is intended to promote the efficiency of the proceedings".[220]

189. However, from the start of Case 002/02, the Chamber drastically departed from this jurisprudence and the need to ensure the efficiency and expeditiousness of the proceedings. During the trial, when the International Co-Prosecutor began requesting the bulk admission of written statements from other case files (something he had not done in Case 002/01),[221] the Chamber merely limited its reasons to the (questionable) relevance of these items. It automatically admitted the documents in bulk despite their inherently low probative value on the ground that they were relevant and therefore conducive to ascertaining the truth.[222] By equating relevance with conduciveness to

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[217] "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) above. The requesting party must also satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial."

[218] Internal Rule 21(4).

[219] Memorandum of 25.10.2011, **E131/1**, p. 4 penultimate paragraph; Memorandum of 28.11.2011, **E118/4**, pp. 2-3, penultimate paragraph. The English version of these two memoranda is the same: "(…) the extremely high threshold of showing that these documents could have been disclosed within the applicable deadlines with the exercise of due diligence, and that their late admission is vital in the interests of justice".

[220] Memorandum of 11.06.2014, **E307/1**, §3. See also Memorandum of 21.10.2014, **E307/1/2**, §11: "IR 87(4) balances the need to ensure that all relevant and reliable evidence is put before the Chamber with the need to provide timely notice of such evidence to ensure a fair and expeditious trial and to allow efficient trial management to this end.".

[221] See below, next section on Material from Cases 003 and 004.

[222] See, for example: 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, 24.12.2014, **E319/7**, §10; Memorandum of 08.04.2015, **E319/17/1**, §4; Memorandum of 17.07.2015, **E319/22/1**, §5; Memorandum of 18.02.2016, **E319/32/1**, §10; Decision on International Co-Prosecutor's Request to

ascertaining the truth and only applying the criteria set out in Internal Rule 87(3) during the trial, the Chamber committed an error of law and gave free rein to the Prosecution to introduce hundreds of new items of evidence during the trial.

190. These requests from the International Co-Prosecutor were the starting point for a large number of requests for admission of new evidence throughout the trial. While some of these requests were made in view of the appearance of witnesses and justified by the fact that the Chamber only disclosed its decisions on the appearance of witnesses as the trial progressed,[223] most of the requests were not strictly necessary. Given the thousands of items of evidence already admitted in Case 002/02, the admission, during the trial, of the new items requested was largely not "vital" nor "essential" in the interests of justice. This admission was made to the detriment of the appearance of a few very important witnesses requested by the Defence before the trial.[224]

191. It was only at the end of June 2016 that the Chamber seemed to return to the spirit and letter of Internal Rule 87(4). In a memorandum on the final stages of Case 002/02, it informed the parties of the imposition of a deadline of 1 September 2016 for the submission of requests for admission under Internal Rule 87(4).[225] It also began to reject some of the documents proposed by the International Co-Prosecutor on the ground that he had failed to exercise diligence and stated that in view of the fact that the close of evidence was approaching, it would subject requests to admit new evidence to "heightened scrutiny".[226]

192. This "heightened scrutiny" – which should have been conducted from the start and not at the end of the trial – did not in any event prevent the Chamber from continuing to admit written statements of inherently low probative value (and of very limited relevance) at the end of the trial.[227] In fact,

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Admit Written Records of Interview Pursuant to Rules 87(3) & (4) and to Call Four Additional Witnesses for Upcoming Case 002/02 Segments, 25.05.2016, **E319/36/2**, §21-22, 26-27, 30, 40-41.

[223] See above, previous section.

[224] CB 002/02, §663-665; See above, §165-173.

[225] Memorandum of 28.06.2016, **E421**, §3. See also: Memorandum of 26.08.2016, **E421/3** (disposition) and Decision on Requests regarding Internal Rule 87(4) Deadlines, 21.09.2016, **E421/4** (reasons), §13-18.

[226] Decision on International Co-Prosecutor's Requests to Admit Written Records of Interview Pursuant to Rules 87(3) and 87(4), 29.06.2016, **E319/47/3**, §23. See also 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), 23.11.2016, **E319/52/4**, §12: "The Chamber recalls that requests to admit new evidence at this late stage of the trial are subjected to heightened scrutiny".

[227] For example: Decision on International Co-Prosecutor's Requests to Admit Written Records of Interview Pursuant to Rules 87(3) and 87(4), 29.06.2016, **E319/47/3**, §24-27.

the Chamber did not also hesitate to admit documents of low probative value at the end of the trial, which came from people who did not appear.[228]

193. The Chamber should have followed international jurisprudence and exercised its discretion "to admit the evidence by reference to the probative value of the evidence and the fairness to the accused of admitting it late in the proceedings" and "to exclude evidence where its probative value is substantially outweighed by the need to ensure a fair trial".[229]

194. Nor did the announcement of a "heightened" scrutiny prevent the Chamber from admitting complete books late at the end of the trial over Defence objection,[230] even though it had urged the parties to select excerpts considered relevant at the start of the trial.[231]

195. Nor did this announcement and the deadline set for new requests prevent the Chamber from deciding *proprio motu* on the appearance of completely new individuals,[232] or from leaving the door open to requests for new appearances at the very end of the trial. Following a request for clarification from the Defence regarding written statements admitted on the ground that they were relevant, particularly concerning the actions and conduct of the Accused,[233] the Chamber stated that it had "dr[awn] the attention of the parties to this potential additional relevance should they wish to file requests to summons these witnesses".[234] The Prosecution rushed in and shortly afterwards requested the appearance of new witnesses on the issue of the role of the Accused. Although the Chamber rejected the request,[235] more time in addition to that already spent during

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[228] See in particular below, §216-226.
[229] See, for example, *Kordic and Cerkez* Appeal Judgement (ICTY), 17.12.2004, §221-222.
[230] Memorandum of 12.09.2016, **E431/4** (disposition) and 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 Kasumi Nakagawa (2-TCE-82), 17.11.2016, **E431/5** (reasons), §27 (Oral Submissions from KHIEU Samphan, T. 05.09.2016, **E1/469.1**, 09.30.41-09.36.45); Oral decision, T. 10.10.2016, **E1/480.1**, between 11.08.00 and 11.12.14 (disposition) and Memorandum of 01.12.2016, **E433/4** (reasons), §2 and 5.
[231] Oral decision, T. 31.03.2015, **E1/285.1**, between 10.03.05 and 10.05.06 and Memorandum of 25.05.2015, **E342/3**, §5-6 (in which the Chamber underlines relevance and states that it facilitates the work of translation of evidence in Case 002/02).
[232] See below, next section, §212-213.
[233] *Demande de la Défense du 29.11.2016*, **E319/52/4/1**, referring to the 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), 23.11.2016, **E319/52/4**, §15 D.
[234] Memorandum of 06.12.2016, **E319/52/5**, §3.
[235] Oral decision, T. 15.12.2016, **E1/514.1**, between 15.44.08 and 15.46.51 (disposition) and Memorandum of 09.01.2017, **E452/1** (reasons).

the trial on requests for admission of new evidence was again spent just a few days before the conclusion of substantive hearings.

196. During the trial, to the detriment of its preparation for the substantive hearings, the Defence spent considerable time objecting to requests for admission of new evidence brought by the other parties or to their admission *proprio motu* by the Chamber,[236] particularly because the admission of this evidence which, in the end, had to be assessed in light of all the other evidence, was going to prolong the proceedings.[237] In its closing brief, the Defence outlined the prejudice it had suffered in having to prepare for the trial during the trial and the negative impact of the admission of huge amounts of new evidence on the expeditiousness of the proceedings.[238] Although the Chamber did not reply to this in the Reasons for Judgement,[239] it seems that it nonetheless realised the impact it had on the length of the deliberations. In fact, during its deliberations, the Chamber twice stated in a quarterly administrative planning document (the Completion Plan) that it had "previously underestimated the time necessary to assess and deliberate on the huge amount of evidence of this very complex case".[240] Moreover, many new documents admitted during the trial were not even used in the Reasons for Judgement, which confirms that their late admission was far from being essential or vital in the interests of justice.[241] It was irrelevant and therefore unnecessarily delayed the trial.

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[236] Apart from those referenced in this section, see the numerous written and oral submissions listed in the next section on Material from Cases 003 and 004 in the fn of §199). See also: *Conclusions de KHIEU Samphân du 15.09.2016*, **E327/4/6**; *Réponse de KHIEU Samphân du 19.09.2016*, **E434/1/1**.; *Réponse de KHIEU Samphân du 03.10.2016*, **E393/3/1**.

[237] For example: *Réponse de KHIEU Samphân du 03.10.2016*, **E319/56/2**, §25-28.

[238] CB 002/02, §660-665.

[239] Reasons for Judgement, §113-115 (in which the Chamber replies tersely and only regarding the allegations of partiality) and §139-148 (in which the Chamber makes absolutely no reply to the Defence argument concerning expeditiousness, recalled in §in §139).

[240] Completion Plan, revision 17, 30 June 2018, §31; Completion Plan, revision 18, 30 September 2018, §32. Available on the ECCC website via the following link: https://www.eccc.gov.kh/en/about-eccc/finances.

[241] For example: document admitted *proprio motu* in Memorandum of 23.03.2015, E345; SAM Sithy's testimony on appeal in Case 002/01 admitted in Memorandum of 08.09.2015, **E356/2** (*Réponse de KHIEU Samphân du 06.08.2015*, **E356/1**); document admitted *proprio motu* in Memorandum of 11.03.2016, E388/1; document admitted in Memorandum of 22.11.2016, **E437/2** (*Conclusions de KHIEU Samphân du 03.10.2016*, 03.10.2016, **E437/1**, and 04.11.2016, **E437/1/1**). Similarly, if the Defence's calculations are correct, the Chamber only used 87 written statements in lieu of oral testimony from Cases 003 and 004 out of the 250 admitted that the Defence has counted. The Defence further notes that the use made of some of them shows that their admission was not really necessary. See, for example, the use of E3/9498 in fn 13086 (of §3917) of the Reasons for Judgement, E3/9656 in fn 11220 (of §3303), E3/9528 in fn 4452 (of §1301) or E3/9785 in fn 12161 (of §3636).

197. Had the Chamber considered each of the requests for admission of new evidence in a genuinely careful manner from the outset, bearing in mind the exceptional nature of Internal Rule 87(4) and appropriately exercising its discretion, it would have better managed the conduct of the proceedings and issued its judgement earlier (perhaps even with reasons on the day the Judgement was announced). By failing to do so, the Chamber erred in law and also violated KHIEU Samphan's rights to adequate time and facilities for the preparation of his defence, to legal and procedural certainty and to be tried without undue delay.

Section III. MATERIAL FROM CASE FILES 003 AND 004

198. During the trial and in the Reasons for Judgement, the Chamber considered that the Prosecution's disclosure of evidence from Case files 003 and 004 did not establish a violation of the rights of the Accused to effectively prepare their defence and to equality of arms, given the measures taken by the Chamber in this regard.[242] However, the late and very insufficient nature of these measures only slightly mitigated the violation of those rights and aggravated the violation of KHIEU Samphan's right to be tried without undue delay. If the Chamber had applied the correct legal criteria regarding the Prosecution's obligation to disclose potentially exculpatory material, Case 002/02 would not have become an inculpatory case during the trial and the verdict would have been rendered much earlier.

199. For reasons of space and to avoid repetition, the Defence refers to the arguments developed in its submissions on the Prosecution's disclosure obligation, which it maintains.[243]

200. Indeed, the Chamber turned a blind eye to the conduct of the International Prosecutor who, unlike in Case 002/01, failed to properly comply with his obligation to disclose exculpatory evidence. In

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[242] Reasons for Judgement, §139-148.

[243] Submissions of the Defence for Mr KHIEU Samphan on the Co-Prosecutors' Disclosure Obligation, 24.08.2015, **E363**; *Réplique de la Défense du 17.09.2015*, **E363/2**; CB 002/02, §660-666. The Defence also fully refers to its written and oral submissions in which it opposed, *inter alia*, the admission into evidence of the material disclosed and the appearance of witnesses on that basis: *Opposition du 03.09.2015*, **E364** and T. 03.09.2015, **E1/341.1**, 15.38.29-15.49.20, 15.52.03-15.54.50; T. 17.09.2015, **E1/349.1**, 09.25.18-09.29.23, 09.34.12-09.40.32, and *Réponse du 25.09.2015*, **E366/1**; T. 01.12.2015, **E1/360.1**, 09.37.15-09.44.05, 09.45.12, 13.38.42-13.55.22, 14.05.14-14.06.52 and T. 12.01.2016, **E1/374.1**, 11.30.55-11.38.33; *Réponse du 11.12.2015*, **E319/36/1**; T. 06.01.2016, **E1/371.1**, 09.17.08-09.49.07; T. 21.03.2016, **E1/405.1**, 09.23.16-09.33.48, 09.39.45-09.42.30; T. 23.05.2016, **E1/429.1**, 10.13.13-10.34.31; *Réponse du 25.07.2016*, **E319/51/1**; *Réponse du 08.08.2016*, **E425/1;** *Réponse du 29.08.2016*, **E319/52/3**; T. 08.09.2016, **E1/471.1**, 10.52.27-11.08.41; T. 08.09.2016, **E1/471.1**, 11.33.33-11.36.00; T. 13.09.2016, **E1/472.1**, 09.17.16-09.19.39; T. 15.09.2016, **E1/474.1**, 14.00.29-14.15.36, 14.26.15-14.27.19; *Réponse du 03.10.2016*, **E319/56/2;** T. 15.12.2016, **E1/514.1**, 09.22.58-09.43.21, 09.57.33-09.59.43.

Case 002/01, the Prosecutor confined himself to providing some exculpatory material, prior statements of witnesses who were likely to testify or written records of witness interviews containing information about individuals who had testified and that were in his possession.[244] At the time, the Prosecutor even specified for each statement disclosed the specific reason for the disclosure ("[name of witness] testified in 002/01", "Contains exculpatory elements" or "Relates to [name of witness] who testified in 002/01").[245] However, from the beginning of Case 002/02, the Prosecutor began to disclose material in bulk that was merely relevant to the trial, whether it was inculpatory or exculpatory, without ever specifying which of the material was exculpatory.

201. Although the Chamber acknowledged that the Prosecution applied an "overly broad" interpretation of Internal Rule 53(4) governing its disclosure obligation,[246] it did not, however, direct the Prosecution to introduce only potentially exculpatory material in the future. Nor did it exclude the illegally disclosed documents from the case file. It considered that the disclosure of additional material, even in large quantities, did not constitute a violation of the Accused's rights so long as other accommodations were made.[247]

202. However, after a judicial investigation lasting three years, eight years spent by KHIEU Samphan in pre-trial detention for the crimes to be tried in Case 002/02 and with thousands of pieces of evidence already admitted during the pre-trial stage, the Chamber should have given priority to KHIEU Samphan's right to be tried without undue delay rather than granting measures extending the length of the trial due to the placement on the case file of thousands of written statements and thus documents of almost no probative value.

203. On the contrary, it allowed the Prosecution to build up a huge pool of inculpatory evidence from which it was able to admit hundreds of documents during the trial and source new witnesses never

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[244] International Co-Prosecutor's Disclosure to Trial Chamber Regarding Interviews of Case 002 Witnesses in Cases 003 and 004 with Strictly Confidential Annex A, 06.10.2011, **E127**, §1; International Co-Prosecutor's Disclosure to Trial Chamber of Case 002 Witness Statements in Cases 003 and 004 in Compliance with Trial Chamber Memorandum **E127/4**, 02.02.2012, **E127/5**, §1; International Co-Prosecutor's Disclosure of Written Records of Interview from Case Files 003 and 004, 07.08.2013, **E127/7**, §4.

[245] Confidential Annex **E127/7.1** of the International Co-Prosecutor's Disclosure of Written Records of Interview from Case Files 003 and 004, 07.08.2013, **E127/7**.

[246] Decision on Khieu Samphan Defence Motion regarding Co-Prosecutors' Disclosure Obligations, 22.10.2015, **E363/3**, §31.

[247] Decision on Khieu Samphan Defence Motion regarding Co-Prosecutors' Disclosure Obligations, 22.10.2015, **E363/3**, §31.

heard in Case 002,[248] to the detriment of those requested by the Defence from the outset of the trial.[249] As a result, despite the measures taken by the Chamber, the Defence had to prepare for the trial during the proceedings, which was already punctuated by incessant last-minute scheduling changes due to witness availability problems (a difficulty with which the Chamber was perfectly familiar).

204. As the Defence has always said,[250] it may be necessary to admit new evidence during the trial. It is the quantity that is at issue here, thousands of pages of documents to be reviewed and hundreds of new items admitted. Not to mention the time spent on requests, responses, requests for extensions of time limits and all the in-court time spent on these matters…

205. Despite the amount of all this new material that was known to the Prosecution before the Defence and its obligation to draw the Defence's attention to exculpatory material,[251] the Chamber has consistently refused to direct the Prosecution to specify which items were exculpatory. It inexplicably and unexplainably felt that "[s]uch is likely to increase rather than reduce the workload of the Defence as well as the other parties."[252] When it set the deadline for disclosure, with the exception of exculpatory material, at 1 September 2016, given the approach of the close of substantive hearings, the Chamber again refused to direct the Prosecution to provide information

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[248] 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, 24.12.2014, **E319/7**; Memorandum of 26.02.2015, **E319/11/1**; Memorandum of 08.04.2015, **E319/17/1**; Memorandum of 17.07.2015, **E319/22/1**; Memorandum of 01.10.2015, **E372** (disposition) and Decision on International Co-Prosecutor's Request to Call Additional Witnesses During the Case 002/02 Trial Segment on Treatment of the Cham, 24.12.2015, **E366/3** (reasons); Email of 11.01.2016, **E380/2.2** Memorandum of 12.01.2016, **E380/1** (disposition) and Decision on Motions 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), 25.05.2016, **E380/2** (reasons); Memorandum of 18.02.2016, **E319/32/1**; Email of 01.09.2015, **E364.2** and Email of 24.12.2015, **E364/1.1** (disposition) and Memorandum of 18.02.2016, **E364/1** (reasons); Decision on International Co-Prosecutor's Request to Admit Written Records of Interview Pursuant to Rules 87(3) & (4) and to Call Four Additional Witnesses for Upcoming Case 002/02 Segments, 25.05.2016, **E319/36/2;** Memorandum of 29.06.2016, **E319/47/3;** Oral decision, T. 24.03.2016, **E1/408.1**, between 09.07.33 and 09.10.21 (partial disposition) and Memorandum of 11.07.2016, **E390/3** (reasons); Email of 10.08.2016 11h32 (attached in annex) and Memorandum of 07.09.2016, **E425/2**; Email of 13.09.2016 14h06 **E448.1.1** (or **E444.1.2)** and Oral decision, T. 22.09.2016, **E1/479.1**, between 09.05.55 and 09.07.55; Memorandum of 17.10.2016, **E436/1**; Partial oral decisions T. 13.10.2016, **E1/483.1**, 13:33:38 and T. 25.10.2016, **E1/489.1**, 13h35-38 and Decision on Two Requests by the International Co-Prosecutor to Admit Documents Pursuant to Rules 87(3) and 87(4) (**E319/56** and **E319/58**), 08.12.2016, **E319/56/3** (reasons).

[249] CB 002/02, §663-665; See above, §165-173.

[250] For example: *Réplique de KHIEU Samphân du 17.09.2015*, **E363/2,** §17-20.

[251] Submissions of the Defence for Mr KHIEU Samphan on the Co-Prosecutors' Disclosure Obligation, 24.08.2015, **E363**, §13 and 20-21

[252] Decision on Khieu Samphan Defence Motion regarding Co-Prosecutors' Disclosure Obligations, 22.10.2015, **E363/3**, §35.

on specifically exculpatory material, considering that the Defence was "best placed" to determine which documents it considered to be exculpatory.[253]

206. As noted by International Investigating Judge BOHLANDER, the Chamber did not wish to become involved in this process.[254] Clearly weary of the numerous requests for disclosure and their impact on his office,[255] the Investigating Judge decided to involve the Chamber as the "the forum where the urgency is caused",[256] since the admission into evidence of any material disclosed as evidence in its case was "their, and only their, responsibility".[257] He had noted that the International Prosecutor's most recent request for disclosure, filed after the deadline of 1 September 2016, sought documents which, according to their description, were not exculpatory in nature.[258] The Investigating Judge therefore decided "to support the Trial Chamber and the Defence in Case 002/02 in considering the relevance of the material to be disclosed" by requiring "an enhanced level of explanation in the Prosecution's requests for disclosure related to exculpatory or rebuttal evidence".[259]

207. Judge BOHLANDER then established a new certification process by the Chamber to assist the Chamber and the Defence in assessing whether the requested material complied with the criteria. He also directed the Prosecution to include "detailed information as to which portions it considers

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[253] Decision on Requests regarding Internal Rule 87(4) Deadlines, 21.09.2016, **E421/4** (reasons of the decision issued in the Memorandum of 26.08.2016, **E421/3**), §10.
[254] Decision on Yim Tith's Request to Set a Timetable for Disclosure Requests from Case 004, 31.10.2016, **E319/62** (or **004-D193/102**), §26. See also T. 04.08.2016, **E1/454/1.1** (closed session), between 13.59.52 and 14.00.34 (Judge LAVERGNE: "I don't think it is up to the Chamber to monitor the situation and ascertain whether the documents disclosed are exculpatory or inculpatory. We have an awful lot of work to do, and we cannot do that as well.").
[255] Decision on Yim Tith's Request to Set a Timetable for Disclosure Requests from Case 004, 31.10.2016, **E319/62** (or **004-D193/102**), §24 ("I have in effect been asked to support the work of the Trial Chamber by deciding on requests for the disclosure of a massive amount of material a large part of which may at the end of the day never be admitted as evidence at trial As I stated before this work has taken an inordinate amount of time from my staff's work hours that could then not be spent on furthering the investigations.").
[256] Decision on Yim Tith's Request to Set a Timetable for Disclosure Requests from Case 004, 31.10.2016, **E319/62** (or **004-D193/102**), §28.
[257] Decision on Yim Tith's Request to Set a Timetable for Disclosure Requests from Case 004, 31.10.2016, **E319/62** (or **004-D193/102**), §29.
[258]Decision on Yim Tith's Request to Set a Timetable for Disclosure Requests from Case 004, 31.10.2016, **E319/62** (or **004-D193/102**), §27 (the Investigating Judge states that he granted the request in view of the urgency, without knowledge of the reasons for the Chamber's decision).
[259] Decision on Yim Tith's Request to Set a Timetable for Disclosure Requests from Case 004, 31.10.2016, **E319/62** (or **004-D193/102**), §29 (emphasis added)

potentially exculpatory", and even more "in order to assist the Chamber and the Defence in their considerations".[260]

208. Following this decision, the International Prosecutor requested the Chamber to certify 21 documents.[261] The Defence objected to the certification of 12 of these documents.[262] Misinterpreting the decision of the Investigating Judge, the Chamber considered there was no provision for Case 002/02 Defence teams filing responses to Prosecution disclosure requests and that the Defence had no standing to oppose them.[263] A few days after the Prosecutor's request and several days before the Defence response, the Chamber informed the Investigating Judge that it had certified the request.[264] Subsequently, the International Prosecutor made further requests for certification of documents, to which the Defence did not respond having regard to the Chamber's decision that it did not have standing to do so. The Chamber then admitted into evidence in Case 002/02 the documents for which certification had been sought, indicating that no party had made submissions in response to the Prosecution's requests,[265] even though it had deprived the Defence of any adversarial debate on the matter and of its right to be heard.

209. Prior to the implementation of the new disclosure process, the Chamber had criticised the Defence for failing to respond to the Prosecution's requests for placement of documents on the case file,[266] even though the Defence had explained that it did not think it could do so because, in any event, by attaching the documents to the requests, the documents were automatically placed on the case file.[267] Later, when the Defence stated that it needed time to respond to requests for admission of documents in the event that the documents were not exculpatory, the Chamber stated that there was no purpose in giving the Defence a right to intervene once disclosure had been made.[268]

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[260] Decision on Yim Tith's Request to Set a Timetable for Disclosure Requests from Case 004, 31.10.2016, **E319/62** (or **004-D193/102**), §30.
[261] International Co-Prosecutor's Proposed Disclosure of Documents from Cases 003 and 004, 02.12.2016, **E319/63**.
[262] *Réponse de KHIEU Samphân du 15.12.2016,* **E319/63/1**.
[263] Memorandum of 27.12.2016, **E319/63/2**, §3.
[264] Decision on Disclosure Requests Directed Through the Trial Chamber, of 22.12.2016, **E319/64** (or **003-D100/41**), §13 referring to an email from the Senior Legal Officer of the Chamber dated 08.12.2016).
[265] Memorandum of 26.01.2017, **E319/67;** Memorandum of 25.04.2017, **E319/68/1**; Memorandum of 9 May 2017, **E319/69**.
[266] Decision on Khieu Samphan Defence Motion regarding Co-Prosecutors' Disclosure Obligations, 22.10.2015, **E363/3**, §18.
[267] *Réplique de KHIEU Samphân du 17.09.2015*, **E363/2,** §30.
[268] T. 04.08.2016, **E1/454/1.1**, between 13.57.28 and 14.14.21 (in this exchange between Ms GUISSÉ and Judges LAVERGNE and FENZ, the shared directory is wrongly referred to when it is in fact *Zylab* which provides access to

210. The contradictory attitude of the Chamber is also apparent from the fact that it has failed to respect its own assertions and the requirements of the Internal Rules. After considering that the disclosure of additional material, even in large quantities, did not constitute a violation of the Accused's rights so long as other accommodations were made, it added:

> "In this regard the Chamber reminds the parties that disclosed documents are not admitted by the simple fact of being made available to the other parties. The Trial Chamber cannot rely on them for the purposes of making any decision or in its verdict until they have been found admissible and put before the Chamber pursuant to Internal Rule 87. This factor reduces significantly the harm allegedly suffered by the KHIEU Samphan Defence because of the disclosure."[269]

211. The Chamber was referring to Internal Rule 87(4) governing the admission of new evidence during the trial,[270] which, as stated in the previous section, the Chamber had not correctly applied, in particular by admitting hundreds of written statements simply because of their (often questionable) relevance and despite their very low probative value. It also granted the Prosecution's requests for appearance based on the mass of documents disclosed,[271] and thus, right in the middle of the trial, authorised the appearance of individuals of dubious relevance completely unknown to the Defence at that point, such as civil party SUN Vuth (for the Prosecution).[272]

212. Furthermore, the Chamber never bothered to give reasons for its *proprio motu* decision to hear the completely new civil party PREAP Sokhoeurn (for the Prosecution),[273] after the 1 September 2016

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the documents on the case file).

[269] Decision on Khieu Samphan Defence Motion regarding Co-Prosecutors' Disclosure Obligations, 22.10.2015, **E363/3**, §32 (emphasis added)

[270] Decision on Khieu Samphan Defence Motion regarding Co-Prosecutors' Disclosure Obligations, 22.10.2015, **E363/3**, fn 67 (of §32), where the Chamber refers to Internal Rules 87(2) and 87(4).

[271] Memorandum of 08.04.2015, **E319/17/1**; Memorandum of 01.10.2015, **E372** (disposition) and Decision on International Co-Prosecutor's Request to Call Additional Witnesses During the Case 002/02 Trial Segment on Treatment of the Cham, 24.12.2015, **E366/3** (reasons); Email of 11.01.2016, **E380/2.2** and Memorandum of 12.01.2016, **E380/1** (disposition) and Decision on Motions 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), 25.05.2016, **E380/2** (reasons); Decision on International Co-Prosecutor's Request to Admit Written Records of Interview Pursuant to Rules 87(3) & (4) and to Call Four Additional Witnesses for Upcoming Case 002/02 Segments, 25.05.2016, **E319/36/2**; Oral decision, T. 24.03.2016, **E1/408.1**, between 09.07.33 and 09.10.21 (partial disposition) and Memorandum of 11.07.2016, **E390/3** (reasons); Email of 10.08.2016 11h32 (attached in annex) and Memorandum of 07.09.2016, **E425/2**; Memorandum of 17.10.2016, **E436/1**.

[272] Oral decision, T. 24.03.2016, **E1/408.1**, between 09.07.33 and 09.10.21 (disposition) and Memorandum of 11.07.2016, **E390/3** (reasons). See oral objection by KHIEU Samphan, T. 21.03.2016, **E1/405.1**, between 09.23.16-09.33.48, and between 09.39.45-09.42.30, and its CB 002/02, §663 fn 627 and §1419-1438. See also: Reasons for Judgement, §3020, 3066-3075 (where the Chamber acknowledged that the civil party had not been detained at PK, the subject of his appearance).

[273] T. 08.09.2016, **E1/471.1**, before 09.03.56 (announcement of the intention to summon PREAP Sokhoeurn following the key documents hearing) and after 11.34.09 (where the President states that the Chamber "will consider those

deadline for filing requests for admission of new evidence due to the approach of the close of substantive hearings and the need for legal certainty for the parties.[274] Excerpts from this civil party's statement in Case 004 had just been read by the Prosecution at a key document hearing. While this appearance was clearly in the interest of the Prosecution, the Chamber never explained how this entirely new appearance at the end of the trial complied with the strict requirements under the rules for the admission of new evidence during the trial and was necessary despite its extreme untimeliness and the new prejudice caused to the Defence.

213. Moreover, totally contradicting what it had said with respect to the requirements to mitigate the prejudice caused to the Defence by the disclosures, the Chamber made decisions on the basis of documents that were simply disclosed even though they had not been admitted. It had done so a few weeks before its statement by deciding *proprio motu* on the appearance of witness MUY Vanny (for the Prosecution), whose statements had been disclosed, but for which no request for admission had been made.[275] It did so again the following year with witness LONG Sat (for the Prosecution)[276], even though the 1 September 2016 deadline for requests for admission of new evidence and legal certainty for the parties had passed.

214. These decisions are perfectly representative of the Chamber's bad faith and its willingness to take advantage of the introduction of new evidence that was more inculpatory than exculpatory to conduct a judicial investigation during the trial, without any real consideration for all the prejudice caused to the Defence, which it had otherwise neutered. The Chamber had sufficient evidence in Case 002/02 to decide on the responsibility of the Accused without unnecessarily complicating and

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responses so that we can issue our decision in due course."); Email of 09.09.2016 10.34 (attached in annex), where the pseudonym of the civil party appears in the next schedule and where it is only specified that Counsel for the Civil Parties will start his examination. The Chamber did not say any more in its Decision on Witnesses, Civil Parties and Experts Proposed to be Heard During Case 002/02, 18.07.2017, **E459**, fn 418 (of §148). See also: reference to CB 002/02 - Oral submissions of KHIEU Samphan, T. 08.09.2016, **E1/471.1**, between 11.33.33 and 11.36.00; CB 002/02, §664.

[274] Memorandum of 28.06.2016, **E421**, §3; Memorandum of 26.08.2016, E421/3 (disposition) and Decision on Requests regarding Internal Rule 87(4) Deadlines 21.09.2016, **E421/4** (reasons), §13-18.

[275] Email of 01.09.2015, **E364.2** and Email of 24.12.2015, **E364/1.1** and Memorandum of 18.02.2016, **E364/1**. *Opposition de KHIEU Samphân du 03.09.2015*, **E364** and his oral submissions, T. 03.09.2015, **E1/341.1,** between 15.38.29-15.49.20 and between 15.52.03-15.54.50. It was only after the decision to appear was made that the written records of interview were requested (International Co-Prosecutor's Request to Admit Written Records of Interview Relating to Treatment of Cham pursuant to Rules 87(3) & 87(4), 25.09.2015, E319/32) and were admitted (Memorandum of 18.02.2016, **E319/32/1**).

[276] Email of 13.09.2016 14.06 **E448.1.1** (or **E444.1.2)** and oral decision, T. 22.09.2016, **E1/479.1**, between 09.05.55 and 09.07.55 (decision on appearance and admission of written records of interview). See oral submissions of KHIEU Samphan, T. 15.09.2016, **E1/474.1**, between 14.00.29-14.15.36 and between 14.26.15-14.27.19. Written records of interview had never been requested on the basis of Internal Rule 87(4).

prolonging the trial. It was also foreseeable that the introduction of all this new evidence during the trial would have an impact on the length of the deliberations.

215. Thus, errors of law and discernible errors in the exercise of the Chamber's discretion as to the introduction and admission of material from Cases 003 and 004 during the trial resulted in the violation of KHIEU Samphan's 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, to equality of arms.

Section IV. EVIDENCE FROM HISTORIANS WHO DID NOT TESTIFY

216. The Chamber erred in law by admitting evidence from researchers or historians who did not testify in addition to the fact that the authenticity and reliability of the documents they used could not be verified. This is particularly true of the 13 Vietnamese documents originating from Professor Goscha (I) and the S-21 Orange Logbook admitted at the end of the trial (II). The manner in which the Chamber handled the admission and assessment of these documents is a perfect illustration of its bias in the treatment of evidence in Case 002.

I. ADMISSION OF DOCUMENTS ORIGINATING FROM PROFESSOR GOSCHA

217. The Chamber committed a discernible error in the exercise of its discretion by admitting 13 Vietnamese documents originating from Professor Goscha during the trial.[277] Indeed, it failed to provide reasons for its decision on the steps taken to obtain the documents under Internal Rule 93 (A). Moreover, the obvious unreliability of these documents did not meet the criteria for admissibility of evidence under Internal Rule 87(4) (B).

A. Lack of reasoning and lack of transparency in obtaining these documents

218. The Chamber committed a discernible error in the exercise of its discretion in considering that "all procedural rights of the Accused [had] been respected" in respect of the steps it took to obtain these documents and have them admitted.[278] Indeed, the investigative action it took to obtain the documents from Professor Goscha far exceeded the Prosecution's request, which consisted solely

[277] Decision on Requests Regarding Copies of Vietnamese Documents Originating from Professor Christopher Goscha, 25.11.2016, **E327/4/7**.
[278] Decision on Requests Regarding Copies of Vietnamese Documents Originating from Professor Christopher Goscha, 25.11.2016, **E327/4/7**, §19.

of searching for the excerpt from the Minutes of the CPK Standing Committee meeting of 11 April 1977 (the "Minutes").[279] The Defence refers to its previous submissions demonstrating the lack of transparency and reasons of the Chamber in obtaining the documents from Goscha.[280]

219. However, in its 25 November 2016 decision on the admission of documents originating from Professor Goscha, the Chamber acted in bad faith in stating that the Defence had failed to object to the Prosecution's request to search for the excerpt from the Minutes of the CPK Standing Committee meeting of 11 April 1977.[281] Indeed, kept in the dark, the Defence was not in a position of being able to oppose this other investigative action with respect to Professor Goscha. The Chamber had no choice but to acknowledge in the next paragraph that it had not informed the Parties of the steps it had taken to obtain other DK contemporaneous documents.[282]

220. It considered that as the Parties were provided an opportunity to make submissions, all procedural rights of the Accused had been respected.[283] However, that is not enough. Without giving reasons for the basis of the investigative action initiated *proprio motu*, the Chamber had failed to respect the procedural rights of the Accused and exhibited partiality. In deciding to admit *proprio motu* all 13 documents, it went further than the Prosecution, which had requested admission of only six of the documents.[284]

B. <u>Error with respect to the admissibility of these documents</u>

221. The Chamber committed a discernible error in the exercise of its discretion in considering that the 13 documents originating from Professor Goscha were "*prima facie* reliable and authentic".[285] The chain of custody and transmission of these documents cannot be traced. Professor Goscha never saw the Khmer originals, as he could only consult Vietnamese "translations" of the documents, and

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[279] Co-Prosecutors Objections and Reservations to Parties Proposed Document Lists in Response to the Trial Chamber's Memorandum E327 and Request to obtain Documents, 02.02.2015, **E327/4**.
[280] *Requête de KHIEU Samphan du 15.09.2016*, **E327/4/6**, §9-16.
[281] Decision on Requests Regarding Copies of Vietnamese Documents Originating from Professor Christopher Goscha, 25.11.2016, **E327/4/7**, §18.
[282] Decision on Requests Regarding Copies of Vietnamese Documents Originating from Professor Christopher Goscha, 25.11.2016, **E327/4/7**, §19.
[283] Decision on Requests Regarding Copies of Vietnamese Documents Originating from Professor Christopher Goscha, 25.11.2016, **E327/4/7**, §19.
[284] Co-Prosecutors Rule 87(4) Application in Response to E327/4/5, 14.09.2016, **E327/4/5/1**.
[285] Decision on Requests Regarding Copies of Vietnamese Documents Originating from Professor Christopher Goscha, 25.11.2016, **E327/4/7**, §26.

it is not known by whom or how they were produced.[286] Thus, the Chamber should have taken more seriously the doubts about the reliability of the translation of documents held by the authorities of a country harbouring a bias with respect to the conflict between them and the KR regime. The precautions were all the more necessary as the Vietnamese State has always refused to cooperate judicially with the ECCC. Moreover, these documents seem to have come from 1980 era magazines, *Le Magazine communiste, Revue communiste or Journal communiste,* propaganda organs of the SRV, a fact which should have led the Chamber to be even more careful.[287]

222. Professor Goscha had also explained that he had not been allowed to make photocopies of these documents. So, he had to transcribe them by hand. Contrary to what the Chamber said, he did not say that he had "copied" the documents "verbatim".[288] He more accurately explained: "I was not allowed to photocopy much of anything. I took notes by hand, but almost always I copied the entire document".[289] Discrepancies can therefore be explained by this "recopying" by hand, which may have been at times incomplete and in a language we do not know whether the professor fully mastered. The Chamber itself noted "some discrepancies regarding the dates of certain of the Copies".[290] The Defence had also raised the matter of the illegibility of some of the documents, raising doubts as to the completeness of its English translation.[291] The Chamber also erred in its findings on the authenticity and reliability of these documents by wrongly considering that "several [bore] the names of translators and dates of translation suggesting a formalised processing of the documents".[292] Only two of the thirteen documents admitted bear the name of the translator or translation agency and only one bears the date of translation.[293]

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[286] Decision on Requests Regarding Copies of Vietnamese Documents Originating from Professor Christopher Goscha, 25.11.2016, **E327/4/7**, §26. See also Memorandum of 24.08.2016, **E327/4/5**, §1 "Professor Goscha clarified that he only consulted Vietnamese translations in his research and suggested that the Army must have the original Khmer documents noting that he never saw them".
[287] See documents **E3/10688, E3/10689**, **E3/10690**, **E3/10691**, **E3/10692** and **E3/10694**.
[288] Decision on Requests Regarding Copies of Vietnamese Documents Originating from Professor Christopher Goscha, 25.11.2016, **E327/4/7**, §25.
[289]Email correspondence between the Greffier of the Chamber and Professor Goscha, 25.01.2016, **E327/4/3.7**.
[290] Decision on Requests Regarding Copies of Vietnamese Documents Originating from Professor Christopher Goscha, 25.11.2016, **E327/4/7**, §26.
[291] *Requête du 15.09.2016*, **E327/4/6**, §25.
[292] Decision on Requests Regarding Copies of Vietnamese Documents Originating from Professor Christopher Goscha, 25.11.2016, **E327/4/7**, §25.
[293] *Requête du 15.09.2016*, **E327/4/6**, §22, fn 24 corresponding to documents **E3/10693** "Translated by Le Dinh Thao" and document **E3/10695** "This document was translated by the General Political Office on 26 January 1978".

223. Accordingly, it is clear that no reasonable trier of fact could have considered that these documents were "*prima facie* reliable and authentic"[294] and therefore would not have admitted them into evidence.

C. Error in the use of these documents for corroboration

224. For the reasons set out above, it is no longer necessary to show that the probative value of these documents is nil, especially as Professor GOSCHA could not be examined by the parties. Nevertheless, the Chamber considered that it could use these documents "for corroboration".[295] According to the Chamber, the authenticity of one of the documents originating from Professor Goscha was confirmed because the number of 29,000 Vietnamese soldiers killed is consistent with what appears in a RF of February 1978.[296] With regard to that single match, the flippancy with which the Chamber analysed the authenticity of a document is particularly mind boggling.

225. This is all the more true as the Chamber distorted the evidence by attempting to cross-reference a document originating from GOSCHA E3/10693 with another document on the Case file E3/7328 transcribing extracts from the minutes of an 11 April 1977 meeting of the SC. However, not only are the excerpts totally different, but above all it should be noted that the Chamber tried to reconcile the content of these two documents as if they concerned the same 11 April 1977 meeting, whereas in reality, it is not only "the precise language [which] is not coterminous",[297] but also the date of the meeting... Indeed, the excerpt quoted from the document originating from GOSCHA E3/10693 comes from an excerpt of the minutes of a meeting of 13 April 1977 and not 11 April.[298] Therefore, in the absence of marshalling any valid arguments as to the authenticity and reliability of these documents, the Chamber erred in law by considering that it could use them for corroboration. All factual findings based on these documents must be reversed.[299]

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[294] Decision on Requests Regarding Copies of Vietnamese Documents Originating from Professor Christopher Goscha, 25.11.2016, **E327/4/7**, §26.
[295] Reasons for Judgement, §352 -354.
[296] Reasons for Judgement, §352.
[297] Reasons for Judgement, §352, fn 983.
[298] Minutes of the SC meeting and Minutes of Meeting of Secretaries and Deputy Secretaries of Divisions and Regiments of 10, 11 and 13.04.1977 (transcribed by C.E. Goscha), **E3/10693**, ERN EN 01324079-01324081: "13 April 1977 […] Continuance to fight against reactionaries and hunt for reactionaries inside our department and bases in order to promote and foster the mission in 1977." (emphasis added).
[299] Reasons for Judgement, §284, 357, 364, 377, 415, 421, 427, 504, 543, 554-556, 1459, 1723, 1763, 2006, 2010, 2016, 3397, 3740, 3805, 3814 and 4126. See below, §1463 for example.

II. Admission of the S-21 Orange Logbook

226. A word should be said about the S-21 Orange Logbook (the "Logbook") which was admitted in the final days of the trial.[300] Indeed, the Chamber failed to take into consideration Defence submissions on the flaws that tainted the admission into evidence of this Logbook and its very low probative value.[301] On the contrary, it decided to rely heavily on the Logbook in the Reasons for Judgement.[302] Accordingly, the Defence refers to its arguments set out in its Closing Brief. The factual findings based on this Logbook must therefore be reversed.[303]

Chapter II. ERRORS IN THE CHAMBER'S APPROACH TO EVIDENCE IN GENERAL

Section I. *INTIME CONVICTION v.* BEYOND REASONABLE DOUBT

227. As it did in the Case 002/01 Trial Judgement, the Chamber stated:

> "In order to resolve any discrepancy between the different language versions of Internal Rule 87(1) that reflect the common law "beyond reasonable doubt" standard and the civil law concept of "*intime conviction*", the Chamber has adopted a common approach that evaluates the sufficiency of the evidence. Upon a reasoned assessment of the evidence the Chamber interprets any doubt as to guilt in the Accused's favour."[304]

228. The Chamber has thus erred again in law by considering that it had to adopt a common approach that was supposed to resolve a non-existent potential discrepancy between the two concepts.[305] Indeed, in the context of the ECCC, *intime conviction* can only be interpreted as beyond reasonable doubt, which is the only standard that must be applied. The Defence expressly refers to its previous arguments on this point.[306]

229. While the Chamber then went on to correctly recall that the evidence of all facts which are indispensable for entering a conviction must be established beyond reasonable doubt,[307] it certainly did not apply this principle consistently. As demonstrated below in this brief concerning errors of fact, it particularly made unreasonable findings, very often unexplained or insufficiently explained

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[300] *S-21 Prisoner List Daily Report*, **E3/10770** admitted by the Chamber in the Memorandum of 27.12.2016, **E443/3**.
[301] CB 002/02, §1185-1193.
[302] Reasons for Judgement, §419, 1467, 2115, 2116, 2122, 2123, 2289, 2296, 2297, 2299, 2369, 2397, 2436, 2443, 2505, 2549-2551, 2886, 3054 and 3058.
[303] Reasons for Judgement, §419, 1467, 2115, 2116, 2122, 2123, 2289, 2296, 2297, 2299, 2369, 2397, 2436, 2443, 2505, 2549-2551, 2886, 3054 and 3058.
[304] Reasons for Judgement, §38 (emphasis added); Case 002/01 Trial Judgement, 07.08.2014, §22.
[305] Reasons for Judgement, §38 -39.
[306] AB 002/01, §109-110; CB 002/02, §367-648.
[307] Reasons for Judgement, §40.

and/or based on evidence which does not provide a sufficient basis for a finding beyond reasonable doubt. The Chamber often extrapolated and drew inferences that do not lead to the only reasonable possible finding. It even went beyond that most often opting for the most unreasonable finding because it was incriminating.

230. The Chamber thus used a standard lower than the beyond reasonable doubt standard in the same spirit as in the criticism voiced by Judge VAN DEN WYNGAERT of the ICC in her dissenting opinion appended to the *Katanga* Trial Judgement:

> "One of my fundamental concerns about this judgment is that the entire decision is very short on hard and precise facts and very long on vague and ambiguous 'findings', innuendo and suggestions. Whatever my colleagues may believe in their *intime conviction*, I fear it cannot stand up against the required standard of proof and the dispassionate rigour it demands. More specifically, the case record has so many weaknesses and presents such an incomplete picture that it is impossible, in my view, to come to conclusions beyond reasonable doubt on many points. In addition, most of the evidence falls far short of the standards of reliability that I was accustomed to at the ICTY. It is not possible, in my view, to base a conviction on such weak evidence. The standard of proof, which must be the same for everyone no matter how challenging the circumstances are for the Prosecutor, simply does not allow it."[308]

231. Had the Chamber correctly applied the beyond reasonable doubt legal standard, it could not have been satisfied of KHIEU Samphan's guilt. The Supreme Court must invalidate the convictions and sentence pronounced.[309] It must also find that KHIEU Samphan's rights to be presumed innocent, to a reasoned judgement and to an impartial tribunal were violated.

Section II. <u>MISREPRESENTATION/ DISTORTION OF EVIDENCE</u>

232. Having regard to the discretion enjoyed by trial judges, it fell to the Chamber to determine the probative value and credibility of the evidence. It could neither misrepresent nor distort the evidence, as judges have an obligation to convey the objective truth as it transpires from the evidence. To distort evidence is to alter it by interpreting it or misrepresenting the information contained therein. The misrepresentation of evidence is a ground for cassation in both French and Cambodian law. Under Article 419 of the Cambodian CCP, distortion of facts is explicitly included among the grounds for cassation.[310] On the other hand, in French law, the distortion of evidence is

[308] Minority Opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07-3436-AnxI, 07.03.2014, §172 (underlined in the original).
[309] Reasons for Judgement, §4236-4238, 4400, 4402.
[310] CCP of the Kingdom of Cambodia, 2007, Article 419.

characterised differently. When a fact asserted by the judgement [of the Court of Appeal] contradicts those contained in the evidence, the Criminal Division of the Court of Cassation prefers to quash the judgement [of the Court of Appeal] because the reasons were contradictory and for lack of any basis in law.[311]

233. In the Reasons for the Judgement under appeal, the Chamber misrepresented and distorted the evidence adduced in oral argument on numerous occasions.[312] By way of example, in its obstinate scheme to convict, it attributed the Assembly's inaugural speech of 11 April 1976 to KHIEU Samphan, even though this position had already been disavowed by the Supreme Court in the Case 002/01 Appeal Judgement.[313] Indeed, the Supreme Court had repeatedly held that the Chamber had been unreasonable in its assessment of the evidence in the Case 002/01 Trial Judgement, in particular when it " inaccurately cited" an account,[314] or by misrepresenting statements.[315] By persisting in Case 002/02 in its generally biased approach to the evidence, by distorting and misrepresenting it, the Chamber committed errors of law and fact which not only invalidate many of its findings but have led, above all, to the unfairness of KHIEU Samphan's trial, which should be so found.

Section III. DOUBLE STANDARD IN THE TREATMENT OF INCULPATORY AND EXCULPATORY EVIDENCE

234. In its assessment of the evidence and the applicable legal standards, the Chamber repeatedly applied a double standard in the treatment of inculpatory and exculpatory evidence, creating legal uncertainty for the Appellant and violating all of his procedural rights. By way of example, in its assessment of the burden of proof, reasons for lying, corroboration or consideration of the Appellant's statements and publications, the writings of experts or of all written statements, the

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[311] Dalloz action, *La cassation en matière pénale*, Chapter 85 *Dénaturation d'un écrit*, Section 2 *Dénaturation des documents de preuve*, 85.21. *Contradiction de motifs*. Jacques and Louis BORÉ, 2018/2019.
[312] See below §257.
[313] Reasons for Judgement, §3739; Case 002/01 Appeal Judgement, 23.11.2016, §1023 "In contrast, in relation to the inaugural speech of 11 April 1976, KHIEU Samphân is correct when he avers that the Trial Chamber erred when it attributed this speech to him. […] 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." See also below §1420-1427.
[314] Case 002/01 Appeal Judgement, 23.11.2016, §440, 442.
[315] Case 002/01 Appeal Judgement, 23.11.2016, §1009.

Chamber's assessment was inconsistent and violated all the standards and principles of evidence that it had itself established.[316]

Section IV. EXCULPATORY EVIDENCE OMITTED

235. The Chamber erred in law by contradicting itself in its reasons and by not applying the principle it set out regarding exculpatory evidence. According to the Reasons for the Judgement under appeal, it "[had] to consider the [existence] of other plausible explanations, including those that may be exculpatory" and "identify and […] consider evidence that could be inculpatory for a particular issue alongside evidence which might be exculpatory for the Accused".[317]

236. The Supreme Court agreed with this interpretation in the Case 002/01 Appeal Judgement and considered that: "[r]ather, the finder of fact must be satisfied beyond reasonable doubt, on the basis of the totality of the evidence, that all facts forming the elements of the crime and mode of liability are established, as well as the facts indispensable for entering a conviction".[318] It had relied, *inter alia*, on the *Ntagerura* Appeal Judgement (ICTR), which required a multi-stage reasoning process for assessing the credibility of the relevant evidence adduced.[319] Despite the clarity of the established principle, the Chamber did not see fit to apply it in its Reasons. By way of example, in the part relating to the sentencing of KHIEU Samphan and in the assessment of the standard of good character, the Chamber completely disregarded the Appellant's character witnesses, saying that none were heard.[320] This is false since it had heard character witnesses in Case 002/01 and simply refused to hear them again in Case 002/02, explaining to the Defence that the testimony of these character witnesses would be taken into account during the deliberations in the second trial.[321] The Chamber erred in law by contradicting itself in its Reasons and by failing to consistently apply the established principle.[322]

Section V. BURDEN OF PROOF

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[316] See below §241-242; 293-305; 312-313; 314-319; 329-330. See also factual examples below: §891; 922; 999: 1195; 1235; 1383; 1529; 1752 (fn 3400).
[317] Reasons for Judgement, §65.
[318] Case 002/01 Appeal Judgement, 23.11.2016, §418 (emphasis added).
[319] *Ntagerura* Appeal Judgement (ICTR), 07.07.2006, §174
[320] Reasons for Judgement, §4399.
[321] See below §2177-2183.
[322] See factual examples below: §756; 1279-1280.

237. According to the Reasons for Judgement under appeal: "[t]he Accused are presumed innocent until proven guilty. The Co-Prosecutors bear the burden of proof."[323] These conclusions are a nod to Internal Rule 87(1). The burden of proof is on the Prosecution. This rule is based on the presumption of innocence, according to which [UNOFFICIAL TRANSLATION] "a person charged with an offence shall be presumed innocent until his or her guilt is established by a final judgement[; this principle] is intended to protect the individual against the authorities".[324] As recalled by the French Court of Cassation, it is on the basis of this principle that the burden of proof lies with the prosecution.[325] The ECtHR agrees with this position; it adds that " the burden of proof is on the prosecution, and any doubt should benefit the accused" and specifies that the prosecution must adduce "evidence sufficient" to convict.[326] The jurisprudence of the ECtHR also holds that the presumption of innocence will be infringed when the burden of proof is shifted from the prosecution to the defence.[327] Despite the clarity of this principle, which no one doubts, the Chamber contradicted itself in its Reasons by failing to apply it consistently.[328]

Section VI. <u>DEDUCTIVE APPROACH / CIRCUMSTANTIAL EVIDENCE</u>

238. According to the Reasons for the Judgement under appeal: "[i]n order to convict, all reasonable inferences that may be drawn from the evidence must be consistent with the guilt of the accused"[329]. The Chamber recalled the principle established by the Supreme Court in the Case 002/01 Appeal Judgement.[330] It went on to say 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.".[331] In so doing, the Chamber had to consider the plausibility of alternative explanations, including those that may be favourable to the Accused.[332] While the rules

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[323] Reasons for Judgement, §38.
[324] *Répertoire de droit pénal et de procédure pénale, Preuve, art 1er Présomption d'innocence*, §9, Jacques BUISSON, October 2013.
[325] Crim. 11 Apr. 2012, No. 11-83.816
[326] *Barbera, Messegue and Jabardo v. Spain*, Judgement (ECtHR), 06.12.1988, §77.
[327] *Telfner v. Austria*, Judgement (ECtHR), 20.03.2001, §15.
[328] For example, see below §1421.
[329] Reasons for Judgement §64.
[330] Case 002/01 Appeal Judgement, 23.11.2016, §598: "The Supreme Court Chamber considers that in cases involving alleged mass criminality, it will often be impossible to call all witnesses that could testify to the set of events in question. In such situations, the fact finder may be called upon [through testimonies collected from a limited number of people] to make inferences from the evidence as to the broader experience"; Reasons for Judgement §64
[331] Reasons for Judgement, §64.
[332] Reasons for Judgement, §65.

of evidence relating to deductive reasoning and circumstantial evidence were correctly set out by the Chamber, it contradicted itself in its Reasons by not applying them. Such findings must be invalidated, and it should be found that KHIEU Samphan's trial was unfair.[333]

Section VII. EXTRAPOLATIONS / GENERALISATIONS

239. As stated above,[334] according to the Reasons for the Judgement under appeal: "[i]n order to convict, all reasonable inferences that may be drawn from the evidence must be consistent with the guilt of the accused".[335] Accordingly, this principle prohibits extrapolation to make findings that must be established beyond reasonable doubt. However, the Chamber contradicted itself in its Reasons for Judgement by making findings based on generalisations and extrapolations that had no place in a criminal judgement.[336] In so doing, it committed multiple errors of law which must be invalidated.

Section VIII. NUMBER OF EVIDENTIARY ITEMS AND PROBATIVE VALUE

240. The Defence agrees with the principle set out by the Chamber regarding the number of evidentiary items and the assessment of their probative value.[337] The Judges had to assess the entire body evidence put before the Chamber, without assessing it in a piecemeal fashion, nor adding up evidentiary items to meet the burden of proof. However, the Chamber erred in law by contradicting itself in the Reasons for the Judgement under appeal and by not consistently applying the established principle.[338] Such findings must be invalidated.

Section IX. CORROBORATION

241. In the Reasons for the Judgement under appeal, the Chamber set out a framework for assessing corroboration. It said that it approached "Civil Party, witness and expert evidence on a case-by-

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[333] See §factual examples below, §695, 910, 1611, 1881.
[334] See above, §238.
[335] Reasons for Judgement §64.
[336] See factual example below: §1829-1835. Conclusions on knowledge of cooperative sites: the Appellant's knowledge of the Preah Vihear cooperative is synonymous with knowledge of the situation throughout DK.
[337] Reasons for Judgement, §40: "All 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 [...] This 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. Of course, as found by the Supreme Court Chamber, this does not mean that "a multiplicity of evidentiary items may add up to meet the burden of proof beyond reasonable doubt by virtue of their sheer number, irrespective of their probative value" (emphasis added); See fn 96-99.
[338] See factual example below: §2026 and Reasons for Judgement, §4271, fn 13938 referring to §3390; §4271, fn 13939 referring to §3517, referring to §3385, 3390, 3391 and 3396. The Chamber's citation in §4271 comes from §3391 referring to fn 11436, which cites numerous items of evidence on the speeches of several leaders. As regards speeches by KHIEU Samphan, the only source is EK Hen.

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".[339]

242. Corroboration seeks to strengthen evidence, to find logical support. CORNU's *Vocabulaire juridique* defines corroboration as follows: [UNOFFICIAL TRANSLATION] "with respect to an evidentiary item, strengthening another evidentiary item with which it is consistent, increasing its probative value by reason of their consistency, sometimes to the point of conferring a particular value on it or making what results from their consistency irrefutable".[340] The ICTR Appeals Chamber in the *Nahimana* Appeal Judgement also gave a clear definition of corroboration which bears quoting: "two testimonies corroborate one another when one prima facie credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts". Corroboration hinges upon other guiding principles of the law of evidence and criminal proceedings. Indeed, it enables the evidence to be subjected to examination and prohibits the Judge from drawing inferences based on hearsay.[341] This trial called for particular scrupulousness. As the events occurred more than 40 years ago, the evidence adduced was particularly fallible. Therefore, in order to confer probative value, corroboration had to be applied consistently. Despite the clarity of the established principle, the Chamber contradicted itself in its Reasons by failing to consistently apply the established principle.[342]

Section X. INCONSISTENCIES

243. The Chamber has established a framework for assessing evidence in the event of inconsistencies in civil parties', witness and expert evidence.[343] It therefore said that it approaches this evidence in consideration of "consistencies and inconsistencies in relation to material facts".[344] Pursuant to Internal Rule 87(3), the Chamber considered that various factors are relevant to the probative value

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[339] Reasons for Judgement, §49. See also §53: "[T]he 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."
[340] Definition of *Corroborer* in Gérard CORNU, *Vocabulaire juridique*, 12th edition, p. 278.
[341] See above, §238 and below §312-313.
[342] See factual examples below §781; 866.
[343] Reasons for Judgement, §49-54.
[344] Reasons for Judgement, §49; fn 131: Decision of 20.06.2012, **E96/7**, §6, 26; Decision of 15.08.2013, **E299**; Decision of 30.06.2015, **E305/17**.

of evidence, including discrepancies with other versions and deficiencies credibly alleged.[345] It went on to say that the credibility of testimony is assessed taking into consideration factors "such as consistencies and inconsistencies in relation to material facts, corroboration and all the circumstances of the case".[346] While the Defence again agrees with this legal framework and to the principles set out by the Chamber, the Chamber erred in law by contradicting itself once again in the Reasons for the Judgement under appeal and by failing to consistently apply what it advocated.[347]

Section XI. PRIOR / SUBSEQUENT STATEMENTS

I. ADMISSION

244. According to the Reasons for the Judgement under appeal, "[i]n the interests of justice, the Chamber [...] admitted all prior statements of witnesses, experts and Civil Parties disclosed from Cases 003 and 004 when these individuals were heard at trial for the same purpose".[348] This position is not new. Indeed, in the course of Case 002/02, the Chamber issued decisions in which it held that this practice applied "in order to permit the Chamber and parties to fully assess credibility based on the extent to which the witness's statements are consistent" "in the interests of ascertaining the truth".[349] However, it failed in its obligations by not reopening the proceedings knowing that these documents came from witnesses and Civil Parties who had appeared before it.[350]

245. Indeed, on 3 September 2018, after the Chamber had been in deliberations for more than a year, documents were disclosed, including two written records from the hearings of EK Hen and CHUON Thy dated 28 February and 6 March 2017 respectively, in relation to whom the Defence

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[345] Reasons for Judgement, §61, See also §51: "The Trial Chamber declared admissible written witness, expert and Civil Party statements, including transcripts from prior proceedings, in conjunction with or in place of oral evidence, in order to give the Parties an opportunity to confront these individuals with alleged discrepancies between their oral evidence and prior statements at trial." (emphasis added).
[346] Reasons for Judgement, §53.
[347] See factual example below about the contradictions in EM Hoeun's statement §1757-1758.
[348] Reasons for Judgement, §51 (emphasis added).
[349] Memo of 25.04.2017, **E319/68/1**, §2; Memo of 09.05.2017, **E319/69**, §2; Memo of 26.01.2017, **E319/67**, §2 and 4.; See also Decision of 22.102015, **E363/3**, §25.
[350] Memorandum of 10.09.2018, **E319/71/1;** International co-prosecutor's Proposed Disclosure of Documents from Cases 003 and 004, 03.09.2018, **E319/71**.

has submitted a request for additional evidence before the Supreme Court.[351] As the Defence has already pointed out in its application:

> "Contrary to its own jurisprudence the Chamber merely asked the Co-Investigating Judges for leave to disclose the documents so that the parties could have access to them, knowing that they could not debate them, Pursuant to Rule 96(2) of the Internal Rules, the parties cannot make submissions during the deliberations of the Chamber, which alone is authorized to reopen the proceedings. Thus, by refraining from so doing, the Chamber prevented the Defence from discussing the contents of the exculpatory statements or the credibility of certain witnesses who testified against KHIEU Samphân."[352]

246. The statements of EK Hen and CHUON Thy[353] have a significant impact on the assessment of the reliability and credibility of their evidence and should have been admitted after reopening the proceedings. Although the Supreme Court admitted these statements on appeal, there was a missed opportunity to discuss the arguments advanced concerning EK Hen's new inconsistencies and the confirmation of CHUON Thy's exculpatory evidence. Accordingly, the Chamber committed an error of law and a discernible error in the exercise of its discretion which resulted in prejudice to the Appellant who, on the basis of these facts, lost the opportunity to argue his case before one level of jurisdiction.[354]

II. REVIEW BEFORE APPEARANCE

247. Since Case 002/01, the Chamber established a practice of letting witnesses review their previous written records of interview before they took the stand. It recalled the framework it had previously established in the Reasons for the Judgement under appeal:

> "[T]he President began asking witnesses and Civil Parties appearing in court to affirm the accuracy of their prior statements made to the Office of the Co-Investigating Judges, as reflected in the written records of interview. Upon affirmation, while noting that the Parties have the right to test a witness's credibility on areas within or beyond his prior statements, the Chamber invited the Parties to ask further questions only where there was a need for clarification relevant to matters that are insufficiently covered by these statements or not dealt with during questioning before the Co-Investigating Judges.".[355]

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[351] Written Record from the hearing of Witness EK Hen, 06.03.2017, **E319/71.2.7**; Written Record from the hearing of Witness CHUON Thy, 28.02.2017, **E319/71.2.4**.
[352] KHIEU Samphan's Request for Admission of Additional Evidence, 08.10.2019, F51, §13.
[353] Written Record from the hearing of Witness EK Hen, 06.032017, **E319/71.2.7**; Written Record from the hearing of Witness CHUON Thy, 28.02.2017, **E319/71.2.4**.
[354] See factual examples below regarding EK, Hen: §1075, 1424,1755, 1759, 1893-1894, 1900, 2026, 2075 and regarding CHUON Thy: §1207, 1220, 1226.
[355] Reasons for Judgement, §52. Decision of 20.06.2012, **E96/7**, §31.

248. The Chamber went on to recall 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.".[356]

249. The Chamber contradicted itself immediately afterwards when defining the framework for assessing the reliability of a witness: "[t]he Chamber considers that the reliability of a witness's testimony is contingent upon his or her ability to perceive, remember and articulate accurately".[357]

250. It is therefore difficult to understand how, on the one hand, for the sake of expeditiousness, prior statements were read out and, on the other hand, in order to assess the reliability of a witness, the Chamber relied on the witness's ability to perceive or remember events. These conclusions are contradictory since, by allowing the witness to read his or her prior statements, the assessment of the witness's ability to perceive or remember facts is artificial. Since 2012 and Case 002/01, the practice before the ECCC has been to enable witnesses' prior statements to be read over to them. This practice was validated by the Supreme Court in the Case 002/01 Appeal Judgement.[358] The Supreme Court had noted that neither the Code of Criminal Procedure of Cambodia nor the Internal Rules address the question of whether witnesses may consult their prior statements or other documents before taking the stand.[359] However, the Supreme Court should not have validated such an approach, which undermines the principle of orality of proceedings. The fact of the matter is that the orality of proceedings should be a catalyst for the spontaneity of criminal hearings. Expeditiousness, while important, ought not to have been at the expense of discussions leading to the ascertainment of the truth. With the same concern for expeditiousness since a reform in 2011, Swiss criminal law allows the presiding judge, when hearing a witness, to read his or her prior statements back to him and ask whether he or she confirms them. But this reform also introduced a new principle into Swiss criminal law, which was named the [UNOFFICIAL TRANSLATION] "principle of limited orality of proceedings". This reform has been subject to many criticisms that can be applied to the practice before the Chamber.[360]

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[356] Reasons for Judgement, §53.
[357] Reasons for Judgement, §62 (emphasis added).
[358] Memo of 24.11.2011, **E141/1**, see also Memo of 17.11.2011, **E141.**
[359] Case 002/01 Appeal Judgement, 23.11.2016, §262.
[360] Article by Christiane BESNIER, *La cour d'assises du XXIe siècle- II) La justice criminelle en Europe, L'avenir de*

251. In French criminal law, on which Cambodian law is modelled, the principle of orality of proceedings, as a guiding principle of the trial, is applied very strictly. It requires the examination of all evidence before the court. The corollary to this principle is the principle of adversarial proceedings, according to which any evidence used before the court must be open to adversarial debate in the course of the proceedings.[361] Thus, witnesses and experts must testify orally. Individuals heard must speak orally and are prohibited from reading a prepared statement. During a witness testimony, his or her prior statements may not be read out in whole or in part, not even a few lines. It is thus not possible to read a statement and ask the witness whether or not he or she confirms what he or she said, or to remind him or her beforehand of the content of his or her statement, or to interrupt him or her during his or her testimony to read passages of his or her prior statements.[362] This is based on long-standing and settled jurisprudence.[363] On the other hand, the principle of orality of proceedings does not preclude the Presiding Judge, using his discretion, **after the witness has testified,** from referring the witness back to his or her prior statements in order to compare them.[364] Also, as the ICC Trial Chamber recalled in *Lubanga*, this schism that allows or prohibits the review of prior statements is the result of a legal opposition between *common law* and civil law systems.[365] Despite the fact that Cambodian law does not deal with this, a substantive case law search would have enlightened the Chamber on the consistency of such a practice with domestic law. The Chamber and the Supreme Court could not establish a practice of allowing witnesses to review their prior statements without infringing the civil law tradition on which Cambodian law is modelled.

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l'audience criminelle: France, Belgique, Suisse, 2017, (emphasis added), see also: p. 646. [UNOFFICIAL TRANSLATION] "The reduction of hearing time changes the nature of the hearing and thus weakens the judicial decision-making process. The time used for summoning witnesses and the examination and cross-examination by the parties are all elements that help the court to reach a decision beyond reasonable doubt".

[361] Article by Michel REDON, *Tribunal correctionnel, article 2 Principe de l'oralité des débats*, Répertoire de droit pénal and de procédure pénale, Dalloz, 2017.

[362] Article by Michel REDON, *Cours d'assises, Principes fondamentaux des débats au procès criminel, §4- Témoins and experts acquis aux débats,* Répertoire de droit pénal and de procédure pénale, Dalloz, 2018.

[363] Cass. Crim. 27.06.1990, n°89-87170; Cass. Crim. 26.02.1992, n°91-83165; Cass. Crim. 14.06.1989, n°88-83860.

[364] Cass. Crim. 08.11.1934, Bull. Crim. No. 179; Cass. Crim. 14.011951, Bull. Crim No. 28. – Cass. Crim. 26.03.1957, Bull. Crim No. 285; Article de Michel REDON, *Cours d'assises, Principes fondamentaux des débats au procès criminel, §4- Témoins and experts acquis aux débats,* Répertoire de droit pénal and de procédure pénale, Dalloz, 2018.

[365] *Prosecutor v. Lubanga* ICC-01/04-01/06 Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial), 30.11.2007, §41.

252. The Chamber has in fact erred in law and this legal framework must be invalidated, as must all the findings resulting therefrom. Moreover, its errors in assessing the inconsistencies in the Prosecution evidence are all the more serious in that it also failed to take into consideration the fact that the witnesses and civil parties who took the stand had had the opportunity to review their statements in order to refresh their memories. The Supreme Court will have to take this into account in reviewing the factual errors identified by the Defence.

Section XII. REASON TO LIE

253. Specifying its standard for reviewing Civil Party, witness and expert evidence, the Chamber explained that it would take into account "possible ulterior motivations"[366] as well as "corroboration and all of the circumstances of the case".[367] In its assessment of the reliability of witness evidence, it then said that it would consider "the [...] bias, source and motive – or lack thereof – of the authors and sources of the evidence"[368] as well as "bias arising from issues such as a desire to avoid self-incrimination or public embarrassment, and attempts to protect another person".[369] Moreover, it recalled that civil parties who testified at trial were not required to take an oath[370] and that witnesses were informed of their right not to self-incriminate and were assisted by counsel where necessary.[371] These conclusions justify, in certain circumstances, a witness or a civil party lying at the hearing for his or her own reasons. This can be seen as a corollary to the right not to self-incriminate, which is enshrined in the ICCPR.[372] The Tribunal and the Office of the Co-Prosecutors, having found that these measures were insufficient to ascertain the truth, introduced assurances of non-prosecution starting in Case 002/01.[373] Yet, in many instances, the Chamber applied a double standard in respect of the reason for lying depending on whether witnesses made inculpatory or exculpatory statements.[374] This double standard was not justified in view of the

[366] Reasons for Judgement, §49.
[367] Reasons for Judgement, §53.
[368] Reasons for Judgement, §61.
[369] Reasons for Judgement, §62.
[370] Reasons for Judgement, §49.
[371] Reasons for Judgement, §50.
[372] ICCPR, Article 14(2)(g).
[373] See factual example below on the regulation of marriage and the corroboration by cadres wrongly dismissed because of "their tendency to minimise their own responsibility" §1194-1195 and fn 2233 with examples of assurances of non-prosecution offered to certain cadres.
[374] See below, §§1194-1195, 1233-1242.

strong assurances offered by the Tribunal, including assurances of non-prosecution. Findings applying a double standard in respect of the reason for lying must therefore be invalidated.

Section XIII. CULTURAL BIAS

254. The Chamber specified that in the assessment of witness credibility, it "also relie[d] upon the guidance of its Cambodian members […] in order to avoid cultural bias".[375] While the Defence partially agrees with this approach, which is a natural part of a judge's ethical duty, it notes that the Chamber erred in law and in fact by applying this standard only to the assessment of witness credibility. Throughout the Reasons for Judgement, it did focus on the context, which it considered crucial to understanding the facts and used it to legally characterise the crimes.

255. It must be noted that the Judges displayed cultural bias when, referring to the living conditions and hygiene in the TTD site, they noted that "there were many flies around the food all the time".[376] Whether in the city or in the countryside, this is a frequent occurrence in Cambodia depending on the time of year and weather conditions. Moreover, the unique nature of this Tribunal, apart from its hybrid nature, lies in the distant past that it has to judge. The judges were tasked to judge events that occurred between 1975 and 1979. This was difficult for the national as well as the international judges and this was also noted concerning the issue of legality. So, while the international judges relied on the national judges in order to avoid any distortion due to cultural bias, it was on the condition that the national judges would assess these facts in light of Khmer culture at the time of the facts being judged. An international judge who accepts a mission such as judging this case is required to overcome his or her cultural, personal or national biases and must learn to be open to very different approaches from his own thinking.[377] This obligation to overcome cultural biases is not unique to the ECCC nor because of the specificity of international justice. A national judge has the same obligation when exercising his or her functions in a domestic court. The code of ethics for French judges thus articulates this duty with judicial independence. Point A.13 of this compendium reads as follows: [UNOFFICIAL TRANSLATION] "Judges must be conscious of the impact of any cultural and social biases they may have, as well as the impact of their political, philosophical or religious beliefs on their understanding of the facts of which they are seised and

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[375] Reasons for Judgement, §62.
[376] Reasons for Judgement, §1298, fn 4648.
[377] Article by Régis DE GOUTTES, *Juger ailleurs, juger autrement- Le juge national and le droit international. Le témoignage d'un magistrat français*, Les cahiers de la Justice, 2017, p. 497.

their interpretation of the rules of law".[378] Accordingly, the international judges had to rely on their national counterparts to understand and avoid any distortion due to cultural biases when assessing witness credibility, but also to understand the context, which affected the Chamber's reasoning on the legal characterisation of the facts. Thus, in order to avoid any distortion due to cultural bias, the Chamber should have relied on the guidance of its Cambodian members not only in the assessment of witness credibility, but also to understand the facts and the context prevailing in Cambodia between 1975 and 1979, which should have resulted in the interpretation of the rules of law accordingly, and not with a contemporary biased view.

256. It is worth noting that these principles were not applied in the Reasons for Judgement. The most blatant example is certainly the findings on marriage, in which the Chamber, including international as well as national judges, not only blithely violated the principle of legality, but also completely disregarded the socio-cultural context.[379]

Chapter III. ERRORS COMMITTED IN RESPECT OF CERTAIN SPECIFIC TYPES OF EVIDENCE

Section I. KHIEU SAMPHAN'S STATEMENTS / PUBLICATIONS

257. The Chamber established different analytical frameworks for assessing KHIEU Samphan's statements and publications. It considered that the testimony and publications of the Accused and [UNOFFICIAL TRANSLATION] "the works of" expert witnesses, collectively provided a detailed survey of the period preceding 17 April 1975.[380] In respect of KHIEU Samphan's testimony, the Chamber found it: "[helpful] with regard to events preceding the DK era and […] relied upon it subject to the appropriate caution and corroboration."[381] With respect to the Appellant's publication entitled "Considerations on the History of Cambodia from the Early Stage to the Period of Democratic Kampuchea" the Chamber stated that it had only relied upon it "in a limited sense" noting its extensive references to the works of Philip SHORT and other authors.[382] Finally, the Chamber specified that in weighing the overall reliability of historical accounts, it had "sought corroboration in contemporaneous materials and other evidence before it".[383] It added that

[378] Code of Ethics for French judges. Available at the following url: http://www.conseil-superieur-magistrature.fr/publications/recueil-des-obligations-deontologiques/lindependance
[379] See below, §1140-1144, 1157-1162.
[380] Reasons for Judgement, §192.
[381] Reasons for Judgement, §194.
[382] Reasons for Judgement, §194.
[383] Reasons for Judgement, §195.

it had "attribut[ed] more weight to testimony heard in court and materials whose authors were either questioned during the trial on the relevant historical topics or were available for examination by the Parties.".[384] Yet, the Chamber contradicted itself in its reasons and distorted and misrepresented KHIEU Samphan's statements or documents or used them entirely for inculpatory purposes.[385]

Section II. EVIDENCE OBTAINED THROUGH TORTURE

258. The Chamber erred in law in its interpretation of the Convention against Torture on the use of torture-tainted evidence, particularly on the use of evidence derived from torture-tainted evidence (I), on the exception to the exclusionary rule set out in Article 15 (II) and on the use of interrogation notebooks and security office interrogation records (III). While this error of law only invalidates some findings in the Reasons for Judgement, the Supreme Court must necessarily address it given its general significance to the ECCC's jurisprudence.[386] Indeed, the prohibition of torture is part of the peremptory norms of international law or *jus cogens*. The permissive jurisprudence adopted by the Chamber clearly threatens this prohibition.

I. EVIDENCE DERIVED FROM TORTURE-TAINTED EVIDENCE

259. The Chamber erred in law by finding that "evidence derived from torture-tainted evidence is deemed permissible as long as the proposed use of the evidence does not circumvent the prohibition against invoking the contents of torture-tainted confessions to establish their truth."[387] This position goes against the absolute prohibition against the use of any evidence obtained through torture. According to the Supreme Court, the terms of the first sentence of Article 15 are unambiguous and "prohibit[…] the use of information that was provided as a result of torture without any qualification whatsoever".[388] This prohibition does not only cover confessions, it also extends to any information obtained through torture. The Supreme Court explains that this prohibition is the result of a pragmatic justification: such information is intrinsically unreliable, as victims of torture are likely to say anything in order to put an end to their torment. Based on this analysis, the use of statements as well as information obtained through torture is prohibited:

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[384] Reasons for Judgement, §195.
[385] See below, §1244, 1395-1398, 1526-1540.
[386] *Kupreškić* Appeal Judgement (ICTY), 23.10.2001, §22; *Tadić* Appeal Judgement (ICTY), 15.07.1999, §247.
[387] Reasons for Judgement, §75.
[388] Decision on Objections to Document Lists Full Reasons, 31.12.2015, **F26/12**, §40.

> [T]he argument that evidence obtained through torture is unreliable is relevant not only to forced confessions but, more generally, to any information derived from a person subjected to torture, even if that person is not party to proceedings in which the information is to be used."[389]

260. The Chamber's argument that Article 15 applies only to statements obtained through torture, which would explain why it does not deal with evidence derived from torture-tainted evidence, is untenable. As recalled by the ICC in *Lubanga* "[the fact that a practice is not mentioned] does not necessarily mean the practice is permissible."[390]

261. The Chamber found it useful to refer to the preparatory work of the Convention. A draft submitted by the International Association of Penal Law included, in addition to statements, "[a]ny oral or written statement or confession obtained by means of torture or any other evidence derived therefrom."[391] This draft was excluded from the final version, which shows that the drafters of the Convention against Torture didnot intend to encompass derivative evidence within the exclusionary rule. According to the ICJ: "[t]he fact that a particular proposal is not adopted by an international organ does not necessarily carry with it the inference that a collective pronouncement is made in a sense opposite to that proposed. There can be many reasons determining rejection or non-approval."[392]

262. Moreover, this would stand against the purpose and object of the Convention. As the Supreme Court recalls:

> "Any interpretation of the CAT, or of its integral parts, which includes Article 15, that would weaken the prohibition and prevention of torture must therefore be rejected. Moreover, in furtherance of the preventive objective and purpose, the CAT Committee has stressed that the state obligation to take effective preventive measures transcends the items enumerated specifically in the CAT. In this light, the object and purpose of Article 15 of the CAT is primarily to prevent the practice of torture by removing an important incentive for its use, namely the possibility of introducing into any formal proceedings information that was extracted through torture.".[393]

263. Nor did the Chamber consider the recommendations made by the Committee against Torture, which recommended that "statements obtained directly or <u>indirectly under torture</u> be not produced

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[389] Decision on Objections to Document Lists Full Reasons, 31.12.2015, **F26/12**, §42.
[390] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30.11.2007, §36.
[391] Decision of 05.02.2016, **E350/8**, §64.
[392] Advisory Opinion, Namibia, ICJ. Reports 1971, 21.06.1971, §69.
[393] Decision on Objections to Document Lists Full Reasons, 31.12.2015, **F26/12**, §40.

as evidence in the courts."[394] It should however have given some weight to this Committee's recommendations and reports which, according to the Supreme Court, are recognised as being "authoritative".[395] Still, in support of its arguments, the Chamber considered that the rule that all evidence is admissible in criminal matters supports its case. While this rule indeed establishes that evidence obtained through dishonest and even unlawful means, as in this case, can be admitted, it nevertheless does not allow the Chamber to rely on such evidence to support its judgement. Moreover, it referred to the "international sources" among which, in its opinion, there is no "consensus [...] as to whether the exclusionary rule should apply to derivative evidence and, if so, under what circumstances."[396] In the four cases cited by the Chamber, the judges' position goes rather against the use of evidence derived from torture.

264. In *Gäfgen v. Germany*, the Grand Chamber considered that the use of torture-tainted evidence or evidence derived from inhumane treatment violates fair trial rights if it has an impact on the Accused's conviction or sentence.[397] Moreover, evidence obtained through ill-treatment must subsequently be obtained *via* other sources to ensure that the proceedings are fair. This jurisprudence does not support the use of evidence derived from torture. Moreover, this case concerned inhumane treatment. However, in another ECtHR decision, it was stated that the use of evidence obtained through torture or evidence derived from torture vitiated the fairness of the proceedings, whereas for treatment falling short of torture, it has to be shown that use of such evidence had a bearing on the outcome of the proceedings, that is, had an impact on the conviction or sentence for the proceedings to be unfair.[398]

265. The Supreme Court also analysed the ECtHR jurisprudence, including *Gäfgen v. Germany* which explains that the use of evidence obtained through torture renders the proceedings as a whole unfair, irrespective of whether it was decisive for securing the accused person's conviction.[399] Indeed, read

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[394] *OHCHR Summary Record of the Public Part of the 279th Meeting Georgia Poland Recommendations*, 21.03.1997, CAT/SR/279, §15; *OHCHR Summary Record of the Public Part of the 250th Meeting Finland Recommendations*, May 1996, CAT/SR/250 §18; See also *OHCHR Report of the Committee Against Torture Annual Sessional Report CAT*, 16.09.1998, 53/44 '1998 CAT Report' 27 (emphasis added).
[395] Decision on Objections to Document Lists Full Reasons, 31.12.2015, **F26/12**, §39.
[396] Decision on Evidence Obtained through Torture, 05.02.2016, **E350/8**, §65-68 referring to *Gäfgen v. Germany*, Judgement (ECtHR), *Jalloh v. Germany*, Judgement (ECtHR), *Cabrera Garcia and Montiel Flores v. Mexico* (IACHR) and *Mthembu v. the State* (South African Supreme Court of Appeal).
[397] Decision on Evidence Obtained through Torture, 05.02.2016, **E350/8**, §66.
[398] *El Haski v. Belgium*, Judgement (ECtHR), 25.09.2012, §85.
[399] Decision on Objections to Document Lists Full Reasons, 31.12.2015, **F26/12**, citing several ECtHR judgements: *Gäfgen v. Germany,* §165-166, *Desde v. Turkey*, §125-126, *Othman v. The United Kingdom*, §263-267.

in its entirety, the *Gäfgen* judgement is clear. The ECtHR establishes the exclusionary rule which prohibits the admission of evidence obtained by ill-treatment:

> The use of such evidence, secured as a result of a violation of one of the core and absolute rights guaranteed by the Convention, always raises serious issues as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction." Accordingly, the Court has found in respect of confessions, as such, that the admission of statements obtained as a result of torture [...] or of other ill-treatment in breach of Article 3 [...] rendered the proceedings as a whole unfair. This finding applied irrespective of the probative value of the statements and irrespective of whether their use was decisive in securing the defendant's conviction (ibid.). As to the use at the trial of real evidence obtained as a direct result of ill-treatment in breach of Article 3, the Court has considered that incriminating real evidence obtained as a result of acts of violence, at least if those acts had to be characterised as torture, should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimise, indirectly, the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, in other words, to "afford brutality the cloak of law." [...] It (The Court) has, however, found that both the use in criminal proceedings of statements obtained as a result of a person's treatment in breach of Article 3 – irrespective of the classification of that treatment as torture, inhuman or degrading treatment – and the use of real evidence obtained as a direct result of acts of torture made the proceedings as a whole automatically unfair, in breach of Article 6 (ibid.)."[400]

266. The Court pointed to the risk of encouraging States to resort to such investigative methods that breach Article 3 of the European Convention on Human Rights (prohibition of torture) if such evidence is authorised:

> "In the Court's view, neither the protection of human life nor the securing of a criminal conviction may be obtained at the cost of compromising the protection of the absolute right not to be subjected to ill-treatment proscribed by Article 3, as this would sacrifice those values and discredit the administration of justice."[401]

267. The Chamber also cited *Jalloh v. Germany*.[402] However, this case also stands against the use of evidence derived from torture. In fact, it held "that the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant rendered his trial as a whole unfair."[403] Even if the Chamber considered that the issue was addressed only in *obiter dictum*, in *Cabrera Garcia and Montiel Flores v. Mexico*, the IACHR judges clearly indicated that they would not allow the use of

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[400] *Gäfgen v. Germany*, Judgement (ECtHR), 01.07.2010, §165-167 and 173 (emphasis added).
[401] *Gäfgen v. Germany*, Judgement (ECtHR), 01.07.2010, §17[6].
[402] Decision on Evidence Obtained through Torture, 05.02.2016, **E350/8**, §66 fn 131.
[403] *Jalloh v. Germany*, Judgement (ECtHR), 11.07.2006, §108.

evidence derived from torture.[404] This position is consistent with that of the ECtHR. We therefore do not understand why the Chamber departed from it.

268. In *Mthembu v. The State*, the Supreme Court of Appeal of South Africa also held that the exclusionary rule set out in Article 15 of the Convention against Torture encompasses evidence that is derived from torture. Nevertheless, the Chamber considered that the judge did not categorically exclude derivative evidence if "it could have been obtained from a source independent of the torture or where it would have been discovered inevitably."[405] This position therefore supports the position that Article 15 prohibits the use of derivative evidence.

269. The Chamber has therefore erred in law by finding that international jurisprudence is not consistent and that no international customary law rule extends the scope of Article 15 to derivative evidence. Rather, the few cases it cited support the prohibition of the use of such evidence. This is logical, as Article 15 clearly prohibits the use of statements obtained through torture. As such, the Chamber should instead have considered whether an international customary norm authorised the use of evidence derived from torture, rather than whether it prohibited it. Moreover, the Chamber was unable to cite a single international law source expressly authorising the use of such evidence.

270. Thus, its decision to use evidence derived from torture, i.e. evidence discovered through the use of torture-tainted evidence stands against the object and purpose of the Convention, the recommendations of the Committee against Torture as well as the Supreme Court decision, and the jurisprudence of the ECtHR, IACHR and Supreme Court of Appeal of South Africa. If there were the shadow of a doubt about the interpretation of this rule of law, the Chamber should have applied the *in dubio pro reo* principle in favour of the Accused.[406]

II. EXCEPTION TO THE EXCLUSIONARY RULE

271. The Chamber also erred in law in considering "that information contained within torture-tainted evidence may be used to establish facts other than the truth of the statement, but only for the purpose of determining what action resulted based on the fact that a statement was made."[407] This interpretation violates Article 15 of the Convention against Torture, which states:

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[404] Decision on Evidence Obtained through Torture, 05.02.2016, **E350/8**, §67.
[405] Decision on Evidence Obtained through Torture, 05.02.2016, **E350/8**, §68.
[406] Reasons for Judgement, §21.
[407] Reasons for Judgement, §77.

> "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."[408]

272. The only exception to this absolute prohibition on the use of evidence obtained through torture is therefore the following: to establish that a statement was made. In fact, this is what the Chamber recalled in its Decision on Evidence Obtained through Torture:

> "The plain language of the exception suggests that it should be interpreted narrowly. It provides a singular instance of what may be proven, namely "that a statement was made."[409]

273. The Chamber should therefore have stopped there. When the letter of a treaty is clear and is not inconsistent with its object or purpose, there is no need to go looking for other interpretations. Indeed, according to the ICJ:

> "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter."[410]

274. Instead, the Chamber invented an ambiguity to allow itself to interpret the text. It considered that "[t]he language of Article 15 does not clarify how a statement may be used and for what purpose(s)" and that it was therefore necessary to refer to "the purpose of Article 15 as a whole and its drafting history."[411] Yet, in the words of the Supreme Court, there is no ambiguity in this text:

> "The Supreme Court Chamber considers that the normative content of Article 15 of the CAT is sufficiently precise not to depend on implementing legislation for it becoming operative."[412]

275. The exception provides that a statement can be used as evidence against someone accused of torture for the sole purpose of establishing that the statement was made. In fact, that is what Judge Fenz noted in her dissenting opinion:

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[408]Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10.12.1984, Article 15.
[409] Decision on Evidence Obtained through Torture, 05.02.2016, **E350/8**, §72.
[410] Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion (ICJ), 03.03.1950, p. 8; see also Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain, Judgement (ICJ), 15.02.1995, p. 19.
[411]Decision on Evidence Obtained through Torture, 05.02.2016, **E350/8**, §72.
[412] Decision on Objections to Document Lists Full Reasons, 31.12.2015, **F26/12**, §34.

> "The language is clear on both: the category of persons – those accused of torture – and the use (purpose) – as evidence that the statement was made. Simply put, the only permissible use is to prove the existence of such statement (and arguably that it was made under torture)."[413]

276. The Chamber even went against the jurisprudence of the Supreme Court. It wrongly considered that in its Decision F26/12, the Supreme Court had not interpreted the exception in Article 15 of the Convention.[414] However, in the light of the similar argument by the Prosecution on broadening the use of statements obtained through torture for the purpose of prosecutorial necessity, the Supreme Court responded that:

> "[T]he exclusionary rule does not lend itself to accommodating the Co-Prosecutors' interpretation. The object and purpose of Article 15 requires broad exclusion of any information obtained through torture, and the exception to this rule, by its nature, is to be interpreted narrowly. Specifically, the Supreme Court Chamber concurs with the jurisprudence cited above, which holds that necessities of prosecution do not justify the use of statements obtained through torture, even where the party moving to use the statements is not responsible for the torture."[415]

277. The Chamber departed from the Supreme Court's position in interpreting Article 15 in the manner recommended by the Prosecution. This interpretation could not be justified on the basis of the drafting history of the Convention (A) nor even on the basis of its purpose and object (B).[416]

A. History of the Convention

278. The Chamber simply indicated that an early draft of Article 15 allowed no exception to the prohibition against using statements obtained through torture, but that a provision was however added during the drafting process allowing such evidence to be used to prosecute the accused.[417] While the Chamber indicated that this language allowed "too broad[…]" an interpretation, it went no further in its analysis of the drafting history. Yet, this history tells us a little more. It is true that the revised article added language which opens the possibility of allowing such statements to be used to prosecute the alleged torturer, but this was rightly rejected in order to limit the use of such evidence to the exception we know.[418] The too broad language allowing such evidence to be used to prosecute those accused of torture, without restriction, and noted by the Chamber was as follows: "*Each State Party shall ensure that any statement which is established to have been made as a*

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[413] Reasons for Partially Dissenting Opinion of Judge Fenz, 11.03.2016, **E350/8.1**, §15.
[414] Decision on Evidence Obtained through Torture, 05.02.2016, **E350/8**, §3.
[415] Decision on Objections to Document Lists Full Reasons, 31.12.2015, **F26/12**, §67 (emphasis added).
[416] Decision on Evidence Obtained through Torture, 05.02.2016, **E350/8**, §72.
[417] Decision on Evidence Obtained through Torture, 05.02.2016, **E350/8**, §73.
[418] Report of the Working Group on a Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, E/CN.4/1367, 05.03.1980, §82-84.

result of torture shall not be invoked as evidence in any proceedings, except against a person accused of obtaining that statement by torture."

279. But in the end Article 15 was adopted as follows: "*Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made*."

280. The drafters therefore considered the option of unlimited use of evidence obtained through torture against those accused of torture. But this language was not adopted. The desire to restrict the use of statements obtained through torture to a single purpose was thus the result of careful deliberation.[419] This is the version that should have been respected by the Chamber, instead of inventing an interpretation that is inconsistent with the letter and spirit of the text and broadens the possibility of using evidence obtained through torture.

B. Purpose and object of the Convention

281. The Chamber went on to examine the object and purpose of the Convention. It considered that the purpose of the prohibition against using evidence obtained through torture was "to prevent reliance on such evidence to gain a benefit with a view to preventing torture."[420] The Chamber then considered that "[t]his purpose would be defeated if in prosecuting those responsible for torture, all uses of such evidence were prohibited, thereby favouring individuals accused of this crime." This argument is clearly wrong. The Chamber was perfectly aware that "all uses of such evidence" were not prohibited. The drafters of the Convention clearly took the Chamber's concern into account. That is why they included, in the second part of Article 15, the ability to invoke [UNOFFICIAL TRANSLATION] "such evidence" against a person accused of torture. Instead the drafters limited such use: a statement can only be invoked against a person accused of torture as evidence that the statement was made. Thus, the letter of Article 15 does indeed respect the object and purpose of the Convention as Article 15, including its exception, enables the prevention of the use of torture. The Chamber should have been confident that the strict application of Article 15 would not allow those responsible for torture to shield themselves from criminal liability.

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[419] Application of Amnesty International, the International Commission of Jurists and the Redress Trust to Present an *Amicus Curiae* Submission Pursuant to Internal Rule 33, 25.09.2009, **D130/9/15.4**, §31-34.
[420] Decision on Evidence Obtained through Torture, 05.02.2016, **E350/8**, §74.

282. The Chamber also considered that Article 15 was meant "to protect the right to a fair trial by, *inter alia,* preventing the invocation of unreliable evidence." The Defence takes no issue with this. However, while it is true that evidence obtained through torture is unreliable, that is not the only reason it cannot be used in a trial. It would therefore be right to consider that the prohibition on the use of evidence obtained through torture prevents the parties from attempting to establish the truth of such evidence. But this would not mean that such evidence can be used for a different purpose, as the Chamber would have us believe.[421] Once again, Article 15 provides for a single exception: establishing that a statement was made. No other use was ever intended.

283. The Chamber wished to use such statements "but only for the purpose of determining what action resulted based on the fact that a statement was made." Thus, it intended to these statements as proof of "arrests […] a purge policy or process."[422] In so doing, the Chamber no longer respected the meaning of Article 15, which provides for the exception to the use of such evidence against those accused of torture to ensure that they are not shielded from criminal liability. In wishing to prove arrests, a purge policy or process, we step out of the scope of this exemption to prosecute individuals accused of other crimes.

284. Let's be clear, in adding the possibility of using evidence obtained through torture, Article 15 no longer includes one exception, but several exceptions. This is self-evident if this exception is compared to the exclusionary rule (Article 15 of the Convention):

- **Any statement obtained through torture may be invoked against a person accused of torture as evidence that the statement was made.**

285. And what the Chamber considered that it is empowered to do:

- **Any statement made through torture may be invoked against a person accused of torture if it is for any purpose other than to establish the truth of the statement, but only for the purpose of determining what action resulted based on the fact that the statement was made.**

286. The Chamber cast aside its role. It did not interpret, but legislated. Indeed, that is why Judge Fenz quite properly opposed this majority interpretation.[423] Finally, the Chamber noted that "[t]he

[421] Decision on Evidence Obtained through Torture, 05.02.2016, **E350/8**, §75.
[422] Decision on Evidence Obtained through Torture, 05.02.2016, **E350/8**, §75.
[423] Reasons for Partially Dissenting Opinion of Judge Fenz, 11.03.2016, **E350/8.1**, §3-11.

exclusionary rule is also meant to preserve the integrity of the proceedings by preventing the Chamber from according any judicial legitimacy to the abhorrent conduct which procured the evidence."[424] It therefore considered that the way in which it wished to use this evidence respected the integrity of the proceedings and "would permit a full assessment of the alleged conduct in this case." The criminal conduct alleged in Article 15 relates to torture. Having regard to the preceding paragraph, the Chamber also wished to be able to establish other criminal conduct. The statements were of no use to the Chamber in establishing that there had been torture. Only the admission and invocation of these statements were sufficient to prove that a statement had been made under torture.

287. **Conclusion** – The Chamber justified the use of evidence obtained through torture for legitimate purposes. The Chamber may very well have been well-intentioned (to allow for the prosecution of torturers), we can only echo the concern expressed by Lord Bingham in the House of Lords: the use of torture-tainted statements will "infringe the party's rights and the fairness of the proceedings, shock the judicial conscience, abuse or degrade the proceedings and involve the state in moral defilement."[425]

288. The stated role of the ECCC, in addition to guaranteeing justice and reconciliation, is to provide a model for the Cambodian judicial system and to transfer skills and know-how to Cambodian court personnel.[426] The legacy of the ECCC jurisprudence when interpreting an international treaty as important as the Convention against Torture to which Cambodia is a party[427] is therefore of particular importance. Such a permissive interpretation of the use of evidence obtained through torture could open the door for Cambodian authorities to use such evidence in court for other purposes. This risk has in fact been highlighted by Cambodian and international civil society groups: two requests to present *amicus curiae* submissions on this issue were made by the *Cambodian Center for Human Rights*, and another by *Amnesty International*, *the International Commission of Jurists* and *the Redress Trust*.[428] While these concerns were raised following a

[424] Decision on Evidence Obtained through Torture, 05.02.2016, **E350/8**, §76.
[425] *A and Others*, House of Lords, 2005 UKHL 71, Lord Bingham, §39.
[426] Report of Secretary General on Khmer Rouge Trials, 12 October 2004, U.N. Doc A/59/432, §27.
[427] Cambodia signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 15.10.1992.
[428] Application of Amnesty International, the International Commission of Jurists and the Redress Trust to Present an *Amicus Curiae* Submission Pursuant to Internal Rule 33, 25.09.2009, **D130/9/15.4**, Application of the CCHR to Present

decision by the investigating judges,[429] they are all the more relevant now that such evidence has actually been used in a trial. This error of law must therefore be corrected and any use of confessions for purposes other than to establish that a statement was made, must be sanctioned and reversed by the Supreme Court.[430]

III. NOTEBOOKS OR PRISONER LOGBOOKS FROM SECURITY CENTRES

289. The Chamber considered that "such documents [notebooks or prisoner logbooks from security centres] containing the thoughts and perceptions of torturers are permissible, so long as they are not invoked to establish the truth of statements made by those subject to torture."[431] Yet it did not specify the torturers' "thoughts" or "perceptions" relating to the confessions of those who were interrogated. Given that the majority of people in security centres were interrogated about their "alleged" links to the enemy, it is more than likely that the interrogators wrote down in their notebooks information about the enemy obtained from these confessions, without any specification by the author. Given this risk, the Chamber should have considered that it was not reliable to rely on such documents filled up by those who spent all their time interrogating detainees.

290. KTC notebooks are a reflection of this issue. The Chamber used them once to corroborate the deportation of Vietnamese.[432] There is nothing in the excerpt used by the Chamber specifying that the notes appearing in the notebook came from confessions. They describe the activities of numerous individuals probably detained at KTC. There is therefore a great risk that this information came from people who were interrogated at KTC, and that it was therefore obtained through torture. Moreover, these notes often state that these individuals were "interrogated" or have "confessed".[433]

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an *Amicus Curiae* Submission Pursuant to Internal Rule 33, 07.09.2009, **D/130/9/15.3**.

[429] Order on Use of Statements Which Were or May Have Been Obtained by Torture, 28.07.2009, **D130/8**.

[430] Reasons for Judgement, §358, 375, 1115, 1358, 2274, 2276, 2277, 2279, 2284-2296, 2300-2302, 2313, 2320, 2322, 2327, 2578, 2670, 2717, 2720, 2724, 2725, 2729, 2788-2790, 4228. See, in particular, below §686-718; 1867-1868.

[430] Decision on Evidence Obtained through Torture, 05.02.2016, **E350/8**, §87.

[431] Decision on Evidence Obtained through Torture, 05.02.2016, **E350/8**, §87.

[432] Reasons for Judgement, §1115.

[433] KTC notebook, not dated, **E3/5827**, ERN EN 00866424 ("When we questioned her"); ERN EN 00866425 ("His confession") (repeated twice); ERN EN 00866436 ("This traitor has confessed his traitorous acts as follows"); ERN EN 00866440 ("He confessed that there were 3 persons in his group doing the betrayal activities"); ERN EN 00866441 ("He confessed"); ERN EN 00866446 ("after we arrested them to be questioned here, they admitted"); ERN EN 00866451 ("This man has confessed that he was lazy to work"); ERN EN 00866456 ("Based on the confessions of the above two persons"), ("Based on Seng's confession regarding to Chhieng"); ERN EN 00866460 ("we questioned her again and again in order to find out how she knows if the Vietnamese will arrive"); ERN EN 00866462 ("He confessed").

The use of these documents must be reversed, and all related findings made by the Chamber must be reversed.[434]

Section III. PROPAGANDA

291. The Chamber defined the value to be given to evidence resulting from propaganda documents in the Reasons for the Judgement under appeal. As the Supreme Court had already stated in its Case 002/01 Appeal Judgement[435], it considered that "statements made for propagandistic purposes may diminish their reliability".[436]

292. These documents must indeed be assessed with particular care as they were produced in a particular political context. The idea of propaganda is based on a specific rhetoric. It is designed to convince the populace, to unite them around a specific socio-political context, which often deliberately deviates from reality. The LAROUSSE dictionary defines propaganda as: [UNOFFICIAL TRANSLATION] "[s]ystematic effort to manipulate public opinion to accept specific ideas or dogmas, notably in the political or social arena".[437] Propaganda may therefore be based solely on a mistaken view or representation of reality, its sole purpose being to convince and unite a group around a political doctrine, irrespective of any objective factors that may exist. Thus, the authors of propagandistic/ documents do not convey facts in a reliable or objective manner. In this respect, no chamber can base a conviction beyond reasonable doubt solely on this kind of document. Yet, in its Reasons, the Chamber contradicted itself by not considering that propaganda documents were less reliable by interpreting propagandistic speech literally, where negative findings could be drawn. The example of a speech delivered by KHIEU Samphan regarding Vietnamese at a celebration during DK is a blatant example.[438] Conversely, the Chamber dimissed the rule published in a RF that partners could freely consent to marriage by saying that it was propaganda published in revolutionary magazines, even though this rule was one of the 12 moral principles that all CPK members had to abide by.[439] The Chamber relied only on propagandistic documents to

[434] See also Reasons for Judgement, §2274 which rests on POU Phally S-21 notebook, **E3/8368**.
[435] Case 002/01 Appeal Judgement, 23.11.2016, §883
[436] Reasons for Judgement, §65; see also §472, 479.
[437] Definition from the online LAROUSSE dictionary. Available at the following url: https://www.larousse.fr/dictionnaires/francais/propagande/64344.
[438] See below §1551-1560.
[439] See below §1193.

convict, which means that it committed numerous errors of law and that such findings must be invalidated.

Section IV. WRITTEN STATEMENTS

I. PROBATIVE VALUE

293. With respect to the probative value of written statements whose authors could not testify before the Chamber, the Chamber noted that "absent the opportunity to examine the source or author of evidence, less weight may be assigned to that evidence."[440] The Chamber had already established this type of framework in Case 002/01, when it recalled on several occasions that "[a]bsent the opportunity to examine the source or author of evidence, less weight may be assigned to that evidence."[441]

294. The Supreme Court clarified this analysis, noting the inherently low probative value of a written statement that had not been examined during adversarial proceedings in the Case 002/01 Appeal Judgement. It thus established a more particularised framework than the Chamber, stating 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."[442] It also pointed out that in its Case 002/01 Trial Judgement, the Chamber had not "explain[ed] why it considered that, despite its inherently low probative value, it could, on this basis, reach findings beyond reasonable doubt as to individual incidents of killings."[443]

295. In the Judgement under appeal, the Chamber was again content to flippantly and in very broad language point to this legal framework which violates the principle of adversarial proceedings. It repeatedly based convictions on simple written statements without taking the care to rigorously

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[440] Reasons for Judgement, §69.
[441] Case 002/01 Trial Judgement, 07.08.2014, §34; Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, 20.06.2012, **E96/7**, §21-22, 24-25, 27, 29, 34; 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, 15.08.2013, **E299**, §19.
[442] Case 002/01 Appeal Judgement, 23.11.2016, §296.
[443] Case 002/01 Appeal Judgement, 23.11.2016, §430: "This evidence is of an inherently low probative value, a fact the Trial Chamber had only acknowledged in general terms, but apparently not applied in practice. Indeed, in relation to the evidence at issue, the Trial chamber did not explain why it considered that, despite its inherently low probative value, it could, on this basis, reach findings beyond reasonable doubt as to individual incidents of killings."

reason its decision, and sometimes without indicating that the witnesses or civil parties in question had not been heard in court. Such findings must therefore be invalidated.[444]

II. ACTS AND CONDUCT

A. Presentation of the flawed legal framework implemented by the Chamber

296. In the Reasons for the Judgement under appeal, the Chamber considered that it would admit written witness, expert and civil party statements, including transcripts from prior proceedings, in conjunction with or in place of oral evidence.[445] With respect to the fact that the authors or sources of certain written statements provided in place of oral testimony had not been examined, the Chamber specified that it admitted them "where the statements fulfilled the *prima facie* requirements of relevance and reliability (including authenticity) and were proposed as proof of matters other than the acts and conduct of the Accused."[446]

297. The Chamber also stated that it considered that written statements by deceased or unavailable witnesses, including for the purpose of proving the acts and conduct of the Accused were admissible. It admitted that it accorded them limited probative value and stated that "a conviction may not be based solely or decisively thereupon"[447] Paradoxically, while these statements are of limited probative value, "they may still be an important source of evidence, particularly where the statement was obtained by a judicial entity."[448] The Chamber erred in failing to take into account the rather inherently low probative value of such statements in making findings in violation of the principle of orality of proceedings, which violates the principle of adversarial proceedings. The judges justified this exception on the basis of the "relevant rules and practice at the international level [that] permit reliance on evidence" of three kinds of witnesses[449]: (i) deceased witnesses; (ii) witnesses who can no longer with reasonable diligence be traced; (iii) witnesses who, by reason of bodily or mental condition, are unable to testify orally.[450]

298. The Chamber considered that it could rely on the written statements by these three types of witnesses when it was satisfied that "the witness[es were] genuinely unavailable and that the

[444] See below, §863-873, 842-847, 1055.
[445] Reasons for Judgement, §51.
[446] Reasons for Judgement, §70 (emphasis added).
[447] Reasons for Judgement, §71-72.
[448] Reasons for Judgement, §71-72.
[449] Reasons for Judgement, §72.
[450] Reasons for Judgement, §72.

proposed evidence [was] reliable, and where it consider[ed] that the probative value of this evidence is not substantially outweighed by the need to ensure a fair trial."[451] Finally, it specified: "[t]he fact that the evidence in question is relevant to the acts and conduct of the Accused as charged in the indictment is not as such a bar, but will impact upon the weight afforded to the evidence."[452] The Supreme Court agreed with this analysis and recalled the framework for these exceptions in its Case 002/01 Appeal Judgement:

> "[F]irst, from the fact that the Trial Chamber would not have had an opportunity to assess the demeanour of the individual while testifying and ask questions to clarify issues. Second, in accordance with persuasive jurisprudence of the European Court of Human Rights, a conviction may not be based solely or to a decisive degree on evidence by a witness whom the defence has not had an opportunity to examine, unless there are sufficient counterbalancing factors in place, so that an accused is given an effective opportunity to challenge the evidence against him.[453]

299. Yet the international practice on which the Chamber relied has continuously recalled the sanctity of the orality of proceedings and the need to preserve the rights of an accused by safeguarding the principle of adversarial proceedings. Recent decisions illustrate this position. In *Bemba*, the ICC Appeals Chamber recalled the importance of the orality of proceedings stating that the Trial Chamber had violated Article 69(2) of the Rome Statute[454] by admitting and using written statements of witnesses who had not testified in court and which had not been subjected to prior analysis on an item-by-item basis.[455] It also recalled that in deviating from the rule regarding the orality of proceedings, a Chamber must "ensure that doing so is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally." [456]Again, recently, the *Karadžić* Trial Chamber recalled that "[a] decision to accept evidence without cross-examination

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[451] Reasons for Judgement, §72.
[452] Reasons for Judgement, §72.
[453]Case 002/01 Appeal Judgement, 23.11.2016, §296.
[454] Rome Statute, Article 69(2): "The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in Article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the Accused." (emphasis added).
[455]*Bemba* ICC Trial Chamber III, 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'', 03.05.2011, §74-81.
[456]*Bemba* ICC Trial Chamber III, 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'', 03.05.2011, §78.

is one that trial chambers should arrive at only after careful consideration of its impact on the rights of the accused".[457]

300. Accordingly, the Chamber erred in establishing such an analytical framework for written statements without counterbalancing it with respect for the principle of adversarial proceedings. This violates the procedural rights of KHIEU Samphan and it should be found that this resulted in unfairness.

B. Use of written statements in lieu of oral testimony

301. The ECtHR has repeatedly held that the right to a fair trial is violated when conviction is based on testimony that the accused was never allowed to discuss and when the accused was at no time able to confront the Prosecution witness.[458] It has admitted exceptions to this principle, saying:

> "In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument [...] This does not mean, however, that in order to be used as evidence, statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3(d) and (1) of Article 6 (art. 6(3)(d), art. 6(1)) provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings."[459]

302. Therefore, no decision can be based on evidence that was not subject to adversarial argument. The principle of adversarial proceedings is an unquestionable corollary of the right to a fair trial. The Criminal Division of the French Court of Cassation applies a similar reasoning. Under paragraph 2 of Article 427 of the Code of Criminal Procedure: [UNOFFICIAL TRANSLATION] "[t]he judge may only base his decision on evidence which was submitted in the course of the hearing and adversarially discussed before him." Any decision based on evidence not subjected to adversarial argument must therefore be annulled, and numerous cassations have been granted on these

[457] *Karadzic* Trial Judgement (IRMCT), 20.03.2019, §162.
[458] See in particular Judgement of *Unterpertinger v. Austria* (ECtHR), 24.11.1986, §31; Judgement of *Saïdi v. France* (ECtHR), 20.09.1993, §43-44; Judgement of *Barberà, Messegué and Jabardo v. Spain* (ECtHR), 06.12.1988, §78.
[459] Judgement of *Kostovski v. The Netherlands* (ECtHR) 20.11.1989, §41 (emphasis added).

grounds.[460] The Chamber violated its own reasoning and ECtHR jurisprudence when it convicted KHIEU Samphan based solely on written statements.[461]

C. Chamber's errors repeated in Cases 002/01 and 002/02

303. The Chamber had already implemented this legal framework in Case 002/01.[462] In Case 002/02, the Chamber chose to have a maximum number of written statements placed on the case file without summoning their authors to appear in court. Many written statements concerned the Appellant's acts and conduct [463] or served to establish crimes.[464]

304. In the Reasons for the Judgement under appeal, the Chamber used only written statements by witnesses and deceased civil parties to legally characterise the facts and convict KHIEU Samphan. For example, the Chamber only used evidence from two deceased civil parties, who never appeared in court, to say that the CAH of murder had been committed at Phnom Kraol.[465] In its discussion of the regulation of marriage, the Chamber, *inter alia*, found KHIEU Samphan guilty in that his involvement "in the execution of this policy was corroborated by SIHANOUK, who recalled him describing the matching of young women (whom KHIEU Samphan described as fervently patriotic) with disabled soldiers as a sacrifice to the nation."[466][467] However, SIHANOUK is a witness whose appearance the Defence requested again and again during his lifetime, precisely because he had made numerous contradictory statements and it was essential to be able to examine him. Moreover, the Chamber relied exclusively on two written statements to find that Vietnamese from Anlung Trea village had been deported to Vietnam.[468] There was no corroboration of these statements, which moreover hinged entirely on hearsay.[469]

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[460] *Répertoire de droit pénal et de procédure pénale*, Dalloz, Art. 3 - *Méconnaissance du principe du contradictoire* §278-279
[461] See below §842-847; 1055.
[462] 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, 15.08.2013, **E299**, §19, 23; Case 002/01 Trial Judgement, §31; CB 002/02, §530-536.
[463] CB 002/02, §541-551.
[464] See below §863-873, 842-847; 899-910; 1055.
[465] See below §863-873.
[466] Reasons for Judgement, §4248, fn 13864 (which refers to §3585).
[467] Reasons for Judgement, §4248, fn 13864 (which refers to §3585).
[468] Reasons for Judgement, §3430.
[469] See infra §686-718.

305. Other chambers admit written statements in lieu of oral testimony but are careful to note that particular attention must be paid to such evidence.[470] But the Chamber has not respected its own legal framework thereby violating the rules of evidence and KHIEU Samphan's procedural rights.

Section V. OUT-OF-COURT STATEMENTS

306. In the Reasons for Judgement, the Chamber recalled that the criteria set out in Internal Rule 87(3) are relevant to the probative value of evidence. It specified that "the circumstances surrounding the creation or recording of evidence, whether the document admitted was an original or a copy, legibility, discrepancies with other versions, deficiencies credibly alleged, whether the Parties had the opportunity to challenge the evidence, and other indicia of reliability including chain of custody and provenance."[471] The Chamber then specified that statements taken outside the framework of a judicial process "are of inherently low probative value," and that when it relies on such evidence for its decision "the reasons for the finding must be clearly explained, particularly if a conviction depends wholly or decisively on such evidence."[472]

307. These findings show that the Chamber considered that it was possible to rest a conviction on out-of-court statements, which are of inherently low probative value, as long as its reasoning was clearly explained. Such a legal framework infringes all of the Appellant's procedural rights. It is legally impermissible to rest a finding beyond reasonable doubt on evidence deemed to be of inherently low probative value. In Case 002/01, the Chamber noted that "statements or other evidence collected not under judicial supervision but instead by diverse intermediary organisations or other entities external to the ECCC" could not enjoy a presumption of reliability, unlike written records of interviews conducted in a judicial framework.[473] The Judges under appeal have therefore reached a new level of violation of the Appellant's rights in burying the principle *in dubio pro reo*.

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[470] *Prlić* Trial Judgement (ICTY), 29.05.2013, §388: "The Chamber paid particular attention to the fact that written statements were admitted without the opportunity to cross-examine the authors of the said statements"; *The Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the admission into evidence of materials contained in the prosecution's list of evidence, §42: "The right of the accused to examine, or have examined, adverse witnesses is of fundamental importance to the fairness of the proceedings. No judgment can be rendered safely if it is based on evidence prepared on behalf of one party which the opponent has not been able to test or verify."

[471] Reasons for Judgement, §61.

[472] Reasons for Judgement, §69.

[473] Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, 20.06.2012, **E96/7**, §29; CB 002/02, §557.

308. In Case 004/01 against IM Chaem , the CIJs explained why out-of-court statements were of inherently low value. First, they recalled that written records of interview were prepared under judicial supervision and thus subject to legal and procedural safeguards and were entitled to a presumption of relevance and reliability,[474] unlike out-of-court statements.[475] In contrast with the Chamber, the CIJs considered that DC-Cam interviews not conducted for the purpose of criminal proceedings did not enjoy the same judicial guarantees as written records of interview and were of low probative value.[476] They also considered that interviews conducted by the Office of the Co-Prosecutors for the purposes of and in the context of legal proceedings were not conducted under oath and were prepared by a party with an interest in the outcome of the case.[477] Finally, according to the CIJs, civil party applications enjoy no presumption of reliability. Furthermore, they only offer general conclusions (representing a "*common narrative*"), meaning that they are insufficient to establish relevant facts.[478]

309. In the *Katanga* case, Trial Chamber I provided non-exclusive criteria for analysing evidence reliability. These criteria include "a. Source: whether the source of the information has an allegiance towards one of the parties in the case or has a personal interest in the outcome of the case, or whether there are other indicators of bias; [...] d. Purpose: whether the document was created for the specific purpose of these criminal proceedings or for some other reason; e. Adequate means of evaluation: whether the information and the way in which it was gathered can be independently verified or tested".[479]

310. With respect to the use of this type of evidence, the Supreme Court recalled its inherently low probative value in its Case 002/01 Appeal Judgement, and specified that in this case, where a factual conclusion is based on out-of-court statements "more reasoning is required" than when there is a sound evidentiary basis.[480]

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[474] *Closing Order (Reasons)*, 10.07.2017, **004/1-D308/3**,§103
[475] *Closing Order (Reasons)*, 10.07.2017, **004/1-D308/3**,§104-108
[476] *Closing Order (Reasons)*, 10.07.2017, **004/1-D308/3**,§104-106
[477] *Closing Order (Reasons)*, 10.07.2017, **004/1-D308/3**,§105
[478] *Closing Order (Reasons)*, 10.07.2017, **004/1-D308/3**,§107
[479] *The Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the admission into evidence of materials contained in the prosecution's list of evidence, 17.12.2010, §27 (emphasis added).
[480] Case 002/01 Appeal Judgement of 23.11.2016, §90.

311. Without conducting any rigorous legal analysis and a detailed assessment, the Chamber based convictions solely on out-of-court statements.[481] It neither saw fit to specify the source of said documents nor to demonstrate their relevance and reliability. It repeated its approach in the Case 002/01 Trial Judgement, despite the fact that the Supreme Court had already corrected it on this point.[482] Accordingly, the Chamber's findings based solely on out-of-court statements must be invalidated and it should be found that KHIEU Sampan's trial was unfair.

Section VI. HEARSAY

312. In the Reasons for the Judgement under appeal, the Chamber considered that in assessing the probative value of hearsay evidence, it had to take 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."[483] The Defence agrees with this assessment of hearsay evidence. However, the fact of the matter is that the Chamber contradicted itself in its Reasons for Judgement in failing to consistently apply the established principle.[484] Still, given the turn taken by Case 002/02, the Defence explicitly alerted the Chamber to the importance of paying attention to this kind of evidence.[485] Indeed, during the trial, both the Prosecutors and the Chamber were uninterested in the sources of the hearsay heard in court such that the Chamber had a duty to consider this in its deliberations.

313. For example, the Chamber contradicted itself in its Reasons in finding that Vietnamese from Pou Chentam village were deported to Vietnam.[486] This finding is solely based on the evidence of civil

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[481] See factual examples below §731, 1044-1045, 1429-1430, 1525.
[482] Case 002/01 Appeal Judgement of 23.11.2016, §550: "The Trial Chamber did not provide any express analysis of the probative value of the evidence on which it relied, nor is any one instance of death supported by more than one piece of evidence. As noted above, in particular when the probative value of the evidence on which a finding rests is inherently low (as is the case with out-of-court statements by witnesses and civil parties), the explanation provided by the Trial Chamber as to why it was confident that findings beyond reasonable doubt could be based thereon are of particular importance when determining whether the Trial Chamber's findings were reasonable. In the absence of any such explanation, the Supreme Court Chamber considers that the findings [...] cannot be said to have been reasonably reached." (emphasis added); *See also,* §970: "In conclusion, the evidence relied upon by the Trial Chamber is weak, ambivalent, of low probative value and called into question by other evidence (...)."
[483] Reasons for Judgement, §63; Case 002/01 Appeal Judgement of 23.11.2016, §302 (referring to ICT Appeals Chamber case law).
[484] See, in par,908, 919, 921, 971, 975, 987, 991-992, 1004-1005, 1007, 1011, 1013-1014, 1044, 1095, 1266, 1762, 1868.
[485] CB 002/02, §567-569.
[486] Reasons for Judgement, §3505-3507.

party DOUNG Oeun.[487] Yet, the Chamber had stated that her evidence that the Vietnamese living in her area such as Ta Ki, *Yeay* Min and their children had to return to Vietnam was based on hearsay.[488] All findings made in violation of the established legal framework must be invalidated and the Supreme Court must find that the Appellant's trial was unfair.

Section VII. CIVIL PARTY STATEMENTS

I. CIVIL PARTY APPLICATIONS

314. According to the impugned Judgement because civil party applications were not created by a judicial entity, they were not accorded "a presumption of reliability."[489] Accordingly, they are accorded little probative value.[490] The Chamber had adopted a similar position in Case 002/01.[491]

315. In addition, during the trial in Case 002/02, when the International Prosecutor disclosed civil party applications from Cases 003 and 004 in bulk, the Chamber recalled that these documents had "much less" probative value than written records of interview.[492] This position was shared by the CIJs[493] and the Supreme Court.[494] Yet, in spite of the recognition of this low probative value, the Chamber was unafraid to rest convictions on civil party applications and even on simple annexes.

316. For example, the Chamber erred by relying on the annex to a civil party application to find that Vietnamese from Angkor Yos village were expelled.[495] First, it noted that it was only using this annex to "corroborate[…] the existence of a pattern of displacements of Vietnamese in Prey Veng province in 1975."[496] However, in its legal characterisation of the facts, the Chamber considered that it had been established that "[s]pecific instances of families being gathered, removed and seen leaving by boats were found in [...] Angkor Yos village" solely on the basis of this annex.[497]

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[487] Reasons for Judgement, §3431.
[488] Reasons for Judgement, §3431, See below §977.
[489] Reasons for Judgement, §73.
[490] Reasons for Judgement, §73.
[491] Decision of 20.06.2012, **E96/7**, §29. "Civil Party applications (which were often prepared by various intermediary organisations on behalf of Civil Party applicants), in the absence of information regarding the circumstances in which they were recorded, may also be proposed to be put before the Chamber but may ultimately be able to be afforded little, **if any, probative weight**." (emphasis added).
[492] Trial Chamber memorandum entitled "Trial Chamber Guidelines on the Disclosure of Cases 003 and 004 Civil Party Applications in Case 002/02, 27.08.2015, **E319/14/2**, §4.
[493] *Closing Order (Reasons)*, 10.07.2017, **004/1-D308/3**, §107
[494] Case 002/01 Appeal Judgement, 23.11.2016, §550.
[495] See below, §978-980.
[496] Reasons for Judgement, §3432.
[497] Reasons for Judgement, §3505.

Accordingly, this determination of KHIEU Samphan's guilt was made in violation of the established law of evidence.[498] These findings must be invalidated and the trial must be found unfair.

II. ASSESSMENT OF STATEMENTS

317. Like the Supreme Court, the Chamber considered that civil party evidence has the same value as witness testimony. The Supreme Court had therefore validated the Chamber's findings in Case 002/01 by quoting Internal Rule 91(1).[499]

318. It also validated the Chamber's assessment on a case-by-case basis, based on a number of factors, including the demeanour of the person testifying, consistencies or inconsistencies in relation to material facts, ulterior motivations, corroboration and all the circumstances of the case.[500] The Chamber again adopted this position in the Reasons for the Judgement under appeal.[501] Unlike witnesses, the civil parties do not take an oath and, as parties, they also have an interest in the ongoing proceedings. Accordingly, they do not offer the same guarantees of objectivity as witnesses. If the Chamber decides to accord the civil parties evidence the same value as witness testimony, it then has a duty to assess the credibility and reliability of the civil party having regard to all the circumstances of the case.

319. However, the fact of the matter is that the Chamber relied on civil party evidence to convict, even where a CP was neither reliable nor credible.[502] The example of the admission of EM Oeun's inculpatory evidence attributing to KHIEU Samphan statements he allegedly made at a training session is a perfect illustration of the way in which the Chamber erred in its assessment of civil party credibility.[503] 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.[504] Such findings must be invalidated.

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[498] See below §978-980.
[499] Case 002/01 Appeal Judgement, 23.11.2016, §313: "Thus, civil parties are mentioned, together with witnesses and experts, as means for establishing the truth in respect of the allegations against the accused. Accordingly, the Trial Chamber may rely on the testimony of civil parties to make determinations of guilt, just as it may rely on the testimony of the accused person, should he or she decide to testify. While the status of a civil party may be of relevance to the probative value and/or credibility of the testimony, there is no reason to exclude it *per se*."
[500] Case 002/01 Appeal Judgement, 23.11.2016, §314:
[501] Reasons for Judgement, §67.
[502] See factual examples below, in particular §978-980, 1014-1016, 1233-1242.
[503] See below §1754-1762.
[504] See below §1233-1242.

Section VIII. DOCUMENTS BENEFITTING FROM PRESUMPTIONS

320. The Chamber recalled that in the trial in Case 002/01, it had considered that certain documents benefitted from "a rebuttable presumption of *prima facie* relevance and reliability (including authenticity)."[505] It also cited Supreme Court jurisprudence which considered that "[i]t was for the party disputing the authenticity of a document which is judicially presumed to be *prima facie* authentic to rebut this presumption".[506] Finally, with respect to the rebuttal of this rebuttable presumption, the Chamber considered that "it is incumbent upon the Party contesting the reliability or authenticity of evidence to identify evidence and proffer reasons to rebut the presumption. Where such issues are raised, the Chamber addresses them on a case-by-case basis. Where no such reasons have been provided, the presumption of reliability (including authenticity) stands."[507]

321. This approach did not include sufficient safeguards to respect the evidentiary standards in criminal law. In this particular trial, these rules had to be even more scrupulously respected, as the evidence adduced was particularly fallible, as fallible as the memory of events that happened 40 years ago. Accordingly, a stricter analytical framework should have been applied on a case-by-case basis and assessed by the Chamber.

322. In the *Prlić* Appeal Judgement, the IRMCT Appeal Chamber established a more rigorous framework for assessing authenticity in order to ensure evidentiary standards: "(1) the fact that another trial chamber had admitted them into evidence; (2) a witness statement recognising Mladic's handwriting in the diaries; (3) a witness statement pertaining to the chain of custody of the Mladic Diaries; and (4) documents corroborating certain facts reported in the diaries."[508] Unlike the Reasons for the Judgement under appeal, the Appeal Chamber considered that it was not enough to admit a rebuttable presumption of authenticity that was not justified by any objective criteria, but established an analytical process based on a specific set of indicia. The Chamber's finding can be criticised even further as, during the trial, the Defence made numerous submissions challenging the authenticity of certain evidence without receiving any reasoned response.[509] Having regard to

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[505] Reasons for Judgement, §46; Case 002/01 Trial Judgement, 07.08.2014, §34.
[506] Case 002/01 Appeal Judgement, 23.11.2016, §375.
[507] Reasons for Judgement, §46.
[508] *Prlić et al.* Appeal Judgement (IRMCT), 29.11.2017, §121.
[509] See above, §217-225, 226.

the legal uncertainty resulting from such a framework for assessing the authenticity of certain evidence, these findings must be invalidated.[510]

Section IX. DOCUMENTARY EVIDENCE AND AUTHENTICITY

I. ANALYTICAL FRAMEWORK FOR ASSESSING DOCUMENTARY EVIDENCE AND CONTEMPORANEOUS DOCUMENTS

A. Accessibility of contemporaneous documents

323. The Chamber recalled that "documents recorded contemporaneously with the charged events are some of the most important sources of evidence".[511] It also specified that "[t]he contemporaneous documents before the Chamber include records of meetings or communications upon which the Chamber did not hear any direct testimony."[512] Lastly, it added that "[t]he vast majority of the contemporaneous documents on the Case File are electronically accessible with the original documents being available at the Documentation Center for Cambodia, the Tuol Sleng Museum, the Cambodian National Archives or the Bophana Center."[513] While contemporaneous documents are electronically available on the Case File as the Chamber highlighted, these are only copies of documents collected by non-judicial bodies, more often, in unknown circumstances. In fact, the Tribunal only has two original documents provided by Stephen HEDER in July 2013.[514] Moreover, as will be seen below, the Chamber erred by stating that the originals were available.[515] This kind of evidence should therefore have been considered with utmost caution and extreme stringency.

B. Assessment of the probative value

324. The Chamber first established a general framework for assessing the probative value noting that it "bases its findings on evidence put before it and subjected to adversarial debate".[516] It then went on to clarify the framework by relying on Internal Rule 87(3).[517] While this framework for

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[510] Reasons for Judgement, §46.
[511] Reasons for Judgement, §57.
[512] Reasons for Judgement, §57.
[513] Reasons for Judgement, §57.
[514] Trial Chamber memorandum entitled "Notice of Original Documents on the Case File", 31.07.2013, **E297** (a copy of a *Revolutionary Youth* magazine and a copy of a *Revolutionary Flag* magazine).
[515] See below, §327-328.
[516] Reasons for Judgement, §61.
[517] Reasons for Judgement, §61 Various factors are relevant to the probative value of evidence including the criteria set out in Internal Rule 87(3), the circumstances surrounding the creation or recording of evidence, whether the document admitted was an original or a copy, legibility, discrepancies with other versions, deficiencies credibly alleged, whether the Parties had the opportunity to challenge the evidence, and other indicia of reliability including

assessing probative value appears satisfactory at first blush, it must be noted that the Chamber contradicted itself in its Reasons by not consistently applying the established principle.[518]

II. EXAMPLES OF ERRORS IN THE ASSESSMENT OF DOCUMENTARY EVIDENCE

A. CPK Statutes

325. With respect to the 1971 and 1976 CPK Statutes, the Chamber noted that "the 1976 Statute on the Case File is a complete, typed version of the CPK founding document and was authenticated by several witnesses, including Duch and NUON Chea".[519] This statement by the Chamber is false. NUON Chea never formally identified the 1976 CPK Statute. During the trial in Case 002/01, he replied to a question from Judge CARTWRIGHT who had specifically asked him to identify the CPK Statutes (D366/7.1.187 renumbered as E3/130). NUON Chea only indicated the usual form of the CPK Statutes and at no time did he state that the document presented was the 1976 CPK Statute. In addition, there was no date on the document such that the Chamber could not in any way say that it was the 1976 Statue.[520] Furthermore, the Chamber compared the 1960, 1971 and 1976 Party Statutes.[521] This comparison necessarily required an assessment of the probative value of these contemporaneous documents, as it had indicated in its Reasons.[522] It must be noted that the Chamber contradicted itself again in not consistently applying established principles. In fact, there is no trace of the 1960 Statute on the Case File such that it is unknown on what the Chamber relied for such a comparison. As the document was not available to the judges or the parties, it cannot be known on what the Chamber could have based its decision. With respect to compliance with evidentiary standards, the Chamber thus preferred to speculate by extrapolating on the basis

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chain of custody and provenance. The Chamber also considers the identification, bias, source and motive – or lack thereof – of the authors and sources of the evidence (emphasis added)

[518] See factual examples above §217-225, 226; see also below §1464, 1819-1828, 1875 .

[519] Reasons for Judgement, §344.

[520] NUON Chea, T. dated 13.12.2011, around 10.13.34: "A. From my recollection, the statute was composed of eight chapters, and there should be 30 articles. And the document before me consists only 29 articles, not 30. So, once again, there should be eight chapters of 30 articles in this statement. Q. Well, I wonder if I can just clarify that the Khmer version that Nuon Chea has in front of his is incomplete, because the English version indeed has eight chapters and 30 articles. Could you go to the end of the document that's currently showing on the court officer's screen, and see if there is another page? A. (Microphone not activated). Q. Mr. Nuon Chea, the microphone was off when you made your last comments. Do you wish to speak now that it's on? A. I could not read the text on the screen. Q. Could the court officer just check Mr. Nuon Chea's copy to make sure that the final page, which appears to have a chapter 8 on it, is part of his document please? A; Yes, there is an article 30 in chapter 8. Q. Thank you".

[521] Reasons for Judgement, §398.

[522] Reasons for Judgement, §61.

of documents that were unavailable to it. The findings based on this evidence that could not be authenticated should be invalidated.[523]

B. SC minutes

326. The Chamber returned to its Case 002/01 Trial Judgement assessment of the authenticity and probative value of 23 sets of SC minutes. It thus recalled that it "previously held that 26 sets of Standing Committee minutes were entitled to a *prima facie* presumption of reliability (including authenticity) due to the way in which DC-Cam evaluated and maintained the documents and/or because they were cited by the Co-Investigating Judges in the Closing Order."[524] However, while the Chamber seemed to have a blind faith in the way in which DC-Cam proceeded, the Defence is not satisfied that it provides sufficient judicial and procedural safeguards. In reality, it is unknown to what "way" the Chamber was referring. It did not say how DC-Cam handled the processing of this evidence such that there could be no effective control. The Chamber thus considered that:

> "[w]hen discussing the admissibility of documents provided to the court by DC-Cam in a digitised format, it ruled that 'the Chamber is satisfied that the processes employed by DC-Cam [for collecting and storing the documents] provides no reasonable apprehension that documents originating from this source could have been subject to tampering, distortion or falsification'. The Chamber notes that the DC-Cam archive contains a number of original, contemporaneous versions of Standing Committee minutes. Where there was any concern as to the accuracy of the copy contained on the Case File or as to the provenance or reliability of particular documents, the originals were available for examination at DC-Cam. Having received no additional evidence or new arguments on this point, the Chamber finds that its previous analysis remains valid and adopts here the same reasoning concerning the documents' reliability."[525]

327. In footnote 9[6]4 at paragraph 348 of the Reasons for Judgement, the Chamber relied on the statement of CHHANG Youk, DC-Cam Director, according to which DC-Cam "responds to all Defence team requests to produce documents".[526] However, it should be recalled that, not only does the Tribunal in fact have only two original documents provided by Stephen HEDER in July 2013,[527] but also that while DC-Cam has documents which it considers as originals, (something

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[523] *Notably*, §344, 398.
[524] Reasons for Judgement, §347.
[525] Reasons for Judgement, §348
[526] Reasons for Judgement, §348; fn 964 "T.; 1 February 2012 (CHHANG Youk), E1/37.1, pp. 108 and 109 (stating that DC-Cam respond to all Defence team requests to produce documents), pp. 118 to 120 (identifying various documents that were examined by Defence teams at DC-Cam) and p.122 to 123 (stating that no party had requested to view original documents).".
[527] Trial Chamber memorandum entitled "Notice of Original Documents on the Case File", 31.07.2013, **E297** (a copy of a *Revolutionary Youth* magazine and a copy of a *Revolutionary Flag* magazine). See also above, §226.

which has never been verified by the Chamber), its Director CHHANG Youk did not wish to disclose on the stand in Case 002/01 the location of the documents, something which did not appear to cause any problem for the Chamber where the President of stated:

> "Mr. Witness, you do not need to respond to the question by the defence counsel, then, as a principle of safety and security of those documents, that is in regards to the original documents and the photocopies documents used in this courtroom, is the core of the debate. It is not necessary to reveal the location of those original documents. And the issues raised by parties for a closed session, we have the view that it is not necessary. You may proceed, but please make sure that it is not necessary to specify the provenance -- secret provenance of the -- of the documents. But the most important thing is the copies of the documents which have been copied from the original."[528]

328. Thus, we do not know where the "originals" are located allegedly for safety and security reasons which were not explained to the parties. These "originals" have never been verified by the Chamber or by any designated experts. It relied only on a feeling of confidence that was quite astonishing in a trial of such magnitude, a feeling which had no legal basis and provided no procedural safeguard. The Chamber preferred to focus its attention on "copies of the documents", neglecting the most important aspect, that is the authentication of originals to know whether the copies could be considered authentic. DC-Cam is not a party to the trial, its representatives have not sworn any oath to the Tribunal and they perform a public service for Cambodia with a biased perspective, which is their right. However, this position does not meet the judicial and procedural safeguards of a criminal trial. It is, in fact, for this reason, *inter alia*, that the interviews conducted by DC-Cam do not enjoy any presumption of reliability.[529] Can it be said that the SC Minutes obtained and stored by DC-Cam have been verified? No. As indicated, there is no indication that the Chamber actually authenticated these documents. Can DC-Cam provide any guarantees of independence? This should have been demonstrated by the Chamber, but this was never done. Under the circumstances, the above-mentioned findings should be invalidated.[530]

Section X. EXPERTS

329. During the trial in Case 002/02, the following experts testified: Elizabeth BECKER, Henri LOCARD, YSA Osman, VOEUN Vuthy, Peg LEVINE, Kasumi NAKAGAWA, Alexander

[528] T. 02.02.2012, **E1/38.1**, p. 11, around 09.28.08 (emphasis added).
[529] Closing Order (Reasons), 10.07.2017, **004/1-D308/3**, §104-108.
[530] Reasons for Judgement, §57, 61, 344, 347-351, 398.

HINTON and Stephen MORRIS. The Chamber stated that it scrutinised carefully the sources relied upon by the experts in making their conclusions.[531]

330. In the Historical Background section of the Reasons for Judgement, the Chamber indicated that the events that took place during the Democratic Kampuchea era must be understood within the context of developments that preceded its foundation.[532] As such, the Chamber specified that, in setting out the foundation and development of the CPK, the Chamber relied predominantly upon the testimony and publications of the Accused and expert witnesses.[533] With respect to weighing these materials, the Chamber stated that it had attributed more weight to testimony heard in court and materials whose authors were either questioned during the trial on the relevant historical topics or were available for examination by the Parties.[534] While the Defence agrees with this analysis, it considers, however, that the Chamber contradicted itself in its Reasons and did not apply the framework for assessing expert evidence, in particular by arbitrarily disregarding relevant evidence when it was exculpatory.[535] Such findings should be invalidated and il must be found that KHIEU Samphan's trial was unfair.

Title IV. CONCLUSION – CUMULATIVE EFFECT OF THE VIOLATIONS

331. According to international and human rights jurisprudence, it is the duty of the Supreme Court to determine whether the cumulative effect of the violations of fundamental rights rendered the trial unfair in and of itself.[536]

332. In this case, as has been demonstrated in this section and throughout this appeal brief, KHIEU

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[531] Reasons for Judgement, §66, see also: "[…] precise indications must be made as to the specific and verifiable sources underpinning the expert's opinion. Where the sources are not fully accessible and verifiable, diminished weight is attributed to expert evidence derived from them.".
[532] Reasons for Judgement, §191-195.
[533] Reasons for Judgement, §192.
[534] Reasons for Judgement, §195.
[535] See factual examples below, notably §1209-1210; Reasons for Judgement, §3531 (LEVINE), §3533 (NAKAGAWA).
[536] *Ntagerura* Appeal Judgement (ICTR), 07.07.2006, §114 ("Even if the Prosecution had succeeded in arguing that the defects in the Indictments were remedied in each individual instance, the Appeals Chamber would still have to consider whether the overall effect of the numerous defects would not have rendered the trial unfair in itself"); *Mirilachvili v. Russie*, Judgement (ECtHR), 11.12.2008, §165-166 ("In *Barberà, Messegué and Jabardo v. Spain* (judgment of 6 December 1988, Series A no. 146, §89) the Court found that the domestic proceedings had been unfair because of the cumulative effect of various procedural defects. Each defect, taken alone, would not have convinced the Court that the proceedings were "unfair", but their coexistence was the factor that led to a finding of a violation of Article 6. In sum, in order to determine whether there has been a breach of Article 6 §§1 and 3, the Court may have to examine separately each limb of the applicant's complaint and then make an overall assessment (see, *mutatis mutandis, Goddi v. Italy*, judgment of 9 April 1984, Series A No. 76, §28).

Samphan's rights to be tried without undue delay, by a tribunal that respects the scope of its jurisdiction /established by law, to be informed of the nature and cause of the charge against him, to legal and procedural certainty, to an independent and impartial tribunal, to the presumption of innocence, to have adequate time and facilities for the preparation of his defence, to an adversarial trial, to be heard, to an effective defence, to transparency of proceedings, to reasoned decisions and a reasoned judgement, equality of arms, not to be tried or punished again for an offence for which he has already been finally convicted or acquitted have been repeatedly violated.

333. The cumulative effect of these violations has rendered KHIEU Samphan's trial unfair in and of itself. His conviction and sentence must be reversed.

Part II. ERRORS CONCERNING THE SCOPE OF THE JUDICIAL INVESTIGATION/THE TRIAL

Title I. OVERSTEPPING THE SCOPE OF THE JUDICIAL INVESTIGATION

Chapter I. THE LAW

334. The Chamber erred in law by considering that the Defence's requests to find that the Chamber had been improperly seised of facts not within the scope of the judicial investigation should have been raised under Internal Rule 89.[537] In the light of the applicable law, the Chamber could not characterise such requests as belated preliminary objections and therefore inadmissible (Section I). It should have addressed the merits of the requests and granted them (Section II and the following chapter).

Section I. ADMISSIBILITY

335. The characterisation of the requests as preliminary objections was not only erroneous (I) but opportunistic (II). By not addressing the merits of the requests, the Chamber committed a miscarriage of justice (III).

I. ERROR IN CHARACTERISING REQUESTS AS PRELIMINARY OBJECTIONS

336. The Chamber considered that challenges to its jurisdiction "to determine facts" set out in addressed by the Indictment are preliminary objections within the meaning of Internal Rule 89, the purpose of which "is to clarify the scope of the trial prior to the start of hearing evidence".[538] However, while Internal Rule 89 stipulates that preliminary objections concerning "jurisdiction" (Internal Rule 89(1)(a)) shall be filed within 30 days after the CO becomes final, it does not apply to jurisdiction with respect to *facts,* but rather to the *legal* (or adjudicative) jurisdiction of the ECCC, within the meaning of the ECCC Law.

337. According to Internal Rule 89(3), the Chamber may issue its decision concerning preliminary objections "either immediately or at the same time as the judgment on the merits". Internal Rule 89(1) should therefore be read together with Internal Rule 98 ("The Judgment"), which deals only with jurisdiction in the legal (adjudicative) sense:

> "3. The Chamber shall examine whether the acts amount to a crime falling within the jurisdiction of the ECCC, and whether the Accused has committed those acts. […]

[537] Reasons for Judgement, §158-165.
[538] Reasons for Judgement, §161-162, 165.

> 6. Where the Chamber considers that the acts set out in the Indictment have not been proved, or that the Accused is not guilty of those acts, he or she shall be acquitted.
>
> 7. Where the Chamber considers that the crimes set out in the Indictment do not fall within the jurisdiction of the ECCC, it shall decide that it does not have jurisdiction in the case."

338. Therefore, objections under Internal Rule 89(1)(a) concerning jurisdiction concern only jurisdiction pursuant to the law and in compliance with the principle of legality. Both the English and Khmer versions of Internal Rule 98 leave no doubt in this regard, because they explicitly refer to the "jurisdiction of the ECCC"[539] in general (much as Internal Rule 74(3)(a) dealing with Grounds for Pre-Trial Appeals).

339. Up until the issuance of the Reasons for Judgement, no one at the ECCC had ever interpreted the jurisdiction referred to in Internal Rules 89(1) and 98 differently. As a matter of fact, the defence teams present at the time that preliminary objections were filed only raised objections on this basis concerning jurisdiction as set out in the ECCC Law.[540] The Prosecution argued that Internal Rule 89 concerns "the jurisdiction of the ECCC, as set out in the ECCC [...] Law, which constitute[s] the relevant point[...] of reference."[541] Referring to Internal Rule 98(3), the Chamber stated that it was its "duty to examine whether the acts committed by the Accused amount to a crime".[542]

340. In the Case 003 judicial investigation, the Pre-Trial Chamber rejected the defence team's claim that it might not have an effective remedy at the trial stage concerning facts of which the CIJs had not

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[539] Rule 98: "3. The Chamber shall examine whether the acts amount to a crime falling within the jurisdiction of the ECCC, and whether the Accused has committed those acts. (...) 7. Where the Chamber considers that the crimes set out in the Indictment do not fall within the jurisdiction of the ECCC, it shall decide that it does not have jurisdiction in the case."; "៣. អង្គជំនុំជម្រះត្រូវពិនិត្យថា តើអំពើនោះជាបទឧក្រិដ្ឋដែលស្ថិតនៅក្នុងយុត្តាធិការរបស់ អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា និងថា តើជនជាប់ចោទបានប្រព្រឹត្តអំពើនោះដែរឬទេ។ ៧. នៅពេលដែលអង្គជំនុំជម្រះ យល់ឃើញថា បទល្មើសដែលកំណត់នៅក្នុងដីកាបញ្ជូនរឿងទៅជំនុំជម្រះមិនស្ថិតក្នុងយុត្តាធិការរបស់អង្គជំនុំ ជម្រះវិសាមញ្ញក្នុង តុលាការកម្ពុជា នោះអង្គជំនុំជម្រះត្រូវសម្រេចថា គ្មានសមត្ថកិច្ចទៅលើករណីនោះទេ។" (emphasis added).

[540] Objections by NUON Chea dated 08.02.2011, **E36** (subsequently replaced by **E42**); Ieng Thirith Defence's Preliminary Objections 14.02.2011, **E44**; Preliminary Objections Concerning Jurisdiction 14.02.2011, **E46**; Ieng Sary's Rule 89 Preliminary Objection (Rule 89(1)(C))14.02.2011 **E48**, §13.

[541] Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability 17.06.2011, **E100**, fn 12 (of §10). See also: Co-Prosecutors' Request for the Trial Chamber to Re-characterize the Facts Establishing the Conduct of Rape as the Crime against Humanity of Rape Rather that the Crime against Humanity of other Inhumane Acts 16.06.2011, **E99**, fn 13 (of §11).

[542] Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Defining of Crimes against Humanity 26.10.2011, **E95/8**, §9 and fn 31.

been seised. In making this determination, the Pre-Trial Chamber did not rely on Internal Rule 89 but on a decision of the Chamber in which the latter had "found it reasonable to consider 'specific and reasoned procedural challenges related to irregularities occurring during the pre-trial phase'".[543] Thus, the Pre-Trial Chamber also does not interpret Internal Rule 89 as providing an avenue of remedy for such challenges.

341. In Case 002, the Pre-Trial Chamber held that challenges alleging defects in the form of the indictment were "clearly non-jurisdictional" in light "of the plain meaning of Internal Rule 74(3)(a) and Chapter II of the ECCC Law, which outlines the personal, temporal and subject matter jurisdiction of the ECCC", before adding:

> "Nothing in the ECCC Law or Internal Rules suggests that alleged defects in the form of the indictment raise matters of jurisdiction. As such, these arguments may be brought before the Trial Chamber to be considered on the merits at trial; however, they do not demonstrate the ECCC's lack of jurisdiction".[544]

342. In conclusion, the Chamber could not therefore interpret Internal Rule 89 as allowing requests to be brought concerning the fact that it was improperly seised with certain facts charged in the CO.

II. EXPEDIENCY IN CHARACTERISING REQUESTS AS PRELIMINARY OBJECTIONS

343. The Defence has to point out that the Chamber attaches the characterisation of preliminary objection selectively.

344. In Case 002/01, it considered the merits of Prosecution requests for "recharacterisation" pursuant to Internal Rule 98(2) and rejected Defence's claims in opposition on the ground that they were in fact preliminary objections the deadline for the filing of which had long since passed.[545] In Case

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[543] 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 28.04.2016, **003-D158/1**, §20 and fn 44 referring to the Decision on Defence Preliminary Objection Regarding Jurisdiction Over the Crime Against Humanity of Deportation, 29.09.2014, **E306/5**, §6-10, referring to the Decision on Nuon Chea's Request for a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews13.03.2012, **E142/3**, §7 (concerning allegations aimed at alterations of written records of interview).

[544] Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order 15.02.2011, **D427/3/15**, §63 (emphasis added). At paragraph 60, the Chamber recalls that to determine what constitutes a jurisdictional challenge, it had earlier "considered that the ECCC "is in a situation comparable to that of the ad hoc tribunals" as opposed to domestic civil law systems", courts where the terms of the statutes are very broad and where the principle of legality has to be respected (referring to its earlier Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20.05.2010, **D97/14/15**, §21 and 23-24). See also: Decision on Ieng Sary's Appeal Against the Closing Order, 11.04.2011, **D427/1/30**, §47 (and §45).

[545] Decision on the applicability of Joint criminal enterprise, **E100/6** (§11-12 and 23-25 concerning admissibility); Decision on Co-Prosecutor's request to exclude armed conflict nexus requirement from the defining of crimes against

002/02, it finally recognised that they were preliminary objections and listed them among those that it had already addressed in Case 002/01.[546]

345. In the Reasons for Judgement, the Chamber characterised as a preliminary objection the request concerning the charge of deportation initially raised by IENG Sary and taken up by the Defence.[547] This characterisation as well as the fact that it was raised "in a timely fashion"[548] enabled the Chamber to justify that it would only rule on the merits of this request and on no other.[549] However, this request was not based on Internal Rule 89. It was part of a request to strike out several defective portions of the CO, the admissibility of which was founded on a Pre-Trial Chamber decision deferring the matter to the Chamber. In addition, it was filed separately from the preliminary objections, after the deadline for their filing had since passed.[550]

346. In Case 002/01, the Chamber had been careful to make the distinction between, on the one hand, preliminary objections and, on the other hand, this request which it had characterised at the time as a motion "requesting that portions of the Closing Order be struck out due to defects".[551] In fact, this had enabled the Chamber to avoid examining the merits of the thorny issue concerning the limitation period applicable to domestic offences. With respect to the admissibility of the request, the Chamber agreed with the Prosecution at the time that generally, "the ECCC legal framework does not envisage" such motions at the trial stage.[552] It did nonetheless examine in view of "the

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humanity, dated 26.10.2011, **E95/8** (§3-5 and 9 concerning admissibility).

[546] Trial Chamber memorandum entitled "Further Information Regarding Remaining Preliminary Objections" 25.04.2014, **E306**, §1: "Prior to the commencement of Case file 002, the parties filed numerous preliminary objections pursuant to Internal Rule 89. At that time, the Chamber ruled on the preliminary objections it considered relevant and necessary to be decided prior to the evidentiary proceedings in Case 002/01 (e.g. E51/14, E116, **E100/6**, E122, **E95/8** and E51/15). " (emphasis added).

[547] Reasons for Judgement, §163-164.

[548] Reasons for Judgement, §164.

[549] Reasons for Judgement, §165.

[550] Ieng Sary's Motion to Strike Portions of the Closing Order Due to Defects 24 [February] 2011, **E58** (although it was dated 24 "January", this request was filed on 24 February, as evidenced, *inter alia*, by the stamp on the cover page of the original English version), §1 (before referring to §63 of the Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, 15.02.2011, **D427/3/15**, IENG Sary's Defence stated: "Cambodian law and the ECCC Internal Rules (" Rules") are silent on the timing and procedure for moving to strike or amend portions of the Closing Order due to procedural defect"). Preliminary objections were supposed to be registered by 14 February 2011 (Memorandum dated 03.02.2011, **E35**, p. 2).

[551] Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes) 22.09.2011, **E122**, §1-2.

[552] Decision on Defence preliminary objections (statute of limitations on domestic crimes), 22.09.2011, **E122**, §16. The Prosecution had raised the fact that the IR did not allow such a request once the CO had become final and had made the distinction between a request and a preliminary objection (Co-Prosecutors' Response to "Ieng Sary's Motion to Strike Portions of the Closing Order Due to Defects" 16.03.2011, **E58/1**, §3-4).

Accused's fundamental fair trial right".[553] This is what it ought to have done with all Defence requests, whether characterised as preliminary objections or not.

III. MISCARRIAGE OF JUSTICE

347. In considering that the Defence had not made use of the procedural avenues which in reality were not available to it instead of recognising that the matters raised were of such importance that it had to address them regardless, the Chamber committed a miscarriage of justice.

348. Before the ad hoc tribunals, preliminary motions may be raised at the start of the trial including in particular motions challenging jurisdiction and motions alleging defects in the form of the indictment.[554]

349. It has been held that in view of the importance in terms of fundamental fairness and due process, preliminary motions must be considered even if filed out of time.[555] Moreover, given the importance of the accused's right to be informed of the charges against him, he should not be foreclosed from raising a defect in the form of the indictment even on appeal for the first time.[556]

350. Thus, the Chamber should have examined all Defence objections, whatever their characterisation and whenever they were raised. Its decision finding them inadmissible should be invalidated. Had the Chamber examined their merits using the proper legal criteria, it would not have convicted KHIEU Samphan on charges of which the Chamber had not been properly seised.

Section II. APPLICABLE LAW FOR DETERMINING THE MERITS OF A CASE

351. When it considered the scope of the CIJ's jurisdiction solely with respect to deportation (dealt with in detail below),[557] the Chamber did not apply the correct legal criteria. First, it noted that the Introductory Submission and the Closing Order were different due to "the degree of detail required

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[553] Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), 22.09.2011, **E122**, §16.
[554] Article 72-A of the RPE of the ICTY and of the RPE of the ICTR, Article 79-4 of the RPE of the IRMCT.
[555] For example: *Prosecution v. Turinabo et al.*, IRMCT-18-116-PT, Decision on Motions for Extension of Time to File Preliminary Motions, 14.12.2018, p. 2: "CONSIDERING, however, that preliminary motions under Rule 79(A) of the Rules concern issues of fundamental fairness and due process and that such motions will be considered even if filed out of time". See also Internal Rule 39(4)(b): "The Co-Investigating Judges or the Chambers may […] on their own motion: […] recognise the validity of any action executed after the expiration of a time limit prescribed in these IRs on such terms, if any, as they see fit".
[556] *Šainović* Appeal Judgement (ICTY), 23.01.2014, §224; *Simić* Appeal Judgement (ICTY), 28.11.2006; *Niyitegeka* Appeal Judgement (ICTR), 09.07.2004. See also CB 002/02, §148 and references therein.
[557] See below, §380-385.

in [them] for the presentation of the facts to be investigated or to be adjudicated".[558] Then, it noted that "[t]o understand the precise scope of the facts of which the Co-Prosecutors intended to seise the Co-Investigating Judges", the Chamber decided to consider the Introductory Submission "in the light of all supporting documents".[559] This reasoning is totally fallacious.

352. The "degree of detail" required in the Introductory Submission and the Closing Order cannot in any way justify using the supporting documents to determine the scope of the case with which the Chamber and the CIJs were seised. In fact, the facts with which the CIJs and the Chamber were seised are those which were legally characterised by their predecessors regardless of the evidence. It is through the legal characterisation of the facts that the Prosecutors and the CIJs provide notice of the facts that they intend to forward to the next organ.

353. After a preliminary investigation (Internal Rule 50), the Prosecutors open a judicial investigation by Introductory Submission if they have reason to believe that crimes within the jurisdiction of the ECCC have been committed (Internal Rule 53(1)). After conducting the investigation impartially, whether the evidence is inculpatory or exculpatory (Internal Rule 55(5)) and limited to the facts set out in an Introductory Submission or in a Supplementary Submission where new facts come to the knowledge of the Co-Investigating Judges (Internal Rules 55(2) and 55(3)), the CIJs issue an indictment if they believe that the acts in question amount to crimes within the jurisdiction of the ECCC and that there is sufficient evidence against the Charged Person or persons of the charges (Internal Rule 67(3)). After the trial, the Chamber may only pass judgment limited to the facts set out in the Indictment (Internal Rule 98(2)). The Chamber examines whether the acts amount to a crime falling within the jurisdiction of the ECCC, and whether the Accused has committed those acts (Internal Rule 98(3)). Any decision of the Chamber must be based only on evidence that has been put before the Chamber and subjected to examination (Internal Rule 87(2)).

354. Both the Introductory Submission and the Closing Order must contain a summary of the facts and their legal characterisation (Internal Rules 53(1) and 67(2)) otherwise the Indictment shall be void for procedural defect and the Introductory Submission void (Internal Rules 53(3) and 67(2)). This is not the case for evidence in support of their allegations.

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[558] Reasons for Judgement, §166.
[559] Reasons for Judgement, §167.

355. While the summary of the facts and their legal characterisation are prescribed formalities, non-compliance with which the Indictment shall be void for procedural defect and the Introductory Submission void, this is because it is only the facts that have been provisionally characterised that determine the scope of the judicial investigation or indictment by providing notice of the charges against the suspect or the accused. This is what the Pre-Trial Chamber clearly understood when, having read Internal Rule 55 together with Internal Rule 53, it stated:

> "The Co Investigating Judges are guided by the legal characterisation proposed by the Co-Prosecutors to define the scope of their investigation".[560]

356. The Pre-Trial Chamber also recalled then that according to Internal Rules 21(1)(d) (and 51(1)), the right to be informed of the charges against a person applies at the investigative stage from the time of arrest:

> "The procedure for judicial investigations at the ECCC set out in the Internal Rules is designed to ensure fairness to the Charged Person in terms of notice of the scope and nature of the acts under investigation for which he may be indicted".[561]

357. The reasoning of the Pre-Trial Chamber is not only consistent with the ECCC Internal Rules, it is also consistent with the human rights jurisprudence and the jurisprudence of the ad hoc tribunals.

358. According to human rights jurisprudence, this right is defined as the right to be informed "of the cause of the accusation, i.e. the material facts alleged against him which are at the basis of the accusation, and of the nature of the accusation, i.e. the legal characterisation of these material facts".[562] The information "should contain the material enabling the accused to prepare his defence, without however necessarily mentioning the evidence on which the charge is based".[563] The ECtHR "considers that in criminal matters the provision of full, detailed information concerning the

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[560] Decision on Appeal Against Closing Order Indicting Kaing Guek Eav *alias* "*Duch*", 05.12.2008, **001-D99/3/42**, §35.

[561] Decision on appeal against Closing Order Pndicting Kaing Guek Eav *alias* "*Duch*", 05.12.2008, **001-D99/3/42**, §138-140.

[562] *X. v. Belgium*, Judgement (European Commission of Human Rights), Decision on the Admissibility of the Application (No.7628/76), 09.05.1977, §1 (references omitted, underlined in the original). See also: *Colozza and Rubinat v. Italy*, Judgement (European Commission of Human Rights), Commission's Report (Applications No. 9024/80 and 9317/81), 05.05.1983, §114.

[563] *X. v. Belgium*, Judgement (European Commission of Human Rights), Decision on the Admissibility of the Application (No.7628/76), 09.05.1977, §1 (references omitted, emphasis added). See also: *Colozza and Rubinat v. Italy*, Judgement (European Commission of Human Rights), Commission's Report (Applications No. 9024/80 and 9317/81), 05.05.1983, §114.

charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair".[564]

359. The same is true before the ad hoc tribunals where, depending on the relevant texts, the Prosecutor prepares an indictment "containing a concise statement of the facts and the crime or crimes [...] charged".[565] The indictment must set out "a concise statement of the facts of the case and of the crime with which the suspect is charged".[566] The Appeals Chamber has consistently held that the Prosecution is required to state the charges and the material facts underpinning those charges with sufficient precision, "but not the evidence by which such facts are to be proven".[567]

360. Thus, according to the ECCC Internal Rules, human rights jurisprudence and the jurisprudence of the International Criminal Tribunals, the information about the charges (and therefore the scope of the judicial investigation or the trial) relates solely to the legally characterised facts, and not to the supporting evidence thereof. This is valid as much for the Introductory Submission as for the Closing Order.

361. This is exactly how the Prosecutors understood it when they drafted the Introductory Submission which made it perfectly clear that they had no intention of seising the CIJs with the facts included in the evidence in support of their allegations.

362. After setting out the facts, the Prosecution claimed to have "reason to believe that NUON Chea, IENG Sary, KHIEU Samphan, IENG Thirith and DUCH committed the specific criminal acts described in paragraphs 37 to 72 of this Introductory Submission, which constitute offences under the ECCC Law".[568] They concluded by deciding to "open an investigation inquiry" against them "into the facts specified in paragraphs 37 to72 in relation to the following proposed charges:

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[564] *Pélissier and Sassi v. France*, Judgement (ECtHR, Grand Chamber), 25.03.1999, §51-52 (references omitted; original quote taken from §52, emphasis added).
[565] Article 18(4) of the Statute of the ICTY, Article 17(4) of the Statute of the ICTR, Article 16(4) of the Statute of the IRMCT (emphasis added, noting the parallel with the "summary' nature of the presentation of the facts in the ISCP of Internal Rule 53(1)(a)).
[566] Article 47(C) of the RPE of the ICTY and of the RPE of the ICTR, Article 48(C) of the RPE of the IRMCT. See also Regulation 52 of the Court Regulations of the ICC stating that the document containing the charges shall include: "b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court; c) A legal characterisation of the facts to accord both with the crimes [...] and the precise form of participation [...]".
[567] *Kanyarukiga* Appeal Judgement (ICTR), 08.05.2012, §73; *Sainović* Appeal Judgement (ICTY), 23.01.2014, §213; *Kupreškić* Appeal Judgement (ICTY), 23.10.2001, §88.
[568] ISCP dated 18.07.2007, **D3**, §73 (emphasis added) and §114.

(…)".[569] For each proposed charge, they created a link with the facts in question by specifying that "[t]he bracketed numbers following each crime type indicate the paragraphs in the Introductory Submission that provide the core basis for that allegation".[570]

363. It was only after that that the Prosecutors submitted the criminal case file and the supporting materials cited in support of the Introductory Submission as "material of evidentiary value".[571] They provided them solely to justify that they had "well founded reasons to believe" that the suspects had committed "the crime or crimes specified [t]herein", with these documents "support[ing] the likelihood that the suspects named in this Introductory Submission will be convicted of the crimes specified herein and punished according to ECCC law".[572]

364. Accordingly, in the light of the applicable law and the Introductory Submission, the Chamber could not consider that the CIJs had been seised with all the facts mentioned in the supporting evidence that was attached.

365. Such reasoning negates the rationale of Internal Rule 53 which stipulates that the absence of a summary of the facts and the type of offence(s) alleged in the Introductory Submission shall render the submission void. Following the logic of the Chamber, the Prosecutors would only have to forward to the CIJs the evidence which they had collected during the preliminary investigation. This makes even less sense in light of the nature and scope of the cases brought before the ECCC where the evidence consists of thousands of pages to be examined.[573]

366. In conclusion, determining the scope of the indictment and thus of the charges against KHIEU Samphan may and can only be guided by the legal characterisation given to the facts charged by the Prosecutors. This is found in paragraph 122 of the Introductory Submission where the

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[569] ISCP dated 18.07.2007, **D3**, §122.
[570] ISCP dated 18.07.2007, **D3**, §122 and fn 571 (emphasis added). In the English original: "The bracketed numbers following each crime type indicate the paragraphs in the Introductory Submission that provide the core basis for that allegation. " (emphasis added).
[571] ISCP dated 18.07.2007, **D3**, §122 (in the original English "material of evidentiary value") and fn 572.
[572] ISCP dated 18.07.2007, **D3**, §118-a. In the original English: "The Introductory Submission provides well founded reasons to believe that these suspects have committed the crime or crimes specified herein. The evidence collected during the Co-Prosecutors' preliminary investigation, including witness, expert and documentary evidence supports the likelihood that the suspects named in this Introductory Submission will be convicted of the crimes specified herein and punished according to ECCC law."
[573] The Defence notes that in fn 365 (of §167) of the Reasons for Judgement, the Trial Chamber mentioned two decisions of the Criminal Division of the French Court of Cassation. These decisions are in no way relevant since there is no provision in the French CPC similar to Internal Rule 53 and the exhibits attached to French introductory submissions are not of the same nature, nor of the scope, as the evidence provided in support of introductory submissions before the ECCC.

Prosecutors clearly established the link between the facts and the proposed characterisation by specifying for each alleged crime the relevant paragraphs from paragraphs 37 to 72 in their summary of the facts.

Chapter II. ERRORS AND IMPACT BY CRIME SITE

Section I. TRAM KAK

I. THE GEOGRAPHIC SCOPE OF THE CHARGES IS LIMITED TO THE EIGHT COMMUNES IN TK DISTRICT

367. The Chamber erred in law by holding that the facts charged in the Closing Order and forwarded for trial with regard to Tram Kak district concerned all the cooperatives in the whole of Tram Kak district, when the CO was read in a holistic way.[574] It ought to have taken into account the violation of the factual jurisdiction of the CIJs (A) and noted that it could not convict beyond the scope therein defined (B).

A. Violation of the factual jurisdiction by the CIJs

368. The Chamber erred in law by including in the trial TK district communes other than those listed in the Introductory Submission. Only paragraph 302 in the CO correctly reflects the scope of the judicial investigation which was limited to the eight subdistricts (communes) listed at paragraph 43 of the Introductory Submission. Thus, 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 were included within the scope of the judicial investigation. The semantic shift from "communes" in the Introductory Submission to "sub-districts" in the CO is of no import to the scope of the judicial investigation which remained limited to the eight "communes" or "subdistricts" identified in the Introductory Submission. But, at paragraph 303 of the CO, the CIJs made findings concerning all TK subdistricts, in violation of the scope of their factual jurisdiction. As guarantor of fair trial rights, the Chamber should not have persisted with this violation.

[574] Reasons for Judgement, §161, 809.

B. Conviction for facts that occurred in communes outside the geographic scope of the judicial investigation

369. This misapplication of the law resulted in illegal ultra vires widening of the scope of the trial. It had a direct impact on the Chamber's findings based on evidence pertaining to facts that occurred outside the eight communes. These facts were not charges that KHIEU Samphan had to answer to. The Chamber was not properly seised with facts that occurred in communes other than those listed at paragraph 302 of the CO. Any evidence adduced in this regard is beyond the scope of the trial. Any conviction for deaths that occurred outside the eight communes must be reversed (1). Much like any conviction for persecutions on political grounds against ex-KR (2) and NP (3).

1. Conviction for deaths resulting from living conditions outside the eight communes

370. The Chamber erred by finding that deaths had resulted from severe food shortages based on the out-of-scope evidence mentioned in paragraphs 1011-1016.[575] This finding must be reversed. Indeed, at paragraphs 1011-1012, EK Hoeun's evidence pertaining to food shortages between 1975 and 1976 in Leay Bour commune is out-of-scope and could therefore not be used as a basis of the *actus reus* of the CAH of murder.[576] The same is true of the evidence of civil party CHOU Koemlan pertaining to the death of her child which occurred in the same commune.[577] The inculpatory material set out at paragraph 1013 all falls outside the geographic scope of the trial[578] and could not serve as the basis to find that the *actus reus* of murder had been established.

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[575] Reasons for Judgement, §1142, fn 3880 referring to §1011-1016.
[576] Reasons for Judgement, §1011. T. dated 07.05.2015, **E1/298.1**, between 15.49.13 and 15.53.12.
[577] Reasons for Judgement, §1011, fn 3218. T. dated 26.01.2015, **E1/252.1**, between 11.27.03 and 11.29.04.
[578] Reasons for Judgement, §1013. Out-of-scope: the report established by Khporp Trabaek commune dated 8 May 1977 (fn 3225 Tram Kak District Record, 08.05.1977, **E3/4108**, ERN EN 00726245); the report dated 3 June 1977 from the Southwest Zone dealing very broadly with the Takéo area (fn 3226. Report of Southwest Zone to respected and beloved Angkar, 03.06.1977, **E3/853**, ERN EN 00185246); NEANG Ouch's testimony pertaining to the food shortage in Leay Bour commune where he lived from June 1977 (fn 3229. T., 10.03.2015, **E1/274.1**, between 09.32.45 and 09.37.06, around 10.03.47); documentary proof of complaints concerning the food situation in Angk Ta Saom, Leay Bour and Khporp Trabaek (fn 3228. Tram Kak District Records, 09.01.197 , **E3/2044**, ERN EN 00290261; Tram Kak District Records, 07.04.1977, **E3/8422**, ERN EN 00369462; Tram Kak District Records, 08.05.1877, **E3/4108**, ERN EN 00726245; Tram Kak District Records, 01.08.1977, **E3/4111**, ERN EN 00322153; Tram Kak District Records, 31.08.1977, **E3/8424**, ERN EN 00538729; Tram Kak District Records, 10.03.1978, **E3/2784**, ERN EN 00143484; Tram Kak District Records, 16.06.1978, **E3/2448**, ERN FEN 00322157-00322158). See also Reasons for Judgement, §1015. The testimony of Civil Party M Vannak pertains also to Leay Bour commune and was out-of-scope, T. 3 April 2015, **E1/288.1**, around 15.14.10.

371. The Chamber also erred in law by finding that various people had died from malnutrition, overwork and sickness based on evidence that fell outside the scope of the trial.[579] The evidence on which this was based refers to locations outside the geographic scope of the trial.[580] Its finding that civil party applications falling outside the scope of the trial recorded accounts of persons dying in Leay Bour provided "substantial corroboration to the [...] evidence that numerous deaths resulted in Tram Kak district", was therefore equally erroneous.[581] Thus, the Chamber erred in fact and in law by finding that the *actus reus* of the CAH of murder had been established based on these facts falling outside the geographic scope of the trial.[582] All findings in this regard, including KHIEU Samphan's conviction for the CAH of murder in the form of *dolus eventualis* must be reversed.[583]

2. Conviction for persecution on political grounds against ex-KR outside the eight communes

372. The Chamber erred in law by finding that from April and May 1977 the ex-KR were targeted for arrest and killed based on evidence falling outside the scope of the trial set out at paragraphs 1062, 1063, 1080, 1081 and 2813.[584] At paragraph 1062, the CIJs relied on the evidence of civil party SENG Soeun concerning a short political session which took place in his battalion at an unspecified date, but after 17 April 1975. A closer scrutiny of his evidence reveals that this session did not "take place at any village or commune" but in the Civil Party's battalion located "in Kaoh Andaet district [...] close to the Khmer-"Yuon" border". [585] At paragraph 1063, the Chamber relied on the evidence of KHOEM Boeun and on a report dated 30 April 1977 from Cheang Tong commune for corroboration, i.e. two items from areas outside the geographic scope of the trial.[586] At paragraph

[579] Reasons for Judgement, §1142, fn 3882 referring to §1016, 1020, 1037.
[580] Reasons for Judgement, §1020, EK Hoeun's testimony according to which workers died in the worksites situated in TK district is out-of-scope (fn 3281). In truth, the passage referred to is limited to the deaths which occurred at the Khporp Trabaek worksite, a commune that was not within the scope of the trial (EK Hoeun: T., 07.05.2015, **E1/298.1**, around 15.56.26).
[581] Reasons for Judgement, §1020, fn 3282. The death of CHOU Koemlan's child, already dealt with in §in §1015 in Leay Bour commune, is also out-of-scope, Reasons for Judgement, §1037, fn 3370 "T., 27 January 2015 (CHOU Koemlan), E1/253.1, pp. 32-34 (describing how at first her daughter got measles, then lost her hair and was admitted to hospital where there was no medicine; but the original cause of death was having no food to eat and she had to scavenge for food in the dirt)".
[582] Reasons for Judgement, §1144.
[583] Reasons for Judgement, §1144-1145, §4318-4328, 4400, 4402.
[584] Reasons for Judgement, §1175, fn 3994 referring to §1062, 1063, 1080, 1081 and section 12.3: The KTC Security Centre, §2813.
[585] T., 30.08.2016, **E1/466.1**, around 10.59.36.
[586] Reasons for Judgement, §1063, fn 3525 -3526. T., 04.05.2015, **E1/296.1**, around 11.23.46; Tram Kak District Record, 30.04.1977, **E3/2048**, ERN EN 01454945.

1080, it also relied on documentary evidence falling outside of the geographic scope of the trial to say that the ex-KR were particularly susceptible to arrest for thoughts, speech or conduct considered contrary to the revolution, and that there was a killing operation underway from April 1977 when "massive numbers" of ex-KR together with their families were being killed in TK district.[587] Thus, the Chamber erred in fact and in law by finding that the *actus reus* of the CAH of persecution on political grounds against ex-KR had been established based on these facts falling outside the geographic scope of the trial.[588]

373. The Chamber erred in fact and in law by adjudicating all of these facts, and this invalidates its findings concerning the *actus reus* of the CAH of persecution on political grounds.[589] Similarly, it could not incorporate them into a policy characterised as "criminal in character".[590] All findings in this regard, including KHIEU Samphan's conviction for persecution on political grounds against ex-KR in TK through a joint criminal enterprise must be reversed.[591]

3. Conviction for persecution on political grounds against NP outside the eight communes

374. **Difference in food received.** The Chamber erred in fact and in law by finding that NP received less food than Base People based on paragraph 1016 which includes evidence falling outside the geographic scope of the trial.[592]

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[587] Reasons for Judgement, §1080. Out-of-scope: report dated 11 April from Popel commune (fn 3589, Tram Kak District Record, 11 April [1977], **E3/4629**, ERN EN 00322133); report dated 6 May 1977 sent by Khporp Trabael commune (fn 3592, Tram Kak District Record, 06.05.1977, **E3/2050**, ERN EN 00276576-00276577; report dated 8 May 1977 from Popel commune (fn 3589, Tram Kak District Record, 08.05.1977, **E3/2048**, EN 01454944). Reasons for Judgement, §1081. Also out-of-scope are the listed reports from Angk Ta Saom commune (fn 3594: Tram Kak District Record, 24.07.1977, **E3/2440**; fn 3598: Tram Kak District Record, 01.03.1978, **E3/2784**; Tram Kak District Record, 01.03.1978, **E3/2785**, 1 March 1978).

[588] Reasons for Judgement, §1175.

[589] Reasons for Judgement, §1144-1145.

[590] Reasons for Judgement, §4058, 4060-4061.

[591] Reasons for Judgement, §4306.

[592] Reasons for Judgement, §1177, fn 4003 referring to §1016. Out-of-scope: the account of Civil Party CHOU Koemlan (Leay Bour commune) falls outside the geographic scope of the case (fn 3258: T. dated 26.01.2015, **E1/252.1**, around 11.53.11); the account of PECH Chim according to which he had seen Base People receive more rice than the NP, because there is no indication concerning TK district where he saw this (fn 3251: T. 23 April 2015, **E1/291.1**, around 13.59.32)

375. **Varying working conditions.** The Chamber erred in fact and in law by finding that NP endured worse working conditions than Base People based on several of the items of evidence falling outside the geographic scope of the trial.[593]

376. **"Miserable" treatment of NP.** The Chamber erred in fact and in law by finding that NP were exposed to miserable treatment based on the evidence of RY Pov.[594] He mentioned several places where he had lived during DK following his return from Vietnam in 1976: in Tnaot Chrum village, Khpob Trabaek commune, Tram Kak district, before being sent to a mobile unit in Kbal Pou "in the south of Takeo province".[595] Despite the difficulties in knowing at what moment he moved, he also said that he was transferred "from Stueng village, Khpob Trabaek commune, to Samraong commune" adding quickly that he was required to work "ploughing the field and digging canals at Pong Tuek village".[596] Finally, he states in his written record of interview that he was sent to "Prey Ta Khab Village, Samraong Commune".[597] In the absence of any indication by RY Pov in his testimony on the stand, it is impossible to say where, according to him, this treatment took place and, in case of doubt, it was impermissible for the Chamber to find that it was in a commune within the geographic scope of the trial.

377. **Alleged surveillance and arrests.** The last factual finding supporting discriminatory treatment concerns both NP and the ex-KR, but also other persons considered as threats to the CPK and who, according to the Chamber, were "susceptible to arrest for thoughts, speech or conduct".[598] However, the evidence pertaining to the surveillance of people falls outside the geographic scope of the trial.[599] The evidence in paragraph 1080 based on which the Chamber found that NP were

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[593] Reasons for Judgement, §1018. Out-of-scope: TAK San's testimony which describes his working conditions at the Kouk Kruos Dam which is not situated within the geographic scope of the trial (fn 3264: T. 01.04.2015, **E1/286.1**); the testimony of EAM Yem concerning the Tuol Kros Dam. (fn 3267: T. 01.04.2015, **E1/286.1).** Reasons for Judgement, §1019. Out-of-scope: EM Phoeung's testimony as it does not indicate where he was working (fn 3270: T. 16.02.2015, **E1/263.1**, pp. 68-69). MEAS Sokha's testimony (Cheang Tong commune) falls outside the geographic scope of the trial and therefore cannot serve as evidence (fn 3273: T. 22.01.2015, **E1/250.1**, pp. 29-30).
[594] Reasons for Judgement, §1177, fn 4007 referring to §1027.
[595] T. 12.02.2015, **E1/262.1**, between 10.40.14-10.44.18.
[596] T. 12.02.2015, **E1/262.1**, between 11.20.58-11.23.02.
[597] Written Record of Interview of Civil Party Applicant of RY Pov, 30.10.2013, **E3/9604**, Q/A 24.
[598] Reasons for Judgement, §1177, fn 4010 referring to §1055 and 1080.
[599] Out-of-scope: EK Hoeun's testimonies, Reasons for Judgement, §1055 fn 3470; THANN Thim's testimony (Trapeang Trav village, in Trapeang Thum Khang Cheung commune); Reasons for Judgement, §1066, (fn 3473: T. 21.04.2015 April 2015, **E1/289.1**, between 10.32.48 and 10.37.53); VONG Sarun's testimony (Chan Taen village), Reasons for Judgement §1055 (fn 3476: T. 18.05.2015, **E1/300.1**, pp. 62-63). The same goes for the reports from Cheang Tong commune, Reasons for Judgement, §1055, fn 3471. Tram Kak District Record, May **E3/8428**, ERN EN

particularly susceptible to arrest equally falls outside the geographic scope of the trial.[600] Accordingly, the finding of the Chamber incorporating these facts into a policy characterised as "criminal in character" must be reversed.[601] KHIEU Samphan's conviction for the CAH of persecution on political grounds against NP in TK through a joint criminal enterprise on the basis of these facts must be reversed.[602]

II. ABSENCE OF *SAISINE* FOR DEATHS OTHER THAN THOSE CAUSED BY STARVATION

378. The Chamber erred in law by finding that its material *saisine* extended to deaths other than those caused by starvation.[603] It ought to have taken into account the breach of the *saisine in rem* of the CIJ and note that it could neither judge nor sentence beyond the scope therein.

379. Concerning the charge of CAH by extermination, the Chamber erred in law by finding that it was charged with carrying out legal proceedings going beyond starvation-related deaths to include facts relating to "bad housing and hygiene conditions, and the insufficient access to medical treatment – with the additional factor that victims were obliged to carry out extremely hard labour".[604] It was wrong in law in interpreting paragraph 1387 of the CO[605] as providing a valid foundation for referring to the Chamber the ability to undertake legal proceedings against people under the charge of extermination for facts relating to living conditions in general, in addition to their being deprived of sufficient food.[606] The Chamber erred in law in basing itself on a conclusion of the CIJ *ultra vires* taken in breach of their *saisine in rem*.[607] In reality, the Prosecutors never referred to the CIJ deaths other than those caused by starvation.[608] In the absence of any supplementary submission, this conclusion of the CIJ breached the scope of their *saisine* which was limited to deaths caused

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00322165; and reports from Popel commune and Saen commune, Reasons for Judgement, §1055, fn 3480 and 3481.
[600] See above in paragraph 372 the fn concerning Popel commune. In addition, the report dated 3 May 1977 from Popel commune concerns facts falling outside the scope of the trial. Tram Kak District Record, 03.05.1977, **E3/2048**, ERN EN 01454944.
[601] Reasons for Judgement, §3924-3925, 3928.
[602] Reasons for Judgement, §4306.
[603] Reasons for Judgement, §808, 809.
[604] Reasons for Judgement, §811.
[605] CO §1387: "Moreover, as set out in the sections characterizing "Other Inhumane Acts" and persecution, many people died as a result of the conditions imposed during phases 1 and 2 of the population movement and also in security centres; such conditions included deprival of food, accommodation, medical care and hygiene. This was also the case at worksites, with the added factor of hard labour" (emphasis added).
[606] Reasons for Judgement, §811.
[607] Reasons for Judgement, §811, 813.
[608] ISCP, §43: "Thousands of people starved to death in these cooperatives […]".

by starvation. The Chamber having been incorrectly seised for these facts should have understood the situation and recognised that KHIEU Samphan had nothing to answer on this subject. It therefore was wrong in law in judging facts for which it had not been correctly seised. This inappropriate application of the law by the Chamber led to an illegal widening of the scope of the trial. This error has a direct effect on the conclusions based on pieces of evidence pertaining to facts going beyond those related to death from starvation that did not constitute charges to which the Appellant was required to respond. Its conclusion that "various people died from malnutrition, overwork and diseases, including at a later date, and that persons belonging to the new people were particularly affected" should be annulled.[609] It is the same for the conclusion according to which "deaths occurred particularly in the district hospital as a result of rudimentary medical treatment, malnutrition and overwork".[610] Thus, based on these conclusions, the Chamber committed en error in law by recharacterising as murder these facts concerning deaths caused by bad living and working conditions.[611] On the contrary, the Supreme Court should say that the Chamber was incompetent to judge these facts and should invalidate the conclusions according to which these facts constitute a *actus reus* for the crime of murder.[612] The sentencing of KHIEU Samphan for the CAH of murder with *dolus eventualis* being deaths outside the definition of death by starvation should equally be reversed.[613]

III. DEPORTATION

380. The Chamber erred in law in considering that "the allegations included in the introductory submission enabled the Accused to know that the co-investigating judges were going to investigate the acts committed as part of the policy of the CPK which consisted in submitting the Vietnamese to discriminatory measures, including forced displacement or in forced deportation from Cambodia".[614] In supporting this conclusion, the Chamber misunderstood the rules of criminal investigation by adding new facts to the submission. The Chamber only partially analysed the submission by citing only a part of paragraph 12 according to which criminal acts involving the

[609] Reasons for Judgement, §1142, 1016, 1020 and 1037.
[610] Reasons for Judgement, §1142, 1047.
[611] Reasons for Judgement, §1144-1145.
[612] Reasons for Judgement, §1144-1145.
[613] Reasons for Judgement, §4318-4328, §4400, 4402.
[614] Reasons for Judgement, §168.

Vietnamese consisted in a policy of discrimination and assassination.[615] This truncated reading leaves the impression that the submission was imprecise and required analysis in the light of other documents. However, the rest of paragraph 12 explained the facts meant by the Prosecution, meaning a policy consisting in eliminating people considered as being Vietnamese. No deportation fact was targeted. [616]

381. In the continuation of its analysis of the submission, the Chamber indicated that the Prosecution relied on two documents to "support the factual allegations to investigate": the 'Livre noir' and a book by Ben KIERNAN.[617] In order to understand which facts these two documents would be "supporting", the Chamber, for the 'livre noir', referred to footnotes 37 and 291 of the submission.[618] However, for the book by Ben KIERNAN, the Chamber made no reference to the submission, such that one cannot know what facts this document would be "supporting". For the 'livre noir', footnotes 37 and 291 were for supporting the following two assertions: (i) " [T]he relations between the CPK and Vietnam continuing to deteriorate, Vietnam is more and more considered as the enemy",[619] and (ii) "The soldiers of the KRA were encouraged to hate the Vietnamese and were charged with killing any Vietnamese person whom they met. ".[620] Once again, no fact of deportation of Vietnamese people was suggested, and with good reason, as no fact of deportation of Vietnamese people appeared in the introductory submission.

382. But the Chamber did not stop there. It went as far as searching the 230 pages of explanatory appendices and the 138 pages of appendix C, attached to the submission in order to find a reference to an extract of the 'Livre noir' referring to an agreement that the Vietnamese leave Cambodia after the liberation[621] and to the book by Ben KIERNAN "susceptible to prove" the "forced displacement of native Vietnamese".[622] Although the Chamber asserted that the submission should be analysed

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[615] Reasons for Judgement, §168.
[616] ISCP dated 18.07.2007, **D3**, §12-f: "Initially, the CPK adopted a policy of purging those who were considered Vietnamese or who had some association with Vietnam. However, the CPK's relationship with Vietnam steadily deteriorated, and Vietnam was increasingly viewed as the enemy. This coincided with a belief that Vietnamese spies were seeking to overthrow the CPK. By mid to late 1977, the policy evolved into one of eliminating all those with any connections to Vietnam" (emphasis added).
[617] Reasons for Judgement, §168.
[618] Reasons for Judgement, §168, fn 366.
[619] ISCP dated 18.07.2007, **D3**, §12-f.
[620] ISCP dated 18.07.2007, **D3**, §70
[621] Explanatory Index 104 of the ISCP dated 18.07.2007, **D3/I**, ERN EN 00146222.
[622] Appendix C of the ISCP dated 18.07.2007, **D3/ IV**, ERN EN 00141532-00141533.

in "the light of all the supporting documents specifically cited in support",[623] this was not the case for the documents it cited. In reality it concerned new facts that appeared only in an appendix. However, "the co-investigating judges are required to investigate only those facts mentioned in the introductory submission or in a supplementary submission".[624] In addition, "if, during the investigation, new facts are brought to the attention of the co-investigating judges, they are required to inform the joint prosecutors [...]. In the absence of a supplementary submission, the investigating judge does not have the right to investigate any new facts". [625] Thus, in considering that the CIJ could investigate, without violating their *saisine*, facts pertaining to the deportation of Vietnamese people based on pieces of evidence appearing in an appendix but not expressly mentioned in the submission, the Chamber misunderstood the rules of criminal investigation.

383. Besides, applying the Chamber's reasoning renders inapplicable the essential procedural usefulness of a submission which has to contain "a summary description of the facts" as well as "the legal characterisation of those facts".[626] The Chamber's logic amounts to concluding that all facts cited in the pieces of evidence appended to the submission are part of the items to investigate. But it would be absurd to consider that all the facts related in Ben KIERNAN's book or in the 'Livre noir' are susceptible to being investigated. In such conditions, and in a case file of such importance, it would be impossible for the Appellant to know which facts the CIJ were authorised to investigate, making a mockery of any guarantee of legal security.

384. Finally, the Chamber is wrong in law in taking advantage of the fact that the submission "mentions expressly 'deportation' among the crimes to investigate".[627] As already stated, the CIJ are authorised to investigate "only those facts targeted by the introductory submission or a supplementary submission".[628] Thus, the Chamber has violated the rules of criminal investigation by considering that the CIJ may investigate a "crime".[629] Besides, this legal characterisation of the

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[623] Reasons for Judgement, §166.
[624] IR, Rule 55-2.
[625] IR, Rule 55-3.
[626] IR, Rules 53-1-a and 53-1-b.
[627] Reasons for Judgement, §168.
[628] IR, Rule 55-2 (emphasis added).
[629] Cass. Crim., 20.03.1972, No. 71-93622 ("The investigating judge is seised for facts denounced by the Introductory Submission, independently of the provisional characterisation given to the said facts by the public Ministry."); Cass. Crim., 11.02.1992, No. 91-86066 (the investigating judge "is not tied by the provisional characterisation given to the facts by the State Prosecutor").

submission does not in any way target the facts pertaining to the Vietnamese but rather the three phases of forced displacement for the entire population, facts that moreover never relate to any transfer to Vietnam.[630]

385. In the light of these elements, the Chamber illegally extended the scope of the introductory submission to include new facts. No fact of deportation was mentioned either in the introductory submission or in the supplementary submission. All legal conclusions drawn pertaining to these facts should be set aside and KHIEU Samphan acquitted of the charges of the CAH of deportation and persecution on racial grounds in TK and in Prey Veng for acts of deportation.[631]

Section II. THE TRAPEANG THMA DAM

386. **OIA enforced disappearances:** The Chamber claimed to have been correctly seised of the events of enforced disappearances at the TTD site[632] although the Defence had contested this charge because it relied on a breach of the *saisine* by the CIJ.[633] In effect, the latter were seised of the TTD site only by paragraph 46 of the ISCP. According to the terms in the latter, there was no mention of the question of workers disappearing. Therefore, this charge against KHIEU Samphan was made illegally.[634]

387. The Chamber rejected the Defence's argument without giving any reason. It contented itself to say that the grievance mentioned had not been raised as a preliminary objection and that therefore it was late according to the terms of Article 89.[635] As demonstrated above, this conclusion constitutes an error in law.[636] The Chamber therefore took the CO's illegal conclusions as their basis for considering that the crime of OIA having taken the form of enforced disappearances was effected

[630] Paragraphs 37 to §42 targeted by the legal characterisation of deportation pertaining to the facts of forcible transfer of the entire population of Phnom Penh and other cities to the countryside after the liberation, the facts of forcible transfer of thousands from the centre and south-western parts of the country to the NZ and NEZ (including the members of the Cham minority), and the facts of forcible transfer of tens of thousands of people from the EZ to the CZ, WZ and NWZ.
[631] Reasons for Judgement, §168, 1110-1125, 1156-1159, 3429-3439, 3502-3509, 3512, 3513, 4004, 4012, 4237, 4292 and 4306.
[632] Reasons for Judgement, §1206.
[633] CO, 336, 346, 348, 1470; see also CB 002/02, §1018-1021.
[634] IR, §46.
[635] Reasons for Judgement, §1206.
[636] See above, §336-350.

at the TTD site.[637] These conclusions based on an illegal *saisine* should be annulled and KHIEU Samphan should be acquitted of the facts of which he is accused.[638]

Section III. THE 1 JANUARY DAM

I. ABSENCE OF *SAISINE* FOR THE EXECUTIONS CARRIED OUT AT THE BARAY CHOAN DEK PAGODA

388. The Chamber committed an error in law by declaring that it had been correctly seised of the acts of execution carried out at the Baray Choan Dek pagoda and that it was competent to judge those acts.[639] It ought to have taken into account the breach of the *saisine in rem* of the CIJ and note that it could neither judge nor sentence beyond the scope therein. The conclusions of the CIJ on which the Chamber based its assertion to be competent to treat the executions carried out at the Baray Choan Dek pagoda violated the *saisine* of the CIJ.[640] In consequence, the Appellant was not required to respond to these facts since the Chamber was incorrectly seised. The CIJ concluded in paragraph 1373 of the CO that the crime of murder was attested on several sites, including that of the 1JD Worksite. Only the deaths of those persons executed were qualified as murders on the 1JD Worksite.[641] It is stated in paragraph 1377 pertaining to the 1JD Worksite that the individuals were "arrested and taken to a place nearby to be killed". These executions are described in paragraphs 366 and § 367 of the CO. In paragraph 366, it is stated that loud-speakers were installed to cover the screams during the executions whereas according to paragraph 367: "Certain witnesses were present during the arrests, others had heard about people being executed [...]. One witness had seen a person being executed. The nearby Baray Choan Dek Pagoda was known as the place to which people were taken for execution, but executions were also carried out elsewhere".

389. But all these conclusions were arrived at by the CIJ outside their scope of jurisdiction. In paragraph 45 of the ISCP, the only paragraph concerning the *saisine* pertaining to 1JD Worksite, there is never any reference to the existence of execution sites outside the construction site. On the contrary, it simply evokes the fact of deaths "on this site" and not "people taken away" and "killed nearby". The Baray Choan Dek Pagoda is mentioned only in paragraph 45 of the ISCP to note the presence of mass graves where the bodies of those killed were buried. There is never any mention of a place

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[637] Reasons for Judgement, §1122 -1429.
[638] Reasons for Judgement, §1424 -1429.
[639] Reasons for Judgement, §165, 1434, 1665. See also T. 25.05.2015, **E1/304.1**, 15.23.57, 15.37.17; T. 30.07.2015, **E1/326.1**, 13.20.36.
[640] Reasons for Judgement, §1134, 1665.
[641] See above, §1001-1003; CO, §1377.

"known as" an execution site as described by the illegal assertions of the CIJ. The comparison with the facts described in the ISCP for S-21 demonstrates the absence of any *saisine* of the CIJ for this site. On the other hand, according to the terms of paragraph 54 of the ISCP, it is clearly indicated that the site of Choeung Ek served as an execution site for those detained at S-21. This is not the case for the pagoda where only the presence of mass graves is alleged in the ISCP. In the absence of a supplementary submission, KHIEU Samphan is not required to answer for deaths carried out at the pagoda.

390. The Chamber therefore erred in law by judging him for these facts and by finding that the Baray Choan Dek pagoda was a detention centre and an execution site[642] and that therefore the CAH of murder was established.[643] All these conclusions should be annulled. The same is true of the finding incorporating these facts into a policy qualified as "criminal", [644] and for the sentencing of the Appellant for the CAH of murder.[645]

II. ABSENCE OF *SAISINE* FOR ACCIDENTAL DEATHS

391. The Chamber committed an error in law by declaring that it had been correctly seised of the facts of accidental deaths at the 1JD Worksite and that it was competent to judge those facts.[646] It ought to have taken into account the breach of the *saisine in rem* of the CIJ and note that it could neither judge nor sentence beyond the scope therein. In paragraph 45 of the ISCP, there is mention of "20,000 people [...] died as a direct result of starvation, forced working conditions and executions". Consequently, in the absence of a supplementary submission, the CIJ were not authorised to investigate accidental deaths on the site. The conclusion of the CO in paragraph 363 according to which "others were killed in accidents such as mud-slides or falling rocks" is present in breach of the *saisine* of the CIJ which is limited by the terms in paragraph 45 of the ISCP. The *saisine* of the Chamber for judging these facts was therefore irregular.

392. The Chamber erred in law in judging accidental deaths in the 1JD Worksite for which KHIEU Samphan was incorrectly charged.[647] The conclusion of the Chamber whereby it was established

[642] Reasons for Judgement, §1666, referring to §1567-1580.
[643] Reasons for Judgement, §1666.
[644] Reasons for Judgement, §3920, 3928.
[645] Reasons for Judgement, §4282, 4306.
[646] Reasons for Judgement, §1668.
[647] Reasons for Judgement, §1668.

that several accidents had caused the death of a certain number of workers should be annulled.[648] This conclusion may not serve as a basis for a *actus reus* for the CAH, re-characterised from extermination into murder.[649] Consequently, the sentencing of KHIEU Samphan for a CAH of murder with *dolus eventualis* at the 1JD Worksite based on these facts should be reversed.[650]

III. ABSENCE OF *SAISINE* FOR FACTS PERTAINING TO "DISCRIMINATION" AGAINST NP ON POLITICAL GROUNDS

393. The Chamber committed an error in law by declaring having been correctly seised of the facts pertaining to "discrimination" against NP and that it was competent to judge those facts.[651] It ought to have taken into account the breach of the *saisine in rem* of the CIJ and note that it could neither judge nor sentence beyond the scope therein. In paragraph 1418 of the CO, it is alleged that on the worksites members of these groups were subjected to more difficult living conditions and were arrested *en masse*. This charge of political persecution is founded on paragraph 360 of the CO where it is noted particularly that "workers were treated differently depending on their unit, or because they belonged to the [NP]". The totality of these conclusions by the CIJ are outside the scope of their *saisine.* There is never any mention in paragraph 45 of the ISCP of discriminatory elements or even a possible categorisation of workers. It simply indicated that "tens of thousands of workers in Sectors 41, 42 and 43 were forced to work on the construction of the dam". On the other hand, when the Prosecutors wished to seise the CIJ for discriminations suffered by a particular group, they did so explicitly. For example, on the subject of the Tram Kok cooperatives, it was specified in paragraph 43 of the ISCP that "[ex-KR] were the object of discriminatory measures". Consequently, KHIEU Samphan is not required to answer to facts supporting this charge and the Chamber erred in law when declaring being competent to deal with this.[652]

394. The Chamber erred in law in treating *ultra vires* these "discrimination" facts against NP. The conclusions of the Chamber pertaining to the fact that the treatment of NP at the 1JD Worksite was discriminatory[653] and that consequently the CAH of persecution of NP on political grounds was

[648] Reasons for Judgement, §1671, referring to §1535.
[649] Reasons for Judgement, §1672-1673.
[650] Reasons for Judgement, §3920, 3928, 4282, 4306.
[651] Reasons for Judgement, §161, 1435, 1685.
[652] Reasons for Judgement, §161, 1435, 1685.
[653] Reasons for Judgement, §1688-1689, referring to §1641-1653.

established[654] should be annulled. Consequently, the Chamber was also wrong in law by incorporating these facts qualified as a CAH of persecution on political grounds into a policy which it qualified as "criminal".[655] These conclusions should be annulled as should be the declaration that KHIEU Samphan is guilty of these facts as part of a JCE.[656]

IV. ABSENCE OF *SAISINE* FOR FACTS PERTAINING TO "DISCRIMINATION" ON RELIGIOUS GROUNDS

395. The Chamber committed an error in law by declaring having been correctly seised of the facts pertaining to "discrimination" on the 1DJ site against the Cham on religious grounds and that it was competent to judge those facts.[657] It ought to have taken into account the breach of the *saisine in rem* of the CIJ and note that it could neither judge nor sentence beyond the scope therein. The CIJ concluded in paragraph 1420 of the CO that the crime of persecution on religious grounds was enacted against the Cham at the 1JD Worksite. As for the persecution on political grounds mentioned above, this charge is based on paragraph 360 of the CO, but also in paragraph 366 where it is indicated that "a large number of those who disappeared were [...] Cham". For the same reasons as those developed above pertaining to political persecution, all these conclusions were reached in breach of the *saisine* by the CIJ. Consequently, KHIEU Samphan is not required to answer these charges. The Chamber erred in law by judging facts pertaining to "discrimination" on religious grounds and by finding that the Cham who were working at the 1JD Worksite suffered *de facto* discrimination imposed with the intention to discriminate against them because of their religious or cultural practices.[658] The conclusion according to which the CAH of persecution of the Cham on religious grounds on the 1JD Worksite was established should be annulled.[659] It is the same for the Chamber's conclusion incorporating these facts into a policy qualified as "criminal".[660] Consequently, the sentencing of KHIEU Samphan for the CAH of persecution of the Cham on the 1JD Worksite on religious grounds as part of a JCE for these events should be reversed.[661]

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[654] Reasons for Judgement, §1691-1692.
[655] Reasons for Judgement, §3919, 3924-3925.
[656] Reasons for Judgement, §4287, 4306.
[657] Reasons for Judgement, §161, 1435, 1693.
[658] Reasons for Judgement, §1695.
[659] Reasons for Judgement, §1695-1697.
[660] Reasons for Judgement, §3998.
[661] Reasons for Judgement, §4070, 4073 -4074, 4306.

V. ABSENCE OF *SAISINE* FOR FACTS PERTAINING TO DISAPPEARANCE

396. The Chamber committed an error in law by declaring having been correctly seised for the facts pertaining to disappearances from the 1JD Worksite and that it was competent to judge those facts.[662] It ought to have taken into account the breach of the *saisine in rem* of the CIJ and note that it could neither judge nor sentence beyond the scope therein. The CIJ concluded in paragraph 1470 of the CO that the crime of OIA (through enforced disappearances) was enacted on the 1JD Worksite. This charge is founded on the facts pertaining to disappearance described in paragraph 366 where it is stated that people "disappeared from the dam site". This conclusion was reached in breach of the *saisine* by the CIJ since there is no mention of facts pertaining to disappearance in paragraph 45 of the ISCP. However, in certain parts of the ISCP, the Prosecutors expressly seised the CIJ for facts pertaining to disappearance. These have nothing to do with the facts described in paragraph 45 of the ISCP where there is only the mention of people being executed or dying as a result of their living conditions. In the absence of a supplementary submission, the CIJ were not authorised to investigate these facts. The Chamber erred in law in judging the facts of disappearances from the 1JD Worksite[663] and by finding that the CAH of OIA having taken the form of facts qualified as enforced disappearance was established regarding these facts.[664] Theses conclusions based on an incorrect referral should be annulled. It is the same for the Chamber's conclusion incorporating these facts into a policy qualified as "criminal".[665] Consequently, the sentencing of KHIEU Samphan for the CAH of OIA having taken the form of facts qualified as enforced disappearances from the 1JD site as part of a JCE for these events should be annulled.[666]

Section IV. PHNOM KRAOL

I. ENSLAVEMENT

397. In the Reasons for Judgement under appeal, the Chamber stated that in the terms of the CO, it had been seised of acts of CAH of enslavement.[667] Thus, it proceeded to provide a legal characterisation of the acts and concluded that the crime was established regarding the said acts committed in the

[662] Reasons for Judgement, §161, 1435, 1708.
[663] Reasons for Judgement, §1710-1712.
[664] Reasons for Judgement, §1712, 3927.
[665] Reasons for Judgement, §3927-3928.
[666] Reasons for Judgement, §4306.
[667] Reasons for Judgement, §3019, 3024.

PK security centre.[668] The Defence has already demonstrated that the Chamber had only been seised of acts committed within the geographic site of K-11.[669] In effect, according to the supplementary submission, the CIJ were only seised of the cases of punitive hard labour imposed on the detainees in K-11, to the exclusion of facts concerning the detainees in the K-17 and PK sites.[670]

398. The CIJ concluded in paragraph 1391 of the CO that the crime of enslavement was enacted in PK by the uninterrupted control of detainees and the latter being subjected to unremunerated punitive hard labour.[671] This conclusion relies on the facts related in paragraphs 636 to 638 of the CO. On reading these paragraphs, one notices that the CIJ used certain testimony containing almost no geographic precision.[672] A single ascertainment of fact was taken within the scope of the *saisine* and refers to facts of punitive hard labour on the K-l1 site.[673] The referral to the CIJ limiting the scope to just the K-11 site means that KHIEU Samphan is required to respond only to the factual allegations pertaining to this site, in reality those mentioned in paragraph 636 of the CO. Through an erroneous reading of Internal Rule 89, the Chamber rejected this argument in its part relating to the preliminary questions,[674] thus committing an error in law as explained above.[675] In basing its sentencing of KHIEU Samphan on facts committed in K-11, K-17 and in the PK prison[676] whereas it had not been seised of the last two sites, the Chamber committed an error in law resulting in a breach of the Appellant's procedural rights. Consequently, conclusions pertaining to the K-17 and PK sites should be annulled.[677]

II. OIA THROUGH ATTACKS AGAINST HUMAN DIGNITY

399. In the Reasons for Judgement under appeal, the Chamber recalled that, in the terms of the CO, it had been seised of acts of CAH of OIA through attacks against human dignity.[678] Thus, it proceeded

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[668] Reasons for Judgement, §3119-3126.
[669] CB 002/02, §1372-1379.
[670] Co-Prosecutors' Clarification of Allegations Regarding Five Security Centres and Execution Sites Described in the Introductory Submission, 11.09.2009, **D202**, §8.
[671] CO, §1392-1394
[672] CO, §636,638.
[673] CO, §636.
[674] Reasons for Judgement, §160-165.
[675] See above, §336-350.
[676] Reasons for Judgement, §3121-3125.
[677] Reasons for Judgement, §3120 -3126.
[678] Reasons for Judgement, §3019, 3024.

to provide a legal characterisation of the acts and concluded that the crime was established regarding the said acts committed in the PK security centre.[679] To justify its conviction, the Chamber notably relied on acts of torture whereas such acts were not part of the *saisine*.[680] The Defence had nevertheless raised this deviation from the terms of the *saisine* in the final conclusions in Case 002/02.[681]

400. It should be recalled that all the conclusions from the CIJ pertaining to torture were arrived at in breach of their *saisine* inasmuch as neither paragraph 64 of the ISCP nor paragraphs 8 to 11 of the supplementary submission made mention of facts concerning interrogations or physical or mental torture. [682] Although under the terms of paragraph 1438 of the CO, KHIEU Samphan was required to answer for the crime of OIA through attacks against human dignity in PK, all the conclusions by the CIJ pertaining to torture for which they had not been seised were on the other hand illegal. The Chamber was not therefore correctly seised of facts relating to torture in PK. Besides, in the Reasons for Judgement under appeal, it did consider that the crime of torture as a CAH had not been established through a lack of sufficient evidence. [683] Based on a fault in the *saisine*, KHIEU Samphan could not be convicted for the CAH of OIA through attacks against human dignity, these being facts relating to torture on the PK site.[684]

III. OIA THROUGH ENFORCED DISAPPEARANCES

401. In the Reasons for Judgement under appeal, the Chamber stated that, in the terms of the CO, it had been seised of the acts of CAH of OIA through enforced disappearances.[685] Thus, it proceeded to provide a legal characterisation of the acts and concluded that the crime was established regarding the said acts committed in the PK security centre.[686] In its final conclusions, the Defence had however demonstrated that this *saisine* had been carried out in breach of the procedural rules.[687] In

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[679] Reasons for Judgement, §3152 -3159.
[680] Reasons for Judgement, §3152 fn 10607.
[681] CB 002/02, §1390-1393.
[682] CB 002/02, §1382-1386, 1390-1393; ISCP §64; Co-Prosecutors' Clarification of Allegations Regarding Five Security Centres and Execution Sites Described in the Introductory Submission, 11.09.2009, **D202**, §8 to 11.
[683] Reasons for Judgement, §3135.
[684] Reasons for Judgement, §3152 -3159.
[685] Reasons for Judgement, §3019, 3024.
[686] Reasons for Judgement, §3160 -3166.
[687] CB 002/02, §1394-1399.

effect, in terms of the ISCP, the CIJ has been seised only of the facts concerning disappearances noted on the K-17 site.[688]

402. The ISCP makes reference to the PK security centre.[689] However, as explained in the Defence's final conclusions, the description of the site corresponds in reality to the K-17 site.[690] In trying KHIEU Samphan for facts concerning enforced disappearances on the K-11, K-17 and PK sites, the CIJ have widened the geographic scope of their *saisine*, which constitutes a breach of the procedural rules. [691] Through an erroneous interpretation of Internal Rule 89, the Chamber rejected the argument presented by the Defence pertaining to the widening of the scope of the *saisine.* It based its convictions on a geographic breach of the *saisine.*

403. It was not allowable that the Chamber could conclude that the facts concerning enforced disappearances took place on the K-17 and K-11 sites and in the PK prison. This error in law invalidates the conclusions.[692] KHIEU Samphan could not be sentenced for the crime of OIA/enforced disappearances based on facts relating to the K-11 site and the PK prison and should therefore be acquitted.

Section V. KRAING TA CHAN

I. ABSENCE OF *SAISINE* FOR DEATHS RESULTING FROM DETENTION CONDITIONS

404. The Chamber committed an error in law by declaring having been correctly seised of the facts concerning deaths resulting from detention conditions in KTC and that it was competent to judge those facts.[693] It ought to have taken into account the breach of the *saisine in rem* of the CIJ and note that it could neither judge nor sentence beyond the scope therein. The CIJ concluded in paragraph 1373 of the CO that the crime of murder was notably attested with regard to "people killed [in the] security centres" including that in KTC. They added in paragraph 1374 that "the death of the victims was the consequence of acts or omissions by the perpetrators, and were the

[688] ISCP, §64.
[689] ISCP, §64.
[690] CB 002/02, §1359.
[691] See above, §336-350.
[692] Reasons for Judgement, §3160 -3166.
[693] Reasons for Judgement, §161, 2638.

major cause of death among the victims'. According to paragraph 1376, the CIJ provided more details of the deaths occurring in all the security centres mentioned in paragraph 1373.[694]

405. The account of the facts which occurred in KTC contained in paragraphs 489 to 514 of the CO enables the determination of which of them were characterised as murders as CAH from the viewpoint of the aforementioned dispositions. In several places, the CIJ instance deaths occurring in KTC, either through executions (§ 500 and § 510 to 514 under the title "Disappearances and executions"), disease (§ 500, 502 and 508), starvation (502 and 508), vermin (§ 502) or from wounds inflicted on them during interrogations (§ 508). Some of these conclusions were arrived at by the CIJ in breach of their *saisine* which was limited by paragraphs 43 and § 60 in the ISCP. According to paragraph 43 pertaining to the Tram Kak cooperatives, the CIJ were judged to be competent to investigate the facts concerning execution of NP sent to KTC. According to paragraph 60 specific to the KTC security centre, the CIJ were judged to be competent to investigate just the acts of detainee execution, without any distinction concerning their belonging to any particular group.[695]

406. The CIJ were therefore only seised of the deaths of people executed in KTC. *A contrario*, they did not receive a mandate for investigating deaths of people dying as a result of their living conditions in the centre (food, health, hygiene) nor as a result of being tortured. In the absence of any supplementary submission, all their charges based on such events are illegal. The Appellant is not required to answer them. The absence of *saisine* of the CIJ becomes all the more apparent when it is clear that when the Prosecutors wished to investigate deaths which occurred in other sites as a

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[694] CO, §1376: "As regards **security centres**, for the entire period of the regime, the personnel of these centres, both directly and indirectly, caused the death of a large number of detainees. In most instances, the prisoners were killed deliberately through a variety of means, including summary execution in or near the **security centre**. Moreover, many prisoners died as a result of torture and ill-treatment." (highlighted in bold in the original).

[695] ISCP, §60: "Between 1975 and 1978, CPK officials executed up to 12,000 people at a security and detention centre at Kraing Ta Chan in Kus Commune, Tram Kok District, Takeo Province, Southwest Zone. Detainees included "new people", the families of former soldiers, and various inhabitants of Takeo Province. Detainees were shackled at all times and executed on a regular basis, including by clubbing to death. Shortly before the collapse of Democratic Kampuchea, in 1978, all remaining prisoners were executed. In exhumations carried out after 1979, the remains of approximately 2,000 detainees were discovered at or near this centre. The remains of a further 10,000 people may be present in undisturbed mass graves at this location." (emphasis added).

result of living conditions or the results of torture, they referred explicitly to the CIJ.[696] The Chamber was therefore not correctly seised of the deaths due to the conditions of detention in KTC.

407. The Appellant was not therefore required to reply to facts concerning prisoners who died in the detention buildings as a result of the treatment they had received and which constitute the CAH of murder with *dolus eventualis*.[697] These conclusions should therefore be annulled and KHIEU Samphan acquitted.[698]

II. ABSENCE OF *SAISINE* FOR ACTS OF ENSLAVEMENT

408. The Chamber committed an error in law by declaring having been correctly seised of facts concerning enslavement in KTC and that it was competent to judge those facts.[699] It ought to have taken into account the breach of the *saisine in rem* of the CIJ and note that it could neither judge nor sentence beyond the scope therein. The CIJ concluded in paragraph 1391 of the CO that the crime of enslavement was enacted in KTC. The CIJ concluded in paragraphs 1392 and § 1394 that the crime was carried out by the combination of two elements: by the uninterrupted control of detainees and the latter being subjected to unremunerated punitive hard labour. This certitude of a crime is based on the factual conclusions from the CIJ taken from paragraphs 497 to 505 of the CO under the title "Arrests and detention". Paragraph 503 is eloquent as to the working conditions in KTC.

> "Certain prisoners explained they had been forced to undertake various tasks within the prison building. Those who worked received more food than those who remained chained in the detention buildings. Those who worked in the paddy fields were not chained but were under surveillance. Some of those who worked outside returned in the evening to be chained up in the main detention buildings".[700]

409. These conclusions from the CIJ pertaining to the work of detainees in KTC are quite illegal as there was never any question in paragraphs 43 and 60 of the ISCP of prisoners being constrained to perform any work. The CIJ introduced new facts in the absence of a supplementary submission to

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[696] See paragraph 55 of the ISCP pertaining to facts occurring in S-21 where they indicated that "other detainees died during torture or from malnourishment, disease and inhumane conditions". In the same vein, in paragraph 59 of the ISCP pertaining to the Koh Kyang security centre, they asserted that "each day five or six prisoners died of illness, hunger or harsh interrogation."
[697] Reasons for Judgement, §2815, referring to §2674, 2676 and 2744-2747.
[698] Reasons for Judgement, §3160 -4318.
[699] Reasons for Judgement, §161, 2638, 2640.
[700] See also CO, §501 where it is stated more succinctly that "they were put to work".

conclude that a crime was carried out. Consequently, KHIEU Samphan is not required to answer concerning facts in support of this charge. The Chamber committed an error in law by concluding in breach of its *saisine* that the CAH of enslavement was established in KTC.[701] These conclusions should be annulled, as should that which incorporates the facts in a policy qualified as "criminal".[702] Consequently, the sentencing of KHIEU Samphan for the CAH of enslavement in KTC as part of a JCE for these facts should be reversed.[703]

III. ABSENCE OF *SAISINE* FOR ACTS OF TORTURE

410. The Chamber committed an error in law by declaring having been correctly seised of acts of torture in KTC and that it was competent to judge those acts.[704] It ought to have taken into account the breach of the *saisine in rem* of the CIJ and note that it could neither judge nor sentence beyond the scope therein. The CIJ concluded in paragraph 1408 of the CO that the crime of torture was enacted in KTC. The acts of torture reported in paragraphs 507 to 509 of the CO form the basis for the charge appearing in paragraph 1408. All these conclusions were arrived at by the CIJ in breach of their *saisine*. No fact concerning interrogation or of physical or mental torture is mentioned in paragraphs 23 and 60 of the ISCP. The CIJ did not have the jurisdiction to investigate such facts. Here again, when the Prosecutors wished that the CIJ carried out an inquiry into acts of torture, they did so perfectly explicitly.[705] As for KTC, in paragraphs 43 and 60, there is no allusion made to acts of such a nature. Consequently, the Chamber not having been correctly seised of acts of torture in KTC and KHIEU Samphan was not required to answer.

411. Accordingly, the Chamber erred in law by concluding in breach of its regular *saisine* that the CAH of torture was established in KTC.[706] These conclusions should be annulled, as should that which

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[701] Reasons for Judgement, §2822-2823, 3979.
[702] Reasons for Judgement, §3979, 3987.
[703] Reasons for Judgement, §4306.
[704] Reasons for Judgement, §161, 2638, 2828.
[705] See §52 of the ISCP on S-21 states "the vast majority of detainees were tortured to extract confessions. Similarly, in §59 regarding the Koh Kyang security centre, the Prosecutors alleged that "thousands of people were imprisoned, tortured and subsequently killed They further claimed in §63 regarding the Kok Kduoch security centre that "the prisoners were kept shackled at all times and were tortured regularly". See also: ISCP, §49, 50, 53 and 55 on S-21; Co-Prosecutors' Clarification of Allegations Regarding Five Security Centres and Execution Sites Described in the Introductory Submission, 11.09.2009, D202, §7 regarding the security centre of Kbal Chheu Puk ("Interrogation, torture and execution of prisoners regularly occurred at this security centre".
[706] Reasons for Judgement, §2829-2832, 3981.

incorporates the facts in a policy qualified as "criminal".[707] KHIEU Samphan's conviction for the CAH torture in KTC as a JCE should be reversed.[708]

IV. ABSENCE OF *SAISINE* FOR ILL-TREATMENT

412. The Chamber erred in law by declaring itself properly seised and competent to judge the facts of ill-treatment by the guards and interrogators that occurred in KTC.[709] It ought to have taken into account the breach of the *saisine in rem* of the CIJ and note that it could neither judge nor sentence beyond the scope therein. The CIJ concluded in § 1434 of the CO that the crime of OIA (through attacks against human dignity) was established in KTC. Paragraph 1438 details the elements taken into account by the CIJ in finding the crime established (insufficient food for the detainees, appalling detention conditions, lack of proper sanitation, etc.). These elements are described in § 497 to 505 of the CO regarding detention conditions. In addition, § 1438 refers to "ill-treatment by guards and interrogators", as referred to in §506 to 509 regarding "Interrogations". As stated above regarding torture, all the CIJ findings on this matter are illegal, given that they were never seised by the ISCP[710] and there was no supplementary submission. The Chamber has not been properly seised and KHIEU Samphan therefore did not have to answer to these facts.

413. It therefore erred in law by concluding in breach of its regular saisine that the OIA CAH/attacks against human dignity was established in KTC with regard to the facts of ill-treatment by guards and interrogators.[711] These conclusions should be annulled, as should that which incorporates the facts in a policy qualified as "criminal".[712] Consequently, the sentencing of KHIEU Samphan for the OIA CAH/attacks against human dignity in KTC as part of a JCE for these facts should be reversed.[713]

V. ABSENCE OF *SAISINE* FOR FACTS PERTAINING TO DISAPPEARANCE

414. The Chamber erred in law by declaring itself properly seised and competent to judge the facts of ill-treatment by the guards and interrogators that occurred in KTC.[714] The CIJ concluded in §1470

[707] Reasons for Judgement, §3979, 3987.
[708] Reasons for Judgement, §4306.
[709] Reasons for Judgement, §161, 2638, 2848.
[710] See above, §410.
[711] Reasons for Judgement, §2849-2851, 3985.
[712] Reasons for Judgement, §3985.
[713] Reasons for Judgement, §4306.
[714] Reasons for Judgement, §161, 2638, 2848.

of the CO that the crime of OIA (through attacks against human dignity) was established in KTC. They then went on to describe the constitutive elements of the crime in §1471 which refers to placing people outside of the protection of the law and "the refusal to provide access to [the victims] or convey [to them] information on the fate or whereabouts of such persons".[715] Paragraph 1472 also mentions implementing "measures designed to conceal the fate of persons who had disappeared by ensuring that witnesses did not reveal information about them". The CIJ allegations are based on certain evidence referred to in §510 to 514 of the CO under "Disappearances and executions". The findings on the facts of disappearance are illegal. The CIJ were neither seised of the disappearances of persons nor by the relevant part of § 43 of the ISCP regarding the Tram Kak cooperatives, nor of § 60 of the same ISCP regarding KTC.

415. In §60, the Prosecutors maintained that "up to 12,000 people" were executed in KTC, namely all prisoners of the site based on the total bone samples found later.[716] The CIJ assert that this conclusion should have been qualified, but it is not the role of the CIJ to remedy the Prosecution's shortcomings. Here again, the ISCP includes examples where the Prosecutors expressly seised the CIJ of facts pertaining to disappearance.[717] This is not the case for the events that occurred in KTC. In the absence of a supplementary submission, the unlawfully seised Chamber could not therefore rule on such events for which KHIEU Samphan was not answerable. Therefore, the Chamber erred in law by concluding in breach of its regular saisine that the OIA CAH/enforced disappearances was established in KTC.[718] These conclusions should be annulled, as should that which incorporates the facts in a policy qualified as "criminal".[719] Consequently, the sentencing of KHIEU Samphan for the OIA CAH/attacks against human dignity in KTC as part of a JCE for these facts should be reversed.[720]

Section VI. AU KANSENG

I. PERSECUTION ON RACIAL GROUNDS

[715] CO, §1471.
[716] In §60, the Prosecutors say that the remains of about 2,000 people have been discovered and that 10,000 probably reside in nearby mass graves.
[717] CO [ISCP], §47 for the KCA site ("The people who disappeared were constantly replaced by new detainees") and §64 for the PK security centre ("These people disappeared and were presumably executed").
[718] Reasons for Judgement, §2853-2858, 3986.
[719] Reasons for Judgement, §3986.
[720] Reasons for Judgement, §4306.

416. The Chamber erred in law by considering itself seised of the events constituting persecution on racial grounds committed against the Vietnamese at AuKg.[721] The Chamber relied on §622 of the CO reporting the arrest and execution of six Vietnamese nationals.[722] The CIJ did not have a mandate to investigate such matters. It appears from the only paragraph of the ISCP devoted to AuKg that the Prosecution made no mention of facts of racial discrimination against the Vietnamese.[723]

417. While the CIJ did have a mandate to investigate executions at AuKg and discovered that Vietnamese nationals were among those executed, this did not give them the authority to investigate the Vietnamese's subjection to specific treatment.[724] Without a supplementary submission, the CIJ findings regarding the persecution of Vietnamese nationals on racial grounds at AuKg were made although not seised thereof. Therefore, the Chamber was not authorised to consider such facts.[725] Its conclusions must therefore be dismissed and KHIEU Samphan must be acquitted of this crime.[726]

II. OIA THROUGH ATTACKS AGAINST HUMAN DIGNITY

418. The Chamber erred in considering itself seised of events constituting OAI through attacks against human dignity at AuKg due to "the lack of medical assistance" and "physical and psychological ill-treatment inflicted on detainees".[727] This is based on § 1434 and 1438 of the CO detailing the facts taken into account for this legal characterisation.

419. However, the facts relating to the lack of medical supervision and ill-treatment by guards and interrogators were taken in breach of the CIJ being seised.[728] Indeed, the ISCP did not mention these facts at any point.[729] Therefore, the Chamber could not legally consider them.[730] The conclusion that the OIA CAH through attacks against human dignity is established as a result of

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[721] Reasons for Judgement, §2994.
[722] CO, §622.
[723] ISCP, §67.
[724] CB 002/02, §1326-1329.
[725] See above, §351-366.
[726] Reasons for Judgement, §2994-2999 and §4306.
[727] Reasons for Judgement, §3003.
[728] CB 002/02, §1330-1333.
[729] ISCP, §67.
[730] See above, §351-366.

the ill-treatment by the guards and interrogators and the lack of medical assistance should be rejected.[731] KHIEU Samphan's conviction on this precise basis must therefore be annulled.

Section VII. PURGES

420. The Chamber erred in law by recognising facts of purges beyond those that occurred in the NZ in 1976 and the EZ in 1978.[732] It ought to have taken into account the breach of the *saisine in rem* of the CIJ and note that it could neither judge nor sentence beyond the scope therein.

I. BREACH OF THE *SAISINE* IN REM BY THE CIJ

421. In virtue of the ISCP, the CIJ were not seised of "purges" that would have occurred in the former North Zone ("NZ") in 1976 and in the East Zone ("EZ") in 1978.[733] However, they automatically extended their investigations to other "purges" other than those mentioned in their referral document, even though no supplementary submission was filed.

422. On 22 June 2016, the Defence submitted an urgent request to the Chamber for clarification of it being seised of "internal purges".[734] On 1July 2016 , the Chamber responded to the Defence's request by way of a terse memorandum (E420/1).[735] In that memorandum, it did not at any point answer the question raised by KHIEU Samphan, which was not regarding the relationship between the alleged policies and the underlying crimes, but that the Chamber was seised after the CIJ had been seised, for the most part irregularly. In fact, the Chamber could not rule on the "purges" of which it had been irproperly seised.

II. CONVICTIONS BASED EXCLUSIVELY ON OUT-OF-CONTEXT "PURGES"

A. Convictions based exclusively on out-of-context knowledge of "purges"

423. The Chamber found that KHIEU Samphan was aware of the crimes committed during the internal purges carried out throughout the DK period on the basis of facts that were not within its regular jurisdiction. Thus, it erred in law by finding that KHIEU Samphan was aware of the crimes committed during the internal purges carried out throughout the DK period on this basis.[736] The

[731] Reasons for Judgement, §3004, 3006 and 3008.
[732] Reasons for Judgement, §161, 2638, 2640.
[733] ISCP, §42, 71.
[734] Urgent request of KHIEU Samphan of 22.06.2016, **E420**.
[735] Memorandum of 01.07.2016, **E420/1**.
[736] Reasons for Judgement, §4235.

Chamber erred in law and in fact by finding that KHIEU Samphan was aware of the arrests and the fate of certain DK cadres.[737] In general, the Chamber erred in law and in fact in considering that KHIEU Samphan had " knowledge of the widespread purges and executions carried out on the population of the country" based on a body of evidence that was not related to the purges in the NZ in 1976 and the EZ in 1978.[738] All of these findings were made despite the Chamber not being properly seised and must therefore be annulled.

424. The Chamber could not use this alleged knowledge to infer KHIEU Samphan's intention to commit crimes in the security centres (§ 4283-4287). It could not research different circumstances and locations for the evidence it lacked to establish the crimes at the sites and for the periods of which it was properly seised. The Chamber erred in law and in fact by concluding in this manner that KHIEU Samphan had the culpable intent to commit the CAH of murder, extermination, enslavement, imprisonment, torture, persecution on political grounds and the OIA through attacks against human dignity and the facts characterised as enforced disappearances.[739]

B. Convictions based exclusively on the contribution to out-of-context "purges"

425. Indeed, it will be seen below that it was incorrect to claim that KHIEU Samphan had contributed to the purges throughout the country.[740]

Chapter III. ERRORS AND IMPACT ON SPECIFIC GROUPS

Section I. BUDDHISTS

I. ABSENCE OF *SAISINE* FOR FACTS AGAINST BUDDHISTS IN TK

426. The Chamber erred in law by declaring of its own motion the inadmissibility of the Defence's arguments concerning the trial's limitation to the facts of which the CIJ were seised.[741] The CIJ were not seised of its findings on which the Chamber relies to state it is competent to deal with the facts against Buddhists in the TK cooperatives.[742] KHIEU Samphan did not have to answer for these facts. The facts for which the Appellant must answer have been characterised by the CIJ as

[737] Reasons for Judgement, §4225-4230.
[738] Reasons for Judgement, §4231.
[739] Reasons for Judgement, §4287.
[740] See below, §1849-1878.
[741] Reasons for Judgement, §165, 809, 815, 1180.
[742] Reasons for Judgement, §1180, referring to the Closing Order §1421 and 321.

persecution on political grounds as a CAH in § 1421 of the CO and the facts in support of this charge are detailed in § 321 of the CO, though they were not seised thereof.

427. The ISCP did not include any allegations about the fate of Buddhists in TK. Paragraph 43 of the ISCP on the TK cooperatives did not mention any allegations on this matter. Under the terms of § 72 of the ISCP on the treatment of Buddhists, no allegations related to the TK cooperatives. The only correct reading of § 72 of the ISCP is the one that distinguishes between two series of events: (i) one is the prohibition of religion imposed on "Buddhists" including both followers and clergy, and (ii) the other concerns the attacks on Buddhist monks and places of worship in seven pagodas in six provinces. For all the facts described in § 72, the title indicates they were seised of reduced facts in five provinces of Cambodia, namely the provinces of Kandal, Kratie, Kampot, Stung Treng and Battambang. However, the TK cooperatives are located in Takeo province. The CIJ were therefore not competent to investigate the matters alleged in the opening part of § 72 of the ISCP in the TK cooperatives. Thus, contrary to what they allege in § 206 of the CO, they have never been seised of any facts "against Buddhists in the whole of the [DK]" but only of facts confined to certain parts of the territory, in accordance with the letter of § 72 of the ISCP. The Chamber erred in law by not observing that the CIJ had not been seised of this. This error led it to wrongly declare it was competent to judge facts concerning the fate of Buddhists in TK. [743]

428. As regards the attacks on "*Buddhist monks*" and places of worship, the CIJ are relying on the phrase "*This policy was implemented at wats throughout Democratic Kampuchea, including*" in § 72 of the ISCP before establishing a list of seven pagodas (*wats)* that illustrate their point. The CIJ were seised only of the facts carried out on the pagodas (*wats)*. Therefore, they could not assert in § 206 to have been seised of facts "throughout the [DK]".

429. The objective of the Prosecutors in § 72 was to present facts taking place in different parts of Cambodia to support the notion that a CPK policy existed before the facts were committed. The Prosecutors presented seven pagodas located in six different provinces. These six provinces, located in five of the seven zones created by the KR after liberation, illustrate the theory of a nationwide spread of the alleged anti-Buddhist policy.[744] It was therefore not the intention of the

[743] Reasons for Judgement, §1180.

[744] In §72 of the ISCP, the Prosecutors only specified the provinces where the *wats* they mention were located. The investigating judges were informed of the zones where these provinces were located pursuant to §743 of the CO. As such, the SWZ, NWZ, EZ, NEZ and sector 505 are represented in §72 of the ISCP. Only NZ and WZ are not included.

Prosecutors to report facts to the CIJ that occurred in all the pagodas in Cambodia, but only those that occurred in certain pagodas considered to be a representative sample in support of their theory.

430. Then, in the ISCP and in a supplemental submission, the Prosecutors referred four times to the existence of other pagodas without ever mentioning the fate of the Buddhists at these sites.[745] This observation is especially telling for three of these sites: Wat Tlork, Wat Kirirum and Wat O Trau Kuon ("Au Trakuon" in the CO).[746] Having become detention centres under the DK, the CIJ were seised of the events that took place there.[747] The Prosecutors inevitably found that these sites had housed monks before the arrival of the KR and that these sites had been damaged to turn them into prisons. However, they made no reference to these or any other evidence concerning the suppression of religion at these sites.[748]

431. The Prosecutors chose not to seise the CIJ of the facts concerning the Buddhists in the above pagodas, just as they had chosen not to deal with the fate of the Buddhists in the Tram Kak cooperatives. Having failed to seise the CIJ of the fate of the Buddhists in the other pagodas mentioned in their indictments, it is impossible to say that the Prosecutors heard them seised of facts that occurred in the pagodas not cited anywhere in their various indictments.

432. Finally, in § 743 of the CO, the CIJ pronounced the "destruction of pagodas" and "their use for other functions" […] in all Cambodian provinces under the [DK] regime". They then listed all areas of the DK as the location of these attacks and referenced many of the interrogation records in the end notes. In spite of their apparent findings of facts at other sites not mentioned in the Prosecutors' submissions, they nevertheless qualified the facts only at the pagodas mentioned in § 72 as persecution under § 1421 of the CO, as well as those at Wat Tlork, Wat Kirirum and the Tram Kak cooperatives, i.e. all the sites mentioned in the ISCP.

433. Thus, when legally characteriseing the facts, the CIJ demonstrated they knew there were limits to the information of which they were seised. If they had really considered themselves seised of facts throughout the territory, they would have qualified as persecution facts other than those which had

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[745] ISCP, §45 (Wat Baray Choeung Daek, *a priori* situated in the province of Kompong Thom), §66 (Wat Tlork, situated in the province of Svay Rieng) and §68 (Wat Kirirum, situated in the province of Battambang); Co-prosecutors' supplementary submission regarding genocide of the cham, 31.07.2009 **D196**, §8-12 (Wat O Trau Kuon, situated in the province of Kampong Cham).
[746] CO, §776-783.
[747] ISCP §66 (Wat Tlork) and §68 (Wat Kirirum).
[748] ISCP §66 (Wat Tlork) and §68 (Wat Kirirum).

occurred at sites already mentioned in the submission, and for which they had – as stated in § 743 – obtained incriminating evidence. This is all the more convincing for facts in zones not covered by § 72 of the ISCP, since they would then have reinforced the Prosecutors' allegation of a national dissemination of the CPK policy. The Chamber erred in law by not observing that the CIJ had not been seised of this. This error led it to wrongly declare it was competent to judge facts concerning the fate of Buddhist monks in TK.[749]

II. CONVICTIONS FOR "DISCRIMINATION" AGAINST BUDDHISTS

434. The Chamber erred by declaring the inadmissibility of the Defence's arguments concerning the trial's limitation to the facts set out in the CO of which the CIJ were seised. The CIJ were not seised of its findings on which the Chamber relies to state it is competent to deal with the facts of "discrimination" on religious grounds against Buddhists and Buddhist monks. KHIEU Samphan did not have to answer for these facts from then on. The Chamber erred in law in ruling on these facts and by finding that the CAH of persecution on religious grounds was established for facts of "discrimination" committed against Buddhists and Buddhist monks in TK cooperatives.[750] As a result, it also erred in fact and in law by incorporating what it characterised as the CAH persecution on religious grounds into what it characterised as a "criminal" policy.[751] These conclusions should be annulled as should be the declaration that KHIEU Samphan is guilty of these facts as part of a JCE.[752]

Section II. VIETNAMESE

435. The Chamber erred in law by considering that the allegations of murders of Vietnamese related to the whole nation of Cambodia.[753] It was justified by explaining that part of the CO is specifically devoted to executions outside the provinces of Prey Vieng and Svay Rieng.[754] However, this part was used although the CIJ were not seised thereof. According to the ISCP, the Prosecution decided to open an investigation against KHIEU Samphan for facts relating to measures directed against Vietnamese people living in the Prey Veng and Svay Rieng provinces and during incursions into

[749] Reasons for Judgement, §1180.
[750] Reasons for Judgement, §1183-1187.
[751] Reasons for Judgement, §4019, 4021-4022, 4296, 4298.
[752] Reasons for Judgement, §4306.
[753] Reasons for Judgement, §3358 and 3360.
[754] Reasons for Judgement, §3358 referring to §802 and 803 of the CO.

Vietnamese territory.[755] The CIJ were therefore only seised of these facts, as they also pointed out in the CO: "The CIJ were seised of measures directed [...] against Vietnamese in the provinces of Prey Veng, Svay Rieng (East Zone) and during incursions into Vietnam.".[756]

436. This position was reiterated in their Order of 13 January 2010 rejecting the Prosecution's and the civil parties' requests for investigative actions in relation to crimes committed against the KK and the Vietnamese outside of Prey Veng and Svay Rieng as these were outside of their scope.[757] Thus, the contradiction put forward by the Chamber is not from the Defence, but from the CIJ.[758] The Defence is well aware that part of the CO is devoted to measures directed against the Vietnamese outside the two provinces, but this contradicts the CIJ who claimed to be fully aware that they were only seised of the provinces of Prey Veng and Svay Rieng. The Prosecution was also aware they were limited in what they had been seised of:

> The CIJ considered that they had been seised of the facts concerning the treatment of Vietnamese in the provinces of Prey Veng and Svay Rieng in the East Zone and during the incursions into Vietnam. When the Chamber disjoined the proceedings in Case 002, it excluded crimes committed during the incursions into Vietnam from the scope of the second trial. For this reason, the charges of genocide against the Vietnamese only concern crimes committed in the provinces of Prey Veng and Svay Rieng. The counts of crimes against humanity mentioned by the CIJ that relate specifically to the treatment of the Vietnamese are also mainly concentrated in these two regions".[759]

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[755] ISCP, §69-70.
[756] CO, §206.
[757] Order of the CIJ, 13.01.2010, **D250/3/3,** §7-9.: "[W]ith reference to paragraphs 69 and 70 of the Introductory Submission, the Co-Investigating Judges were seised of the treatment of Vietnamese nationals living in Prey Veng and Svay Rieng provinces and of Vietnamese nationals during incursions into Vietnam. [...] With regard to the first part of the application filed by the civil parties (i.e. the examination of new evidence concerning crimes allegedly committed against the Khmer Krom living in the provinces of Pursat and Takeo and against ethnic Vietnamese living in the province of Kampong Chhnang), the co-investigating judges consider that it raises essentially the same issue as that referred to in the requests submitted by the co-prosecutors, namely the question of investigations into the treatment of the Khmer Krom and the ethnic Vietnamese population living in geographical zones not covered by the Introductory or Supplementary Submissions. Consequently, the co-investigating judges reject this part of the civil parties' application for the same reasons as those given for the co-prosecutors' applications.".
[758] Reasons for Judgement, §3356.
[759]Co-prosecutors' request to summon 2-TCW-843, 2-TCW-957, 2-TCCP-245, 2-TCW-939, 2-TCW-849, and 2-TCW-905 in relation to the Vietnamese segment of case 002/02, 15.09.2015,**E381**, §9 (emphasis added). See also T. of 06.01.2016, **E1/371.1**, after 09.52.57 "It's not only genocide.Of course, the intent to commit genocide has its requirements, and it's hard, of course, to prove this, but here, we're speaking about the genocide in Svay Rieng and Prey Veng as the implementation of a national policy, and this is why we heard a certain number of witnesses regarding regions other than Svay Rieng and Prey Veng; after 09.55.58 "there are six civil parties and witnesses that we would like the Chamber to hear, mainly regarding Prey Veng and Svay Rieng. And I would like to insist upon the fact that it is necessary to refocus the trial on these two provinces" (emphasis added).

437. Even the Chamber appeared to have been seised of this for a time.[760] However, in the Reasons for Judgement, it did not explain why and on what basis it could have considered that the matters of which it had been seised had been extended to facts of genocide by murder, the CAH of extermination and murder outside these two provinces.[761] The lack of evidence regarding the murders of Vietnamese in Prey Veng and Svay Rieng certainly explains the Chamber's interest in examining murders across the country, particularly in order to be able to establish the crime of genocide.[762] In any event, the House adopted an erroneous reading of the CO.[763] It could not examine these facts, of which the CIJ had not been seised to characterise the CAH of murder, extermination and genocide by murder.[764]

438. Although they were not seised thereof, it appears from the CO that the CJI developed this sub-section on massacres of Vietnamese outside Prey Veng and Svay Rieng provinces to demonstrate "a national policy".[765] This is no doubt why the Prosecution considered that the evidence heard outside the provinces of Prey Veng and Svay Rieng could be useful in demonstrating national policy and inferring genocidal intent.[766] This reason is incorrect with respect to intent, as it is dealt with separately in the CO.[767] In any case, national policy is not a legal characterisation of the facts. It was therefore necessary to distinguish between the facts developed in support of the specific charges against the Accused. Thus, the Chamber could not extend the matters of which it was seised to include facts constituting genocide by murder, the CAH of extermination and murder of Vietnamese nationals outside the provinces of Prey Veng and Svay Rieng under the pretext of

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[760] Decision on motions 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), 25.05.2016, **E380/2**, §27: "The Chamber nonetheless recalls that the crimes charged in [Case 002/02] relating to the treatment of the Vietnamese are based, to a large extent, on underlying crimes alleged to have been committed in Svay Rieng and Prey Veng provinces".
[761] Reasons for Judgement, §3358 and 3360.
[762] Reasons for Judgement, §3442-3455 where the Chamber could only rule on the murder of four Vietnamese families at Svay Rieng. Furthermore, this conclusion was disputed *infra*, §987-992.
[763] Reasons for Judgement §3358, see also fn 11317.
[764] See above, §351-366.
[765] CO, §802 ("The killing of Vietnamese civilians was not limited to Prey Veng and Svay Rieng Provinces, thus demonstrating that it was organised as a national policy", emphasis added).
[766] T. 06.01.2016, **E1/371.1**, after 09.52.57 "It's not only genocide. Of course, the intent to commit genocide has its requirements, and it's hard, of course, to prove this, but here, we're speaking about the genocide in Svay Rieng and Prey Veng as the implementation of a national policy, and this is why we heard a certain number of witnesses regarding regions other than Svay Rieng and Prey Veng".
[767] In the CO, massacres outside the provinces of Prey Veng and Svay Rieng for demonstrating a national policy are dealt with in §802-804 while the intent to destroy the group is dealt with in §814-818.

developments relating to a national policy. The Chamber's conclusions must therefore be dismissed and KHIEU Samphan must be acquitted of these crimes.[768]

Title II. INSUFFICIENT CHARGES TO BRING TO JUDGEMENT

439. The Chamber erred in law by ignoring the Defence's arguments on insufficient charges to bring to judgement (Chapter I) the facts at TK (Chapter II).

Chapter I. THE LAW

440. After summarising the Defence's arguments relating to being irproperly seised due to insufficient charges to bring to trial, the Chamber summarily rejected them on the grounds that, due to a lack of clarity, it was difficult to determine which defects of the CO were alleged and whether the Chamber had been seised thereof.[769]

441. However, the Defence's conclusions were sufficiently clear and precise for the Chamber to comply with its obligation to respond to them under Internal Rule 101(4).[770]

442. First of all, the Defence explained very clearly why it was legally impossible to raise the defects of the CO before the Chamber and why it was incumbent upon it to examine them.[771] Secondly, the Defence specified that it would develop its challenges in the relevant crime sites,[772] which it clearly did for each of them by identifying the paragraphs of the CO in question and explaining why the evidence in support of them or their absence was insufficient to bring them to judgement.[773]

443. Therefore, there was no excuse for the Chamber not to consider these arguments. Especially since they were perfectly justified, if only in terms of the law that the CIJ announced that they would apply.[774] The latter stated that the notion of sufficient charges involved evidence that was

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[768] Reasons for Judgement, §3456-3488, 3490, 3492-3497, 3498-3502 and 3514-3519.
[769] Reasons for Judgement, §168-169.
[770] Rule 104-1 of the IR: "The finding in the judgement shall respond to the written submissions filled by all of the parties". See also Article 419 of the Cambodian CCP, which lists, among the reasons that may lead the Supreme Court to overturn a judgement, the failure to rule on a request made by a party when that request was in writing and unambiguous.
[771] CB 002/02, §70, 213-216, 244-255, 294-299.
[772] CB 002/02, §154-155, 298 and fn 270.
[773] CB 002/02, TK: §924-931, 942-948, 968-969; TTD: §1022-1028; KCA: §1096-1105; KTC: §1254-1271; former KR: §2264-2267, 2283-2287, 2288-2298, 2306.
[774] CO, §1320-1326.

"sufficiently serious and consistent to have some probative value" or "credible evidence of such a nature as to constitute a sufficient basis for convicting the accused of a crime".[775]

444. The CIJ brought KHIEU Samphan to trial for facts where the standard of proof did not meet this minimum standard. As a result, the Chamber was not properly seised of this and could not rule on it. The convictions for these facts must be overturned.

Chapter II. ERRORS AND IMPACT AT TRAM KAK

I. ACTIONS EXCEEDING THE CRIMES

A. Absence of *saisine* for the deaths from starvation in the TK communes

445. The Chamber erred in law by finding that it was properly seised and competent to judge the CAH of extermination for deaths from starvation that occurred in the TK cooperatives.[776] It incorrectly rejected systematically the Defence's arguments that the extremely weak incriminating evidence could not support a referral for these facts to the TK municipalities forming part of the geographical jurisdiction of the CIJ for "lack of clarity".[777] It should have taken into account the inadequacy of the evidence relied on for referral for trial (1) and found that it could not convict beyond matters it was properly seised of (2).

1. Insufficient relevant incriminating evidence in Samrong and Ta Phem

446. First of all, the relevant incriminating evidence cited by the CIJ in support of the referral for trial for deaths from starvation in TK is confined to events that occurred only in the communes of Samrong and Ta Phem falling within its scope of referral.[778] In these two communes, the CIJ rule on the deaths of four persons:[779] the death of an unnamed person in Pen Meas village, Samraong commune [780] and the deaths of three people named Bin, old Max and old Torng in Ta So village,

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[775] CO, §1323-1326 (citations taken from §1323 and 1325).
[776] Reasons for Judgement, §808, 809, 1141.
[777] Reasons for Judgement, §180, 811. See CB 002/02, §930-931.
[778] CO, 312, end note 1283 citing for incriminating evidence the Written Record of Witness SOKH Sot, 31.10.2007, **E3/5835** (D25/32), ERN EN 00223507-00223509, Written Record of Witness SIM Chheang **E3/7980** (D40/16), pp. 3-4 and the Written Record of Witness SOK Sim, 23.11.2009, **E3/5519** (D232/67), ERN EN 00414077-00414078; end note 1284 citing for exculpatory evidence the Written Record of Witness TOP or TOB De **E3/7982** (D40/19), pp. 2-3 and the Written Record of Witness NUT Nouv, 01.12.2009, **E3/5521** (D232/70), ERN EN 00422327-00422329.
[779] CO, §312.
[780] Written Record of Witness SIM Chheang, 27.11.2007, **E3/7980**, ERN FR 00494439-4.

Ta Phem commune, mentioned in a record.[781] Therefore, this extremely meagre evidence could not support the Prosecution's allegations of "mass starvation" and "thousands" of starvation deaths.[782] Moreover, the strength of this incriminating evidence is nullified by the exculpatory evidence, the amount of which is comparable, and which the CIJ dismissed without explanation.[783] Thus, these facts clearly could not support the referral of KHIEU Samphan for trial for the CAH of extermination and did not constitute charges for which he had to answer. The Chamber was not properly seised of this.

2. Convictions for deaths from starvation in the communes of TK beyond the scope of the *saisine*.

447. The Chamber erred in law by judging facts of which it was not properly seised by unlawfully extending the scope of the trial to include deaths due to starvation and, more broadly, facts under the CAH of extermination.[784] However, it should not have been aware of deaths due to starvation that occurred in all of the TK cooperatives. Its conclusions on these facts must therefore be reversed.[785] It is on this incorrect basis that the Chamber erred in law by reclassifying these facts as murder with *dolus eventualis* for deaths due to living and working conditions.[786] The Supreme Court must find that the Chamber lacks jurisdiction to try these facts and overturn its conclusion considering these as the *actus reus* of the crime of murder[787] as well as the conviction and sentence of the Appellant in this regard. [788]

B. Absence of *saisine* for of "discriminatory treatment" regarding New People

448. The Chamber erred in law by declaring itself properly seised and competent to judge the facts of discriminatory treatment regarding NP in the TK cooperatives.[789] It incorrectly rejected

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[781] Written Record of Witness SOK Sim, 23.11.2009, **E3/5519**, Q/A 5 and 43.
[782] ISCP, §43.
[783] Written Record of Witness TOP or TOB De, 28.11.2007, **E3/7982**, ERN EN 00233140-2. (the first person, a member of a cooperative in the village of Prey Kdey, Trapeang Thom Tboung commune, said he had not seen the "people die of starvation"); Written Record of Witness NUT Nouv, 01.12.2009, **E3/5521**, Q/A 32, 36 and 100. (the second, a KR cadre, lived in Nheng Nhang commune until 1977 and was then appointed head of Sré Ronong commune. He says no one starved to death in these places).
[784] Reasons for Judgement, §808-809, 811, 1141.
[785] Reasons for Judgement, §1142-1146.
[786] Reasons for Judgement, §1144-1145.
[787] Reasons for Judgement, §1144-1145.
[788] Reasons for Judgement, §4318-4328, §4400, 4402.
[789] Reasons for Judgement, §180, 813, 1169, 1171.

systematically the Defence's arguments that the extremely weak incriminating evidence could not support a referral on the grounds of suppression of "political rights" of NP qualified as the CAH of persecution on political grounds for "lack of clarity".[790] It should have taken into account the inadequacy of the evidence relied on for justifying a referral for trial (1) and found that it could not convict beyond matters it was properly seised of (2).

1. Lack of evidence to support the alleged suppression of New People's "political rights".

449. The interpretation regarding what the CIJ had been seised of in the CO, limited to the allegations of a suppression of New People's "political rights" referred to in § 305, is in fact not valid. The evidence supporting the CIJ conclusion was not sufficient to support this allegation. The extracts from the interrogation records of PHNEOU Yav and PIL Khieng, both BP of Samraong commune, do not support the conclusion of the CIJ in § 305. PHNEOU Yav said nothing about a prohibition on NP applying to be unit head in cooperatives.[791] As for PIL Khieng, he reported that NP "had no right to be the unit chief or group"[792], and this isolated evidence was undeniably weak. The conclusion of § 305 was therefore supported by only one piece of incriminatory evidence, limited to a single municipality of TK. It was not sufficient to substantiate the charge of persecution on political grounds against NP at TK.[793] On this basis alone, the Appellant was not liable for these facts of "discrimination" on political grounds.

2. Conviction of "discriminatory treatment" regarding New People out of scope of the *saisine*

450. The Chamber erred in law by declaring itself seised despite the manifest inadequacy of evidence necessary for a proper referral to trial.[794] This error led it to try KHIEU Samphan for facts qualified as persecution of NP on political grounds to which he was not answerable.[795] The Chamber's conclusions that "certain cadres [were] chosen exclusively from among the rank and file", and the discrimination against NP consisted, *inter alia*, "in matters of political rights or the possibility for New People to take part in decision-making in cooperatives or work units" must therefore be

[790] Reasons for Judgement, §180, 813. See CB 002/02, §942-948.
[791] Written Record of Witness PHNEOU Yav, 12.11.2009, **E3/5515**, Q/A 13.
[792] Written Record of Witness PIL Khieng, 27.11.2007, **E3/5135**, ERN EN 00233132-00233133.
[793] CO, §305 and end note 1245 citing the Written Record of Witness PHNEOU Yav, **E3/5515** (D232/62), ERN EN 00410247-00410249 and PIL Khieng, **E3/5135** (D40/15), pp. 2-4.
[794] Reasons for Judgement, §180, 813, 1169, 1171.
[795] Reasons for Judgement, §1176-1179, 3924.

reversed.[796] The same applies to the conclusion that these acts, considered in their context and together with the other acts constituting the CAH of enslavement and other inhumane acts and the testimonies of arrests and killings, constitute the CAH of persecution of New People on political grounds.[797] Therefore, the Chamber's conclusion incorporating these facts into a policy described as "criminal" must be reversed,[798] as must the conviction of KHIEU Samphan under the JCE for the CAH of persecution of New People at TK on political grounds.[799]

II. ABSENCE OF *SAISINE* FOR FACTS OF SURVEILLANCE AND DISAPPEARANCE OF EX-KR MEMBERS

451. The Chamber erred in law by declaring itself properly seised and competent to judge the facts of discriminatory treatment regarding ex-KR members in the TK cooperatives.[800] It incorrectly rejected systematically the Defence's arguments that the extremely weak incriminating evidence did not warrant a referral for the facts of surveillance of ex-KR members described as CAH of persecution on political grounds for "lack of clarity".[801] Of all the crime sites mentioned in § 1416 of the CO, the general paragraph on the charge of political persecution, those where the crime was allegedly committed against ex-KR members are not distinguished from those targeting one of the other groups mentioned in § 1417. Facts concerning ex-KR members are dealt with in three sentences in § 319 of the CO ("Tram Kak Cooperatives") and further developed in §in §498 ("[KTC]" Security Centre"). The Chamber should have taken into account the inadequacy of the evidence for justifying a referral for trial (A) and found that it could not convict beyond matters it was properly seised of (B). Therefore, the Appellant's conviction for the CAH of persecution on political grounds towards ex-KR members must be reversed (C).

A. Lack of evidence to support allegations of surveillance of ex-KR members in §in §319

452. The Chamber erroneously rejected the Defence's argument that the CIJ allegations in §319 of the CO that ex-KR members were "closely monitored" were not sufficient to bring KHIEU Samphan to trial on charges of persecution on political grounds.[802] Indeed, in §319 of the CO, it was put forward:

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[796] Reasons for Judgement, §1177.
[797] Reasons for Judgement, §1178-1179.
[798] Reasons for Judgement, §3924-3925, 3928.
[799] Reasons for Judgement, §4306.
[800] Reasons for Judgement, §180, 812, 1172.
[801] Reasons for Judgement, §180, 812, 1172. See CB 002/02, §2265, 2267, 2283-2287.
[802] Reasons for Judgement, §1172.

> "Former members of the [KR] armed forces and police forces, especially those who had served as officers, were also under close surveillance. Lists of former LON Nol officers arriving in the sub-districts were drawn up and sent to the district. For example, a document addressed to District 105 by Nheng Nhang sub-district records the names of 11 former LON Nol officers who had been sent to the sub-district".

453. However, the evidence in support of § 319 on the treatment of ex-KR members is weak and did not reach the threshold required to justify a referral for trial. Above all, the alleged surveillance of ex-KR members is not supported by any evidence. Moreover, the conclusion on the establishment of lists of former LON Nol officers in the communes subsequently addressed to the district refers only to one piece of evidence presented as an example of such practices. However, although the referenced report does indicate the names of officers and their commune of residence, it says nothing about the recipient of this information. In these circumstances, the Chamber was irproperly seised of the facts described as persecution on political grounds committed against ex-KR members in TK.

B. Lack of evidence to support the facts of the alleged disappearance of ex-KR members in TK in §498

454. The Chamber erred in declaring itself seised of the facts of disappearance of ex-KR members in TK as persecution on political grounds.[803] According to a superficial reading of § 498 of the CO, KHIEU Samphan had to answer to the facts of the alleged disappearance. However, the evidence in support of this accusation shows many irregularities and did not allow for a referral to trial for disappearances of ex-KR members in TK. These facts were not supported by any evidence, as the CIJ did not provide any sources of information.[804] The Appellant did not have to answer to this unfounded accusation.

455. Contrary to what was subsequently announced,[805] this accusation was confirmed by only one person, IEP Duch, heard by the investigators during the inquiry, who never claimed that the persons

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[803] Reasons for Judgement, §1172.

[804] According to the first two phrases of the CO, §498:"A Tram Kok District resident recalls that before evacuees from Phnom Penh arrived in the area, the secretaries of the districts and subdistricts attended a meeting at which they were advised that there would be a purge of the evacuees. Anyone who had been a soldier holding the rank of Corporal Sergeant or above in the Khmer Republic regime, and anyone from the Khmer Republic administration who had been a first deputy chief or higher, would be purged".

[805] CO, §498."This is confirmed by three witnesses, including the former district youth chairman who recalls that when New People arrived at Tram Kok they were made to write biographies. He also states that anyone who admitted to being a soldier would subsequently disappear".

had disappeared but indicated that they "had to disappear", as no action had yet been taken according to his testimony.[806] Similarly, the following conclusion of the CIJ on the alleged disappearance of ex-KR members[807] was not supported by the cited BUN Thien since he never lived in Tram Kak district, but in the Traing district.[808] The following statement of the CIJ "The Kraing Ta Chan prisoner lists and the increase in the number of prisoners at Kraing Ta Chan after April 1975 suggests many of those who disappeared were sent to Kraing Ta Chan"is interesting because it was not based on any list of prisoners but on the words of PECH Chim and PHAN Chhen who mention nothing about what the CIJ are saying. [809]

456. The CIJ concluded that "several reports from the sub-district to the district in 1977 revealed that purges of former Lon Nol soldiers and former civil servants continued after 1975".[810]While this conclusion appeared to be supported by some evidence consistent with their argument, this evidence related to many events in Tram Kak communities that the CIJ were not mandated to investigate.[811] The Chamber has not been properly seised and KHIEU Samphan did not have to answer for these facts.

C. Convictions for facts of persecution on political grounds outside of the scope of the trial

457. The Chamber erred in law by considering facts of surveillance and disappearance of ex-KR members under charges of politically motivated persecution of which it was not properly seised.[812] It was not competent to characterise the *actus reus* of the CAH of persecution on political grounds against ex-KR members.[813] Its conclusions must be reversed. Therefore, the Chamber's conclusion incorporating these facts into a policy described as "criminal" must be reversed,[814] as must the

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[806]Written Record of Witness IEP *Duch*, 30.10.2007, **E3/4627**, ERN EN 00223477.
[807] CO, §498: "A committee member of a sub-district in Tram Kok recalls the commune secretary being ordered to gather together all the evacuees who held the rank of Second Lieutenant or higher. Once assembled, the upper echelon would send a truck to take them away. These people disappeared forever". It should also be noted that another passage in §498 does not mention any allegations of discrimination:
[808]Written Record of Witness BUN Thien, 17.08.2009, **E3/5498**, ERN EN 00384397-00384399 and 00384402-00384403.
[809] CO, §498, end note 2159.
[810] CO, §498.
[811] CO, §498, end note 2160.See, for example, **E3/2048** (RI18.33), ERN EN 01454944 (report from the commune Popel); ERN EN 01454945 (report from the commune Cheang Torng); ERN EN 01454946 (report from the commune Popel).
[812] Reasons for Judgement, §1175, 1177-1179.
[813] Reasons for Judgement, §1175, 1177-1179, 3924-3925.
[814] Reasons for Judgement, §3924-3925, 3928.

conviction of the Appellant for the CAH of persecution on political grounds of ex-KR members in TK.[815]

Title III. LACK OF LEGALLY QUALIFIED MATERIAL FACTS

458. The Chamber erred in law by ignoring the Defence's arguments that it could not try facts that were not accepted and not legally qualified by the CIJ (Chapter I), which led it to breach the scope of its referral on numerous facts (Chapter II).

Chapter I. THE LAW

459. According to the IR, to be deemed as void, the CO shall state the identity of the accused, the alleged facts and the characterisation used by the CIJ, as well as the nature of the criminal responsibility (Internal Rule 67(2)). It is substantiated and may be referred for some facts and dismissed for others (Internal Rule 67(4)).

460. As Defence has developed in its CB 002/02 and above,[816] the determination of the scope of the charges (material facts against the accused with their legal characterisation) and therefore the referral can and should only be guided by the legal characterisation of the incriminated facts. The Chamber is seised only of facts identified by the CIJ as those likely to give rise to the criminal responsibility of the accused. It is not seised of the other facts mentioned in the CO nor the factually unrelated legal characterisations. Nor is it seised of the facts mentioned in the evidence in its support.[817]

461. It is by no means a question of examining the huge CO "in its entirety",[818] especially since the CIJ have included developments:

> "probably not absolutely indispensable, but which [they] considered important in the event that [the CO] remains the only trace left by this Tribunal of what happened in Cambodia between 17 April 1975 and 6 January 1979".[819]

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[815] Reasons for Judgement, §4306.
[816] To avoid repetition, the Defence expressly refers to: CB 002/02, §66, 68, 77-97; Above, §351-366.
[817] On the latter, see also: Order *Dorđevic* (ICTY), 27.01.2014, §331: "A clear distinction must therefore be made between the essential facts on which the Prosecution relies and which are to be set out in the indictment and the evidence presented in support of it".
[818] Reasons for Judgement, §173.
[819] Extract from the book by Marcel LEMONDE, *Un juge face aux Khmers Rouges*, January 2013, p. 202, **E280.12**.

462. In addition, as an instrument of indictment, the CO must set out "with sufficient particularity to inform an Accused clearly of the nature and cause of the charges against him enabling him to prepare a defence effectively and efficiently".[820] If not, it "suffers from a material defect".[821] An essential fact, which must be stated with sufficient precision to inform the accused, is a fact on which a verdict is "critically dependent".[822]

463. Vague charges (such as the accusation of persecution) cannot be used as "a catch-all [charge]". According to the basic principles governing the pronouncement of charges, it is not sufficient for an indictment to state a crime in general terms. It must go into detail and specify the essential aspects of the criminal behaviour, or otherwise the indictment would be unacceptably imprecise.[823]

464. Had the Chamber correctly applied all these legal principles, it would not have ruled on facts of which it had not been seised and would have found that the CO was seriously flawed, preventing it from convicting KHIEU Samphan for certain crimes.

Chapter II. ERRORS AND IMPACT BY CRIME SITE

Section I. TRAM KAK

I. ABSENCE OF *SAISINE* FOR DEATHS FROM HEALTH PROBLEMS AND LIVING CONDITIONS

465. Regarding the prosecution charges of the CAH extermination for facts in the TK cooperatives, the Chamber erred in law by finding that it was properly seised of deaths other than those due to starvation to include facts relating to "poor living conditions, hygiene, lack of medical care – together with the consequences of hard labour the victims were put to".[824]

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[820] Decision on Defence Preliminary Objections Statute of Limitations on Domestic Crimes, 22.09.2011, **E122**, §18, referring to *Kupreškić* Appeal Judgement (ICTY), 23.10.2001, §88. See also: *Kanyarukiga* Appeal Judgement (ICTR), 08.05.2012, §73 ("the charges and supporting material facts must be pleaded with sufficient precision in the indictment in order to provide clear notice to the accused").

[821] Decision on Defence Preliminary Objections Statute of Limitations on Domestic Crimes, 22.09.2011, **E122**, §19, referring to: *Le Procureur c. Pavković et al.*, IT-03-70-PT, Decision on the preliminary objection raised by Vladimir Lazarević for formal defects in the indictment, 08.07.2005, §6. See also: *Kupreškić* Appeal Judgement (ICTY), 23.10.2001, §114 ("an indictment, as the primary accusatory instrument, must plead with sufficient detail the essential aspect of the Prosecution case. If it fails to do so, it suffers from a material defect. A defective indictment, in and of itself, may, in certain circumstances cause the Appeals Chamber to reverse a conviction."); *Kanyarukiga* Appeal Judgement (ICTR), 08.05.2012, §73 ("An indictment which fails to set forth material facts in sufficient detail is defective").

[822] *Haradinaj et al.* Appeal Judgement (ICTY), 19.07.2010, §312, referring to *Kupreškić* Appeal Judgement (ICTY), 23.10.2001, §99 and 105.

[823] *Kupreškić* Appeal Judgement (ICTY), 23.10.2001, §98.

[824] Reasons for Judgement, §811, 1138-1139, 1141.

A. No deaths due to general living conditions other than those due to famine in TK

466. The Chamber erred in law in its interpretation of § 1387 of the CO by considering it to be a valid basis for referring the extermination charge for reasons other than deprivation of food and as sufficient for including living conditions.[825] Paragraphs 1381 and 1387 of the CO legally characterise the facts detailed in the section "presentation of facts" referring to the TK cooperatives in §302-321. The Chamber could not dispense with examining these paragraphs in order to determine the scope of the facts qualified as extermination.[826]

467. However, there is no mention of deaths due to general living conditions in §301-321 or health problems in §313. Only three paragraphs refer to the deaths of people, and none deal with deaths other than those from starvation. Paragraph 312 deals with deaths from starvation, § 313 provides information on the absence of funeral rites and § 320 refers to the execution of Vietnamese people. In addition, the Chamber erred in law in §1139 of the Reasons for Judgement by misinterpreting the Defence's argument, contrary to its assertion, that the CAH charge of extermination excludes deaths due to health problems and is limited to deaths due to starvation.[827]

468. The Chamber erred in law by finding that the Closing Order refers to cases of death due to inadequate medical care in §313.[828] In a footnote, it argued that in §313 of the CO, "referring to health problems, particularly among the New People, and people dying without the family being informed"[829] and "describing inadequate medical care then continuing: 'When people died, they were buried without the family being informed'."[830] The reading of paragraph 313 of the CO upheld by the Chamber is erroneous because the CIJ merely refers to the death of persons at the end of the paragraph, without establishing any connection between the death of persons and health problems or failures in the health system attributable to the policies of CPK.[831] The use of the conjunction

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[825] Reasons for Judgement, §811.
[826] Reasons for Judgement, §811.
[827] Reasons for Judgement, §1139: "The Khieu Samphan Defence submits that the charge of extermination is limited to deaths from starvation, health issues and executions of Vietnamese." (emphasis added). See *contra,* CB 002/02, §858-863.
[828] Reasons for Judgement, §811, see fn 2413 referring to §313 of the CO and §1141.
[829] Reasons for Judgement, §811, see fn 2413 referring to §313 of the CO (emphasis added).
[830] Reasons for Judgement, §1141, see fn 3875 referring to §319 of the CO.
[831] See CO, §313: "Many people living in the cooperatives had health problems, particularly the "new people" who were not used to living in rural areas. Those who were sick were treated by subdistrict medics. However, treatment was rudimentary and the medicine used was locally produced. Patients were given intravenous medicine prepared from tree roots and herbal medicine. Patients were also injected with coconut juice mixed with penicillin. The medics were female CPK cadre who had not received any formal training. Many of them were only twelve to thirteen years old.

"and" demonstrates the absence of cause and effect between illness and death. Thus, the Chamber erred in law by declaring itself properly seised of facts other than deaths from starvation.[832]

B. Convictions for deaths caused by living conditions of which the Chamber had not been seised

469. This error caused the Chamber to declare itself competent to deal with allegations of deaths due to general living conditions and to conclude that it was "established that various people died from malnutrition, overwork and sickness including in later periods and that New People in particular were affected".[833] It also maintained that "people died in the District Hospital among other locations because of inadequate medical treatment, malnutrition and overwork".[834] On the basis of these findings, the Chamber erred in law in reclassifying these facts from extermination to murder by finding that the *actus reus* of the murder is established "with respect to the deaths resulting from the working and living conditions described above".[835]

470. On the contrary, the Chamber should have declared itself incompetent to judge these facts. Its conclusion according to which deaths due to living conditions beyond those from starvation, when re-characterised, constitute the *actus reus* of the crime of murder must be reversed. Therefore, KHIEU Samphan's conviction for the CAH of murder must be reversed.[836]

II. ABSENCE OF *SAISINE* FOR THE DEATHS DUE TO STARVATION OUTSIDE OF SAMRAONG AND TA PHEM

471. With regard to the charges of the CAH of extermination for events that occurred in the TK cooperatives, the Chamber erred in rejecting the Defence's argument that, at most in Case 002/02, he should only answer to facts which took place in Samraong and Ta Phem.[837] The Chamber erred in law by finding that it was seised of charges for deaths from famine occurring in places other these two communes.[838]

472. It should have taken into account the examination of the relevant paragraphs demonstrating that there are no facts characterised as extermination in the account of facts other than the deaths from

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When people died they were buried without the family being informed" (emphasis added).
[832] Reasons for Judgement, §811, 1140-1141.
[833] Reasons for Judgement, §1142 fn 3882 referring to §1016, 1020, 1037.
[834] Reasons for Judgement, §1142 fn 3884 referring to §1047.
[835] Reasons for Judgement, §1144, 1145.
[836] Reasons for Judgement, §1144-1145, 4311, 4315-4318, 4328, 4363, 4366, 4383, 4400, 4402.
[837] Reasons for Judgement, §811, 1140-1141. CB 002/02, §924-931.
[838] Reasons for Judgement, §811, 1138 fn 3870 referring to §312 of the CO. See CB 002/02, §930-931.

starvation which occurred in the communes of Samraong and Ta Phem in §312 of the CO (A), and found that it could not convict beyond what it has been seised of (B).

A. The only mention of deaths from starvation in Samraong and Ta Phem in §312 of the CO

473. The Chamber erred in law by interpreting the CO superficially in assessing the material extent of the deaths from starvation referred to in §312 in the CO, qualified in §1381 and 1387, without assessing its geographical extent. The facts described in §312 are based on evidence; these geographical facts constitute the extent of the facts qualified by the CIJ in the legal characterisation section. In this case, however, the relevant incriminating evidence cited by the CIJ can be summarised as facts that occurred in only two communes of which it was seised: the communes of Samrong and Ta Phem.[839] On this basis, the Chamber was properly seised only of deaths from starvation that occurred in those two communes, and erred in law by declaring itself seised of deaths from starvation that occurred elsewhere.[840]

B. Convictions for deaths from starvation of which the Chamber had not been seised

474. This misapplication of the law led the Chamber to unlawfully broaden the scope of the trial. This error of law has a direct bearing on its conclusions based on evidence of deaths from starvation other than those in Samrong and Ta Phem.[841] These facts did not constitute charges for which KHIEU Samphan had to answer, and the conclusions regarding deaths from starvation that occurred outside these two communes must be reversed. On the basis of these *ultra vires* findings, the Chamber erred in law in reclassifying these facts from extermination to murder and by finding that the *actus reus* of the murder is established "with respect to the deaths resulting from the working and living conditions described above".[842] The conviction of KHIEU Samphan for the

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[839] CO, §312, end note 1283 citing for incriminating evidence the Written Record of Witness SOKH Sot, 31.10.2007, **E3/5835** (D25/32), ERN EN 00223507-00223509, Written Record of Witness SIM Chheang **E3/7980** (D40/16), pp. 3-4 and the Written Record of Witness SOK Sim, 23.11.2009, **E3/5519** (D232/67), ERN EN 00414077-00414078; end note 1284 citing for exculpatory evidence the Written Record of Witness TOP or TOB De **E3/7982** (D40/19), pp. 2-3 and the Written Record of Witness NUT Nouv, 01.12.2009, **E3/5521** (D232/70), ERN EN 00422327-00422329. In addition, the Investigating Judges also noted the deaths of people in the Cheang Torng commune that were not under inquiry.
[840] Reasons for Judgement, §811, 1140-1141.
[841] Reasons for Judgement, §1142-1145.
[842] Reasons for Judgement, §1144, 1145.

CAH of murder in connection with deaths from starvation outside the communes of Samrong and Ta Phem must therefore be annulled.[843]

III. ABSENCE OF *SAISINE* FOR FACTS OF "DISCRIMINATION" AGAINST NEW PEOPLE OTHER THAN THE LIMITATION OF CERTAIN "POLITICAL RIGHTS"

475. The Chamber erred in law by declaring itself properly seised of facts of "discrimination" against New People beyond the limitation of certain "political rights".[844] It should have taken into account the examination of the relevant paragraphs demonstrating that there are no facts characterised as extermination in the account of facts other than the allegation of suppression of political "rights" at TK (A) and found that it could not convict beyond what it has been seised of (B).

A. Suppression of political "rights", sole discriminatory act against New People in the CO

476. The Chamber erred in law by using § 1418 of the CO as its basis to argue that "New People were subjected to harsher treatment than Old People with a view to re-educating them and/or identifying enemies among them".[845] The CIJ concluded:

> "In **cooperatives and worksites**, and during **population movements**, real or perceived enemies of the CPK were subjected to harsher treatment and living conditions than the rest of the population. Also, they were arrested *en masse* for re-education and elimination at **security centres and execution sites**".[846]

477. As regards New People, the facts characterised as persecution on political grounds in §1418 are facts elaborated on in the section of the CO dealing with the presentation of facts. A review of all the paragraphs in the "Factual Findings Crimes" section identifies paragraphs 304-306 and 319 as mentioning the treatment of New People. On the basis of these facts, the conclusion of §1418 is based on three references to "discriminatory" treatment of New People: (1) evacuees from the towns after their arrival in TK cooperatives would sometimes have been "occasionally moved *en masse* from area to area within the District"[847]; (2) they would have "lacked political rights and

[843] Reasons for Judgement, §1144-1145, 4311, 4315-4318, 4328, 4363, 4366, 4383, 4400, 4402.
[844] Reasons for Judgement, §813, 1170-1171.
[845] Reasons for Judgement, §1170.
[846] CO, para, 1428 (underlined in the original). See also §302-321.
[847] CO, §304.

could not be unit chiefs within the cooperatives"[848] and (3) they would have "kept a close eye on them".[849]

478. Nevertheless, the *a priori* discriminatory character of these facts is contradicted by other findings of indiscriminate treatment. According to the CIJ, the treatment of New People was not singular: the displacements affected both Base People and New People,[850] and all types of cooperative residents, regardless of class, were arrested and taken away.[851] In addition, according to the CIJ, "saying something against the Party" or "complaining about working and living conditions" could lead to an arrest, respectively for New People and all inhabitants of the cooperatives. In other words, their treatment in this regard was the same.

479. The particular discriminatory acts expressly referred to in the CO come down to the allegation of a suppression of a "political right" for New People, who could not be heads of units. The Chamber erred in law by asserting that it had been seised more broadly of "different treatment".[852]

B. Convictions for facts of "discrimination" against New People outside of the scope of the indictment

480. Apart from this allegation of suppression of "political rights", no facts relating to the treatment of New People in TK cooperatives constituted charges for which KHIEU Samphan had to answer. The Chamber's findings on acts of "discrimination" against New People more broadly were made despite not being seised of this.[853]On the basis of these findings, the Chamber erred in law in characterising the *actus reus* of persecution on political grounds against New People and by finding that this crime was established in relation to these facts.[854] It erroneously considered that, in their context and taken together with the facts of arrests and murders, the cumulative effect of these facts reached the degree of seriousness required to constitute the *actus reus* of the crime of persecution on political grounds against New People.[855]

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[848] CO, §305.
[849] CO, §319.
[850] CO, §310.
[851] CO, §311-312 and 315-318.
[852] Reasons for Judgement, §1170-1171.
[853] Reasons for Judgement, §1175-1177.
[854] Reasons for Judgement, §1178-1179.
[855] Reasons for Judgement, §1178-1179.

481. The Chamber also erred in fact by incorporating what it characterised as the CAH of persecution on political grounds into what it characterised as a "criminal" policy.[856] These conclusions should be annulled as should be the declaration that KHIEU Samphan is guilty of these facts as part of a JCE.[857]

Section II. THE TRAPEANG THMA DAM

482. **Persecution on political grounds** According to the Reasons for Judgement, the Chamber considered that it was seised of the crime of persecution on political grounds at the TTD site in relation to "real or perceived enemies of the CPK" who "were subjected to harsher treatment and living conditions than the rest of the population".[858] As indicated above,[859] only three groups were identified by the CIJ in the CO. Under the terms of § 1417 of the CO, the targets of political persecution were ex-KR members, NP and Cambodians returning from abroad.[860] The parts of the CO relating to the TTD site refer only to facts of persecution on political grounds against NP. [861] In §343 of the CO, it is stated that NP "were subjected to harsher working conditions, such as larger working quotas or unjustified punishments".[862]

483. The CIJ did not draw any conclusions on the working and living conditions of ex-KR members and Cambodians returning from abroad. It appears that the Chamber was seised exclusively of these facts as far as New People were concerned. The Chamber rejected the Defence's argument by misinterpreting the CO.[863] It considered that the three groups defined were not intended to be exhaustive and could evolve over time.[864] This broad interpretation constitutes an error of law.[865] Consequently, the Chamber could not consider itself seised of these facts solely within the limits of New People. All conclusions outside this framework must therefore be invalidated.[866]

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[856] Reasons for Judgement, §1178-1179, 3319, 3324-3325, 3928-3929.
[857] Reasons for Judgement, §4306.
[858] Reasons for Judgement, §1405; CO, §1418.
[859] See above, §359-464.
[860] CO, §1417.
[861] CO, §323-349.
[862] CO, §343.
[863] Reasons for Judgement, §170, 1405
[864] Reasons for Judgement, §170.
[865] See *supra*, §359-464.
[866] Reasons for Judgement, §1405-1429.

Section III. THE 1 JANUARY DAM

I. ABSENCE OF *SAISINE* FOR DEATHS THAT OCCURRED OUTSIDE OF THE 1ST JANUARY DAM

484. The Chamber erred in law by expanding the geographical scope of the trial, ruling on deaths that occurred outside of the 1st January Dam to include deaths that occurred in villages and local clinics.[867] It should have taken into account the geographical limit it had been seised of and confirmed that it could not convict beyond this.

485. The Chamber's jurisdiction was geographically limited to deaths on the 1st January Dam. As the Chamber recalled, the Closing Order limited the jurisdiction of the Chamber to deaths that occurred at the 1st January Dam.[868] KHIEU Samphan did not have to answer for these facts.

486. The Chamber has erred in law by rendering a ruling as regards the deaths that occurred in the villages and local dispensaries, for which KHIEU Samphan was not charged.[869] This conclusion should be invalidated.[870] It could not serve to establish the *actus reus* of the CAH of extermination recharacterised as murder.[871] Consequently, the sentencing of KHIEU Samphan for a CAH of murder with *dolus eventualis* at the 1JD Worksite based on these facts should be invalidated.[872]

II. ABSENCE OF *SAISINE* FOR ACCIDENTAL DEATHS

487. The Chamber committed an error in law by declaring that it had been correctly seised of the facts of accidental deaths at the 1JD Worksite and that it was competent to judge those facts.[873] Those deaths were not among the material allegations specified in the Closing Order and therefore KHIEU Samphan was not answerable for them. The Chamber should have taken into account the subject matter limit it had been seised of and confirmed that it could not convict beyond this.

488. In §1381 of its CO, the CIJ concluded that the crime of extermination was established with respect to "persons who were killed, or died, *en masse*" at a large number of crime sites, including the 1JD Worksite. The broad elements to be taken into consideration regarding all the sites where extermination is alleged to have taken place are set out in §1382 and 1383 of the CO. It also indicates that "other relevant elements" are to be taken into account with respect to each of the sites

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[867] Reasons for Judgement, §1629.
[868] Reasons for Judgement, §1668.
[869] Reasons for Judgement, §1629.
[870] Reasons for Judgement, §1671, referring to §1535.
[871] Reasons for Judgement, §1672-1673.
[872] Reasons for Judgement, §3920, 3928, 4282, 4306.
[873] Reasons for Judgement, §1668.

where the crime is committed. Those elements are provided in §1387 with respect to all of the forced labour worksites:

> "Moreover, [...] many people died as a result of the conditions imposed [...]; such conditions included deprival of food, accommodation, medical care and hygiene. This was also the case at worksites, with the added factor of hard labour".

489. The finding under § 363 that "[a]ccidents such as collapsing stones or soil killed others" is patently absent from the legal characterisation of the facts. KHIEU Samphan did not have to answer for these facts. The Chamber erred in law by rendering a ruling as regards the deaths resulting from accidents that occurred at the 1JD Worksite, for which KHIEU Samphan was not duly charged.[874] The conclusion of the Chamber whereby it was established that several accidents had caused the death of a certain number of workers should be invalidated.[875] This conclusion may not serve as a basis for a *actus reus* for the CAH, re-characterised from extermination into murder.[876] Consequently, the sentencing of KHIEU Samphan for a CAH of murder with *dolus eventualis* at the 1JD Worksite based on these facts should be invalidated.[877]

III. ABSENCE OF *SAISINE* FOR FACTS OF "DISCRIMINATION" TARGETING EX-KR SOLDIERS AND OFFICIALS

490. The Chamber has erred in law in judging KHIEU Samphan with regard to facts of "discrimination" targeting ex-KR soldiers and officials at the 1JD Worksite .[878] The Court should have taken into consideration that the examination of the relevant CO paragraphs fails to show any evidence of facts of "discrimination" targeting the ex-KR soldiers and officials, and should have found that it was not competent to condemn beyond the scope of this *saisine*. In §1418 of its CO, the CIJ found that in worksites, the groups referred to in §1417 "were subjected to harsher treatment and living conditions than the rest of the population. Also, they were arrested *en masse* for reeducation and elimination at **security centres** and **execution sites.**" (underlined in the original). However, in its "statement of facts" regarding 1JD Worksite, the CIJ did not prove there were discriminatory acts with respect to ex-KR soldiers and officials.

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[874] Reasons for Judgement, §1668.
[875] Reasons for Judgement, §1671, referring to §1535.
[876] Reasons for Judgement, §1672-1673.
[877] Reasons for Judgement, §3920, 3928, 4282, 4306.
[878] Reasons for Judgement, §161, 1435, 1685.

491. Only § 366 of the CO seems to substantiate the allegation, by stating that a large number of ex-KR soldiers and officials disappeared. However, it also discusses the indiscriminate nature of the arrests, as all workers at the site were subject to arrest, irrespective of the group to which they belonged. Consideration of the facts as set out in §351-367 thus indicates a failure to find instances of "discrimination". Accordingly, the CIJ were unable to provide a legal characterisation for these non-existent facts. No facts relating to "discrimination" with regard to the treatment of ex-KR soldiers and officials at the 1JD Worksite formed the basis of a charge for which KHIEU Samphan was answerable.

492. The Chamber was improperly seised as regards facts of "discrimination" targeting ex-KR soldiers and officials. It was not competent to judge facts characterised as discriminatory treatment targeting ex-KR soldiers and officials, and those findings should be invalidated. [879] In light of the foregoing, the Chamber erred in law by holding that the CAH of persecution on political grounds targeting ex-KR soldiers and officials was established with regard to the facts that took place at the 1JD Worksite .[880] Therefore, the Chamber erred in law by incorporating these facts, characterised as the CAH of persecution on political grounds, in a policy it characterised as "criminal" in nature.[881] These conclusions should be annulled as should be the declaration that KHIEU Samphan is guilty of these facts as part of a JCE.[882]

Section IV. KAMPONG CHHNANG AIRFIELD

493. **Persecution on political grounds** The Chamber's acceptance of the charges of persecution on political grounds at the KCA site[883] was based on an unlawful *saisine*. Indeed, while in §1416 of its CO the CIJ found that the crime of persecution on political grounds was established at the KCA site, the facts relating to the crime as described therein do not make mention of any of the three groups defined under § 1417 of that document.[884] Therefore, in light of the absence of any identification, the charge brought against KHIEU Samphan was unfounded.[885]

[879] Reasons for Judgement, §1660-1663, 1690-1692.
[880] Reasons for Judgement, §1691-1692.
[881] Reasons for Judgement, §3924-3925, 4049-4050, 4058-4061.
[882] Reasons for Judgement, §4246, 4299 -4300, 4306.
[883] Reasons for Judgement, §1818-1820.
[884] Closing Order, §383-398, 1416-1417, See also KHIEU Samphan's CB 002/02, §1120-1123.
[885] See above, §359-464.

494. The Chamber rejected this argument through a misreading of the CO and the rules of law, notably finding that the definition of the three groups was non-exhaustive and that the categories could expand over time.[886] Such findings constitute an error of law and therefore must be invalidated, as must the conviction of KHIEU Samphan with regard to the alleged offences.[887]

Section V. KRAING TA CHAN

I. ABSENCE OF SAISINE FOR FACTS OF "DISCRIMINATION" TARGETING NEW PEOPLE

495. The Chamber committed an error in law by declaring having been correctly seised of facts concerning "discrimination" on political grounds targeting NP that occurred in KTC.[888] The Court should have taken into consideration that an examination of the relevant paragraphs of the CO fails to show any evidence of facts of "discrimination" targeting NP (A), and should have found that it was not competent to condemn beyond the scope of this *saisine* (B).

A. No discrimination targeting New People in the presentation of facts in §489-514 of the Closing Order

496. In §1418 of the CO, the CIJ sets out in detail the manner in which persecution was carried out at the respective crime sites:

> "In **cooperatives and worksites**, and during **population movements,** real or perceived enemies of the CPK were subjected to harsher treatment and living conditions than the rest of the population. Also, they were arrested *en masse* for reeducation and elimination at **security centres** and **execution sites**." (Underlined in the original).

497. Only the facts of arrest, re-education and the elimination of individuals are relevant to KTC and illustrate the discrimination suffered. As all detainees were treated in the same way, no mention is made of harsher living conditions being imposed in KTC on members of the groups identified by the CIJ in §1417. With regard to the New People, the latter are mentioned twice in the factual discussions concerning KTC that are presented in the Closing Order and constitute the basis on which the CIJ based its legal characterisation of the facts. In §498, it is stated that when "*new people*" arrived at TK, they wrote biographies. Then, in §500, as regards the nature of the prison population, the CIJ wrote:

> "Men, women, and children were all detained at Kraing Ta Chan, including whole families. Eight

[886] Reasons for Judgement, §170.
[887] Reasons for Judgement, §1818-1828.
[888] Reasons for Judgement, §2835-2836.

witnesses were former detainees. Witnesses remember that most of the detainees were new people originating from Phnom Penh. However, "Base People", former Khmer Republic soldiers, CPK cadre, Chinese, Vietnamese and Cham also contributed to the population."

498. That finding contradicts the existence of discrimination since everyone, regardless of age, sex, nationality or function, was subject to arrest. It may be that the CIJ meant to say that NP were more frequently arrested than their fellow citizens, but no information has been provided on this point. In §501 of the CO, it is stated that "The evidence suggests that prisoners were divided into two categories: serious and light offenders." No reference is made anywhere else in this paragraph to any of the groups referred to in §500. Therefore, it cannot be said that a person was more likely to be classified as a serious offender because that person belonged to NP. However, this finding here and this finding alone could have shown discrimination such that it could be characterised as persecution on political grounds. Finally, in §510-514 under the heading "Disappearances and Executions", no mention is made whatsoever of New People. Thus, contrary to whin §1418 of the CO might seem to imply, the CIJ did not rely on that narrative to establish the notion of discrimination against NP. Accordingly, the CIJ's finding in §1418 lacks any material basis. Therefore, no facts relating to the treatment of NP at KTC formed the basis of a charge for which KHIEU Samphan was answerable.

B. Convictions for facts of "discrimination" against New People outside of the scope of the indictment

499. Insofar as KHIEU Samphan was not properly indicted for facts characterised as persecution directed against NP in KTC, the material findings reached by the Chamber with respect to facts of "discrimination" targeting NP are *ultra vires*.[889] Accordingly, the Chamber erred in law in finding that the actus reus and *mens rea* of persecution on political grounds targeting NP were established. The Chamber erred in law by incorporating these facts, characterised as the CAH of persecution on political grounds, in a policy it characterised as "criminal" in nature.[890] These conclusions should be annulled as should be the declaration that KHIEU Samphan is guilty of these facts as part of a JCE.[891]

II. ABSENCE OF *SAISINE* FOR FACTS OF "DISCRIMINATION" TARGETING EX-KR SOLDIERS AND OFFICIALS

[889] Reasons for Judgement, §2839-2841.
[890] Reasons for Judgement, §3983, 3987.
[891] Reasons for Judgement, §4306.

500. The Chamber committed an error in law by declaring having been correctly seised of facts concerning "discrimination" on political grounds targeting ex-KR soldiers and officials that occurred in KTC.[892] The Court should have taken into consideration that an examination of the relevant paragraphs of the CO fails to show any evidence of facts of "discrimination" targeting ex-KR soldiers and officials (A), and should have found that it was not competent to condemn beyond the scope of this *saisine* (B).

A. No discrimination targeting ex-KR soldiers and officials in the presentation of facts in §489-514 of the Closing Order

501. The Chamber has erred in law in judging KHIEU Samphan with regard to acts of "discrimination" targeting ex-KR soldiers and officials in KTC.[893] As was discussed above with regard to "discrimination" targeting NP in KTC, in §1418, the CIJ specifies the manner in which persecution was carried out at the crime sites:

> "In **cooperatives and worksites**, and during **population movements,** real or perceived enemies of the CPK were subjected to harsher treatment and living conditions than the rest of the population. Also, they were arrested *en masse* for reeducation and elimination at **security centres** and **execution sites**." (Underlined in the original).

502. Only the facts of arrest, reeducation and the elimination of individuals are relevant to KTC and illustrate the discrimination suffered. In §498 of the Closing Order, during its examination of the facts relating to KTC, the CIJ reached a conclusion as to the fate of the ex-KR soldiers and officials in TK. As regards the facts that took place within the KTC compound itself, reference is only made to ex-KR soldiers and officials in §500, where it is stated, *inter alia*, that "[...] 'Base People', former Khmer Republic soldiers, CPK cadre, Chinese, Vietnamese and Cham also contributed to the population." That finding contradicts the existence of discrimination since everyone, regardless of age, sex, nationality or function, was subject to arrest.

503. The CIJ did not present any evidentiary proof of the existence of discriminatory acts against ex-KR soldiers and officials within the KTC compound. Accordingly, the CIJ's finding in §1418 lacks any material basis. Therefore, no facts relating to the treatment of ex-KR soldiers and officials at KTC formed the basis of a charge for which KHIEU Samphan was answerable.

B. Convictions for facts of "discrimination" targeting ex-KR soldiers and officials are out of

[892] Reasons for Judgement, §2835-2837.
[893] Reasons for Judgement, §2835-2836.

scope

504. The Chamber was not competent to rule on the alleged facts of "discrimination" targeting ex-KR soldiers and officials in KTC. Its findings regarding such facts of "discrimination" targeting the ex-KR soldiers and officials were delivered in breach of its lawful *saisine* and must be reversed.[894] Therefore, the Chamber has erred in law by holding that the CAH of persecution on political grounds targeting ex-KR soldiers and officials was established.[895] The Chamber has also erred in law by incorporating those facts, characterised as the CAH of persecution on political grounds, in a policy it characterised as "criminal" in nature.[896] Its conclusions should be annulled as should be the declaration that KHIEU Samphan is guilty of these facts as part of a JCE.[897]

III. *SAISINE* RESTRICTED TO THE THREE GROUPS DEFINED IN THE LEGAL CHARACTERISATION SET OUT IN THE CO

505. The Chamber has erred in law in finding that the scope of its *saisine* in regard to KTC extended beyond the three groups of enemies defined in the "Legal Findings" of the Closing Order.[898] It should have taken into account the fact that only three groups are identified in the CO (A) and found that it could not convict outside the scope of its strictly defined referral (B).

A. Only three groups are identified in the Closing Order

506. In §1416 of its Closing Order, the Co-Investigating Judges determined that the crime of persecution on political grounds was chargeable in respect to several crime sites, including the KTC site. Under § 1417, general information, applicable to all the crime sites, is first given so as to provide an understanding of the crime.[899]

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[894] Reasons for Judgement, §2839, 2841-2843.
[895] Reasons for Judgement, §2843, 4058.
[896] Reasons for Judgement, §2839-4061.
[897] Reasons for Judgement, §4246, 4299 -4300, 4306.
[898] Reasons for Judgement, §2834, referring to §170, and 2837.
[899] CO, §1416: "The CPK authorities identified several groups as "enemies" based on their real or perceived political beliefs or political opposition to those wielding power within the CPK. Some of these categories of people, such as former ranking civilian and military personnel of the Khmer Republic, were automatically excluded from the common purpose of building socialism. As for junior officials of the former regime, some were arrested immediately after the CPK took power, because of their allegiance to the previous government, and many were executed at security centres such as S-21 and at Tuol Po Chrey. The entire population remaining in towns after the CPK came to power was labelled as "new people" or "17 April people", and subjected to harsher treatment than the old people, with a view to reeducating them or identifying "enemies" amongst them. Intellectuals, students and diplomatic staff who were living abroad were recalled to Cambodia and, upon arrival, were sent to reeducation camps or to S-21". (emphasis added). The facts pertaining to the S-21 and Prey Sar crime sites are developed below, in §1175 *et seq*.

507. Thus, the CIJ identified that three groups had been labelled as "enemies": ex-KR soldiers and officials, new people and Cambodians returning from abroad. No additional information is given with regard to the identification of the other "categories of so-called 'enemies'". As the last sentence of § 1417 is unclear, it is impossible to know exactly what the CIJ meant. They mention one element - "anyone who disagreed with the CPK ideology was excluded" - which seems to extend well beyond the definition of a group as set forth in §1417. It would seem to follow that anyone at all might have been persecuted, whether they were members of a group or not. That overlooks, however, that persecution presupposes that a group had been defined by the CPK authorities.[900]

508. Where there are no longer any clearly defined groups, there is no longer any crime. The position of the Supreme Court in this respect with regard to the increase in the number of crimes during the DK era is enlightening:

> "as the revolution wore on, however, individuals were indiscriminately apprehended, mistreated and eliminated without any attempt at rational or coherent justification on political grounds in actions that were no longer persecution but constituted a reign of terror where no discernible criteria applied in targeting the victims."[901]

509. Accordingly, KHIEU Samphan should only have had to answer to accusations pertaining to the persecution of the three groups clearly defined in §1417. The Chamber has erred in law in declaring itself seised of facts of "discrimination" targeting groups whose very designation and membership were unknown to KHIEU Samphan.

B. Convictions for "discrimination" against the "group" of real or perceived enemies are out of scope

510. The Chamber's findings in respect to facts of "discrimination" targeting the "group" of real or perceived enemies were reached in breach of its lawful referral.[902] Accordingly, the Chamber has erred in law in finding that the *actus reus* of persecution on political grounds was established with regard to facts targeting the "group" of real or perceived enemies.[903] The Chamber has also erred

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[900]The element as given by the CIJ is in fact a matter of translating the components of the legal definition of the crime onto the facts, which presupposes that the perpetrator of the crime has defined the group "on the basis of certain specific criteria" and that the group itself "is identifiable". See below, §1212-1213.
[901] *Duch* Appeal Judgement, 03.02.2012, §283 (emphasis added).
[902] Reasons for Judgement, §2839.
[903] Reasons for Judgement, §2843.

in law by incorporating those facts, characterised as the CAH of persecution on political grounds targeting the "group" of real or perceived enemies, in a policy it characterised as "criminal" in nature.[904] Its conclusions should be annulled as should be the declaration that KHIEU Samphan is guilty as part of a JCE.[905]

Section VI. AU KANSENG

511. The Chamber has erred in law by declaring itself seised as regards facts of persecution on political grounds at AuKg with regard to the group consisting of "adversaries of the CPK [...] real or perceived".[906] Indeed, it held that "this group included detractors of the socialist revolution, critics or opponents of the Party [...], as well as the Vietnamese (including former Thieu-Ky soldiers, members of the FULRO and ethnic Jarai from Vietnam)".[907]

512. This, however, is a misreading of the CO. While facts relating to these persons are indeed described in §589 to 623 of the CO, they were not legally characterised by the CIJ. Indeed, only the facts pertaining to three defined groups were characterised as persecution on political grounds by the CIJ, namely: ex-KR soldiers and officials, new people and Cambodians returning from abroad.[908] It is clear that the group as defined by the Chamber does not fall into any of the three groups covered by the characterisation set out in the Closing Order. Moreover, such a disparate inventory of "real or perceived adversaries" that supposedly make up this group as established by the Chamber in no way satisfies the stringent requirements governing the definition of what a particular group must be in order to establish the crime of persecution.[909]

513. The facts reviewed by the Chamber have thus not been legally characterised by the CIJ. Such a misreading of the CO has resulted in the unlawful expansion of its referral.[910] Accordingly, its findings with respect to persecution on political grounds at AuKg must be reversed and KHIEU Samphan must be acquitted of that crime.[911]

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[904] Reasons for Judgement, §3973, 3983, 3987.
[905] Reasons for Judgement, §4306.
[906] Reasons for Judgement, §2980-2982.
[907] Reasons for Judgement, §2982.
[908] CO, §1417.
[909] See below, §849-853.
[910] See above, §359-464.
[911] Reasons for Judgement, §2980-2993 and 4306.

Section VII. PHNOM KRAOL

514. **Persecution on political grounds**: In the Reasons for Judgement under appeal, the Chamber recalled that according to the CO, it was seised of facts concerning the CAH of persecution on political grounds.[912] Thus, it proceeded to provide a legal characterisation of the facts and concluded that the crime was established regarding the said facts committed in the PK security centre.[913]

515. The Defence had already argued before the Chamber that the facts in question fell outside the jurisdiction of the Chamber since the Closing Order had not determined that the detainees in this instance belonged to a defined group.[914] It should be recalled that according to §1416 of the Closing Order, the crime of persecution on political grounds had been established in regard to Phnom Kraol. In §1417 of the Closing Order, three groups were defined as having been victims of persecution on political grounds: former Khmer Republic soldiers and officials, new people and Cambodians returning from abroad. The sole reference to the nature or background of the detainees at the PK site appears in §634.[915] However, as that single reference did not identify those detainees as being members of a defined group, the charge brought against KHIEU Samphan was consequently baseless. The Chamber rejected that argument and held, on the basis of a misreading of the CO, that those facts did indeed fall within its jurisdiction.[916] It held that the definition of the three groups was non-exhaustive and could expand over time.[917] In this Brief, the Defence submits that such an analysis, based as it is on a broad construction of the CO, constitutes a serious error of law.[918]

516. The failure to identify the group should have precluded referring KHIEU Samphan for trial with respect to the crime of persecution. As the basis for prosecution was null and void, the Chamber could not consider itself seised of those facts nor could it find that they had been established at PK.

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[912] Reasons for Judgement, §3019, 3024.
[913] Reasons for Judgement, §3136-3151.
[914] CB 002/02, §1386-1389.
[915] CO, §634: "All the former prisoners of Phnom Kraol who were interviewed, attest that they were arrested on suspicion of being traitors to the revolution either because of associations with the Vietnamese or because of alleged connections to the CIA."
[916] Reasons for Judgement, §170, 3137.
[917] Reasons for Judgement, §170.
[918] See above, §359-464.

Hence, by finding KHIEU Samphan guilty of the resulting charges, it has also breached his procedural rights. Accordingly, those findings in their entirety must be invalidated.[919]

Chapter III. ERRORS AND IMPACT ON SPECIFIC GROUPS

Section I. CHAM

I. ABSENCE OF *SAISINE* FOR EXECUTIONS THAT TOOK PLACE AT TREA VILLAGE

517. The Chamber erred in law by interpreting the Closing Order as encompassing the facts of murder as a CAH that occurred at the security office in Trea village.[920] It should have taken into account the subject matter limit it had been seised of and confirmed that it could not convict beyond this. § 1378 of the CO restricts the scope of its referral to the Chamber to murders committed "during the ill-treatment of [...] Chams" at the security centres of Krouch Chhmar and Wat Au Trakuon. The scope of the trial was further restricted by the severance decision, which specifically excluded the Krouch Chhmar security centre. Thus, the Chamber has never been seised of the facts constituting the CAH of murder with respect to Trea village.

518. The Chamber has erred in law by drawing conclusions *ultra vires* outside the scope of its material and geographical referral. The findings pertaining to executions that occurred in Trea village must be invalidated. This is equally true of the statement that "[I]t has further found that, in 1978, a great number of Cham people from Kroch Chhmar district were arrested and taken to Trea Village Security Centre [...]. Those who were deemed to be Cham were executed".[921] The CAH of murder has not been established with respect to the facts carried out in 1978 at Trea Security Centre.[922] Lastly, the further findings pertaining to the incorporation of such facts within a CPK policy and the subsequent deduction of its criminality must be reversed.[923] The same holds true with respect to the conviction of KHIEU Samphan on the grounds of those facts characterised as the CAH of murder through a JCE.[924]

II. ABSENCE OF *SAISINE* FOR FACTS OF PERSECUTION ON POLITICAL GROUNDS THROUGH A JCE

[919] Reasons for Judgement, §3136-3151.
[920] Reasons for Judgement, §3184, 3305.
[921] Reasons for Judgement, §3306.
[922] Reasons for Judgement, §3306-3308.
[923] Reasons for Judgement, §3992-3998.
[924] Reasons for Judgement, §4306.

519. The Chamber erred in law by declaring itself seised of facts establishing the CAH of persecution on political grounds targeting the Cham "relevant to the implementation of this policy through a joint criminal enterprise".[925] KHIEU Samphan was not held liable under § 1525 of the CO for the CAH of persecution of the Cham on political grounds pursuant to the mode of liability of JCE. Therefore, the Chamber's criminal findings with respect to the CAH of persecution on political grounds targeting the Cham under that mode of liability should be reversed.[926]

Section II. VIETNAMESE

520. The Chamber has erred in law by deeming itself seised of facts pertaining to Vietnamese within the territorial waters of DK.[927] However, no such facts appear in the ISCP nor were they included in any other supplementary indictment, nor were they ever the subject of an investigation during the pre-trial proceedings.[928] Indeed, it is for that very reason that no facts pertaining to measures taken against the Vietnamese at sea have been legally characterised in the CO. By basing its decision on a single document, referenced in an endnote in the CO,[929] the Chamber's finding that it was indeed seised of the matter has led to a miscarriage of justice.[930] Indeed, the CIJ used that particular telegram from Division 164 as one of a great number of other DK documents to sustain its allegation that there was an intent to destroy the group of Vietnamese.[931]

521. The Chamber could not extend its referral to facts constituting crimes against the Vietnamese at sea on the basis of that single element alone. However, the Chamber had noted that "a more complete 'description of the material facts' and their legal characterisation is required in the Closing Order".[932] The Chamber erred in law by failing to consider the consequences of its findings. Any information pertaining to the charges brought against the accused must be full, detailed and accurate so as to enable him to prepare his defence.[933] By relying on that single piece of evidence, which only appears as an endnote, the Chamber has breached KHIEU Samphan's right

[925] Reasons for Judgement, §3991.
[926] Reasons for Judgement, §3995, 3998, 4306.
[927] Reasons for Judgement, §3357.
[928] ISCP, §69-70. See also above, §435-438.
[929] CO, §816, endnote 3487.
[930] Decision on motions 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) 25.05.2016, **E380/2**, §21
[931] CO, §816, endnote 3487.
[932] Reasons for Judgement, §166.
[933] CB 002/02, §82-85.

to properly prepare his defence. Therefore, the Chamber should not have found KHIEU Samphan guilty of the crime of genocide through murder, the CAH of extermination and the CAH of murder in respect of facts relating to the Vietnamese at sea.[934] He must be acquitted of these crimes.

Section III. FORMER KHMER REPUBLIC SOLDIERS AND OFFICIALS

522. The Chamber has erred in law and a discernible error in the exercise of its discretion in relating to the alleged existence of a policy of specific measures to be taken against ex-KR soldiers and officials.[935] It should have taken into account the subject matter limit it had been seised of (I) and confirmed that it could not convict beyond this (II).

I. BREACH OF THE *SAISINE* IN REM BY THE CHAMBER

523. According to the Closing Order, KHIEU Samphan is on trial for crimes committed against ex-KR soldiers and officials at the sites of the Tram Kak, 1JD, S-21 and KTC cooperatives. The Closing Order does not mention ex-KR soldiers and officials among the groups it specifies (1). The expansion of the Chamber's referral *in rem* as set out in the Decision on Severance is invalid (2). The Chamber committed a discernible error in the exercise of its discretion by accepting that the scope of the trial be expanded (3).

A. No mention is made to ex-KR soldiers and officials among the groups specified in the Closing Order

524. The CIJ was never instructed to investigate the existence of a policy potentially underpinning the commission of the crimes at the sites at issue in Case 002/02. It is therefore logical that in the Closing Order, the ex-KR solders and officials are not defined as a specific group alongside Buddhists, Cham and Vietnamese under section "D. Treatment of Targeted Groups" of Title "VII. Factual Findings" of the Closing Order.[936]

B. Expansion of the Chamber's *saisine in rem* in the Decision on Severance

525. In the Decision on Severance, the ex-KR soldiers and officials are said to constitute a group against which a policy of specific measures was allegedly implemented, as exemplified by the crime sites selected for inclusion in Case 002/02. Thus, according to the Chamber: "[f]actual allegations

[934] Reasons for Judgement, §3456-3461, 3490, 3493, 3499-3501, 3514-3519 and 4306.
[935] Reasons for Judgement, §174, 3520
[936] CO, summary, p. 4 and §740 to 840.

relevant to each of these crime sites are relevant to the policy of targeting of former Khmer Republic officials."[937] In support of its contention, the Chamber states the following in a footnote:

> "The Closing Order alleges that there was a pattern of targeting former Khmer Republic officials. Factual allegations relevant to this pattern are included within the sections of the Closing Order concerning Tram Kok Cooperatives (Closing Order, para. 319), 1st January Dam Worksite (Closing Order, para. 366), S-21 Security Centre (Closing Order, para. 432), Kraing Ta Chan Security Centre (paras. 498, 500)."[938]

526. The Chamber's analysis is patently incorrect. Never in the above-mentioned paragraphs is there any mention of a "pattern" – the imprecise meaning of the term is problematic in and of itself – directed against ex-KR soldiers and officials. It could hardly be otherwise since, as was discussed in the previous chapter, none of the paragraphs mentioned in the footnote in question, with the exception of § 498, make any reference to treatment directed specifically against ex-KR soldiers and officials. The Chamber has misread the CO, which clearly states in §206 under the heading "Treatment of Targeted Groups":

> "The Co-Investigating Judges are seized of treatment of the Cham in the Central, East and Northwest Zones; of the Vietnamese in Prey Veng and Svay Rieng Provinces in the East Zone and during incursions into Vietnam; of Buddhists throughout Democratic Kampuchea; and of former officials of the Khmer Republic during the movement of the population from Phnom Penh." This last incident constitutes only one of several occurrences of a pattern of targeting former officials of the Khmer Republic." (emphasis added).

527. The issue is never one of a territory-wide policy of targeting ex-KR soldiers and officials, but rather that there are two types of facts: the first pertaining to the evacuation of Phnom Penh, of which the CIJ claim to have been seised with regard to specific measures directed against ex-KR soldiers and officials, and the second pertaining to other events of which they have not been seised under that heading. Thus, the Chamber was not competent to determine whether or not KHIEU Samphan was liable with regard to a CPK policy that may have targeted ex-KR members. He was therefore not answerable for the implementation of a policy that the Chamber arbitrarily established in its severance decision. The Chamber erred in law by reaching conclusions with regard to the treatment of ex-KR soldiers and officials at all of the crime sites.

C. A discernible error in the exercise of the Chamber's discretion has been committed with regard to the scope of the proceedings

[937] Decision on Additional Severance of Case 002 and Scope of Case 002/02, 04.04.2014, **E301/9/1**, §44
[938] Decision on Additional Severance of Case 002 and Scope of Case 002/02, 04.04.2014, **E301/9/1**, fn 95.

528. On 26 August 2015, at the request of the Defence and in a communication by email, the Chamber sought to justify its position by providing the parties with the reasons for a decision rendered in court in which it found that the questions put by the Prosecutors regarding ex-KR soldiers and officials at TTD (a site which is not included in the CO in respect of their treatment) were relevant, despite an objection raised by the NUON Chea Defence. Despite the absence of any policy directed against ex-KR soldiers and officials in the CO in relation to the facts under consideration in Case 002/02, the Chamber justified its improper approach as follows: "The Chamber considers that the Co Prosecutor's question is relevant to the *existence* of the alleged policy to target former Khmer Republic officials in addition to internal purges [(*sic*)]."[939]

529. That position was adopted in flagrant contradiction to the restrictions imposed on its *saisine* in rem and resulted in a considerable waste of time, since witnesses had been heard with regard to the issue of the ex-KR soldiers and officials at all of the crime sites relevant to Case 002/02, and the Prosecutors had even been allowed extra time to present documents pertaining to the ex-KR soldiers and officials at the hearing on key documents concerning the treatment of specific groups.[940] That decision is vitiated by a discernible error in the exercise of its discretion and has repercussions on the approach of the Chamber in the Reasons for Judgement.

II. CONVICTIONS THROUGH A JCE FOR CRIMES OUTSIDE THE SCOPE OF THE *SAISINE*

530. The Chamber erred in law by expanding its jurisdiction *in rem* to include the existence of a policy that consisted of taking specific measures directed against ex-KR soldiers and officials.[941] Therefore, all the findings as to the existence of a specific policy targeting ex-KR soldiers and officials are in breach of the scope of the Chamber's referral.[942] They must be reversed on the grounds that they could not serve as a basis for KHIEU Samphan's liability through a JCE.[943] His conviction on the charge of the CAH of persecution on political grounds targeting ex-KR soldiers and officials will be reversed.

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[939] Email dated 26.08.2015, **E362** (emphasis in the original).
[940] T. 24.02.2016, **E1/391.1**, towards 09.17.50.
[941] Reasons for Judgement §174, 3520, 3988, 4023-4024.
[942] Reasons for Judgement, §4026-4049,
[943] Reasons for Judgement, §4306.

Title IV. EXCLUSION THROUGH SEVERANCE

Chapter I. THE LAW

531. The IR provides for the severance of proceedings at the trial stage (Internal Rule 89 *ter*) and the reduction of the scope of the trial (Internal Rule 89 *quater*).

532. Under Internal Rule 89 *ter,* the Chamber may 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 Chamber deems appropriate". The charges are then tried and adjudicated separately.

533. Internal Rule 89 *quater* allows the Chamber to "decide to reduce the scope of the trial by excluding certain facts set out in the Indictment" (Internal Rule 89 *quater* 1.). In that case, the charges are permanently dropped (Internal Rule 89 *quater* 3.):

> "The Trial Chamber shall terminate the proceedings concerning the excluded facts. Once the decision to reduce the scope of the trial becomes final, the facts excluded shall not form basis for proceedings against the same Accused Person(s)". [944]

534. The framers of the rule explicitly brought the principle of *non bis in idem* to bear on such a discontinuance of proceedings, whereby: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country".[945]

535. By severing the proceedings, the Chamber is thus deciding to consider the excluded facts at some later stage. It is thus temporarily relinquishing its jurisdiction in regard to such facts. By reducing the scope of the trial, the Chamber has decided that it will never consider the facts it has excluded. The Chamber has thus permanently relinquished its jurisdiction to hear those facts. Once the Chamber has ruled on facts or has decided to exclude facts and its decisions have become final, the facts in question can no longer be used as a basis for proceedings against the accused.

536. In this case, the Chamber has twice severed the proceedings and then has reduced the scope of Case 002. It defined and tried Case 002/01, on which a final verdict has now been handed down.[946] It

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[944]Emphasis added. Rule 89 *quater* 3 further states: "Evidence relating to the facts excluded may be relied upon to the extent it is relevant to the remaining facts".
[945] ICCPR, Article 14-7.
[946] Case 002/01 Appeal Judgement, 23.11.2016, **F36**.

defined Case 002/02[947] and finally decided to terminate the proceedings concerning the facts excluded from Case 002/01 and Case 002/02.[948] That decision was not appealed and therefore became final.[949]

537. In light of the applicable law, the Chamber could not by any means deliver judgement in Case 002/02 on facts that it had already adjudicated in Case 002/01, nor on facts that it had excluded from Case 002/02 and regarding which it had moreover permanently terminated proceedings. Any consideration of such facts, whether it be under the same legal characterisation, under another legal characterisation or indeed together with other facts under the same legal characterisation, constitutes a breach of the IR and of the principle of *non bis in idem*.

Chapter II. ERRORS AND IMPACT ON SPECIFIC GROUPS

Section I. CHAM

I. ABSENCE OF SAISINE FOR FACTS OF PERSECUTION ON POLITICAL GROUNDS AND OIA OF FORCIBLE TRANSFER OF POPULATIONS

538. The Chamber has erred in law by not restricting its scope to the facts relating to MOP2 exclusively from the perspective of facts constituting the CAH of persecution on religious grounds (A) and by convicting KHIEU Samphan in respect of facts falling outside of that scope (B).

A. Restriction of the scope of the *saisine* for MOP2 exclusively to the CAH of persecution on religious grounds

539. The Chamber correctly recalled that under the Annex to the Decision on Further Severance of Case 002, the scope of proceedings in Case 002/02 was restricted to the facts referred to in §226, 268 and 281 of the Indictment. However, the Chamber has erred in law by omitting § 43 of the decision on severance, which clearly defines the scope of the trial as regards the forcible transfers of the Cham in MOP2 under the legal characterisation of the CAH of persecution on religious grounds. The following paragraph is essential to establishing the scope of the trial:

> "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

[947] Decision on Additional Severance of Case 002 and Scope of Case 002/02 04.04.2014, **E301/9/1**; Annex Setting the Scope of Case 002/02, 04.04.2014, **E301/9/1.1**.
[948] Decision on Reduction of the Scope of Case 002 27.02.2017, **E439/5**.
[949] None of the parties filed an appeal under Rule 104-4-b, which provides for immediate appeals against decisions which have the effect of terminating the proceedings.

> (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."[950]

540. Pursuant to that decision, the Chamber was seised of the facts relating to MOP22 only insofar as they pertained to the crime of persecution on religious grounds directed against the Cham in the course of MOP2.

B. Convictions for facts carried out in the course of MOP2 are beyond the scope of the trial

541. In breach of its own severance order, the Chamber has erred in law by declaring itself seised and competent to try facts falling outside the scope of "discrimination" on political grounds in the course of MOP2 (1)[951] and facts of forcible transfers in the course of MOP2 (2).[952]

1. Convictions for facts of "discrimination" on political grounds are beyond the scope of the trial

542. The Chamber erred in law by declaring itself competent to try facts of persecution on political grounds committed in the course of MOP2 which did not fall within the scope of Case 002/02 as defined in its severance order.[953] With regard to the facts of persecution on political grounds, all the findings which the Chamber reached in breach of its referral must therefore be reversed. This pertains in particular to its finding that the CAH of persecution on political grounds was indeed established with respect to the forcible transfer of the Cham population from the EZ to the CZ in September 1975 and October 1975.[954] Therefore, the further findings pertaining to the incorporation of such facts, characterised as the CAH of persecution on political grounds within a CPK policy and the subsequent deduction of its criminality must be reversed also.[955] The same holds true with respect to the conviction of KHIEU Samphan on the grounds of those facts through a JCE.[956]

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[950] Decision on Additional Severance of Case 002 and Scope of Case 002/02, 04.04.2014, **E301/9/1**, §43 (emphasis added).
[951] Reasons for Judgement, §3184, 3320.
[952] Reasons for Judgement, §3184.
[953] Reasons for Judgement, §3184, 3320.
[954] Reasons for Judgement, §3322-3326, referring to §3261-3268.
[955] Reasons for Judgement, §3995 -3996, 3998.
[956] Reasons for Judgement, §4306.

2. The convictions for facts of forcible transfers fall outside the scope of the trial

543. The Chamber has also erred in law by declaring itself competent to try facts of forcible transfer committed in the course of MOP2 under the legal characterisation of the CAH of OIA relating to forcible population transfers, whereas such facts did not fall within the scope defined by the severance order.[957] All these findings relating to the facts of forcible population transfers are ultra vires and must therefore be reversed.[958] The same holds for the Chamber's finding that the CAH of OIA in the form of facts characterised as forcible population transfers were established with respect to the Cham population in the course of MOP2.[959] Therefore, the Chamber has erred in law by incorporating these facts, characterised as the CAH of OIA through forcible transfers in a policy it characterised as "criminal" in nature.[960] These conclusions should be annulled as should be the declaration that KHIEU Samphan is guilty of these facts as part of a JCE.[961]

II. ABSENCE OF *SAISINE* FOR FACTS RELATING TO OIA OF FORCIBLE TRANSFER OF POPULATIONS IN THE COURSE OF MOP2

544. Further, the Chamber has committed a twofold error in law by adjudicating facts constituting the CAH of OIA through forcible transfers of the Cham population in the course of MOP2[962] in breach of the principle of *res judicata* (A), as KHIEU Samphan had already been tried and definitively convicted of the CAH of OIA through forcible population transfers carried out in the course of MOP2 (B).[963]

A. Principle of *res judicata*

545. The authority conferred by the principle of *res judicata* may be defined as the totality of the effects appertaining to a court decision, such as legal truth.[964] This attribute, which is granted to all judicial decisions with respect to the dispute they are called upon to settle, "prevents, subject to appeal, the same matter from being re-litigated by the same parties in the course of another trial".[965] The

[957] Reasons for Judgement, §3184, 3335.
[958] Reasons for Judgement, §3336-3339.
[959] Reasons for Judgement, §3340.
[960] Reasons for Judgement, §3397-3398.
[961] Reasons for Judgement, §4306.
[962] Reasons for Judgement, §3184.
[963] See above, §926-931; Case 002/01 Appeal Judgement, 23.11.2016, disposition.
[964] G. CORNU, Vocabulaire juridique, V° Autorité [*res judicata*], 2003, PUF.
[965] G. CORNU, Vocabulaire juridique, II° Chose [principle of *res judicata*], 2003, PUF.

principle, founded on the Latin axioms *res judicata pro veritate habetur* or *res judicata pro veritae accipitur* (literally: "The findings in the matter are held as truth"[966]), serves first and foremost to safeguard decisions of the Court and ensure legal certainty.[967] It follows that *res judicata* precludes new litigation of the matter at issue. *Res judicata* is an established principle of international criminal law and jurisprudence.[968] For example, the ad hoc tribunals have stated that the doctrine of *res judicata* "is limited, in criminal cases, 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".[969]

B. Breach of the principle of *res judicata*

546. In its Appeal Judgement in Case 002/01, the Supreme Court upheld the ruling that the CAH of OIA had been established in respect of the facts of MOP2 regarding the"300,000 to 400,000 people [who] were transferred between September 1975 and early 1977 between the Zones."[970] With regard to the alleged discriminatory nature of the population transfer, the Supreme Court held that "it cannot be said that it has been established that the transfer of people itself was carried out in a discriminatory manner or with discriminatory intent" and "the movement of the population during Population Movement Phase Two was not, as such, discriminatory or an emanation of persecutory intent."[971] The transfers of the Cham population from the EZ towards the CZ occurred in September 1975 and in October 1975.[972] Thus, under the characterisation of OIA of forcible transfers, they have already been the subject of a final decision in Case 002/01 Appeal Judgement, which has the authority of *res judicata* in respect of those facts. Pursuant to the principle of *non bis in idem*, the

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[966]Judgement Delalic, (ICTY), 16.11.1998, §228 and fn 260.
[967] See ECtHR, *Brumărescu v. Romania* (Application No. 28342/95), 28 October 1999, §61. "One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question.".
[968] See, for example: Judgement *Delalic* (ICTY), §228; *Prosecutor v. Simic et al.*, Case No. IT-95-9-PT, Decision relative to (1) the application of Stevan Torodovic for the purpose of reconsidering the decision, 27 July 1999, (2) the application of the ICRC for the purpose of reconsidering the scheduling order, 18 November 1999 and (3) the terms of access to documents, 28 February 2000, §9-10; *Prosecutor v. Bizimungu et al*, Case No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial Without Undue Delay,* 29 May 2007, §6; *Prosecutor v. Karemera et al*, Case No. ICTR-98-44-T, Decision regarding Joseph Nzirorera's application to have the allegation of collusion with Juvenal Kajelijeli withdrawn on the basis of *res judicata* ("Collateral Estoppel"), 16 July 2008, §4; *Prosecutor v. Karadzic,* Case No. IT-95-5/18-T, *Decision on Accused's Motion to Strike Scheduled Shelling Incident on Grounds of Collateral Estoppel*, 31 March 2010, §5.
[969]Judgement *Delalic*, (ICTY), 16.11.1998, §228.
[970] Case 002/01 Appeal Judgement, 23.11.2016, §658.
[971] Case 002/01 Appeal Judgement, 23.11.2016, §705-706.
[972] Reasons for Judgement, §3336, fn 11274 referring to §2993.

Chamber should have found that the Supreme Court had already convicted KHIEU Samphan and definitively sentenced him for the CAH of OIA with respect to the facts relating to MOP2.[973] The criminal findings relating to those facts will be reversed.[974]

Section II. VIETNAMESE

547. The Chamber has erred in law in determining that it was competent to consider facts constituting the CAH of OIA through enforced disappearances concerning Vietnamese victims at TK.[975] However, the Chamber did acknowledge that as a result of severance, the Vietnamese had been excluded from the examination of the facts constituting OIA through enforced disappearances. Therefore, it was mistaken in its determination that because it had been seised of facts constituting OIA through enforced disappearances in relation to certain locations, it was competent to consider such facts pertaining to Vietnamese victims at those same locations "even if these last have not been particularised as such".[976] It should be recalled that the Chamber is seised of facts and not of the legal characterisation of the facts.[977]

548. However, with respect to the TK co-operatives,[978] the CO clearly distinguished the facts relating to the "Treatment of Specific Groups" from the other facts.[979] The factual part of the section concerning the "Treatment of Specific Groups" cites facts that might be constitutive of the disappearance of Vietnamese persons.[980] The facts relating to the TK cooperatives were not included. Thus, the facts that might constitute incidents of enforced disappearances and which are not included in the sections of the CO relating to the "treatment of specific groups" clearly did not pertain to the Vietnamese victims. This may be confirmed by the evidence cited in support of those facts.[981] The written record of the hearing of RIEL San is a clear example showing the distinction that is drawn in the CO. During his hearing, he first spoke about incidents of night-time

[973] Case 002/01 Appeal Judgement, 23.11.2016, §1089-1090 and its disposition, p. 623 of the French version.
[974] Reasons for Judgement, §3184, 3335-3340, 3997-3998, 4306.
[975] Reasons for Judgement, §3352.
[976] Reasons for Judgement, §3352.
[977] IR, Rule 98-2 "The judgement 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".
[978] This is the only crime site in relation to which KHIEU Samphan has been convicted of OIA through enforced disappearances encompassing Vietnamese victims.
[979] CO, §319/321 (as to facts pertaining to the "treatment of specific groups") and §310-318 (as to the other facts).
[980] CO, §320.
[981] CO, §311 and §318.

disappearances, in particular that of his younger uncle.[982] That passage from the written record is cited in support of disappearances at TK apart from those facts appearing in the section relating to "treatment of specific groups".[983] Later on in the written record, RIEL San talked about Vietnamese who "had to disappear".[984] This particular passage, however, is cited in support of facts of disappearances in the section relating to the "treatment of specific groups".[985]

549. Hence, the facts underlying the charge of enforced disappearances at the TK cooperatives do not pertain to Vietnamese victims, as it is clear that their particular case was addressed in a specific section of the CO which at the time of severance was excluded from the scope of Case 002/02. The Chamber has therefore breached its referral by determining that in the context of other facts that constituted enforced disappearances at TK, facts pertaining to Vietnamese victims were indeed within its scope. Accordingly, the findings relating to the CAH of OIA through enforced disappearances with regard to Vietnamese victims at TK must be reversed and KHIEU Samphan must be acquitted of that crime.[986]

Part III. ERRORS PERTAINING TO THE ALLEGED OFFENCES

Title I: BREACH OF THE PRINCIPLE OF LEGALITY

Chapter I. ERRORS PERTAINING TO THE PRINCIPLE OF LEGALITY

550. The Chamber found that the requirements of accessibility and foreseeability that underlie adherence to the principle of legality had been satisfied "in general" after an "objective analysis" of three factors: the existence of the crime or mode of liability in customary international law at the time of the alleged criminal conduct, the gravity of the crime, and the positions occupied by the Accused as members of Cambodia's governing authority.[987] Thus it followed the approach taken

[982]Written Record of Witness Interview, 29.10.2009, **E3/5511** (D232/48 in the CO), ERN EN 00412170-00412171, pp. 2-3.
[983] CO, §318, endnote 1314.
[984]Written Record of Witness Interview, 29.10.2009, **E3/5511** (D232/48 in the CO), ERN EN 00412170-00412171, p. 4.
[985] CO, §320, endnote 1319.
[986] Reasons for Judgement, §1201-1204, 3927 and 4306.
[987] Reasons for Judgement, §20-32, 300, 325-326, 651, 654, 661, 672-673, 688, 700, 712, 723, 757, 759, 761-763, 765-767, 770-771, 780-781, 784-789, 3703, 3704, 3707, 3721.

by the Supreme Court in its Appeal Judgement in Case 002/01 and thus dismissed[988] the arguments submitted by the Defence demonstrating that such an approach was in fact incorrect.[989]

551. In so doing, the Chamber has committed a grave error of law by failing to apply the correct legal criteria that underlie the principle of legality. It has inappropriately distorted the purpose of that principle (Section I), reasoned in terms of the conduct of the accused rather than the quality of the law (Section II), and carried out only a very cursory review of the basic requirements of accessibility and foreseeability (Section III).

Section I. INAPPROPRIATE DISTORTION OF THE PURPOSE OF THE PRINCIPLE

552. According to the Chamber, "for the purposes of foreseeability and accessibility it has to look beyond the technical definition of the crime and have regard to the purpose of the principle of legality".[990] However, taking into account the purpose of the principle of legality in order to avoid addressing whether the technical definition of the offence is accessible and foreseeable is not only contrary to applicable law, but also contrary to the very purpose the principle of legality is intended to serve.

553. Indeed, jurisprudence established by the Grand Chamber of the ECtHR is very clear on the matter:

> "The term "law" implies qualitative requirements, including those of accessibility and foreseeability (see, among other authorities, Cantoni v. France, 15 November 1996, § 29, Reports 1996-V; Coëme and Others, cited above, § 145; and E.K. v. Turkey, no. 28496/95, § 51, 7 February 2002). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in question carries (see Achour, cited above, § 41). An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it what acts and omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission (see, among other authorities, Cantoni, cited above, § 29). Furthermore, a law may still satisfy the requirement of "foreseeability" where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[991]

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[988] Reasons for Judgement, §20-32.
[989] CB 002/02, §300-380.
[990] Reasons for Judgement, §651 (and fn 2017-2018 referring to other sections of the Reasons for Judgement and to the Appeal Judgement, Case 002/01), §30. In particular, the Chamber addressed accessibility and foreseeability before even considering the definition of the alleged criminal conduct or the mode of liability: Reasons for Judgement, §326 and 757, 759, 761-763, 765-767, 770-771, 774-778, 780-781; §654 *et seq.*; §661 *et seq.*; §673 *et seq.*; §688 *et seq.*; §700 *et seq.* §712 *et seq.*; §723 *et seq.*; §789 *et seq.*; §3704 *et seq.*
[991] *Kafkaris v. Cyprus*, Judgement (ECtHR, Grand Chamber), 12.02.2008, §140.

> "[A]n offence must be clearly defined in the law, be it national or international. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable."[992]
>
> "[T]he principle that offences and sanctions must be provided for by law entails that criminal law must clearly define the offences and the sanctions by which they are punished, such as to be accessible and foreseeable in its effects. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable."[993]

554. Thus, by virtue of the principle of legality and its purpose, it is the definition of the crime (and the sentence)[994] that should have been both accessible and foreseeable. It is therefore not simply a matter of considering whether the offence was punishable by law at the time the alleged criminal acts were committed. The exact manner in which the crime was punished must also be considered so as to ascertain whether "the applicant could have known [at the material time] what acts and omissions would make him criminally liable for such crimes and regulated his conduct accordingly".[995] The principle of legality is the means whereby free will may be implemented, arbitrariness avoided and equality guaranteed as regards legal penalties.[996]

555. Drawing on the jurisprudence of the ECtHR, the Chamber emphasised that in law, "there is an inevitable element of judicial interpretation. [...] [I]n particular there will always be a need for elucidation of doubtful points and for adaptation to changing circumstances.[997] The Chamber stresses that ECtHR jurisprudence cannot be interpreted "as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen".[998] However, in no way does that eliminate the obligation to consider accessibility and foreseeability with respect to the definition of the offence. On the contrary, what must be

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[992] *Vasiliauskas v. Lithuania*, Judgement (ECtHR, Grand Chamber), 20.10.2015, §154.
[993] *G.I.E.M. S.R.L. et al. v. Italy*, Judgement (ECtHR, Grand Chamber), 28.06.2018, §242.
[994] *Kafkaris v. Cyprus*, Judgement (ECtHR, Grand Chamber), 12.02.2008, §143-148, 150. See also: *Maktouf and Damjanović v. Bosnia-Herzegovina*, Judgement (ECtHR, Grand Chamber), 18.07.2013, §65-76.
[995] *Kononov v. Latvia*, 17.05.2010, Judgement (ECtHR, Grand Chamber), 17.05.2010, §187, cited in §28 of the Reasons for Judgement.
[996] CB 002/02, §300-302 and 306-307, referring in particular to *Vasiliauskas v. Lithuania*, Judgement (ECtHR, Grand Chamber), 20.10.2015, §153-154 and to *Kokkinakis v. Greece*, Judgement (ECtHR), 25.05.1993, §52.
[997] Reasons for Judgement, §28, likely based implicitly on *Vasiliauskas v. Lithuania*, Judgement (ECtHR, Grand Chamber), 20.10.2015, §155.
[998] Reasons for Judgement, §29, citing *Vasiliauskas v. Lituanie*, Judgement (ECtHR, Grand Chamber), 20.10.2015, §155 and also referring to *Kononov v. Latvia*, Judgement (ECtHR, Grand Chamber), 17.05.2010, §185.

considered are the accessibility and foreseeability of the definition of the offence as it was interpreted and clarified. Indeed, according to ECtHR jurisprudence, it is a matter of "ascertaining whether, in the case in point, the text of the relevant regulation, read if necessary together with any accompanying interpretative case-law, fulfilled this condition at the material time".[999] "From the prohibition of the broad application of penal law it follows that, in the absence of an accessible and reasonably foreseeable legal interpretation at the very least, the requirements set out in Article 7 cannot be deemed to have been satisfied with respect to an accused person".[1000]

556. Thus, in its rulings the ECtHR has penalised for example an interpretation stemming from an unforeseeable reversal in jurisprudence,[1001] a broad and unforeseeable interpretation of an offence detrimental to the accused and incompatible with the very nature of the offence,[1002] a conviction for an offence resulting from developments in jurisprudence which were reinforced after the alleged offences had been committed,[1003] as well as a conviction pursuant to an ambiguous rule that had been interpreted in widely divergent ways.[1004] In so doing, it held that inconsistent case law fails to provide the degree of precision that is required so as to eliminate any danger of arbitrariness and to enable everyone to foresee the consequences of their acts.[1005]

557. Accordingly, neither the purpose of the principle of legality nor the gradual clarification of the rules of liability through judicial interpretation were sufficient to exempt the Chamber from its obligation to consider the accessibility and predictability of the technical definition of the offence at the material time. The same holds true for the gravity of the crimes alleged.

Section II. <u>REASONING BASED ON THE ACCUSED'S CONDUCT</u>

558. The Chamber concurred with the reasoning of the Supreme Court that "as to foreseeability, the accused "must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision".[1006] The Chamber "concurs with the view that the

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[999] *Dragonotiu and Militaru-Pidhorni v. Romania*, Judgement (ECtHR), 24.05.2007, §36-38. [In French only] See also: *Contrada v. Italy (No.3)*, Judgement (ECtHR), 14.04.2015, §64.
[1000] *Dragonotiu and Militaru-Pidhorni v. Romania*, Judgement (ECtHR), 24.05.2007, §43. [In French only]
[1001] *Dragonotiu and Militaru-Pidhorni v. Romania*, Judgement (ECtHR), 24.05.2007, §39-48. [In French only]
[1002] *Navalnyye v. Russia*, Judgement (ECtHR), 17.10.2017, §68.
[1003] *Contrada v. Italy (No.3)*, Judgement (ECtHR), 14.04.2015, §64-76.
[1004] *Žaja v. Croatia*, Judgement (ECtHR), 04.10.2016, §99-106.
[1005] *Žaja v. Croatia*, Judgement (ECtHR), 04.10.2016, §103.
[1006] Reasons for Judgement, §30, referring to Case 002/01 Appeal Judgement, 23.11.2016, §762.

higher the gravity of crimes, the more likely that an accused would be aware in a general sense that such conduct is punishable".[1007] The Chamber then limited its consideration to the existence of the indictment in CIL and "the gravity of the crime" before finding that, "generally speaking", the requirement of foreseeability had been satisfied.[1008]

559. The only source provided in support of the Supreme Court's reasoning is a decision of the ICTY in which it was stated that, "[a]s to foreseeability, the conduct in question is the concrete conduct of the accused; he must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision".[1009] That assertion is not grounded in any source and is in direct opposition to ECtHR established case law,[1010] according to which the conduct in question is the conduct described in the "wording of the relevant provision", and certainly not the actual conduct of the accused. It is therefore the quality of the law that is at issue, not that of the accused.

560. Although the flawed wording of the ICTY decision had been noted earlier by the Pre-Trial Chamber,[1011] the latter nevertheless considered the foreseeability of the elements constituting JCE before finding that the moral element of JCE-3 had not in fact been foreseeable by the Accused between 1975 and 1979.[1012] While the Supreme Court had referred to the ICTY decision as well in its Judgement regarding Duch,[1013] at the same time it also stated:

> " [...] in light of the protective function of the principle of legality, Chambers in this Tribunal are under an obligation to determine that the holdings on elements of crimes or modes of liability therein were applicable during the temporal jurisdiction of the ECCC. Furthermore, they must have been foreseeable and accessible to the Accused. In addition, the Supreme Court Chamber stresses that careful, reasoned review of these holdings is necessary for ensuring the legitimacy of the ECCC and its decisions."[1014]

[1007] Reasons for Judgement, §30.
[1008] Reasons for Judgement, §326, 651, 654, 661, 673, 688, 700, 712, 723, 789.
[1009] Case 002/01 Appeal Judgement, 23.11.2016, §762, fn 1983, referring to: *The Prosecutor v. Hažihasanović et al.*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16.07.2003, §34.
[1010] See above, §553.
[1011] Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20.05.2010, **D97/15/9**, §45.
[1012] Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20.05.2010, **D97/15/9**, §87.
[1013] *Duch* Appeal Judgement, 03.02.2012, §96.
[1014] *Duch* Appeal Judgement, 03.02.2012, §97 (emphasis added). In §90 it also states that "the legality principle protects the individual against arbitrary exercise of political or judicial power by preventing legislative targeting or conviction

561. In Judgement 002/01, the Supreme Court made a complete departure from that analysis, to which it never made reference. It chose instead to pursue the flawed reasoning underlying the decision of the ICTY and thus reached the conclusion that "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".[1015] As a matter of law such reasoning is incorrect and the Chamber could not decently have used it as a justification for not considering the issue of foreseeability as it relates to the definition of offences.

562. Merely being satisfied that it exists in customary international law and that the reprehensible nature of the conduct is foreseeable amounts to taking the view that the elements constituting the offence and the penalty need not be specified in advance.

563. The ICTY explicitly rejected that reasoning, which is contrary to the very purpose and raison d'être of the principle of legality as regards both offences and their penalties.[1016] It is certainly not followed by the ECtHR, even with respect to the most egregious offences. For example, in *Vasiliauskas v. Lithuania,* the applicant was most certainly aware that the murders constituting the crime of genocide for which he had been convicted were punishable and that "his conduct was criminal in the general sense, without reference to any particular provision". The Grand Chamber of the ECtHR nevertheless proceeded to: (1) consider whether the Applicant had access to the relevant provisions at the material time,[1017] and further (2) consider whether foreseeability was established, by analysing the technical terms of the definition of the elements constituting genocide as they existed at the material time, a definition that proved to be narrower than the definition that had been applied to the Applicant.[1018] It found that while the relevant legislation was accessible to the applicant at the time, "the applicant's conviction for genocide could not have been foreseen at

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of specific persons without stating legal rules in advance".

[1015] Case 002/01 Appeal Judgement, 23.11.2016, §765, referring to §762.

[1016] *Vasiljević* Appeal Judgement (ICTY), 29.11.2002, §198 *Vasiljević* Trial Judgement (ICTY), 29.11.2002, §198 wherein the judges recalled that the offence must be "defined with sufficient clarity for it to have been foreseeable", and fn 541 wherein they rejected the prosecution's argument that a distinction must be made between the principle of legality (existence of the offense) and the principle of specificity (definition of the offense in question or of its constituent elements). At the time, the prosecution argued that: "*Needless to say, the principle of legality requires that the crime exist under the law when and where the relevant act is committed. This does not mean however that the offence must have all its elements exhaustively spelled out in advance.*" (*Prosecutor v. Vasiljević*, IT-98-32-T, *Submission by the Prosecution on the Law with Respect to "Violence to Life and Person"*, 28.03.2002, §5).

[1017] *Vasiliauskas v. Lithuania* Appeal Judgement (CEDH, Grand Chamber), 20.10.2015, §167-168.

[1018] *Vasiliauskas v. Lithuania*, Judgement (ECtHR, Grand Chamber), 20.10.2015, §169-185.

the time of the killing of the partisans".[1019] The Court held that there had been a breach of the principle of legality.[1020] Therefore, although genocide was a criminal offence at the time, and although the Applicant had access to the relevant legislation, the Applicant could not have foreseen that a broader definition of genocide would be applicable. While he may have been aware of the wrongful nature of his acts, he was nevertheless the victim of a breach of the principle of legality.

564. By adopting the reasoning of the Supreme Court in 002/01, the Chamber has validated the unlawful establishment of an exception to the principle of legality with respect to persons accused of the most egregious crimes. As an essential element of the primacy of the rule of law, the principle of legality must be adhered to at all times and in all circumstances. It is one of those very few guarantees where no derogation is permissible, even in times of war or other public emergencies.[1021]

565. The approach adopted by the Chamber is therefore not only incorrect as a matter of law, but also impermissible on the part of judges who are expected to uphold the values of democratic societies and the primacy of the rule of law.

Section III. A CURSORY CONSIDERATION INCONSISTANT WITH THE REQUIREMENTS OF THE PRINCIPLE

566. The Chamber has turned the need to carefully consider the requirements that underlie the principle of legality into a mere formality with respect to those persons charged with the most serious crimes, one that can be done "in a general way". However, such consideration must in fact be carried out in a thorough manner for each defendant individually.

567. The Chamber failed even to consider accessibility and foreseeability as regards the contextual elements required to characterise crimes against humanity and serious breaches of the Geneva Conventions,[1022] nor did it do so as regards a so-called general principle of culpable omission

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[1019] *Vasiliauskas v. Lithuania*, Judgement (ECtHR, Grand Chamber), 20.10.2015, §186.
[1020] *Vasiliauskas v. Lithuania*, Judgement (ECtHR, Grand Chamber), 20.10.2015, §191.
[1021] ICCPR, Article 4-2; CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11, 31.08.2001, §7; *Specific Human Rights Issues: New Priorities, in particular Terrorism*, Human Rights Committee, E/CN.4/Sub.2/2003/WP.1, 08.08.2003, §63-65; ECHR Article 15-2; *Vasiliauskas v. Lithuania*, Judgement (ECtHR, Grand Chamber), 20.10.2015, §153.
[1022] Reasons for Judgement, §300-316, 325-355.

applying to all modes of liability.[1023] However, the principle of legality applies to all matters that may incur criminal liability.[1024]

568. Moreover, the Chamber has again completely overlooked the fact that the Cambodian legal system is a dualistic system that effectively prevents international norms from being directly applied to domestic law.[1025] In the absence of legislative measures that would enable international law to be transposed into national law,[1026] the application of the provisions of the 1956 Cambodian Penal Code and the principle of legality set forth therein were all that a Cambodian citizen could reasonably expect in the 1970s.[1027] The 1956 Cambodian Penal Code did not contain any provisions with regard to genocide, crimes against humanity and war crimes. It was not until 2009 that such provisions were introduced.[1028] Whereas the Chambers of the ECCC hold that it is the Law on the

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[1023] Reasons for Judgement, §3703.

[1024] *Duch* Appeal Judgement, 03.02.2012, §90; *Korbely v. Hungary*, Judgement (ECtHR, Grand Chamber), 19.09.2008, §78, 81-85, 95.

[1025] Following the example of French law in the Romano-Germanic tradition that served as its inspiration; Article 31 of the Constitution of the Kingdom of Cambodia, 1993, as regards human rights as defined in international treaties and conventions, last paragraph ("The exercise of such rights and liberties shall be in accordance with the law."), Article 38, third paragraph ("The prosecution, arrest, police custody or detention of any person shall not be done, except in accordance with the law".), Article 90 ("The National Assembly is an organ invested with legislative power which exercises its functions according to the provisions of the Constitution and the laws in force. […] [It] votes the approval or the abrogation of international treaties or conventions").

[1026] *Kononov v. Latvia*, Judgement (ECtHR, Grand Chamber), 17.05.2010, §208 (from the period when the laws and customs of war were first codified up to the Nuremberg Principles: "International and national law (the latter including transposition of international norms) served as a basis for domestic prosecutions and liability. In particular, where national law did not provide for the specific characteristics of a war crime, the domestic court could rely on international law as a basis for its reasoning, without infringing the principles of *nullum crimen* and *nulla poena sine lege*", emphasis added), §212 ("Finally, where international law did not provide for a sanction for war crimes with sufficient clarity, a domestic tribunal could, having found an accused guilty, fix the punishment on the basis of domestic criminal law."); *Cour de Cassation, Chambre criminelle*, 17 June 2003 (the *Aussaresses* case: "International customary law cannot make up for the absence of a statute that would criminalise, under the characterisation of [CAH], the facts denounced by the civil party").

[1027] *Code Pénal et Lois pénales*, 1956, **001-91/6/1.1**, Articles 1, 2 and 6. See also the references to the Constitution of the Kingdom that was in force at that time: Article 4, paragraph 1 ("No one may be prosecuted, arrested or detained except in the cases determined by law and in accordance with the forms prescribed by it", ERN FR 00366791); Article 19, paragraph 2 ("No one may be tried or punished except as a result of offences provided for by a law enacted and made mandatory prior to them", ERN FR 00366794). See also the reference to Article 4 in Krâm No. 857-NS dated 9 March 1954 ("The said courts (Cambodian courts) shall apply the various codes enacted for the Khmer Kingdom, the laws and regulations in force, legally promulgated and published", ERN FR 00366794).

[1028] Penal Code, 2009, Articles 183 to 198. See also Article 8, cited in fn 42 (from §21) of the Reasons for Judgement: "The provisions of this Code may not have the effect of denying justice to the victims of serious offences which, under special legislation, are characterised as violations of international humanitarian law, international custom, or international conventions recognised by the Kingdom of Cambodia." (emphasis added). The CIJ noted that the underlined passage referred to the Law establishing the ECCC (Closing Order, 10.07.2017, **004/1-D308/3**, §20.

Establishment of the ECCC of 2004 that renders CIL applicable to the ECCC,[1029] that Law was not in force between 1975 and 1979.[1030]

569. Moreover, as the Defence has already discussed,[1031] it is very difficult to ascertain an CIL rule ("a general practice accepted as law") at a given time, even today, "notwithstanding the development of technology and information resources". The availability of documentation relating to such an inherently unwritten and constantly changing body of law still needs to be improved. The issue of ascertaining CIL has been the focus of ILC work since 2012, and is expected to result in the publication of an annotated practical guide for judges, lawyers and practitioners called upon to identify CIL.

570. Ascertaining CIL from 40 years ago is particularly perilous, as can be seen from the differing rules that ECCC judges have identified. For example, in order to determine whether facts may be characterised as CAH, some judges have identified a requirement that a nexus to armed conflict must exist, whereas others have not.[1032] Some have identified the existence of rape as a separate CAH, while others have not.[1033] Some have identified *dolus eventualis* as regards extermination whereas others have not.[1034]

571. Such divergent interpretations of a constantly changing body of law that even professional judges find particularly difficult to identify, despite all the resources at their disposal in the 21st century, make it impossible to conclude that a Cambodian citizen in the 1970s could have known with sufficient accuracy, "including with the help of the interpretation of the courts and informed legal advice, what acts and omissions would make him criminally liable"[1035] under the rules of CIL (even supposing that he could have foreseen that CIL applied to him, which of course is a purely fictional hypothesis).

[1029] Case 002/01 Trial Judgement, 07.08.2014, §18; Case 002/01 Appeal Judgement, 23.11.2016, §763.
[1030] Similarly, whereas Article 15 of the ICCPR, 1966, refers to national "or" international law, the Covenant had neither been signed nor ratified by Cambodia between 1975 and 1979 (it was signed and ratified only in 1980).
[1031] CB 002/02, §381-393 and references cited.
[1032] Decision on Ieng Thirith's and Nuon Chea's Appeals against the Closing Order, 13.01.2011, **D427/2/12**, **D427/4/14**, **D427/1/26** (reversing the findings of the CIJ) *versus* Decision on Co-Prosecutors Request to exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 26.10.2011, **E95/8**.
[1033] *Duch* Trial Judgement, 26.07.2010, §366 *versus Duch* Appeal Judgement, 03.02.2012, §207-213; Decision on Ieng Thirith's and Nuon Chea's Appeals against the Closing Order, 13.01.2011, **D427/2/12**, **D427/4/14**, **D427/1/26** (reversing the findings of the CIJ).
[1034] Case 002/01 Appeal Judgement, 23.11.2016, §522, reversing the findings of the Trial Chamber.
[1035] See above, §553 and 566.

572. Thus, from a legal point of view, it is unacceptable to assume as a matter of course, solely based on the existence of an indictable offense in CIL and the gravity of the crime, that the condition of foreseeability under the principle of legality has been satisfied "in a general way".[1036] It is equally unacceptable to assume as a matter of course that the fact of occupying "positions of authority" is sufficient grounds to find that the condition of accessibility to legal standards has been met "in a general way" in the present instance.[1037] Thus, with regard to this last point, the Chamber has fallen far short of carrying out the thorough analysis for each defendant "individually" that the ECtHR undertakes, even as regards international criminal matters.[1038] In particular, it has never endeavoured to show, even theoretically, how KHIEU Samphan could have had access to the post-war case law to which it refers, including in a language he may have been able to understand.

573. In conclusion, the error of law committed by the Chamber seriously taints its ruling. Had it carried out the requisite assessment and correctly applied the legal criteria, it would not have been able to reach the finding that the principle of legality had been respected. Therefore, its incorrect findings,[1039] together with the resulting convictions and sentence,[1040] must be reversed.

574. All the more so as the Chamber applied a body of law that did not exist at the material time.[1041]

Chapter II. ERRORS AS REGARDS THE CRIME AGAINST HUMANITY OF MURDER

Section I. APPLICABLE LAW: NON-INCLUSION OF *DOLUS EVENTUALIS* IN *MENS REA*

575. The Chamber erred by finding that the definition in 1975 of the *mens rea* of murder as a crime against humanity encompassed *dolus eventualis*.[1042] Contrary to the Chamber's contention, there is no valid legal basis for such a claim (I). Further, that definition of requisite intent does not meet the standards of accessibility and foreseeability required under the principle of legality (II).

I. ABSENCE OF A VALID LEGAL BASIS

576. First of all, the lack of precision and clarity in the source that the Chamber's contention relies upon is indicative of the absence of a valid legal basis (A). Second, CIL as it stood in 1975 did not

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[1036] Reasons for Judgement, §30, 300, 326, 651, 654, 661, 673, 688, 700, 712, 723, 789, 3704, 3707.
[1037] Reasons for Judgement, §31, 300, 326, 651, 654, 661, 673, 688, 700, 712, 723, 789, 3704, 3707.
[1038] CB 002/02, §316-318 and references cited.
[1039] Reasons for Judgement, §20-32, 300, 326, 651, 654, 661, 673, 688, 700, 712, 723, 789, 3703, 3704, 3707.
[1040] Reasons for Judgement, §4236-4328, 4400,4402.
[1041] Concerning modes of liability, see below, §1938-1965 and 2120-2123.
[1042] Reasons for Judgement, §650.

include *dolus eventualis* in the definition of *mens rea* in relation to the CAH of murder (B). Furthermore, the stated recourse to general legal principles as a source of case law is not a valid means of defining *largo sensu* the constitutive elements of an offense so as to lower the standard of intent CIL requires (C). Finally, in the alternative, the Chamber has not presented any evidence proving that a general principle of law existed at the time the alleged criminal acts were committed that lowered the standard of *mens rea* in relation to murder as a CAH to *dolus eventualis* (D).

A. Misunderstanding and incorrectly combining CIL and general principles of law

1. A criminal offence under CIL defined by a general principle of law

577. The Chamber is correct in recalling that the applicable definition of murder must reflect CIL as it stood in 1975,[1043] and has stated that both the Chamber and the Supreme Court "have conducted their own assessments concerning the state of customary international law in 1975".[1044] However, contrary to that statement, the Chamber has erred in law by holding that "having regard to general principles of law can assist when defining the elements of an international crime, where that crime has otherwise been recognised in customary international law".[1045] It does not cite any sources in support of such an unprecedentedly hybrid position, where the existence of a criminal offence is determined under CIL while its content is defined through general principles of law.

2. Misunderstanding and confusion between CIL and general principles of law

578. The Chamber committed an error in law when it stated that it was satisfied that "the review of pre-1975 international and national jurisprudence and legislation demonstrates a general principle of law that when an individual knowingly and willingly engaged in conduct which was likely to lead to death, that conduct would amount to murder or a crime of similar seriousness in each domestic legal system".[1046] In so doing, it incorrectly confused the various sources of law that apply in international public law.

579. Yet, in the Appeal Judgement in Case 002/01, the Supreme Court had rejected a similar submission by the Prosecution seeking to show that, based on "general domestic criminal practice", a CIL rule

[1043] Reasons for Judgement, §634.
[1044] Reasons for Judgement, §635.
[1045] Reasons for Judgement, §638 (emphasis added).
[1046] Reasons for Judgement, §650 (emphasis added).

recognising JCE-3 indeed existed. It held that a domestic practice "cannot be the basis for establishing a rule of customary international law, given that it lacks an international element."[1047] The Supreme Court thus stressed the need to maintain "the distinction between the spheres of international law and domestic law – as well as that between customary international law and general principles of domestic law".[1048]

580. In this instance, with regard to murder with *dolus eventualis*, the reasoning of the Chamber is invalid because it has not clearly indicated whether it was basing its definition of *mens rea* in relation to the crime against humanity on CIL as it stood in 1975 or on a general legal principle. On the contrary, it is apparent from its reasoning that the Chamber has confused those two separate and distinct sources of international public law, and thus has committed the very error that the Supreme Court criticised.

B. Absence of *dolus eventualis* in the definition of murder as a crime against humanity in CIL as it stood in 1975

581. The Chamber erred in law by finding that *dolus eventualis* was included within the definition of the CAH of murder in CIL as it stood in 1975, based on the cumulative foundations of the *Doctors' Trial* as "as one of several authorities" (1), through "guidance" provided by the ad hoc jurisprudence of the ICT (2) and domestic legal practice that "further reinforced" the Supreme Court's broader interpretation of the *Doctors' Trial* (3). The Defence reaffirms and reiterates its contention, expressed both in KHIEU Samphan's Appeal Brief 002/01 and KHIEU Samphan's Closing Brief 002/02, that at the time of the facts charged, "there was no different alternative or lesser standard in customary international law than the specific intent to kill" (4).[1049] In the alternative, the principle of retroactive application of *lex mitior* would effectively set aside the lesser standard than the direct intent to kill that was adopted by the Chamber (5).

1. Absence of *dolus eventualis* in the *Doctors' Trial*

[1047] Case 002/01 Appeal Judgement, 23.11.2016, §805.
[1048] Case 002/01 Appeal Judgement, 23.11.2016, §805 (emphasis added).
[1049] AB 002/01, §59, CB 002/02 §395.

582. The Chamber erred in law by stating, as did the Supreme Court, that the *Doctors' Trial* can be considered "as one of several authorities for attributing criminal responsibility for intentional killing even if the perpetrator acted with less than direct intent".[1050]

583. First, the Supreme Court provided an interpretation of the *mens rea* of murder as a CAH "*largo sensu*"[1051] that is problematic in that it breaches the principle of legality, which requires that an interpretation be both rigorous and favourable to the accused.

584. And then, the Chamber committed an error in law by reaching this conclusion "although the judgement handed down at the end of the *Doctors' trial* does not expressly mention the criterion used to define the mental state element – a fact recognised by the [Supreme Court]".[1052] So, by the very fact of this observation, it could not use just this jurisprudence which does not expressly provide the definition of the mental state element of the CAH of murder to assert in general that "the jurisprudence from the end of the Second World War" retained *dolus eventualis* in the definition of this crime in CIL in 1975. This erroneous assertion, devoid of any analysis, should be sanctioned.

585. Finally, the analysis of the facts in the *Doctors' Trial* does not support the conclusion of the Supreme Court taken up by the Chamber, whereby the "intention carried with it the risk of putting in danger the lives of those subjected to the experiments, knowing full well that the latter were likely to cause their deaths".[1053] The Supreme Court in Judgement 002/01 and the Chamber in Case 002/02 assumed an interpretation which in no way corresponds to the functioning of the Nazi camps. In effect, an analysis of the facts can lead to only one unambiguous interpretation: that no sentence handed down by the American Military Tribunal was based on *dolus eventualis*. The experiments for which the crime of murder was retained against the accused were the eight experiments (A), (B), (C), (D), (E), (H), (J) and (K). In fact, the direct intent to kill is demonstrated by the fact that all the experiments were carried out in the death camps (Ravensbruck, Saschsenhausen, Natzweiler, Dachau and Buchenwald). People detained in these concentration camps in the Nazi regime were destined for certain death, except in exceptional circumstances. In addition, the direct intent to kill is clear from the extreme experimental methods used on the

[1050] Reasons for Judgement, §636.
[1051] Case 002/01 Appeal Judgement, 23.11.2016, §410.
[1052] Reasons for Judgement, §636.
[1053] Reasons for Judgement, §636 (emphasis added).

detainees/guinea-pigs. There was never any doubt about the outcome of these lethal experiments. It was never a case of taking "the risk of putting in danger the lives of those subjected to the experiments"; the perpetrators expected that the experiments would end in death.

586. Thus, the Chamber committed an error in using the *Doctors' Trial* as the basis for supporting the conclusion that the definition of the CAH of murder in CIL in 1975 included an intent less stringent than a direct intent to kill.

2. Impossibility of finding "indications" in ICT jurisprudence post-eventum

587. In using this broad definition of the mental state element in the CAH of murder, the Chamber committed an error in law in relying on post-1975 case law from the ICTY.[1054] The Chamber affirmed incorrectly that the current ICT jurisprudence which "now" recognises that *dolus eventualis* may suffice for characterising the intention to kill "effectively gave indications" concerning the state of the CIL in 1975.[1055] However, ICT case laws on which the Chamber is relying applied for the first time a lower standard of direct intent to kill for facts later than for those involving the ECCC. In addition, these ICT case laws were never founded on earlier international decisions for formulating this new level of intent for the crime of murder. Finally, the fact that the Chamber notes that "jurisprudence has not always been totally consistent with regard to the precise terms used" and that "in some of its decisions, the ICTR judged that premeditation was required for an act to be characterised as murder" [1056] should have led it to exclude such jurisprudence. Moreover in *Duch*, the Supreme Court rightly affirmed that "these cases are non binding and are not in and of themselves primary sources of international law".[1057] Thus, such jurisprudence cannot in any way serve as a source of "indications" of the state of the CIL in 1975; it is purely and simply devoid of any relevance for supporting that the CIL included the CAH of murder with *dolus eventualis* in 1975.

[1054] Reasons for Judgement, §635, see fn 1993 citing *Kvočka* Appeal Judgement (ICTY), 28.02.2005, §261; *Stakić* Appeal Judgement (ICTY), 22.03.2006, §239 *Dragomir Milošević* Appeal Judgement (ICTY), 12.11.2009, §108.
[1055] Reasons for Judgement, §635. See also Reasons for Judgement, §634: "Contrary to what KHIEU Samphan's Defence asserts, that does not prevent the Chamber from relying on subsequent decisions which interpret or clarify the law". fn 1992, referring to Section 2.2: Principle of legality; section 4.2.1.2: Contextual elements of crimes against humanity.
[1056] Reasons for Judgement, §635.
[1057] *Duch* Appeal Judgement, 03.02.2012, §97.

3. Impossibility of relying on national judicial practices

588. The Chamber committed an error in law by taking the conclusion of the Supreme Court that "national judicial practices" "reinforced even more" its conclusion that murder as a crime against humanity included the notion of *dolus eventualis*".[1058]

589. The judicial reasoning by the Supreme Court cited by the Chamber is erroneous. Even if there were national practices allowing *dolus eventualis* to be used to characterise murder in national law, that would not in any way "reinforce" the erroneous conclusion of the Supreme Court that the *Doctors' Trial* set a lesser *mens rea* standard than the direct intent to kill in order to characterise the CAH of murder in CIL in 1975.

590. The only way to characterise a CIL rule in terms of national laws is to demonstrate using the latter the existence "of a generalised practice that is accepted as being the law (*opinio juris*)".[1059] But neither the Chamber, nor the Supreme Court in the Case 002/01 Appeal Judgement on which it based this, sought to establish each of the two constitutive elements necessary for a basis in law for the existence in 1975 of a customary rule according to which *mens rea* could be less than the direct intent to kill.[1060]

591. Moreover, the Case 002/1 Appeal Judgement was based on an erroneous reference in Cambodian law, on law existing post-eventum and on a few pre-1975 sources not suitable for characterising a CIL law in 1975.The Defence therefore refers to its arguments set out in its Closing Brief.[1061]

4. Conclusion on the state of the CIL in 1975

592. The Chamber committed errors in law by basing its conclusion whereby the *mens rea* of a CAH of murder included *dolus eventualis* in 1975 on "among other items" the extensive interpretation of the *Doctors' Trial* by the Supreme Court supposedly "reassured" by references to some national laws in 1975. It also committed an error in law in believing that current ICT jurisprudence provided "indications" of the state of the CIL in 1975.

[1058] Reasons for Judgement, §637.
[1059] Report of the International Law Commission, Final projects on determining customary international law and comments thereon, Conclusion 2, 21.09.2018, A/73/10, §51; Article 38-1 of the Statute of the ICJ.
[1060] Reasons for Judgement, §637 -650.
[1061] CB 002/02, §421-429.

593. Moreover, contemporary CIL, as drawn up by the Rome Statute, confirm a restrictive vision of criminal intent. Article 30(1) of the Rome Statute codifies quite clearly the CIL for the concept of intent for crimes which come within its jurisdiction: "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material [objective] elements are committed with intent and knowledge".[1062]

594. For a CAH of murder, it follows that direct intent is unambiguously required. It is necessary to prove that "that person means to cause that consequence or is aware that it will occur in the ordinary course of events".[1063]

595. There is no source in the CIL which validates the Court's affirmation that the *mens rea* of the CAH of murder included *dolus eventualis* in 1975. This does not mean that there was no rule of law in the CIL pertaining to the definition of the mental state element in the CAH of murder, but rather that the definition did not include *dolus eventualis*. The principles of criminal interpretation should lead the Supreme Court to reverse this judicial conclusion.

5. In the alternative, retroactive application of a more lenient criminal law

596. In the alternative, even if the state of the CIL in 1975 had authorised criminalising murder with a lesser intent than the direct intent to kill, one would need to exclude this *mens rea* standard by following the principle of retroactive application of the most lenient criminal law.

597. The UN Agreement demonstrates this desire for retroactive application of a more lenient criminal law by indicating the applicability of the CIL such as is codified in the Rome Statute for the law pertaining to CAHs. Article 9 explicitly mentions the Rome Statute as the source of law:

> "The *subject-matter* jurisdiction of the Extraordinary Chambers shall be the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court and grave breaches of the 1949 Geneva Conventions and such other crimes as defined in Chapter II of the Law on the Establishment of the Extraordinary Chambers as promulgated on 10 August 2001".[1064]

1062

Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre *Bemba* Gombo
(ICC), 15.06.2009, §360: "With respect to *dolus eventualis* as the third form of dolus, recklessness or any lower form of culpability, the Chamber is of the view that such concepts are not captured by article 30 of the Statute".

1063 Article 30-2-b of the Rome Statute.

1064 Article 9 of the Agreement between the United Nations and the Royal Government of Cambodia (emphasis added).

598. Of course, criminal law is in principle not retroactive except when it is more lenient. Thus, this reference to the law pertaining to CAHs as defined in the Rome Statute may only be interpreted in line with the cardinal principles of criminal law which allows applying the law pertaining to CAHs as defined by the Rome Statute when the definition of the latter is more lenient.

599. The direct intent to kill is required to invoke a CAH of murder. Consequently, even in the case where the CIL of 1975 included a lesser intent than the direct intent to kill, the CIL of 1975 should have been excluded in favour of the more stringent contemporary standard of CIL as codified by the Rome Statute.

600. CIL does not allow supporting the position of the Chamber which lowered the mental state element of murder to *dolus eventualis*. The same is true for the general principles of law which are not a valid source of law for the ECCC for supporting an interpretation contrary to the state of the CIL in 1975. Above all, when they are invoked in the situation when, unequivocally, CIL does not allow the conclusion that the definition of the mental state element of the CIL crime of CAH of murder in 1975 included *dolus eventualis*.

C. Invalid recourse to the general principles of law for lowering the level of intent required

601. The Chamber erred in law by using the "general principles of law to define the elements of a crime in international law when the said crime has otherwise been recognised in customary international law"[1065] before concluding that "the vast majority of these national systems consider that a criterion defining the mental state element less strict than that taken from direct intent may apply to murder, the minimum level of intent being *dolus eventualis*".[1066] It has not demonstrated that the general principles of law were a primary source of law applicable to the ECCC for defining the elements of a crime for the CIL as it existed in 1975 (1). In reality, the general principles of law are nothing more than a subsidiary source which may not replace a rule of the CIL for defining a constitutive element for a crime (2). In addition, recourse to the general principles of law is strictly limited by the cardinal principles of criminal law enshrined in the principles of legality and *in dubio pro reo* (3).

1. Absence of grounds for recourse to the general principles of law as primary source for

[1065] Reasons for Judgement, §638.
[1066] Reasons for Judgement, §650.

defining the elements of a crime in CIL

a. Absence of jurisprudence from the ECCC validating recourse to the general principles of law for defining a constitutive element for a crime

• The jurisprudence of the Pre-Trial Chamber

602. The Chamber committed an error in law by referring to the Pre-Trial Chamber for a legal basis for its recourse to the general principles of law for defining the *mens rea* of the CAH of murder using the international law as it existed in 1975. Just this piece of case law from the ECCC cited by the Chamber cannot be a valid foundation for this affirmation. First of all, the Pre-Trial Chamber simply declared, without carrying out any analysis, that the general principles of law had been taken into account by the ICTY "to define the elements of a crime in international law or the scope of a form of responsibility found in customary international law".[1067] In addition, the Chamber committed a clear error in law by not mentioning two important passages in this decision by the Pre-Trial Chamber which did not support its conclusion. In effect, the Pre-Trial Chamber first affirmed that "the exact status of general principles of criminal law as primary or auxiliary sources of international law is unclear".[1068] And secondly, it excluded as a matter of course recourse to the general principles of law for defining as a general rule the *mens rea* of the JCE-3 for preserving the principle of legality because this interpretation was not at all supported by Cambodian law at the time of the events.[1069] The intentional omission by the Chamber of key passages of cited jurisprudence opposing its affirmation shows that it was well aware of its inapplicability for defining the *mens rea* of the CAH of murder. It is a perfect demonstration of the erroneous nature of its reasoning. The Chamber was wrong to cite isolated jurisprudence – and furthermore

[1067] Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20.05.2010, **D97/15/9**, §84.
[1068] Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20.05.2010, **D97/15/9**, §84, citing in fn 238 the *Furundžija* Judgement (ICTY), 10.12.1998, §177; §86, citing in fn 244, the *Furundžija* Judgement (ICTY), 10.12.1998, §178, *Milutinović* decision concerning the prejudicial objection of incompetence raised by Dragoljub Ojdanić (indirect joint action) (ICTY), 22.03.2006, Separate opinion of Judge Bonomy, §27; fn 245, *Erdemović* Appeal Judgement (ICTY), 07.10.1997, The separate and concurring opinion of Judge McDonald and of Judge Vohrah, §57, The separate and dissenting opinion of Judge Stephen, §25; fn 246, the *Furundžija* Judgement (ICTY), 10.12.1998, §178 and the *Kunarac et al.* Judgement (ICTY), 22.02.2001, §439; fn 247, *Blaškic* Appeal Judgement (ICTY), 29.07.2004, §34-42.
[1069] Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20.05.2010, **D97/15/9**, §87

inapplicable – for the basis of its recourse to the general principles of law for defining the *mens rea* of a crime in CIL.

• **Jurisprudence from the Supreme Court**

603. The Case 002/01 Appeal Judgement does not, in addition, provide a legal foundation for recourse to the general principles of law for defining the *mens rea* of the CAH of murder in CIL in 1975. In effect, the Supreme Court only explicitly mentioned the general principles of law of civilised nations in the framework of its assessment of the JCE-3. It affirmed that a general practice in criminal matters at the national level:

> "may only be used to identify a general principle of (domestic) law or be a reference point for interpreting international crimes and attendant principles and concepts, given that international criminal law concepts were developed based on domestic concepts of criminal law".[1070]

604. As a foundation for this affirmation, it only referred to two articles of doctrine written in German. In the Case 002/01 Appeal Judgement, the Supreme Court operated a simple referral to paragraphs387 and those following which seemed to proceed without any explicit judicial basis with an examination of the general principles of law to determine the definition of the CAH of murder in 1975. The Supreme Court did not use any legal rule and gave no reasoning which could support the Chamber's position judicially.

b. Absence of jurisprudence from the ICT validating recourse to the general principles of law for defining a constitutive element for a crime

605. The Chamber committed an error in by using the jurisprudence of the ICTY which does not address the validity of recourse to a general principle of law for defining a constitutive element for a crime.[1071] On the contrary, it contented itself with indicating sources for defining the methodology to adopt for determining **the existence** of a general principle of law citing: a decision of the ECCC, the *Furundžija* judgement, the *Kunarac* judgement, the separate opinion of Judge BONOMY in the *Milutinović* decision, the separate and concurring opinion of Judge MCDONALD and of Judge VOHRAH and the separate and dissenting opinion of Judge STEPHEN in the *Erdemović* Appeal Judgement. The analysis of this ICTY jurisprudence cited by the Pre-Trial Chamber does not allow

[1070] Case 002/01 Appeal Judgement, 23.11.2016, §805.
[1071] Reasons for Judgement, §638, fn 1997-1998.

support for the affirmation that the general principles of law are a valid source for defining the elements of crime under international law.[1072] An examination of the sources cited by the Chamber to support its methodology for determining a general principle of law does not provide a valid foundation for the Chamber's affirmation according to which it "could be useful" to refer to the general principles of law for defining the *mens rea* of a crime under CIL.

c. Applicability conditioned by article 38(1)(c) of the Statute of the ICJ for determining sources applicable to the ECCC

606. Moreover, the Court affirmed in a footnote that "in terms of article 38(1)(c) of the Statute of the International Court of Justice "the general principles of law recognised by civilised nations" constitute a source of international law".[1073] It committed an error in law in affirming implicitly by this reference that "the general principles of law recognised by civilised nations" are an independent primary source of law applicable to the ECCC on an equal footing with conventional and customary international law.

607. Article 38 of the Statute of the ICJ reflects the state of international law concerning sources of law applicable in classic international public law establishing relations between States. According to this article, on the one hand primary sources include "international conventions, whether general or particular, establishing rules expressly recognised by the contesting States", "international

[1072] *Furundžija* Judgement (TPIY), 10.12.1998, §177-178. This part of the judgement which concerned the definition of rape provides no reference nor precise analysis pertaining to the legal validity of recourse to the general principles of law; *Kunarac* Judgement (ICTY), 22.02.2001, §439. The *Kunarac* Judgement repeats the declarative *Furundžija,* jurisprudence without adding further judicial ground pertaining to the validity of recourse to the general principles of law; *Milutinović* decision concerning the prejudicial objection of incompetence raised by Dragoljub Ojdanić (indirect joint action) (ICTY), 22.03.2006, Separate opinion of Judge Bonomy, §27 which refers to the *Blaškic* Appeal Judgement (ICTY). This separate opinion still provides no precision for the legal basis for the affirmation according to which the general principles of law are a source for defining either a constitutive element of the crime or a mental state element for a form of responsibility. The judge avoided this crucial question for defining the substantial applicable law being content to repeat the declarative *Furundžija,* jurisprudence and the *Blaškic* Appeal Judgement which, according to his interpretation, would say "implicitly that a Chamber may equally rely on the general principles of law for defining the scope of a form of responsibility"; *Blaškic* Appeal Judgement (ICTY), 29.07.2004, §34. The judges deemed "useful to consider the approaches of national jurisdictions", without explicitly mentioning the source invoked of the general principles of law; Joint separate opinions of Judge McDonald and Judge Vohrah, §5. They were exclusively founded on the exchange of Greek and Turkish populations case (PCIJ) and the Assider v. High Authority case (CJEC) which placed restrictive criteria on recourse to national law for defining the CIL terms; *Erdemović* Appeal Judgment (ICTY), 07.10.1997; Separate and dissenting opinion of Judge Stephen, §25. This separate and dissenting opinion mentions Article 38-1-c of the Statute of the International Court of Justice as a foundation without explaining why this would apply automatically to ICTY litigation.

[1073] Reasons for Judgement, §638, fn 1997.

custom, as evidence of a general practice accepted as law" and "the general principles of law recognised by civilised nations" and on the other hand subsidiary sources including "judicial decisions and the teachings of the most highly qualified publicists of the various nations".[1074]

608. In public international law, the three primary sources apply with equal force with no formal hierarchy between the three sources independent of the applicable law. The authorisation to have recourse to the general principles of law recognised by civilised nations figuring in article 38(1)(a) has the very precise function in the mandate of the PCIJ and thus the ICJ of avoiding a situation of *non liquet*.[1075] A situation of *non liquet* arrives when international jurisdictions are required to desist from giving a ruling because of the absence of a relevant applicable rule.[1076]

609. In the absence of articles clearly defining the law applicable to the ECCC, it can be suggested that the classical sources of international law apply. However, the special nature of international **criminal** law is contrary to a blind automatic application of article 38(1)(a) of to the special cases before the ECCC.[1077]

610. Thus, the reason – avoiding a situation of *non liquet* - justifying recourse to the general principles of law in classic international law does not apply to cases covered by international criminal law. The criminal nature of this law limits the applicability of article 38(1)(c) in terms of this source of law.

611. It is important to recall the origins of the general principles of criminal law. They were established to create guarantees against the arbitrariness of judges.[1078] This function emerged from their use in

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[1074] Article 38 of the ICJ Statute.

[1075] Vladimir-Djuro Degan, "On the sources of international criminal law." *Chinese Journal of International Law* 4, no. 1, 2005, p. 51: "*There is another substantial difference in this regard. When two or more States agree on the jurisdiction of the ICJ, or on international arbitration, they expect to obtain in these procedures the final Judgement of their case. To this end, in order to avoid* non liquet*, Judges resort to all sources of law provided in Article 38(1). They must find applicable legal rules to any dispute which States can refer to them.* ".

[1076] Regarding the general principles of law, see: Jean Combacau and Serge Sur, *Droit international public*, 2010 (9th edition), p. 108: "Much more than treaties or custom, they are dependent on the judicial activity. Their objective consists in providing judges with the means to furnish a judicial solution for all the disputes brought before them, in cases where customary or conventional law is silent.

[1077] On the nature of international criminal law: Olivier de Frouville, *Droit international pénal*, 2012 (1st edition), p. 3: "international criminal law deals with the criminal aspects of public international law. This means that international criminal law comes under public international law, with the crucial consequence that formal sources are identical between public international law and criminal international law.[…] But international criminal law is also, from a material point of view, a law dealing with criminal cases. " (emphasis added).

[1078] See for example: Vladimir-Djuro Degan, "On the sources of international criminal law." *Chinese Journal of International Law* 4, no. 1, 2005, p. 54: "*Historically, the general principles of criminal law first appeared in municipal*

post-war jurisprudence[1079] and do not support recourse to this source for defining the substantial law.

612. The general principles of law are nothing more than a subsidiary source and may not replace a rule of the CIL for defining a constitutive element of a crime (2) and its application is strictly limited by the cardinal principles of criminal law and of legality and *in dubio pro reo* (3).

2. Recourse to the general principles of law with disregard for the hierarchy of the sources of law

613. The Chamber committed an error in law by applying the general principles of law as a primary and independent source for identifying the mental state element of the CAH of murder in 1975 contrary to international practice to which it is rigorously opposed. The ECCC jurisprudence never carried out an analysis of the lawfulness of a recourse to the general principles of law and simply referred unreservedly to the jurisprudence of international criminal tribunals (ICTs).[1080] The Chamber relied on the declarative jurisprudence of the ICTY, going even further in its disregard for the hierarchy which even the ICTY had evoked. In the jurisprudence cited, the general principles may not be applied in the presence of a rule of the CIL and, *a fortiori*, may not be used for excluding a CIL rule in order to substitute a general principle of law.

a. The jurisprudence of the ICTY

614. In effect, the jurisprudence of the ICTY built around the views of Judge CASSESE proposed a hierarchy of applicable law unambiguously confining the general principles of law to a subsidiary role, and can only be invoked as a last resort.[1081]

615. This use of jurisprudence posterior to the facts judged in the case in point was expressed as follows:

> "[A]ny time the Statute does not regulate a specific matter, and the Report of the Secretary-General does not prove to be of any assistance in the interpretation of the Statute, it falls to the International

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law of some States, as guarantees against arbitrariness of judges as State organs. Since their very beginnings, they form a part of human rights." " (emphasis added).

[1079] See, for example: *Trial of the Major War Criminals before the International Criminal Tribunal*, 01.10.1946, IMT, vol. I, pp. 122, 126, 155. The Nuremberg Military Tribunal recognised as such *nullum crimen nulla poena sine lege*, the principle according to which there is no individual criminal responsibility without moral freedom, without the possibility of choice for the perpetrator of the act, or even "that of individual culpability, which excludes collective sanctions".

[1080] See above, §602-605.

[1081] Antonio Cassese *et al., International criminal law: cases and commentary*, 2011, pp. 34-35.

> Tribunal to draw upon (i) rules of customary international law or (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice.It must be assumed that the draftspersons intended the Statute to be based on international law, with the consequence that any possible lacunae must be filled by having recourse to that body of law".[1082]

616. Thus it is clear from this jurisprudence that this thinking does not provide the possibility for the judges to use the general principles of law as they wish, apart from restrictive rules. It is only when there is no precise CIL rule that one may perhaps seek an insight from the general principles of law.[1083]

617. But, in the case in point, there was a precise and recognised definition of the CAH of murder in CIL in 1975. According to this jurisprudence, the Chamber could not invoke the general principles of law to support the suggestion that the definition of the CAH of murder included *dolus eventualis* after having affirmed that a CIL rule existed.

b. The Rome Statute

618. Article 21(1) of the Rome Statute is the only article defining the sources of law in international criminal law. Its scope of application is limited to the litigation before the ICC but includes the practice of ICTs by explicitly rejecting the primary and independent character of the general principles of law. Explicitly setting out for the first time the sources applicable before an international tribunal and their order of importance, this article excludes irrevocably article 38 of the Statute of the ICJ and, in this context, the general principles of law are a supplementary source and strictly conditional:

> "1. The Court shall apply:
>
> a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

[1082] *Kupreškic* Judgement (ICTY), 14.01.2000, §591 (emphasis added). It is appropriate to note that the President of the Chamber was Judge CASSESE.

[1083] *Furundžija* Judgement (TPIY), 10.12.1998, §177-178. It is only "Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified", and that it is possible "with all due caution", "to look for principles of criminal law common to the major legal systems of the world"; *Kunarac et al.* Judgement (ICTY), 22.02.2001, §439. The "identification of the relevant international law on the nature of the circumstances in which the defined acts of sexual penetration will constitute rape is assisted, in the absence of customary or conventional international law on the subject, by reference to the general principles of law common to the major national legal systems of the world"; *Erdemović* Appeal Judgement (ICTY), 07.10.1997, Joint separate opinion of Judge McDonald and Judge Vohrah, §5. Judges McDONALD and VORAH jointly affirmed that "In the event that international authority is entirely lacking or is insufficient, recourse may then be had to national law to assist in the interpretation of terms and concepts used in the Statute and the Rules".

> b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards" (emphasis added).

619. In the case in point, the Chamber committed an error in law in having recourse to the general principles of law in refusing to conclude in the absence of a CIL rule defining the mental state element of murder. It thus committed an error in law by invoking the general principles of law without any legal basis and any judicial framework, whereas recourse to the general principles of law in the presence of a CIL rule is categorically prohibited by later international practice, which is nevertheless more permissive compared with the law applicable to the ECCC.

3. Application disregarding the respect of the principles of legality and *in dubio pro reo*

620. Even when the recourse to the general principles of law is justified, it is restricted and conditioned by the respect of the principles of legality and *in dubio pro reo*. This restriction applies *a fortiori* for defining a constitutive element of a crime in international law.

a. General principles of law as secondary source and principle of legality

621. The ECCC does not have an article listing the applicable sources of law. On the other hand, the jurisprudence is clear concerning the fact that the principle of legality demands that the applicable definition of murder reflects **the state of the CIL** in 1975.[1084] The intrinsic general nature of the **general** principles of law recognised by civilised nations refuses their being invoked in the framework of the ECCC **specifically** for defining a constitutive element of an international crime.

b. General principles of law as secondary source and the *in dubio pro reo* principle

622. The Chamber correctly recalled that it was constrained by the principle of strict interpretation of criminal law and that in case of ambiguity the definition is interpreted in favour of the Accused.[1085] The cardinal principle of legality demands a strict interpretation of the law and prohibits recourse to the general principles of law to widen the definition of crimes in international law to the

[1084] Reasons for Judgement, §634.
[1085] Reasons for Judgement, §21.

detriment of the Accused. In concluding otherwise, the Chamber violated this principle of legality and committed a grave error in law.

D. Absence of a general principle of law lowering the *mens rea* to *dolus eventualis*

623. In the alternative, the Chamber erred in law by concluding that "the review of pre-1975 international and national jurisprudence and legislation demonstrates a general principle of law that when an individual knowingly and willingly engaged in conduct which was likely to lead to death, that conduct would amount to murder or a crime of similar seriousness in each domestic legal system".[1086] It erred in adopting a superficial methodology relying on a sample of inconsistent national laws (1). It wrongly excluded the Cambodian law contradicting its conclusion (2). Finally, the general principle of law identified by the Chamber is not a sufficiently precise foundation for basing a criminal charge and lowering the degree of intent in an anachronistic manner (3).

1. Superficial methodology and inconsistent sample

624. The Chamber erred in law by carrying out a superficial comparison in assimilating complex singular notions of national criminal law taken out of their national context with the notion of "*dolus eventualis*" which it invented.[1087]

625. It erred in law by repeating the analysis of the Supreme Court in the 002/01 case, according to which "the requisite *mens rea* for murder in common law systems including England, India and Australia was consistent with the notion of '*dolus eventualis*'".[1088] However, some of the sources invoked require the intention to inflict bodily harm or with a risk that such a result would be "highly probable". For example, article 300 of the Indian Criminal Code cited in the footnote mentions as an intent characterising murder "the intention of causing such bodily harm as the offender knows to be likely to cause the death of the person". In this case, the minimum intent to be characterised as murder is that of causing bodily harm susceptible to cause death.

626. Continuing with illustrations, according to the Chamber "article 18 a) of the 1990 criminal law (New South Wales) punishes acts committed with "reckless indifference to human life, or with

[1086] Reasons for Judgement, §650 (emphasis added).
[1087] Reasons for Judgement, §650.
[1088] Reasons for Judgement, §645.

intent to kill or inflict grievous bodily harm".[1089] It can only be concluded that this is by no means a simple probability.

627. As for the situation in England, the Chamber cited the 1974 case of *R v. Hyam* "in which the House of Lords ruled that for murder, it was sufficient to have 'foreseen that the illegal issue was a result the accomplishment of which was highly probable'". Given the facts in this case, [1090] the House of Lords was divided, giving rise to two dissenting opinions. In one dissension, the very distinguished Lord Diplock advanced a stricter standard, supported by Lord Kilbrandon.[1091] Thus there was no unanimous consensus in 1974.

628. Moreover, the Chamber did not meet its obligation to provide its reasons by not presenting its methodology for supporting its analysis. And criminal law is a very complex subject for comparative law.[1092] This complexity led the Chamber to err in law by wrongly assimilating the notions of intent in national laws more restrictive than *dolus eventualis*. This *dolus eventualis* that the Chamber defined as "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"[1093] was even less applicable in that it was expressly rejected by the then Cambodian law.

2. Erroneous exclusion of Cambodian law requiring the intent to kill

629. The Chamber erred in law by concluding that there existed a general principle of law contrary to the national law of the State in which the facts were committed, the national law dealing with the defendants and the alleged victims. [1094] In effect, it retained the application of a general principle of law although it stated in other respects that "A noticeable exception to this principle is the French

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[1089] Reasons for Judgement, §645, fn 2010 (emphasis added).
[1090] The case (quoted in fn 2010 in Reasons for Judgement, §645) dealt with the actions of a woman who had set on fire the letter box of a rival and left the scene without warning the occupants of the house. The intention of the defendant was to frighten her boyfriend's new fiancée to try to force her to move to another district. The rival's two daughters died in the fire. It was therefore a very high risk.
[1091] R v. Hyam [1975] AC 55, p. 72.
[1092] See in relation to this, Jean Pradel, *Droit pénal comparé*, 2016, p. 102: "psychological problems are always delicate and those which appear in criminal law are a good illustration of this. People may be coming at it from very different points of view and, to translate the varying degrees, criminologists have used different words and expressions. The difficulty is that the same terminology does not always cover the same realities and that, in addition, identical concepts are frequently covered by different terms."
[1093] Reasons for Judgement, §650.
[1094] Reasons for Judgement, §650.

and Cambodian law in force before 1975".[1095] This reasoning is erroneous and in no way follows the rules prescribed in international criminal law. For example, article 21(1)(c) of the Rome Statute logically demands taking account of "the national laws of States that would normally exercise jurisdiction over the crime" to provide a general principle of law. The Chamber should have drawn the conclusion from its own realisation concerning Cambodian law contrary to the general principle of law that it tried to employ. In choosing not to do this, it erred in law.

3. Unprecedented lowering of the threshold of criminal intent

630. The Chamber has also erred in law in lowering the degree of criminal intent in violation of the principle of individual criminal responsibility. There has never been such a wide definition for characterising the CAH of murder in international criminal law. Even in comparison with the jurisprudence from the ICT, the definition of the mental state element of the CAH of murder from the Chamber constitutes an unprecedented lowering of the threshold of criminal intent.

631. The Chamber erred in law by incorrectly assimilating the intent "to kill the victim or to cause grievous bodily harm in the reasonable knowledge that the attack was likely to result in death"[1096] and that of "knowingly and willingly to commit acts likely to result in death" under the characterisation of *dolus eventualis*. In effect, the threshold of criminal intent is even lower than the definition of *dolus eventualis* retained by the Chamber because the definition from the ICT requires in addition the direct intent to cause bodily harm to the victim. In removing the requirement that the acts be restricted to intentional acts causing grievous bodily harm to the victim to widen the scope to all types of act, the Chamber has produced a vague definition having no relation to any legal framework. As opposed to the current definition from the ICT which characterises the applicable standard for assessing the foreseeable character as "reasonable", the Chamber has expressed no judicial assessment criterion of the foreseeable character (objective, subjective or both), nor a probability threshold required for individual criminal responsibility to be involved.

632. In conclusion, the Chamber erred in law by defining the *mens rea* of the CAH of murder with a lowering of the threshold for criminal intent to a level that has not existed in CIL either before or after 1975.

[1095] Reasons for Judgement, §648.

[1096] *Kvočka* Appeal Judgement (ICTY), 28.02.2005, §261, *Dragomir Milošević* Appeal Judgement (ICTY), 12.11.2009, §108, Akayesu Judgement (ICTR), 02.09.1998, §589, *Blaškić* Judgement (ICTY), 03.03.2000, §217.

II. INACCESSIBILITY AND UNFORESEEABILITY OF THE DEGREE OF INTENT THUS DEFINED IN 1975

633. Because the conclusion concerning the *mens rea* of the CAH of murder is a particularly complex judicial construct in addition to being erroneous, the Chamber finally erred in law by considering that "it is unquestionable that it was foreseeable in 1975 that killing an individual with *dolus eventualis* was criminal and entailed individual criminal responsibility".[1097] It first of all erred in conducting a general assessment using abstract criteria, ignoring the fact that the crime of murder required the direct and specific intent to kill in Cambodian law and finally relying on an erroneous graduation of the intent threshold for justifying the retroactive introduction of *dolus eventualis*.

634. First, as seen above, the Chamber committed an error in its definition of the crime of murder in CIL in 1975 and concerning the functions exercised by the Appellant for concluding that "in general" it was foreseeable that behaviour corresponding to the definition of murder in CIL was punishable and to have access to the standards for taking legal proceedings.[1098]

635. Then, the Chamber did not draw the conclusions from its realisation that murder in Cambodian law in 1975 required evidence of a specific direct intent to kill. It thus violated the principle of legality. It should have, as the Pre-Trial Chamber did, exclude recourse to the general principles of law for defining a constitutive element. In any case, Cambodian law pertaining to murder providing no support for its interpretation, it erred in law by concluding that this definition of the crime was foreseeable and accessible for the Appellant. .[1099]

636. Finally, the Chamber erred in law by concluding that "the required *dolus (dolus praeter intentionem)* which characterises the mental state element of this felony, is of a standard lower than *dolus eventualis"*.[1100] In fact, it 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

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[1097] Reasons for Judgement, §651.
[1098] Reasons for Judgement, §651. See above, §566-573.
[1099] Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20.05.2010, **D97/15/9**, §87
[1100] Reasons for Judgement, §651.

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. Its reasoning which lacks precision is once again invalidated.

Section II. ERRORS AND IMPACT BY CRIME SITE

I. ON THE WORKSITES OF TK, TTD, 1JD AND KCA

637. The re-characterisation as CAH of murder for deaths resulting from living conditions should be invalidated since the mental state element of murder has not been constituted inasmuch as it has never been established that the direct perpetrators nor KHIEU Samphan had the direct intention to kill in TK,[1101] TTD, [1102] 1JD,[1103] and AKC. [1104] Consequently, the Chamber has not correctly characterised the mental state element in murder. These conclusions should be annulled and KHIEU Samphan should be acquitted of these crimes in TK,[1105] TTD, [1106] 1JD[1107] and AKC. [1108]

II. IN THE SECURITY CENTRES OF S-21, KTC AND PK

638. The CAH of murder being the death caused by taking blood samples at S-21 is not constituted because the mental state element of murder has not been constituted inasmuch as it has never been established that the direct perpetrators nor KHIEU Samphan had the direct intention to kill.[1109] Consequently, the Chamber has not correctly characterised the mental state element in murder. This conclusion should be annulled and KHIEU Samphan should be acquitted of this crime.[1110]

639. The CAH of murder being the death caused by treatment suffered in KTC is not constituted because the mental state element of murder has not been constituted inasmuch as it has never been established that the direct perpetrators nor KHIEU Samphan had the direct intention to kill.[1111]

[1101] Reasons for Judgement, §1144-1145.
[1102] Reasons for Judgement, §1387-1389.
[1103] Reasons for Judgement, §1670-1673.
[1104] Reasons for Judgement, §1801-1806.
[1105] Reasons for Judgement, §4311, 4315-4318, 4328, 4363, 4366, 4383, 4400, 4402.
[1106] Reasons for Judgement, §4311, 4315-4318, 4328, 4363, 4366, 4383, 4400, 4402.
[1107] Reasons for Judgement, §4311, 4315-4318, 4328, 4363, 4366, 4383, 4400, 4402.
[1108] Reasons for Judgement, §4311, 4315-4318, 4328, 4363, 4366, 4383, 4400, 4402.
[1109] Reasons for Judgement, §2565.
[1110] Reasons for Judgement, §4311, 4315-4318, 4328, 4363, 4366, 4383, 4400, 4402.
[1111] Reasons for Judgement, §2815, 2817.

Consequently, the Chamber has not correctly characterised the mental state element in murder. This conclusion should be annulled and KHIEU Samphan should be acquitted of this crime.[1112]

640. The CAH of murder being the death of Touch caused by detention conditions in PK is not constituted because the mental state element of murder has not been constituted inasmuch as it has never been established that the direct perpetrators nor KHIEU Samphan had the direct intention to kill.[1113] Consequently, the Chamber has not correctly characterised the mental state element in murder. This conclusion should be annulled and KHIEU Samphan should be acquitted of this crime.[1114]

Chapter III. ERRORS CONCERNING THE CAH OF PERSECUTION

641. The Chamber erred in law through an incorrect interpretation of the constitutive elements of the CAH of persecution (Section I) which led it to erroneous conclusions pertaining to Buddhists and the Cham (Section II).

Section I. THE LAW

642. The Chamber correctly stated that the crime of persecution requires evidence of "deliberate perpetration of an act or omission with the intent to discriminate on political, racial or religious grounds (*mens rea*)".[1115] On the other hand, it erred in omitting the condition that the deprivation of these rights had as its "objective [...] the removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself".[1116] The Chamber made express reference to the *Duch* Judgement which excludes this constitutive element for CAH of persecution arising from an erroneous analysis mentioned in the footnote (I). On the contrary, an examination of the initial jurisprudence and the practice at the ICTs, as well as the post-war jurisprudence, demonstrates that in 1975 the CIL required this condition be met for the crime of persecution (II).

I. ERRONEOUS SUPERFICIAL ANALYSIS OF THE *DUCH* JUDGEMENT TAKEN UP BY THE CHAMBER

[1112] Reasons for Judgement, §4311, 4315-4318, 4328, 4363, 4366, 4383, 4400, 4402.
[1113] Reasons for Judgement, §3116 -3117.
[1114] Reasons for Judgement, §4311, 4315-4318, 4328, 4363, 4366, 4383, 4400, 4402.
[1115] Reasons for Judgement, §713.
[1116] Reasons for Judgement, §713. *Kupreškic* Judgement (ICTY), 14.01.2000, §634.

643. To define the constitutive elements for the CAH of persecution, the Chamber relied principally on the jurisprudence from the Supreme Court in the *Duch* Judgement in paragraphs 236-240.[1117] In this judgement, the Supreme Court had rejected in a footnote the applicable jurisprudence requiring as the condition necessary for characterising persecution judicially to establish that the aim was to remove the targeted individuals from the society by effective "discrimination".[1118] The Supreme Court had however in the first instance correctly recalled that two ICTY Chambers and one ICTR Trial Chamber had retained that the mental state of the CAH of persecution required that the deprivation of rights had as its "aim [...]the removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself".[1119]

644. However, it erred in dismissing this jurisprudence reasoning that (1) the other ICTY and ICTR Chambers had not retained this condition and (2) that the post-World War II tribunals had not required this condition in order to proceed with sentencing for this crime.[1120] In effect, the two reasons provided by the Chamber for dismissing the aim of removal are not valid.

II. REQUIREMENT TO ESTABLISH AN OBJECTIVE TO REMOVE BY EFFECTIVE "DISCRIMINATION"

A. A condition initially consensual ignored by the Chamber

645. In *Kupreškic*, the Trial Chamber had clearly established:

> "When examining some of the examples of persecution mentioned above, one can discern a common element: those acts were all aimed at singling out and attacking certain individuals on discriminatory grounds, by depriving them of the political, social, or economic rights enjoyed by members of the wider society.The deprivation of these rights can be said to 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 ".[1121]

646. In *Kordic and Cerkez*, the Trial Chamber had noted the consensus of the parties concerning the definition of the *mens rea* of the crime of persecution:

> "The Prosecution and the Defence agree with the Kupreškic formulation of the intent requirement for persecution: the acts of the accused must have been "aimed at singling out and attacking certain

[1117] Reasons for Judgement, §713, fn 2187 referring to the *Duch* Appeal Judgement of 03.02.2012, §236-240.
[1118] *Duch* Appeal Judgement of 03.02.2012, §238, fn 514.
[1119] *Duch* Appeal Judgement of 03.02.2012, §238, fn 514 referring to the *Kupreškic* Judgement (ICTY), 14.01.2000, §634, to the *Kordic and Cerkez* Judgement (ICTY), 26.02.2001, §214 and to the Ruggiu Judgement of 01.06.2000, (ICTR), §22.
[1120] *Duch* Appeal Judgement, §238, fn 514.
[1121] *Kupreškic* Judgement (ICTY), 14.01.2000, §634.

> individuals on discriminatory grounds", with the aim of "removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself. ".[1122]

647. Still with *Kordic and Cerkez*, the Trial Chamber insisted on the necessity of a heightened interpretation of the mental state element in the CAF of persecution since "The expansion of *mens rea* is an easy but dangerous approach".[1123] The judges concluded by affirming that "in order to possess the necessary heightened *mens rea* for the crime of persecution, the defendant must have shared the aim of the discriminatory policy: "the removal of those persons from the society in which they live alongside the perpetrators, or eventually from humanity itself"".[1124] In the same way, in *Ruggiu*, the Trial Chamber applied this judicial criterion.[1125]

648. The evidence of the "consensual" character on this legal point such as has been characterised in the Kordic and Cerkez judgement is that this reasoning has not been the subject of any valid appeal. In the *Kupreškic* case, no party appealed this point. In the *Kordic and Cerkez* trial, the Prosecution repeated and cited the jurisprudence as formulated in the *Kupreškic judgement*.[1126] However, the Prosecution appealed this legal point.This point had no influence on the verdict in one of the ways provided for in article 25(1).The Prosecution stated that it was a question of general interest for the Court's jurisprudence.[1127] In this context, the Appeal Chamber contented itself with declaring, *obiter dicta*:

> "Pursuant to the jurisprudence of the International Tribunal, the Appeals Chamber holds that a showing of a specific persecutory intent behind an alleged persecutory plan or policy, that is, the removal of targeted persons from society or humanity, is not required to establish the *mens rea* of the perpetrator carrying out the underlying physical acts of persecutions.".[1128]

[1122] *Kordic* and *Cerkez* Judgement (ICTY), 26.02.2001, §214.
[1123] *Kordic* and *Cerkez* Judgement (ICTY), 26.02.2001, §219.
[1124] *Kordic* and *Cerkez* Judgement (ICTY), 26.02.2001, §220.
[1125] *Ruggiu* Judgement (ICTR), 01.06.2000, §22: "The Trial Chamber considers that when examining the acts of persecution which have been admitted by the accused, it is possible to discern a common element.Those acts were direct and public radio broadcasts all aimed at singling out and attacking the Tutsi ethnic group and Belgians on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of wider society.The deprivation of these rights can be said to have as its aim the death and removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself" (emphasis added).
[1126] *Kordic and Cerkez*, final Prosecution brief, §200: "*This mental state element may be satisfied when the acts of the perpetrator "were all aimed at singling out and attacking certain individuals on discriminatory grounds", with the aim of "removal of those persons from society in which they live alongside the perpetrators, or eventually even from humanity itself"* " (emphasis added). In fn, the Prosecution aligns itself with paragraph 634 of the *Kupreškic* Judgement.
[1127] *Kordic and Cerkez*, final Prosecution brief, §2.5.
[1128] *Kordic and Cerkez* Judgement (ICTY), 17.12.2004, §111, fn 134 referring to the *Blaškic* Judgement (ICTY), 29.07.2004, §165.

649. In the *Kordic and Cerkez* case, the Appeals Chamber cited in a footnote the *Blaškic* Judgement as the source supporting the abandonment of the requirement of proving the intention to remove certain people from society for the crime of persecution. However, in the *Blaškic* judgement, the judges did not give any reasons for this conclusion and did not rely on any judicial reference or any analysis to justify it.[1129] Conversely, the *Kupreškic* judgement, taken up by the *Kordic and Cerkez* judgement, was based on the post-war jurisprudence.

650. Contrary to the interpretation retained by the Supreme Court in the *Duch* Judgement and reproduced by the Chamber, the absence of any explicit mention of this key condition by other Appeal Chambers and the ICTY and ICTR Trial Chambers is no more and no less than evidence that this condition was abandoned in 1991, thus after the events of 1975.

651. The explicit formulation of the intent to exclude targeted people in the *mens rea* has not been explicitly advanced since the *Blaškic* judgement. No decision subsequent to the *Blaškic* judgement has provided more precision pertaining to the reasons for the explicit abandoning of the condition in the *Blaškic* judgement.[1130] In addition, be it in the ICTY or the ICTR, the facts pertaining to persecution were all founded on the banishment of the persecuted group from society. It was never a case of assimilation or of equal treatment.

652. Above all, the Chamber erred in law by rejecting the initial consensus as it was in the initial jurisprudence of the ICT requiring the intent to exclude the individuals targeted by the discrimination as an indication that such jurisprudence based on post-war jurisprudence reflected the state of the CIL in 1975. It is the same for the later practice of the ICTs sentencing solely for facts of persecution motivated by a desire to exclude individuals targeted by the discriminatory measures.

B. Exclusion: essential element of persecution in post-war jurisprudence

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[1129] *Blaškic* Appeal Judgement, 29.07.2004, §165: "Pursuant to the jurisprudence of the International Tribunal, the Appeals Chamber holds that a showing of a specific persecutory intent behind an alleged persecutory plan or policy, that is, the removal of targeted persons from society or humanity, is not required to establish the *mens rea* of the perpetrator carrying out the underlying physical acts of persecutions.".
[1130] Reasons for Judgement, §713, fn 2187 referring to the *Duch* Appeal Judgement, 03.02.2012, §236-240. See *Duch* Appeal Judgement, 03.02.2012, §238, fn 514.

653. The requirement of a clear desire to remove from society the targeted individuals arises from the judgement handed down by the Nuremberg IMT and the Eichmann judgement from the Jerusalem District Court as a common denominator when concerning persecution.

654. The Nuremberg Tribunal set out the grounds on which the declaration of Göring's guilt was founded, concentrating on the intent to remove the Jews.[1131] This applies equally to the defendant Von Ribbentrop.[1132] As for the defendant Frank, the intent to remove arises clearly from the judges' analysis.[1133] As for the assessment of the individual criminal responsibility of FRICK, the judges underlined that "Always rabidly anti-Semitic, Frick drafted, signed, and administered many laws designed to eliminate Jews from German life and economy".[1134] The individual criminal responsibility of Streicher for the persecution of Jews is also founded on the intent to eliminate.[1135] The declaration of the culpability of Funk for CAH of persecuting the Jews was based on elements

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[1131] *Trial of the Major War Criminals before the International Criminal Tribunal*, 01.10.1946, IMT, vol. I, p. 283-284: "Göring persecuted the Jews, particularly after the November 1938 riots, and not only in Germany where he raised the billion mark fine as stated elsewhere,but in the conquered territories as well. His own utterances then and his testimony now shows this interest was primarily economic - how to get their property and how to force them out of the economic life of Europe. As these countries fell before the German Army, he extended the Reich's anti-Semitic laws to them. The Reichsgesetzblatt for 1939, 1940, and 1941 contain several anti-Semitic decrees signed by Göring. Although their extermination was in Himmler's hands, Göring was far from disinterested or inactive, despite his protestations in the witness box. By decree of 31 July 1941 he directed Himmler and Heydrich to bring about a "complete solution of the Jewish question in the German sphere of influence in Europe"" (emphasis added).

[1132] *Trial of the Major War Criminals before the International Criminal Tribunal*, 01.10.1946, IMT, vol. I, p.288: "On 17 April 1943 he took part in a conference between Hitler and Horthy on the deportation of Jews from Hungary and informed Horthy that the "Jews must either be exterminated or taken to concentration camps". (emphasis added).

[1133] *Trial of the Major War Criminals before the International Criminal Tribunal*, 01.10.1946, IMT, vol. I, p. 298: "The persecution of the Jews was immediately begun. The area originally contained from 2.5 million to 3.5 million Jews.They were forced into ghettos, subjected to discriminatory laws, deprived of the food necessary to avoid starvation, and finally systematically and brutally exterminated. On 16 December 1941 Frank told the Cabinet of the Governor General: "We must annihilate the Jews, wherever we find them and wherever it is possible, in order to maintain there the structure of the Reich as a whole." By 25 January 1944, Frank estimated that there were only 100,000 Jews left." (emphasis added)

[1134] *Trial of the Major War Criminals before the International Criminal Tribunal*, 01.10.1946, IMT, vol. I, p. 300 (emphasis added).

[1135] *Trial of the Major War Criminals before the International Criminal Tribunal*, 01.10.1946, IMT, vol. I, p. 302: "Twenty-three different articles in Der Stürmer between 1938 and 1941 were produced in evidence, in which extermination "root and branch" was preached.Typical of his teachings was a leading article in September 1938 which termed the Jew a germ and a pest, not a human being, but "a parasite, an enemy, an evildoer, a disseminator of diseases who must be destroyed in the interest of mankind". Other articles urged that only when world Jewry had been annihilated would the Jewish problem have been solved, and predicted that 50 years hence the Jewish graves "will proclaim that this people of murderers and criminals has after all met its deserved fate"". (emphasis added); p. 304: "Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly "constitutes persecution on political and racial grounds in connection with War Crimes, as defined by the Charter, and constitutes a Crime against Humanity." (emphasis added)

demonstrating elimination.[1136] The defendant von Schirach was found guilty of CAH by the IMT on similar grounds.[1137] In the same way, the IMT retained the individual criminal responsibility for CAH against defendants Seyss-Inquart and Bormann on the grounds of elimination.[1138] In the *Eichmann* case, the District Court of Jerusalem confirmed the interpretation of persecution as demanding elimination.[1139]

655. In point of fact, to characterise the crime of persecution, the Chamber was duty bound to establish in what way the measures characterised as persecution had as an objective to eliminate the group or to remove it from society. In not doing this, the Chamber erred in law and effected, in the legal

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[1136] *Trial of the Major War Criminals before the International Criminal Tribunal*, 01.10.1946, IMT, vol. I, p. 305: "Funk has testified that he was shocked at the outbreaks of 10 November, but on 15 November he made a speech describing these outbreaks as a "violent explosion of the disgust of the German People, because of a criminal Jewish attack against the German People", and saying that the elimination of the Jews from economic life followed logically their elimination from political life"." (emphasis added).

[1137] *Trial of the Major War Criminals before the International Criminal Tribunal*, 01.10.1946, IMT, vol. I, p. 319: "The deportation of the Jews from Vienna was then begun and continued until the early autumn of 1942. On 15 September 1942, Von Schirach made a speech in which he defended his action in having driven "tens of thousands upon tens of thousands of Jews into the ghetto of the East" as "contributing to European culture" (emphasis added).

[1138] *Trial of the Major War Criminals before the International Criminal Tribunal*, 01.10.1946, TMI, vol. I, p. 225: "One of Seyss-Inquart's first steps as Reich Commissioner of the Netherlands was to put into effect a series of laws imposing economic discriminations against the Jews. This was followed by decrees requiring their registration, decrees compelling them to reside in ghettos and to wear the Star of David, sporadic arrests and detention in concentration camps, and finally, at the suggestion of Heydrich, the mass deportation of almost 120,000 of Holland's 140,000 Jews to Auschwitz and the "final solution". Seyss-Inquart admits knowing that they were going to Auschwitz, but claims that he heard from people who had been to Auschwitz that the Jews were comparatively well off there, and that he thought that they were being held there for resettlement after the war. In light of the evidence and on account of his official position it is impossible to believe this claim."; p. 329: "Bormann was extremely active in the persecution of the Jews, not only in Germany but also in the absorbed and conquered countries. He took part in the discussions which led to the removal of 60,000 Jews from Vienna to Poland in cooperation with the SS and the Gestapo. He signed the decree of 31 May 1941 extending the Nuremberg Laws to the annexed Eastern territories. In an order of 9 October 1942, he declared that the permanent elimination of Jews in Greater German territory could no longer be solved by emigration, but only by applying "ruthless force" in the special camps in the East. On 1 July 1943 he signed an ordinance withdrawing Jews from the protection of the law courts and placing them under the exclusive jurisdiction of Himmler's Gestapo." (emphasis added).

[1139] In the District Court of Jerusalem Criminal Case No. 40/61, 36 ILR, 1968, §56: "With the rise of Hitler to power, the persecution of the Jews became official policy and took on quasi-legal form through laws and regulations published by the government of the Reich, in accordance with legislative powers delegated to it by the Reichstag on 24 March 1933 (Session 14, Vol. *I, p. 215 [where it is erroneously dated 23 March 1933])*, *and through direct acts of violence organized by the regime against the persons and property of the Jews. The purpose of these actions carried out in the first stage was to deprive the Jews of citizen rights, to degrade them and to strike fear into their hearts, to separate them from the rest of the inhabitants, to oust them from the economic and cultural life of the state, and to close off their sources of livelihood*" (emphasis added); §201: *"It is clear that both parts of the definition of the crime against humanity apply to all the activities of the Accused against the Jews at the final stage, as from August 1941, and that at this stage he participated in all the inhuman acts mentioned in the section of the Law (murder, extermination, enslavement, starvation and deportation of civilian population). Causing serious damage to the Jews, bodily or mentally, was also an inhuman act committed against the civilian population. All 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.*" (emphasis added).

characterisation of the facts, an incorrect application of the applicable law at the time of the facts as shall be shown below.[1140]

Section II. ERRORS AND IMPACT BY CRIME SITE

I. NO DISCRIMINATORY INTENT TOWARDS BUDDHISTS AND MONKS

656. The Chamber had to establish how the measures defined as persecution aimed to isolate or exclude the group from society, while affirming that the discriminatory intent irrespective of knowing whether the aim was to arrive at absolute equality.[1141] Consequently, the moral aspect of religious persecution has not been established and the Chamber's conclusion must be invalidated.[1142]

II. NO DISCRIMINATORY INTENT TOWARDS CHAM PEOPLE

657. The Chamber has not defined how the measures defined as persecution were intended to isolate or exclude the group from society. Failure to do so means that the Chamber has erred in law.[1143] Consequently, the moral aspect of religious persecution of Cham people has not been established, and the Chamber's conclusion must be invalidated.[1144]

Chapter IV. ERRORS REGARDING THE OIA CAH

658. In the Closing Order, KHIEU Samphan was committed to stand trial for OIA CAH. The Chamber erred in law in its definition of the law applicable to the aforementioned crime.[1145] The Chamber erred in law in its examination of the principle of legality (Section I) and its provision of a truncated definition of the condition of formal illegality (Section II).

Section I. ERRONEOUS ANALYSIS OF THE LEGALITY OF OIA

659. The Chamber stated that after "having weighed these factors objectively, the Chamber concludes that it was both foreseeable and accessible in general that other inhumane acts was punishable as a crime against humanity by 1975".[1146] The Judges provide no reasons to support this general conclusion, presented without the support of any footnotes. The Chamber simply stated that it had

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[1140] See below, §656-657.
[1141] Reasons for Judgement, §1186.
[1142] Reasons for Judgement, §1186.
[1143] Reasons for Judgement, §1654-1659, 1695-1697, 3320-3326, 3243, 3329, 3332.
[1144] Reasons for Judgement, §3990-3998, 4306.
[1145] Reasons for Judgement, §724-727.
[1146] Reasons for Judgement, §723 (emphasis added).

"taken into account the customary status and gravity of the crime and the positions held by the Accused as members of Cambodia's governing authority".[1147]

660. The Defence does not contest the fact that OIA was a crime at the time when the events took place. This alone is not enough to mean that punishment for this crime was foreseeable and accessible to the Accused. OIA covers a range of behaviour, it is a residual category, which requires a much more rigorous examination of the principle of legality than that submitted by the Chamber.

661. Article 5 of the Law that created the ECCC specifies the various CAH: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds and concludes with "all other inhumane acts".

662. OIA is not a crime or a specific type of crime. Under the definition of CAH, OIAs are intended to be an extension of all of the aforementioned specifically enumerated crimes, applied by analogy, according to the *esjudem generis* interpretation rule. CAH were included in the terms on CAH as a residual category, or even *"catch-all provision*" (in the words of Iris HAENEN[1148]), to ensure that inhumane acts not explicitly specified as CAH are included in the scope of international criminal law. This therefore means that the criminal behaviour or omission must not already have been covered by one of the crimes defined as a CAH in a specific law. This conclusion is confirmed by ICTY and ICTR jurisprudence and is also grammatically logical: the clause concerns <u>*other*</u> inhumane acts.[1149]

663. OIA is probably the area of the CAH definition that creates the greatest difficulty respecting the principle of legality.[1150] The principle of legality – *nullum crimen sine lege* – is fundamental to international criminal charges and therefore applies to all international courts. It is consecrated in

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[1147] Reasons for Judgement, §723.

[1148] Iris HAENEN, *Classifying acts as crimes against humanity in the Rome Statute of the International criminal court,* German Law Journal, 2013, p.796-822 and *Force & Marriage: The criminalisation of forced marriage in Dutch, English and international criminal law*, Intersentia, 2014. Translated as "*fourre-tout*" in the French document by the Defence.

[1149] Iris HAENEN, *Classifying acts as crimes against humanity in the Rome Statute of the International criminal court*, German Law Journal, 2013, p.812 (emphasis added). References cited to support this argument: '*Jain, above note 1, at 1028, referring to the Kayishema Trial Judgement, above note 65, at para. 150. See also Prosecutor v. Mitar Vasiljević (Trial Judgement), ICTY IT-98-32-T, Nov. 29, 2002, para. 234; Prosecutor v. Dario Kordić & Mario Čerkez (Trial Judgement), ICTY IT-95-14/2-T, Feb. 26, 2001, at para. 269'.*

[1150] Cherif BASSIOUNI, *Crimes against humanity, Historical and evolution and contemporary application*, Cambridge, 2011, p. 411.

Article 2(2) of the Rome Statute[1151] and Article 11 of the Universal Declaration of Human Rights. There are several corollaries of this principle, including the principle of foreseeability, which requires the criminal act to be specific and clear. The definition of a crime must be sufficiently precise for a potential perpetrator to know whether their act or omission is likely to result in criminal charges. According to the principle of non-retroactivity, an act or omission committed prior to the law criminalising such behaviour cannot lead to a criminal sentence, unless these rules are more favourable to the accused. The corollary of this principle is the preservation of the integrity of the rights of those accused.

664. CASSESSE affirms that the principle of non-retroactivity for criminal rules is now solidly anchored in international criminal law and that courts need only apply the fundamental criminal regulations that existed when the alleged offence was committed.[1152] However, the courts have avoided strict application of this principle, preferring a broader approach in which judicial interpretation and drafting are allowed through legal arrangements. Examination of the recent decisions on non-retroactivity, in which the courts have tried to reconcile the fact that international criminal law is [largely constituted of customary rules which are often identified, clarified or specified or whose legal scope is defined by the courts][1153] to ensure that guilt is not imposed on people who could not have reasonably known that an act was criminal[1154], makes this clear. The OIA residual category shares this broad approach and this desire to build international criminal law. And yet, international jurisprudence has developed a prudent definition of OIAs, to ensure that it does not violate the principle *nullum crimen sine lege.*

665. It is therefore not enough to say that the crime of OIA was foreseeable at the time of the facts as it can cover numerous kinds of behaviour. As a residual category, it would have been worth analysing each of the alleged criminal facts on a case-by-case basis; i.e. identifying the behaviour and examining whether this could have been defined as criminal at the time, in an equivalent manner

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[1151] Rome Statute, article 22-2: "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted".
[1152] Antonio CASSESSE, *International criminal law*, 2008, p.113-114
[1153] Antonio CASSESSE, *International criminal law*, 2008, p.113-114.
[1154] Article by Nicolas Azadi GOODFELLOW, *The Miscategorization of 'Forced Marriage' as a Crime against humanity by the Special Court for Sierra Leone*, p. 843-844.

to the other CAH. By failing to provide a more rigorous examination of the legality of the offence in question, the Chamber has made an error in law and its conclusions must be annulled.

Section II. ABRIDGED SUMMARY OF FORMAL UNLAWFULNESS

666. The Chamber recalled the condition of formal unlawfulness established by the Supreme Court in Judgement 002/01, as "assessing both the requirement of foreseeability and whether the behaviour reaches the level of gravity of other crimes against humanity".[1155] According to Judgement 002/01, while the behaviour covered does not need to have been expressly breached in international criminal law, a real connection between the rights and prohibitions set out in the human rights instruments in force at the time when the facts that gave rise to the accusation of OIA took place must nevertheless be established.[1156]

667. To establish the nature of the behaviour and whether it is of a similar gravity to that of the other acts specifically defined, international criminal jurisprudence has sought to determine the limits of this conduct and compare it against the international norms, to determine whether or not it is a case of OIA. The Supreme Court signed up to the jurisprudence developed at the ICTY in using this kind of reasoning, which seeks to establish the potential unlawfulness of the alleged behaviour at the time it took place.

668. In the *Kupreškić* Judgement, the Chamber recalled that the expression "other inhumane acts" was deliberately designed to be a residual offence, which was why its component elements were not specified exhaustively.[1157] In order to respect the principle of legality and its corollaries, the Chamber has attempted to find more specific parameters for interpreting the "OIA" expression in international human rights legislation. It therefore based its arguments on a certain number of international texts to establish the basic human rights whose violation may constitute a CAH. Once the basic rights have been identified, they "must be carried out in a systematic manner and on a large scale. In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article 5". In the final stage of its reasoning, the Chamber considered that once the legal parameters allowing the nature of the "inhumane acts" category had been identified, the *ejusdem generis* should be applied in order to compare and assess the gravity of the prohibited

[1155] Reasons for Judgement, §726.
[1156] Case 002/001 Appeal Judgement, 23.11.2016, §584.
[1157] *Kupreškić Judgement* (ICTY), 14.01.2000, §563.

act. [1158] In the *Blagojević* Case, the Trial Chamber recalled the residual nature of OIA, adding that the principle of legality required that the act in question also be distinct from the other CAH described.[1159] But in the *Stakić* Case, the Chamber did not subscribe to this method as:

> "[T]he international human rights instruments referred to by the *Kupreškić* Trial Chamber provide somewhat different formulations and definitions of human rights. However, regardless of the status of the enumerated instruments under customary international law, the rights contained therein do not necessarily amount to norms recognised by international criminal law. The Trial Chamber recalls the report of the Secretary-General according to which 'the application of the principle *nullum crime sine lege* requires that the International Tribunal should apply rules of international customary law which are beyond doubt part of customary law.' Accordingly, this Trial Chamber hesitates to use such human rights instruments automatically as a basis for a norm of criminal law, such as the one set out in Article 5(i) of the Statute".[1160]

669. The Case 002/01 Appeal Judgement seems to establish a compromise between the two aforementioned decisions. Indeed, while the judgement adheres to the method established in the *Kupreškić* Judgement in highlighting "its advantage for assuring the requirement of foreseeability" and in allowing the introduction of "formal international unlawfulness", it nevertheless specifies that it is also necessary to identify prohibitions contained in these human rights instruments, which suggests that human rights cannot be the sole foundation for a norm in criminal law.[1161]

670. To summarise, formal unlawfulness is identified by an "affirmative articulation of rights and prohibitions contained in human rights instruments, applicable at the time relevant for charges of "other inhumane acts".[1162]" The ICJ also subscribed to this analysis during the investigations for cases 003 and 004.[1163]

671. In contenting itself with a simple evocation of the fundamental rights included in instruments at the time, the Chamber has provided a truncated analysis of the formal unlawfulness and has in fact committed a error in law. In conclusion, all of the conclusions concerning the law applicable to OIA in the contested Reasons for Judgement must be invalidated.

[1158] *Kupreškić* Judgement (ICTY), 14.01.2000, §566.
[1159] *Blagojević* Judgement (ICTY), 17.01.2005, §625.
[1160] *Stakic* Judgement (ICTY), 31.07.2003, §721.
[1161] Case 002/001 Appeal Judgement, 23.11.2016, §584.
[1162] Case 002/001 Appeal Judgement, 23.11.2016, §584.
[1163] Consolidated decision on the requests for investigative action concerning the crime of forced pregnancy and forced impregnation, 13.06.2016, **004/2-D301/5**, §63: "The above analysis demonstrates that courts have taken a cautious approach in assessing "other inhumane acts" so as to ensure the principle of legality is not violated. This approach has almost always involved reference to international criminal jurisprudence and international human rights and legal instruments to define or outline the elements of the behaviour."

Title II. ERRORS IN ASSEMBLING THE PARTICULARS

Chapter I. COOPERATIVES AND WORKSITES

Section I. TRAM KAK

I. THERE WAS NO MURDER WITH *DOLUS EVENTUALIS*

672. Principally, deaths due to living conditions outside the eight communes,[1164] or deaths other than those due to starvation,[1165] or deaths due to starvation,[1166] or deaths due to health problems and living conditions more generally,[1167] or deaths due to starvation outside the communes of Samraong and Ta Phem[1168], were not regularly referred to the Chamber. It is also worth remembering that the CAH murder with *dolus eventualis* did not exist at the time of the facts and that the Chamber erred in law in ruling to the contrary.[1169] As mentioned above, given the lack of evidence for the crime of extermination, the Chamber illegally re-categorised the facts as murder with *dolus eventualis*, committing an error in law that invalidates its decision.[1170] Failing that, the Chamber erred in law in its omission of "guilt"(A), manslaughter (B) and mistakes of fact due to the unreasonable nature of its remarks establishing the *actus reus* and *mens rea* of murder with *dolus eventualis* at TK (C).

A. Errors in law: culpable omission

673. The Chamber declared that the constitutive element of the *actus reus* for the CAH of murder at the TK cooperatives was the act of "the imposition on the inhabitants of the Tram Kak Cooperatives of conditions that caused their death," and also an omission: "by the absence of appropriate measures to change or alleviate such conditions".[1171]

674. The Chamber committed an error in law in failing to provide a legal definition of the nature and scope of the duty to act incumbent upon the direct perpetrators of deaths caused by living conditions in TK cooperatives.[1172] At §627 of the Reasons for Judgement, the Chamber nevertheless correctly recalled that "an omission will be culpable only where there is a duty to act". Individual criminal

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[1164] See above, §367-371.
[1165] See above, §378-379.
[1166] See above, §445-447.
[1167] See above, §465-470.
[1168] See above, §471-474.
[1169] See above, §575-637.
[1170] Reasons for Judgement, §1138-1155. See above, §135-157.
[1171] Reasons for Judgement, §1144.
[1172] Reasons for Judgement, §1144.

responsibility only comes into force for an omission when an individual fails to act despite their obligation to do so.[1173] Indeed, "[criminal responsibility] covers first and foremost the physical perpetration of a crime by the offender himself",[1174] and omissions are only culpable where mandated by a rule of criminal law.[1175] In this case, the Chamber has not indicated which duty to act was violated or the rule under which the authorities of TK district had an obligation to take appropriate measures to change or improve living conditions for TK residents. Its conclusion of guilt by omission is therefore given outside any legal framework and without any legal and factual analysis. It must be invalidated.

675. On the other hand, the Chamber committed an error in law in applying the wrong criteria in analysing culpable omission to characterise the *actus reus* of murder. Without making any reference to specific evidence or providing any legal analysis of the evidence, it simply declared that the TK authorities were guilty of murder for having "abstained from taking appropriate measures to change or alleviate such conditions".[1176] The Chamber also made an error in law by failing to provide any reasons for this conclusion. This lack of analysis or legal definition leading to a sentence demonstrate bias. As a result, its conclusion that culpable omission was the *actus reus* must be invalidated.[1177]

B. Errors in law regarding *dolus eventualis*

676. The Chamber also committed an error in law in declaring that the *mens rea* murder requirement was satisfied in the form of *dolus eventualis*.[1178] It was happy to **hypothesise** the *mens rea* for murder. Indeed, the Chamber limited itself to deeming that the TK district authorities had deliberately imposed conditions "with the knowledge that they would likely lead to deaths or in the acceptance of the possibility of this fatal consequence". But it should not have based a conviction on an X 'or' Y alternative, and should instead have established the existence of *mens rea* beyond reasonable doubt.[1179]

[1173] *Tadić* Judgement (ICTY), 15.07.1999, §188; *Galić* Judgement (ICTY), 30.11.2006, §175; *Blaškić* Judgement (ICTY), 29.07.2004, §663 (on command).
[1174] *Blaškić* Judgement (ICTY), 29.07.2004, §663.
[1175] *Tadić* Judgement (ICTY), 15.07.1999, §188.
[1176] Reasons for Judgement, §1144 (emphasis added).
[1177] Reasons for Judgement, §1144-1145.
[1178] Reasons for Judgement, §1145.
[1179] Reasons for Judgement, §1145.

677. The Chamber neither established that the TK district authorities knew that the imposed conditions were likely to lead to deaths nor that they accepted the possibility that they could have fatal consequences.[1180] Accordingly, it has not correctly defined the *mens rea* for murder with *dolus eventualis*. This conclusion should be annulled.

C. Unreasonable ascertainments of fact

1. Lack of sufficient evidence of alleged deaths

a. Alleged deaths caused by starvation

678. The Chamber erred in fact in deeming that the evidence revealed periods of great food shortages by basing its arguments on evidence in a report from the Southwestern Zone dated 3 June 1977.[1181] The cited reference does not support the Chamber's statement according to which this report indicated that certain districts and communes had experienced hardship.[1182] The only relevant passage in this report is not found at the page mentioned by the Chamber but on the following; and it is limited to a vague statement that in the Takeo region "the people's living standard: [...] can be addressed. Although some Districts and Sub-districts have encountered the shortage it can be addressed".[1183]

679. The Chamber also made an error of fact in stating that RIEL Son had declared that the number of deaths had increased towards the final period of the régime as there was not enough food.[1184] The reference provided mentions no deaths. Moreover, the Chamber also made an error in distorting the statement by NEANG Ouch, which does not attribute the penury to bad administration, unlike the passages cited by the Chamber.[1185] Lastly, the Chamber erred in fact in basing its arguments on the testimony by civil party CHANG Srey Mom, to ascertain that some died of malnutrition

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[1180] Reasons for Judgement, §1145.
[1181] Reasons for Judgement, §1142, fn 3880, fn 3881 referring to §1013, fn 3226: Report of South-western zone to respected and beloved Angkar, 03.06.1977, E3/853, **E3/853**, ERN EN 00185245.
[1182] Reasons for Judgement, §1013, fn 3226: Report of South-western zone to respected and beloved Angkar, 03.06.1977, E3/853, **E3/853**, ERN EN 00185245.
[1183] Reasons for Judgement, §1013. Report of South-western zone to respected and beloved Angkar, 03.06.1977, E3/853, **E3/853**, ERN EN 00185246 (emphasis added).
[1184] Reasons for Judgement, §1013, fn 3227: referring to "T., 17 March 2015 (RIEL Son), Doc. n° E1/278.1, p. 37-38."
[1185] Reasons for Judgement, §1014, fn 3228 [3229]: "T., 10 March 2015 (NEANG Ouch), E1/274.1, p. 13, 23-24), (discussing that provision from high-yield areas still might not be sufficient."; Reasons for Judgement, §1016, fn 3253: "T., 10 March 2015 (NEANG Ouch), E1/274.1, p. 12."

because their daily ration was insufficient[1186]. This statement rather highlights the irregular nature of rations and the major difficulties involved in ration management.[1187]

680. The Chamber erred in fact by concluding that some workers died because of their difficulties in finding nourishment based on the statement by EK Hoeun.[1188] She did not confirm that workers were dying at the worksites located in TK district due to a lack of food.[1189] The passage cited as a reference is actually unclear and seems to attribute deaths at the Khporp Trabaek worksite to "haemorrhoid problems".[1190] At §1020 of the Reasons for Judgement, the Chamber wrongly used minutes of SIM Chheang's testimony of a death at Pen Meas and civil party applications mentioning deaths at Leay Bour and Ta Phem to provide "substantial corroboration of the aforementioned evidence that numerous deaths resulted in Tram Kak district [...] therefore establishes that this was the general and well-known situation in Tram Kak district".[1191] This last evidence is inherently low probative value. At §1037, the only reported death in the Leay Bour commune is that of the child of civil party CHOU Koemlan.[1192]

681. No reasonable trier of fact would have concluded that deaths were due to periods of food shortage on the sole basis of the evidence cited at §1011-1016, 1020 and 1037 which would not have allowed the facts to be demonstrated beyond reasonable doubt. The Chamber's conclusions are therefore to be annulled.

b. <u>Death in hospital due to rudimentary medical care</u>

682. The Chamber committed an error in law in judging that the *actus reus* for murder for deaths in hospital was the rudimentary medical care, malnutrition and overwork.[1193] It relied exclusively on

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[1186] Reasons for Judgement, §1015, fn 3248: "T., 29 January 2015 (CHANG Srey Mom), E1/254.1, p. 11-12".
[1187] T., 29 January 2015 (CHANG Srey Mom), Doc. n° E1/254.1, at 09.34.25: ("Some died because they ate **too much**. At the time the daily food ration was not sufficient for us. And one day, there was one day, on the 10th, 20th, 30th day, occasional parties were held, we were allowed to eat as much as we could. As the, you know, because our daily food ration was not enough, and on that day, the 10th, because we had never had enough food to eat, so some ate too much. And some died because of such eating." (emphasis added).
[1188] Reasons for Judgement, §1142, fn 3883 referring to §1020.
[1189] Reasons for Judgement, §1020, fn 3281.
[1190] T. 07.05.2015, **E1/298.1**, around 15.55.56: "Workers were sometimes sick, they had problems feeding themselves, they worked and sometimes <u>they had external anal sphincters stuck out, bled and died on the worksites</u>" (emphasis added).
[1191] Reasons for Judgement, §1020, fn 3282.
[1192] Reasons for Judgement, §1037, fn 3370: T. 27.01.2015, **E1/253.1**, around 10.55.28.
[1193] Reasons for Judgement, §1142, fn 3884 referring to §1047.

the testimony of RIEL Son to do so. But he has not stated that the deaths were due to rudimentary medical care.[1194] No reasonable trier of fact would have made this extrapolation in the absence of tangible evidence to reach this kind of conclusion.

2. Lack of evidence of manslaughter in deaths due to starvation and living conditions

683. The Chamber erred in fact by finding that the *mens rea* for murder was satisfied in the form of *dolus eventualis*.[1195] Yet it concluded that factors beyond the control of the authorities may have sometimes contributed in part to the lack of food and/or medical resources.[1196] It erred in fact in not drawing the only reasonable conclusion from this observation.

684. *Mens rea* involves subjective analysis as it starts from the offender's point of view. Here 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; and acceptance of risk depends on how it was perceived at the time. Criminal intent is determined before a crime is perpetrated, not afterwards.

685. The Chamber erred in fact in failing to analyse the evidence precisely in terms of timing. It "stated that maintaining conditions during a long period, including after their impact became visible" demonstrates the *mens rea* in this case.[1197] It therefore made a mistake in failing to establish the connection between the *actus reus* and the *mens rea* at a specific moment concerning deaths due to the living conditions in TK. No reasonable trier of fact would have drawn such a conclusion without evidence. As a result, the Chamber's conclusion on the existence of the *mens rea* for murder must be annulled.

II. ERRORS IN CONCLUDING THAT VIETNAMESE PEOPLE WERE DEPORTED

686. Let us first start by remembering that facts that constitute deportation were wrongly referred to the Chamber, which prohibits all sentencing related to these events.[1198] Nevertheless, beyond this error in law, it was impossible for the Chamber to conclude that the CAH of deportation had been

[1194] Reasons for Judgement, §1047.
[1195] Reasons for Judgement, §1145.
[1196] Reasons for Judgement, §1145.
[1197] Reasons for Judgement, §1145.
[1198] See above, §380-385.

committed "in relation to the large number of Vietnamese expelled from Tram Kak district and sent to Vietnam without their consent in 1975 and 1976[1199]". It is indeed through errors of fact that the Chamber was able to consider that the two elements that constitute a crime had been assembled: the *actus reus* requiring that people cross a national border (A) and the intent to forcibly displace victims over a national border (B).

A. Error in concluding that the victims effectively crossed a national border

687. To establish a crime of deportation, the victims must have been displaced over a national border.[1200] The Chamber considered this established in stating that it was convinced "that some Vietnamese persons gathered up in Tram Kak district indeed crossed the international border and were sent to Vietnam".[1201]

688. The Chamber committed numerous mistakes of fact and law in reaching this conclusion. It not only failed to provide sufficient reasons for its decision (1), but also analysis of all the evidence submitted does not prove beyond reasonable doubt that Vietnamese people from TK district actually crossed the Vietnamese border (2). Additionally, the Chamber made mistakes in using evidence obtained through torture (3) and in relying heavily on OC evidence (4).

1. Failure to state reasons

689. It is hard to follow the Chamber's reasoning in its legal characterisation of the facts.[1202] Its chaining together of contradictory conclusions make it hard to understand the foundations on which the Chamber has based its arguments to establish evidence of a crime. This is flagrant in its demonstration of what happened to Vietnamese people from the TK district, making it hard to know whether they actually crossed the Vietnamese border.

690. Initially, the Chamber is satisfied that the Vietnamese people "disappeared from [TK] district." It also concluded that orders targeting the killing of Vietnamese people were issued "during the period when they were expelled". And added that "instructions were being issued by the district level" to kill Vietnamese persons and that "large numbers of Vietnamese people were assembled over the course of a few days in 1975 or at the start of 1976".[1203] However, the Chamber explained

[1199] Reasons for Judgement, §1159.
[1200] Reasons for Judgement, §681.
[1201] Reasons for Judgement, §1158.
[1202] Reasons for Judgement, §1157-1159.
[1203] Reasons for Judgement, §1157.

that the evidence did not allow them to conclude that executions of Vietnamese people had taken place. Simultaneously, it affirmed:

> "The available evidence [... does not] allow the Chamber to track with specificity the fate of particular Vietnamese persons gathered up at this time ".[1204]

691. Indeed, in the words of the Chamber, the evidence that allowed us to ascertain what had happened to the Vietnamese people assembled in TK district presented "evidential gaps".[1205] Yet, without any transition or explanation, the Chamber concluded:

> "[T]he only reasonable inference to be drawn 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".[1206]

692. This argument leaves readers perplexed. If the evidence did not allow the Chamber to determine what happened to "particular Vietnamese persons" in TK district, how is it possible to conclude that a large number of Vietnamese people were expelled to Vietnam on the basis of the same evidence? The Chamber expressly cites the April 1976 RF edition and the evidence of an exchange of KK and Vietnamese people. But, according to the Chamber this evidence only "confirmed" this "reasonable inference". The Chamber has therefore failed to reveal the evidence that allowed it to arrive at such a "reasonable inference". This incoherence reaches its peak at the end of its analysis of all the evidence:

> "The Chamber deems that the aforementioned evidence allows it to establish that large numbers of Vietnamese people were assembled in Tram Kak district between the end of 1975 and the start of 1976, many of whom were deported and/or disappeared".[1207]

693. The same conclusion is reiterated in the legal characterisation of OIA through enforced disappearances in TK.[1208] The use of the double preposition allowing readers to choose between two options or to opt for both demonstrates the Chamber's uncertainty. There is no room for doubt in legal conclusions leading to a verdict of guilt in the case of KHIEU Samphan. By proceeding in

[1204] Reasons for Judgement, §1158.
[1205] Reasons for Judgement, §1158.
[1206] Reasons for Judgement, §1158.
[1207] Reasons for Judgement, §1125 (emphasis added).
[1208] Reasons for Judgement, §1201.

this manner, the Chamber has violated the principle of *in dubio pro reo* which establishes that any doubt must be resolved in favour of the Accused.

694. The Chamber should therefore have concluded that it was impossible to establish the evidence for the crime of having forced victims over a national border. As the Chamber failed to provide justification for its arguments, its conclusion must be dismissed and KHIEU Samphan must be acquitted of the CAH of the deportation of Vietnamese people from TK.

2. Mistaken conclusions concerning the forced transfer of a large number of Vietnamese people

695. All the examined evidence does not prove what the Chamber tried to establish, i.e. that Vietnamese people from TK district were forced over the Vietnamese border. The testimonies mentioning the gathering of Vietnamese people in TK district do not allow us to know what happened to these people (a). The other evidence examined does not provide any additional light on their fate, and the Chamber relied solely on circumstantial evidence to extrapolate what happened to the Vietnamese people from TK (b).

a. Unknown fate of the Vietnamese people gathered in TK district

696. Contrary to the Chamber's affirmations, the repatriation of Vietnamese people mentioned by PECH Chim took place not in 1975[1209] but in 1972. This is what the witness explained when the Defence asked him to confirm if the repatriation process examined by the Prosecution had taken place in 1975:

> "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. ".[1210]

697. Yet this clarification was consistent with the witness' initial responses to questions from the Prosecution. PECH Chim had indeed explained that, at the time, Vietnamese soldiers were everywhere in TK district, and as agreed by Vietnam and the CPK, these soldiers had been

[1209] Reasons for Judgement, §1110, fn 3707.
[1210] T. 24.04.2015, **E1/292.1**, around 13.55.43.

repatriated over two nights.[1211] The Chamber itself noted that Vietnamese soldiers were repatriated in around 1972.[1212] PECH Chim's explanation was therefore credible and corroborated.

698. The Chamber has acted in bad faith and distorted the witness' statements in order to date this repatriation to after April 1975. It considered that this repatriation took place after April 1975 notably because *Yeay* Khom and Chorn had taken part in the process.[1213] But the information contained in PECH Chim's testimony does not support this affirmation. In fact, the witness explained that Khom and Chorn were responsible for registering all refugees or people displaced by the war who arrived in the district.[1214]

699. Moreover, the Chamber has tried to use *Yeay* Khom's presence in the district to conclude that the expulsion took place after 1975.[1215] Yet we must not forget that TK district was a liberated zone under KR authority from 1970.[1216] *Yeay* Khom was already in the district, where he held the position of secretary before April 1975.[1217] In the light of this, any reasonable trier of fact would have considered PECH Chim's statements regarding Vietnamese repatriations in 1972 coherent. The Chamber's opposite conclusion must therefore be discarded.

700. EK Hoeun's testimony is confused. Moreover, the Chamber highlighted that his interview had not allowed them to distinguish between the orders to execute Vietnamese people from the orders to displace them.[1218] The witness is said to have seen Vietnamese people being picked up by lorries. However, he would have seen them leaving and heading down a road away from the border.[1219]

[1211] T. 22.04.2015, **E1/290.1** between 10.30.00 and 10.52.16.
[1212] Reasons for Judgement, §3383.
[1213] Reasons for Judgement, §1110. See also fn 3707.
[1214] T. 22.04.2015, **E1/290.1** between 10.43.30 and 10.56.48.
[1215] Reasons for Judgement, §1110.
[1216] PECH Chim: T. 21.04.2015, **E1/289.1**, around 15.09.16. CHANG Sreimom: T. 29.01.2015, **E1/254.1**, between 09.25.28 and 09.30.06. PECH Chim: Written Record of Witness Interview, 19.06.2014, **E3/9587**, Q/A 3, 7. KHOEM Boeun: Written Record of Witness Interview, 21.05.2014, **E319/12.3.2**, Q/A 7.
[1217] PECH Chim: T. 21.04.2015, **E1/289.1** around 15.09.16 (PECH Chim explains that he was an alternate member of the party on 1 October 1970 and a voting member on 1 April 1971. The membership ceremony was held in TK district attended by Keav and Khom, district party leader); T. 22.04.2015, **E1/290.1**, between 13.45.41 and 13.54.48; T. 24.04.2015, **E1/292.1**, around 09.15.30; Written Record of Witness Interview, 27.08.2009, **E3/4626**, ERN EN 00380135 ("[a]fter the liberation in 1975, Khom was still the secretary of District 105 until early 1976") (emphasis added). KHOEM Boeun: Written Record of Witness Interview, 21.05.2014, **E3/9480**, Q/A 284 ("Khom had been District Committee for a long time, since I had been working in the village").
[1218] Reasons for Judgement, §1111.
[1219] Reasons for Judgement, §1112.

701. SANN Lorn testified to having played a direct part in picking up Vietnamese people by lorry. Yet the Chamber has specified that he was unaware of the fate of the people he said he never saw again after they were handed over to the district militia.[1220] The Chamber used an extract from a KTC notebook to try and corroborate the fact that the rounding up of Vietnamese people SANN Lorn mentioned would have taken place at the start of 1976. Above we saw how the Chamber should not have used this evidence as it was obtained through torture.[1221] Moreover, the extract used ("In January 1976 *Angkar* rounded up the Yuon [Vietnamese] people and sent them back to Vietnam")[1222] does not in any way support the fact that the Vietnamese people mentioned by SANN Lorn indeed crossed the Vietnamese border. Such general information cannot be used to project the fate of Vietnamese people, especially in TK.

702. Witness CHANG Srey Mom mentioned the rounding up of "some Vietnamese – or persons who pretended to be Vietnamese" from Nhaeng Nhang commune when *Angkar* was searching for Vietnamese people to send them back to their country.[1223] The use of the preposition 'or' demonstrates that there is no certainty as to whether the witness was describing Vietnamese people or people who were pretending to be Vietnamese, which presents a problem when it comes to demonstrating a crime that targeted Vietnamese people. Moreover, her testimony does not reveal whether the people she saw get into a lorry would indeed have crossed the Vietnamese border. Indeed, the Chamber mentioned that the witness stated that those rounded up into lorries set off towards the mountains rather than towards Vietnam.[1224]

703. CHOU Koemlan would have heard an announcement about rounding up Vietnamese people to return them to their country in her village. This statement has very low probative value as it is based on hearsay from an unknown source.[1225] The Chamber added that she believed that a Vietnamese family and a Kampuchea Krom person "fell for this 'vicious trick'".[1226] But the Chamber has not explained how this enigmatic statement proves any deportation. RIEL Son reported the disappearance of Vietnamese people, and had no further knowledge of what

[1220] Reasons for Judgement, §1114.
[1221] See above, §289-290.
[1222] Reasons for Judgement, §1115.
[1223] Reasons for Judgement, §1116 (emphasis added).
[1224] Reasons for Judgement, §1116.
[1225] See above, §312-313.
[1226] Reasons for Judgement, §1116.

happened.[1227] As for PHANN Chen, the Chamber has admitted that his testimony did not allow it to establish what happened to the Vietnamese people, civilians or soldiers.[1228]

704. This analysis shows that all of the evidence used by the Chamber does not allow it to determine that Vietnamese people from TK district indeed crossed the Vietnamese border. Some evidence could even allow us to believe that Vietnamese people were sent away from the border. No reasonable trier of fact would be able to deduce that the deportation of Vietnamese people to Vietnam was the only possible reasonable "inference". The Chamber's conclusion must therefore be dismissed.

705. Given the lack of direct proof, the Chamber made the mistake of relying on circumstantial evidence like that of the April 1976 RF and the evidence regarding an exchange of Vietnamese people and KK to conclude that Vietnamese people from TK district were forced over the Vietnamese border.

b. <u>Extrapolation on the basis of circumstantial evidence</u>

706. The Chamber distorted the meaning of the April 1976 RF in concluding that "the only reasonable interpretation is that this reference to "foreigners" referred to Vietnamese previously present in Cambodia".[1229] But when read in its entirety, the text explains that this is an old problem as the "exploitation classes" sold land to foreigners and the Khmer Rouge movement fought successfully against the "imperialists".[1230] The statement that the movement has expelled hundreds of thousands of foreigners out of the territory follows on from this passage.[1231] Above all, it states that the problem was specifically solved on 17 April 1975,[1232] i.e. the day on which the Khmer Rouge arrived in the capital. It is widely known that numerous foreigners, Americans, Europeans and others, lived in the capital before the Khmer Rouge arrived. Those who had not fled already were

[1227] Reasons for Judgement, §1117.
[1228] Reasons for Judgement, §1117.
[1229] Reasons for Judgement, §1118, fn 3750, referring to §3416 (the Defence notes that this reference contains an error as the citation makes no mention of the interpretation of the April 1976 RF extract in question. This interpretation is found in §3387-3388).
[1230] Revolutionary Flag, April 1976, **E3/759**, ERN EN 00517853-00517854.
[1231] Revolutionary Flag, April 1976, **E3/759**, ERN EN 00517853-00417854: "it was done by going along with the imperialists and by following proper methods following our revolutionary principles. That is, the great typhoon of the national movement and the great typhoon of our democratic revolution swept hundreds of these foreigners clean and expelled them from our country, got them permanently out of our territory".
[1232] Revolutionary Flag, April 1976, **E3/759**, ERN EN 00517853: "However, our revolution, in particular on 17 April 1975, sorted this issue out cleanly and sorted it out entirely".

rounded up at the French embassy and expelled from the country. Any reasonable judge should have considered these events in interpreting this issue of the RF.

707. Moreover, the Chamber made a mistake in relying on the opinion of expert witness Alexander HINTON to interpret this RF issue.[1233] His opinion cannot be relevant as his "expertise" lies in anthropological and ethnographic research. His study focuses on "the lived experience of the people from this village" in region 41 alone.[1234] Not only does interpretation of the RF issue not fall into his field of expertise, the genocide prism through which he has approached the evidence also clearly altered his ability for objective criticism.[1235] Moreover, the Chamber reminded us that RF issues were propaganda documents and therefore unreliable.[1236] While it has examined these carefully when exculpatory evidence is concerned, in this case, the Chamber has not considered any potential exaggeration or other potential interpretations.

708. The Chamber also made a mistake by finding that this analysis of the RF "is also consistent with evidence before the Chamber concerning the nation-wide pattern of expulsion of Vietnamese from Cambodia in 1975 and 1976".[1237] The Chamber's reference in fact only refers to conclusions concerning deportations in the district of Prey Veng. We are therefore a long way from a "national model". Additionally, as we will see below, the sum of all the evidence fails to establish beyond reasonable doubt that Vietnamese people from Prey Veng were deported to Vietnam.[1238]

709. Beyond these errors, such general conclusions at the "national" (or rather Prey Veng province) level[1239] would not be enough to establish what happened to other people in another location. Even if it were to be confirmed that Vietnamese people from Prey Veng province were deported, this would not provide evidence that Vietnamese people from TK district were also deported. In the light of insufficient proof, the Chamber cannot use a 1976 RF as evidence that Vietnamese people from TK district indeed crossed the Vietnamese border. This unreasonable extrapolation will be dismissed.

[1233] See below §1070-1076, 1895-1897.
[1234] T. 16.03.2016, **E1/403.1**, around 09.24.22, between 15.16.26 and 15.18.49 and before 15.31.50.
[1235] CB 002/02, §2226-2231.
[1236] Reasons for Judgement, §65.
[1237] Reasons for Judgement, §1118 (emphasis added).
[1238] See below, §982.
[1239] Reasons for Judgement, §1118, fn 3751 referring to §3433 (this §only describes cases of the deportation of Vietnamese people in Prey Veng province).

710. The analysis of the evidence for an exchange of Vietnamese people and KK is not only out of scope,[1240] it also fails to demonstrate that Vietnamese people from the TK district were indeed deported to Vietnam. The Chamber has heard the testimonies of KK people from Vietnam who are alleged to have been moved to the TK district. While they mentioned that their return to Cambodia took place in the framework of an exchange programme, the other information they provided is based on hearsay.[1241] No evidence that Vietnamese people from TK district effectively crossed the Vietnamese border has been provided. RY Pov declared that he had not seen Vietnamese people make the reverse journey over the Vietnamese border.[1242] TAK Sann also said nothing about this in his statement.[1243] BENG Boeun mentioned a Vietnamese family who left TK district but did not know whether they were actually sent back to Vietnam.[1244] THANN Thim merely heard of an exchange programme but never witnessed one.[1245]

711. The Chamber also analysed lists and accounts of KK who arrived in TK district in 1977.[1246] This documentary evidence comes from the TK district archives whose probative value is contested.[1247] And under all circumstances, it can only be used to prove that KK came to live in TK district. The Chamber's extrapolations are unreasonable as there is no direct evidence for them, and they must therefore be dismissed.

3. Use of evidence obtained through torture

712. The Chamber made a mistake in using an extract from a KTC notebook containing information according to which "[i]n January 1976 *Angkar* rounded up the Yuon [Vietnamese] people and sent them back to Vietnam".[1248] This document contained interrogation notes from the KTC security

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[1240] See above, §120-125.
[1241] RY Pov: T. 12.02.2015, **E1/262.1**, before 09.25.00 ("I didn't know much about what was happening but then the Vietnamese officials informed us that we, the Cambodian people, would be returned to Cambodia as part of the exchange programme"). BENG Boeun: T. 02.04.2015, **E1/287.1**, around 14.42.31 ("I cannot recall the year. But I lived near a Vietnamese family and I was told that Angkar would send the Vietnamese back to their country although I did not know about the exchange programme"). THANN Thim: T. 21.04.2015, **E1.289.1**, after 09.39.15 ("I heard of it. I never witnessed it").
[1242] T. 12.02.2015, **E1/262.1**, at 09.31.04 ("At the time, […], we crossed the border and it was closed and no entry or departure from the border").
[1243] T. 01.04.2015, **E1/286.1**.
[1244] T. 02.04.2015, **E1/287.1**, after 14.42.31.
[1245] T. 21.04.2015, **E1.289.1**, after 09.39.15.
[1246] Reasons for Judgement, §1122-1124.
[1247] See above, §320-324.
[1248] Reasons for Judgement, §1115.

centre where the Chamber has considered there was a real risk of torture.[1249] In its decision, the Chamber considered that records or notebooks from security centres could be invoked "so long as they are not invoked to establish the truth of statements made by those subject to torture."[1250]

713. Although this decision is mistaken,[1251] reading this document does not allow us to know if the cited extract is "reflections" or "reactions" by KTC torturers, or if it is information extracted from prisoner confessions. The vocabulary generally used in these notes[1252] nevertheless demonstrates that it principally contains prisoner confessions, and the use of such confessions to establish the truth is prohibited.[1253] It is worth remembering that during the questioning of VONG Sarun, Judge Fenz already opposed the use of this document on the grounds that it was probably tainted by torture.[1254] VONG Sarun, whose confession is included in this document, confirmed this during his testimony.[1255] The President himself had enjoined the Prosecution to not ask questions about the merits of the document.[1256] Going against its own recommendations, the Chamber used information that may have been obtained through torture to corroborate the evidence. This document must absolutely be dismissed.

4. <u>Use of OC evidence</u>

714. The Chamber erred in fact and in law by relying heavily on the evidence relating to an exchange of Vietnamese and KK people in TK district.[1257] While it justly recalled that facts that could constitute crimes against KK had not been referred to it,[1258] it should not have considered this evidence as relevant for other accusations, notably for the crime of deportation of Vietnamese

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[1249] Decision on Evidence Obtained through Torture, 05.02.2016, **E350/8**, §79.
[1250] Decision on Evidence Obtained through Torture, 05.02.2016, **E350/8**, §87.
[1251] See above, §258-290.
[1252] KTC notebook, not dated, **E3/5827**, ERN EN 00866424 ("When we questioned her"); ERN EN 00866425 ("His confession") (repeated twice); ERN EN 00866436 ("This traitor has confessed his traitorous acts as follows"); ERN EN 00866440 ("He confessed that there were 3 persons in his group doing the betrayal activities"); ERN EN 00866441 ("He confessed"); ERN EN 00866446 ("after we arrested them to be questioned here, they admitted"); ERN EN 00866451 ("This man has confessed that he was lazy to work"); ERN EN 00866456 ("Based on the confessions of the above two persons"), ("Based on Seng's confession regarding Chhieng"); ERN EN 00866460 ("we questioned her again and again in order to find out how she knows if the Vietnamese will arrive"); ERN EN 00866462 ("He confessed").
[1253] Decision on Evidence Obtained through Torture, 05.02.2016, **E350/8**, §77.
[1254] T. 18.05.2015, **E1/300.1**, around 11.22.34.
[1255] T. 18.05.2015, **E1/300.1**, after 11.29.12.
[1256] T. 18.05.2015, **E1/300.1,** between 11.22.34 and around 11.27.32 ("please try to avoid the substance of the document in your question").
[1257] Reasons for Judgement, §1119-1124 and §1158.
[1258] Reasons for Judgement, §185.

people.[1259] As we saw above, this position is mistaken.[1260] And so all of the evidence about the arrival of KK in TK district must be dismissed. Given its importance in demonstrating that Vietnamese people from the TK district would actually have crossed the border, this error in law annuls the Chamber's decision which much therefore be declared unfit.

B. Error concerning the intent to force victims over a national border

715. The Chamber committed an error by concluding "that there existed an overarching intention to displace these persons across a national border".[1261] In its legal characterisation of the facts, it concluded:

> "[A]t a bare minimum – significant numbers of [Vietnamese people] 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.[1262]

716. In this way the Chamber relied on the same evidence to establish the *actus reus* that people must be displaced over a national border. But as we have just explained, this conclusion was neither justified nor established beyond reasonable doubt.[1263] Moreover, the Chamber has not explained which elements allowed it to conclude the existence of this intention.

717. On the other hand, it "has found that instructions were being issued by the district level to kill and purge Vietnamese persons during the period when they were expelled[1264]" and that "[t]he evidence established clear instructions to kill Vietnamese from the district level".[1265] These statements demonstrate more of an intent to execute than an attempt to displace". Given these contradictions and the lack of reasoning, the Chamber's conclusion on the *mens rea* must be dismissed.

718. **Conclusion** – The mistakes of fact and law described above weighed heavily on the sentence given to KHIEU Samphan as they prevent the assembly of the two constitutive elements of the crime of deportation. They clearly led to a miscarriage of justice. The Chamber's conclusion must therefore

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[1259] Reasons for Judgement, §816.
[1260] See above, §120-125.
[1261] Reasons for Judgement, §1158.
[1262] Reasons for Judgement, §1158.
[1263] See above, §687-688.
[1264] Reasons for Judgement, §1157.
[1265] Reasons for Judgement, §1158.

be dismissed and KHIEU Samphan must be acquitted of the CAH of deporting Vietnamese people from TK district.[1266]

III. THERE WAS NO PERSECUTION ON POLITICAL GROUNDS

A. Ex-KR were not persecuted on political grounds

719. It should be recalled, primarily, that the Chamber was not properly seised of facts characterised as persecution of ex-KR on political grounds outside the eight communes,[1267] nor of facts pertaining to the surveillance and disappearance of ex-KR[1268] nor of facts other than with respect to the restriction of certain "political rights".[1269]

720. The Chamber erred in fact in its characterisation of the *actus reus* of persecution of ex-KR on political grounds and by finding that the crime had been established.[1270] It erroneously based its finding on the fact that from April and May 1977, ex-KR were allegedly targeted for arrest and killed. The inculpatory evidence set out at §1062, 1063, 1081, 1083 and 2813 of the Reasons for Judgement are of such low probative value that no reasonable trier of fact would have made such a finding.[1271] The Chamber erred in fact in failing to find that there was no probative evidence of the orders that were given to search for and arrest ex-KR in TK (1) nor of an alleged killing operation starting from April 1977 in TK (2). The Chamber also erred in relying on an erroneous reference to the section pertaining to KTC (3).

1. There was no probative evidence of the orders that were given to search for and arrest ex-KR in TK

721. In §1062 of the Reasons for Judgement, the judges used civil party SENG Soeun's testimony pertaining to a short political session he allegedly attended after 17 April 1975 at which the commander of his battalion is alleged to have announced that ex-KR would not be spared.[1272] First, this evidence is out-of-scope as this meeting allegedly took place in Kaoh Andaet district, which

[1266] Reasons for Judgement, §1110-1125, 1157-1159, 4004, 4237, 4271, 4292, 4306.
[1267] See above, §367-369, 372-373.
[1268] See above, §451-457.
[1269] See above, §475-481.
[1270] Reasons for Judgement, §1178.
[1271] Reasons for Judgement, §1175, fn 3994 referring to §1062, 1063, 1080, 1081 and section 12.3: KTC security centre, §2813.
[1272] Reasons for Judgement, §1062, fn 3513.

has nothing to do with TK district.[1273] Secondly, this statement is of no probative value as not only is the date of the political session unknown,[1274] but SENG Seoun also indicated that he did not know whether Bao was acting on his own account or if he was following orders.[1275]

722. The second testimony in support of this finding is that of RIEL Son. According to the Chamber, his testimony would lead to the finding that at a meeting which allegedly took place in 1976 or later, chiefs of communes and various villages were allegedly instructed to search for former soldiers with ranks from adjutant up, or former policemen from first deputy chief up then "purge" them.[1276] However, it erred in failing to draw the consequences from the witness's inconsistencies concerning the date of the alleged meeting which the Chamber in fact noted.[1277] Given the lack of a date certain, and the impossibility of establishing a coherent chronology and recollection of that meeting, RIEL Son's statement had no probative value.[1278] In selectively using his testimony to find that the witness's recollection was "reliable" because he was allegedly the representative of the district hospital at the time, the Chamber erred in fact and in law in violating the principle of *in dubio pro reo*.[1279]

723. It also erred in fact in stating that RIEL Son's evidence "was corroborated" by the September-October 1976 issue of *Revolutionary Flag*, which discussed "life-and-death contradictions".[1280] It provided no analysis nor did it explain the meaning of the expression "life-and-death contradictions", which moreover is out of context. The Chamber erred in fact in relying on this

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[1273] T. 30.08.2016, **E1/466.1**, around 10.50.55 and 10.59.55.
[1274] The date is important as it is worth remembering that in Case 002/01 Appeal Judgement, the Supreme Court ruled that "the evidence of killings of Khmer Republic soldiers and officials in late April and May 1975 was weak, except in relation to killings in Battambang at Tuol Po Chrey and in Siem Reap, along with a certain number of killings in connection with the evacuation of Phnom Penh." Case 002/01 Appeal Judgement, 23.11.2016, §904.
[1275] T. 30.08.2016, **E1/466.1**, around 10.53.42.
[1276] Reasons for Judgement, §1062, fn 3517: "T., 18 March 2015 (RIEL Son), E1/279.1, p. 72-75, 77-79, 92".
[1277] Reasons for Judgement, §1062: "At times Riel Son's evidence wavered on the precise timing of this meeting. At one point he seemed to suggest that such a meeting took place earlier because he referred to many evacuees from Phnom Penh and Takeo at the time. At another point, he suggested it may have taken place before the evacuation of Phnom Penh. He then corrected himself on the basis that he attended as the representative of the District Hospital."
[1278] T., 18.03.2015, **E1/279.1**, between 15.04.38 and 15.21.32.
[1279] Moreover, the references indicated: p. 96 and 97 are incorrect, there is no mention of "purges" on these pages of the transcript. Reasons for Judgement, §1062, fn 3517: "T., 18 March 2015 (RIEL Son), E1/279.1, p. 72-75, 77-79, 92".
[1280] Reasons for Judgement, §1062, fn 3522.

evidence to find that the position that ex-KR were not to be harmed had changed starting in 1976.[1281] Accordingly, this finding must be reversed.

2. Lack of evidence of a killing operation starting in April 1977 in TK

724. In §1063 of the Reasons for Judgement, the Chamber wrongly relied on KHOEM Boeun's out-of-scope testimony and two reports, one of which was outside the geographic scope of the case,[1282] which referred to sweeping clean and purging, to find that there had been a concerted effort to round up ex-KR starting in April 1977. This finding is an extrapolation and an excessive generalisation based on a report that only refers to the identification of six former soldiers with the rank of first or second lieutenant.

725. In §1080 of the Reasons for Judgement, the Chamber relied on documentary evidence of low probative value to state that ex-KR were particularly susceptible to arrest for thoughts, speech or conduct considered contrary to the revolution and that there was a killing operation underway from April 1977, when "massive numbers" of ex-KR military together with their families were killed in the TK district. Of the five reports cited, only the 8 May 1977 report from Popel commune refers to the elimination and deaths of ex-KR soldiers.[1283] The Chamber erred in fact in drawing a general conclusion about the existence of a killing operation in TK starting in April 1977 that targeted ex-KR military together with their families based on the single sentence "the number of military families smashed by the *Angkar* and died is 393 or 106 families" from a Popel commune report dated 8 May 1977.[1284] Finally, the documentary evidence listed in §1081 of the Reasons for Judgement deals with NP, not ex-KR. Accordingly, it could not be used to support the Chamber's findings.

3. Erroneous reference to the section pertaining to KTC

726. The paragraph 2813 referenced in a footnote to §1175 of the Reasons for Judgement in support of the statement that ex-KR were targeted for arrest and killing starting in April and May 1977 based on inculpatory evidence refers to the legal characterisation of the facts pertaining to the CAH of

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[1281] Reasons for Judgement, §1063.
[1282] See above, §367-369, 372-373.
[1283] "The number of military families smashed by the Angkar and died is 393 or 106 families" Tram Kak District Record, 08.05.1977, **E3/2048**, ERN EN 01454946.
[1284] Tram Kak District Record, 11 April, **E3/4629**, ERN EN 00322133; Tram Kak District Record, 06.05.1977, **E3/2050**, ERN EN 00276576-00276577; Tram Kak District Record, 08.05.1977, **E3/2048**, ERN EN 01454944.

murder in KTC.[1285] In paragraph 2813, the Chamber found that ex-KR were targeted on the basis of their rank alone from April 1977 onwards, referring to § 2643 of the Reasons for Judgement in the footnotes. But §2643 deals only with the charges before the Chamber. Accordingly, the Chamber erred with respect to the evidence it relied on to find that ex-KR were persecuted on political grounds. All of its findings in this respect must be reversed.

B. NP were not persecuted on political grounds

727. The Defence submits, as its main argument which bears repeating, that the Chamber was not properly seised of the charge that NP in TK were subjected to "discriminatory treatment".[1286] Moreover, the Chamber erred in fact in unreasonably finding that there was discrimination in fact against NP in TK absent any evidence.[1287] Discrimination in fact against NP in TK was not proved to the requisite standard in respect of allegations that rations were different (1), working conditions were worse (2), particularly in mobile youth units (3), of "miserable treatment" (4) and surveillance and arrests (5).

1. There is no evidence that NP received different rations in TK

728. The Chamber erred in fact by finding that New People received less food than others.[1288] In §1016 of the Reasons for Judgement, it referred to inculpatory evidence that NP received less food (PECH Chim, KEO Chandara and TAK Sann) and exculpatory evidence that no distinction was made (PECH Chim, NEANG Ouch and CHANG Srey Mom).

729. The inculpatory evidence was of extremely low probative value or, in any case, was such that it was impossible to know where it originated from. Thus, PECH Chim stated on several occasions that "[o]n the issues of food distribution, the food ration was the same for everyone.".[1289] However, he also stated that in reality, he himself "observed that there was distinction in the distribution of rice. "For instance, the Base People secretly received a can of rice for two people whereas a can of rice served for three people for the New People.".[1290] However, he did not specify where, when, how often and, most importantly, by whom these distinctions were allegedly made. Above all, the

[1285] Reasons for Judgement, §1175, fn 3994.
[1286] See above, §367-369, 374-377, 448-450, 475-481.
[1287] Reasons for Judgement, §1176-1179.
[1288] Reasons for Judgement, §1177, fn 4003 referring to §1016.
[1289] T. 23.04.2015, **E1/291.1**, around 14.01.10.
[1290] T. 23.04.2015, **E1/291.1**, around 14.01.10.

fact that he indicated that this was done "secretly" would indicate that this was not a correct attitude or an official rule. Accordingly, the Chamber should not have made any findings of a general nature that NP received a lot less food than others based on this evidence. Furthermore, civil party TAK Sann was confused and, as a consequence, lacked credibility. In fact, she did not explain how she arrived at the conclusion that NP received a little less food than BP.[1291]

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.[1292] Furthermore, it omitted some exculpatory evidence for no reason. For example, it did not mention the evidence of SAO Han which it nonetheless used very selectively to establish the varying working conditions imposed on NP. In fact, SAO Han had answered the question "could you tell us how the food that the full-rights people received compared to the food received by other groups?": "As for food ration, actually, we were in the same cooperative, so we received the same food ration."[1293]

731. Finally, the Chamber used a DC-Cam interview of RIEL Son to "corroborate" very weak evidence in support of its finding that there were differences in access to food.[1294] According to the Chamber, RIEL Son allegedly said that NP were dying of malnutrition while BP were rarely underfed.[1295] First of all, it is important to recall the low probative value of DC-Cam interviews, it being understood that the witness was not examined on this matter at the hearing. Furthermore, it is evident from a reading of the DC-Cam interview that he was explaining the difference between NP and BP not by a difference in rations but because members the latter group "were more locally knowledgeable" to "find food outside."[1296] The Chamber could not rest its finding that New People had suffered more and had died of malnutrition, while BP were less likely to be malnourished

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[1291] T. 01.04.2015, **E1/286.1**, around 14.14.03: "They had a little bit more food than all of us. Sometimes I did not fill my stomach. I wept. But I would just walk away and would not dare to let other people see that I was weeping." (emphasis added).
[1292] Reasons for Judgement, §1016
[1293] T. 17.02.2015, **E1/264.1**, around 15.59.01. See Reasons for Judgement, §1018, fn 3262.
[1294] Reasons for Judgement, §1016, fn 3259: RIEL Son DC-Cam Interview, E3/5859, 22 May 2001, p. 39-41, ERN EN 00729060-00729062.
[1295] RIEL Son DC-Cam Interview, 22.05.2010, **E3/5859**, 39-41, ERN EN 00729060-00729062.
[1296] RIEL Son DC-Cam Interview, 22.05.2010, **E3/5859**, 39-41, ERN EN 00729060-00729062. "Q. Did "base" people seldom have malnutrition?" The witness replied by expressing a vague personal opinion: "A. They seldom had malnutrition. "Base" people were more locally knowledgeable to find food outside. For example, my wife knew who controlled this village; she colluded with the local leader to get coconuts and something else to eat."

solely on this DC-Cam interview.[1297] On the one hand, the witness appears to have drawn a general conclusion based on his wife's experience and, on the other hand, he was not examined adversarially on this part of his out-of-court statement that could not be used to establish an essential fact.[1298]

2. Lack of evidence that working conditions were worse for NP

732. The Chamber erred in fact by finding that it had been proved that NP had worse working conditions by referring to § 1017 to 1020 of the Reasons for Judgement.[1299] In §1017, in an introductory sentence, it had correctly found that the factors determining the working conditions in TK included: the location, the tasks, the time of year, the state of the land, the attitude of supervisors and the category of person. However, it erred in fact by unreasonably finding in the following sentence that "the conditions altered depending on the category of person".[1300] The Chamber distorted the evidence and did not substantiate its finding that the category of person was the decisive factor. The Chamber also erred in law and in fact by not indicating how the conditions were allegedly worse for NP. In fact, no footnote is appended to §1017 of the Reasons for Judgement. The testimony mentioned in §1018-1019 might have been used as the basis for this factual finding, but the Chamber merely listed the testimonies without explaining how they would prove that there were differentiated working conditions to the detriment of NP.

733. The Chamber wrongly used the testimony of SAO Han who, having otherwise averred that "the "full-rights people" enjoyed better conditions than the [others]",[1301] was unable to state what this preferential treatment consisted of, merely saying: "In terms of working conditions, usually I observed that full-rights people were working as chief or group, chief of units. So, they supervised candidate groups".[1302] Furthermore, BUN Saroeun, TAK Sann and EAM Yen did indeed describe harsh working conditions but their testimony provided no basis for the Chamber to establish that there existed a differentiated treatment. However, it had to establish that there was unequal treatment. It is evident from § 1019 of the Reasons for Judgement that the inculpatory testimony

[1297] Reasons for Judgement, §1177, fn 4005 referring to §1016.
[1298] See above, §306-311.
[1299] Reasons for Judgement, §1177, fn 4006 referring to §1017 to 1020.
[1300] Reasons for Judgement, §1017.
[1301] T. 17.02.2015, **E1/264.1**, around 15.57.18.
[1302] T. 17.02.2015, **E1/264.1**, around 16.00.04.

describing the working hours provided no basis to establish that a differentiated treatment existed. On the contrary, MEAS Sokha, whom the Chamber quoted but omitted to mention that she was a BP, described similar conditions for all workers.[1303]

3. Undifferentiated situation in mobile youth units

734. The Chamber erred in fact by finding that the working conditions in the mobile units were "especially harsh" and then suggesting without clearly saying so that these conditions were even more so for NP.[1304] civil party RY Pov did indeed describe harsh working conditions but there was nothing in his evidence to claim that these working conditions were harsher for NP.[1305] The same goes for EK Hoeun who stated that some workers – without specifying their "category" – became sick, or had problems feeding or died on the worksites in TK.[1306] Similarly, NUT Nov's testimony that NP became sick more often than BP because they were not used to working in the rice fields was insufficient to sustain the conclusion that working conditions imposed differed depending on the category of person.[1307] Thus, no reasonable trier of fact could have extrapolated from and made excessive generalisations based on such evidence of low probative value.

4. Lack of objective evidence of the "miserable" treatment of NP

735. The Chamber erred in fact by considering as credible the evidence describing how NP had been exposed to "miserable treatment" and treated as "worthless slaves", with particular cadres exclusively selected from Base People cursing them or hitting them, including the children of New People."[1308] The evidence in support of this finding appears in §1023 of the Reasons for Judgement[1309] in which the Chamber found that food could be withheld from [UNOFFICIAL TRANSLATION] "people", without specifying who, "for transgressions or failing to meet quotas".[1310] Thus, no mention was there made of discriminatory treatment.

[1303] Reasons for Judgement, §1019, fn 3273.
[1304] Reasons for Judgement, §1020.
[1305] Reasons for Judgement, §1020, fn 3277, 3278.
[1306] Reasons for Judgement, §1020, fn 3281.
[1307] Reasons for Judgement, §1020, fn 3279.
[1308] Reasons for Judgement, §1177.
[1309] Reasons for Judgement, §1177, fn 4007 referring to §1023.
[1310] Reasons for Judgement, §1023, for BUN Saroeun, see fn 3289 and for IM Vannak, see fn 3290.

736. With respect to the evidence mentioned in §1023, only RY Pov and IM Vannak mentioned treatment that applied [UNOFFICIAL TRANSLATION] "specifically" to NP. However, the Chamber merely took RY Pov's evidence *verbatim* without any credibility analysis of what he said. The Chamber simply averred that the witness had testified that "17 April People were exposed to miserable treatment and treated like "worthless slaves" and Base People could curse and hit them" without conducting any analysis.[1311] In fact, RY Pov had testified on the stand that:

> "A. During the regime, people were divided into three categories. Our family members and others who returned from Vietnam, and other people who were evacuated, called 17 April People, were exposed to very miserable treatment. They treated us like worthless slaves. The Base People could curse us, could hit us, we could not move anywhere. If we caught some fish, we need to bring to put in the cooperative. So, if anyone caught in catching fish without any permission, they, the 50 member unit, would catch fish and force-feed the fish to that person to eat in one sitting with a large amount of fish, that was the kind of a torture by the Khmer Rouge in the place that I was living."[1312]

737. His evidence could not support a finding as to an overall conduct towards all NP. What is more – without knowing whether he has described an attitude of the leaders or authorities or ordinary members of his unit, his testimony seems to be a description of a deviation of some BP contrary to what was advocated by the CPK.[1313] RY Pov mentioned his feeling that NP were treated as "worthless slaves" by referring to three types of the discriminatory treatment that was meted out, starting with cursing by Base People which could even end up in beatings. However, he provided no specific example for this unsubstantiated generalisation. Then, RY Pov stated that NP were not allowed to move anywhere, once again without providing a specific example and above all without stating how this differed from the situation of Base People. Finally, he referred to "anyone" who caught fish without permission and of ensuing punishment without it being possible to determine whether he was referring to an isolated incident and whether this type of incident only involved NP.

738. Thus, the Chamber erred in finding that NP were exposed to "miserable treatment" at TK on the basis of such vague and unsubstantiated testimony regarding the matters described.

5. Alleged monitoring and arrests

[1311] Reasons for Judgement, §1177, fn 4007 referring to §1023.
[1312] T., 12.02.2015, **E1/262.1**, between 09.42.27 and 09.45.19 (emphasis added).
[1313] See below §1490-1517.

739. The final factual finding in support of discriminatory treatment against NP is that NP as well as ex-KR, and other perceived threats to the CPK "were targeted for arrest for [...] thoughts, speech or conduct".[1314] § 1055 of the Reasons for Judgement to which this refers concerns evidence mentioning surveillance of the population by the militia. However, this does not concern discriminatory treatment. Similarly, the evidence referenced in footnote 3471 would not allow any reasonable trier of fact to find that there had been specific treatment. KHOEM Boeun stated that everyone was monitored.[1315]

740. THANN Thim and BUN Saroeun's evidence on their monitoring could not alone prove its discriminatory nature. In fact, they talked about their personal experiences but were unable to provide information about the reasons and the extent of their monitoring.[1316] VONG Sarun's evidence about statements made by the wife of the chief of Chan Taeb village is hearsay material of inherently low probative value. However, not having provided an analysis concerning the truth and credibility of the statements in question, the Chamber could not rely mainly on them.[1317] Similarly, the Chamber misapprehended the evidence by failing to conduct an analysis of CHAN Srey Mom's credibility. In fact, the Chamber simply included her statements before the CIJs on the fact that the militia allegedly spied on New People. However, on the stand, CHAN Srey Mom testified only that people in the units were questioned on their biographies during break times. Her evidence was insufficient to support findings by the Chamber regarding the extent of the monitoring and its discriminatory nature. Also, the documentary evidence stating that people monitored each other added nothing to the evidence in this respect.[1318]

741. Nor did the evidence cited by the Chamber in support of § 1080 of the Reasons for Judgement entitle the Chamber to find that NP were susceptible to arrest. Regarding NP, it considered two reports: a report dated 3 May 1977 from Popel commune and a note dated 24 April 1977 from Ta Phem commune.[1319] The first report is a request for advice regarding a couple who were NP and

[1314] Reasons for Judgement, §1177, fn 4010 referring to §1055 and 1080.
[1315] Reasons for Judgement, §1055: "Khoem Boeun's evidence was that both New and Old People were monitored", fn 3474 "T., 4 May 2015 (KHOEM Boeun), E1/296.1, p. 88-89".
[1316] Reasons for Judgement, §1055, fn 3473 "T., 21 April 2015 (THANN Thim), E1/289.1, p. 27-30" and fn 3477 "T., 3 April 2015 (BUN Saroeun), E1/288.1, p. 37".
[1317] Reasons for Judgement, §1055, fn 3476 "T., 18 May 2015 (VONG Sarun), E1/300.1, p. 62-63".
[1318] Reasons for Judgement, §1055, fn 3480 and 3481.
[1319] Reasons for Judgement, §1080, fn 3589 and fn 3591.

who had run away once.[1320] The note dated 24 April 1977 is summarised in one sentence: "Please keep a close watch in advance on whether they are new or Base People, their activities so far and in the future because the report is not so clear".[1321] Thus, contrary to what the Chamber stated, being a NP or a BP was a feature to be noted amongst others. Accordingly, the Chamber extrapolated from documents of low probative value.

742. No reasonable trier of fact could have found that NP suffered discrimination in fact based on this evidence. The Chamber's finding that the *actus reus* of persecution of NP on political grounds at TK had been established must be reversed.

IV. THERE WAS NO PERSECUTION ON RELIGIOUS GROUNDS

743. Primarily, it should be recalled that the Chamber was not seised of the crimes committed against Buddhists and Buddhist monks at TK.[1322] As stated above, the Chamber erred in law by characterising the crime of persecution on religious grounds against Buddhists and Buddhist monks in the absence of any intention to exclude Buddhists from humanity and society.[1323] In the alternative, the Defence submits that the Chamber erred in law and in fact by finding that the constitutive elements of the crime of persecution on religious grounds at TK had been established because equal treatment cannot constitute discriminatory treatment (A) and because there was no evidence of the physical or mental effects of these events on Buddhists (B).

A. Equal treatment does not constitute discriminatory treatment

1. There was no discrimination in fact against Buddhist monks

744. The Chamber erred in law by stating that "to force Buddhist monks to renounce their faith discriminate[d] against Buddhist monks in fact" because of "the differing impact which absolute physical equality inevitably has on people's differing backgrounds".[1324] The Chamber thus characterised the concept of indirect discrimination of fact as a constitutive element of the CAH, broadly interpreting the *actus reus* of the crime outside any legal framework. However, in 1975, as will be seen below, the crime of persecution in CIL did not include indirect discrimination.[1325]

[1320] Reasons for Judgement, §1080, fn 3589, Tram Kak District Record, 03.05.1977, **E3/2048**, p. 1, ERN EN 01454944.
[1321] Reasons for Judgement, §1080, fn 3591, Tram Kak District Record, 24.04.1977, **E3/4107**, ERN EN 00361772.
[1322] See above, §426-434.
[1323] See above, §641-656.
[1324] Reasons for Judgement, §1185.
[1325] See below §954-956.

Accordingly, the *actus reus* of persecution on religious grounds is not established in the absence of evidence of direct discrimination. The Chamber's finding must be reversed.

2. There was no discrimination in fact and discriminatory intent against Buddhists

745. The Chamber erred in law by stating that it further found that "the elements of religious persecution [were] 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" irrespective of whether equality of outcome was the absolute goal.[1326] However, the indiscriminate nature of the general prohibition of religion which applied to everyone under DK is inconsistent with this finding that discrimination in fact was established. In law, discrimination requires that there be differentiated treatment. Accordingly, this finding must be reversed.

B. Lack of evidence of physical or mental effects on Buddhists

746. The Chamber erred in fact by stating 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".[1327] It relied on its finding that the abolition of religious practices, symbolism, and the inability to make offerings, deprived people of their "psychological base".[1328] This factual finding is based entirely on the subjective and personal evidence of civil party BUN Saroeun who stated that the absence of pagodas "left him feeling deprived of any psychological base".[1329] The second reason put forward to assess the impact of persecutions on religious grounds is the fact that "in general wedding ceremonies were not conducted according to Cambodian tradition".[1330]

747. This finding by the Chamber which rests on this evidence is an excessive generalisation and an extrapolation such that no reasonable trier of fact could have arrived at this finding. It could not in any event support a finding that the *actus reus* of the CAH of persecution on religious grounds against Buddhists had been established. The Chamber's finding in this respect must be reversed.

[1326] Reasons for Judgement, §1186.
[1327] Reasons for Judgement, §1186.
[1328] Reasons for Judgement, §1186, fn 4039 referring to §1107.
[1329] Reasons for Judgement, §1107, fn 3699: "T., 3 April 2015 (BUN Saroeun), E1/288.1, p. 30-31".
[1330] Reasons for Judgement, §1186, fn 4040 referring to §3638.

V. ERRORS IN FINDING THAT VIETNAMESE WERE PERSECUTED ON RACIAL GROUNDS

748. The Chamber erred in law by considering itself seised of the crime of persecution on racial grounds against the Vietnamese of TK district.[1331] It also erred in fact by finding that the *actus reus* (A) and the *mens rea* (B) of the CAH of persecution on racial grounds had been established.

A. The Chamber erred in finding that the *actus reus* had been established

749. The Chamber erred in fact by finding that the *actus reus* of the crime of persecution on racial grounds had been established in TK district based on acts of deportation in 1975 and 1976.[1332] According to the Chamber, these acts were discriminatory in fact and "infringed upon fundamental rights and freedoms".[1333]

750. In fact, the Defence has demonstrated that the Chamber erred in fact and in law by finding that the CAH of deportation against the Vietnamese of TK district had been established.[1334] In fact, the Chamber had no evidence to support its finding that the Vietnamese who had been gathered up in in TK district were expelled across the Vietnamese border. Thus, without evidence of deportation, the Chamber had no evidence establishing the existence of discrimination in fact which denied a fundamental right laid down in international customary or treaty law.[1335] Accordingly, the Chamber's finding must be set aside and KHIEU Samphan acquitted of the charge of CAH of persecution on racial grounds at TK.[1336]

B. The Chamber erred in finding that the *mens rea* was established

751. The Chamber also erred in fact by finding that the *mens rea* of the crime of persecution on racial grounds in TK district had been established.[1337] To arrive at this finding, the Chamber relied on three items: "the instructions and orders given regarding the transportation of Vietnamese, contemporaneous reports, as well as contemporaneous publications in the *Revolutionary Flag* targeting the Vietnamese".[1338] The Chamber did not cite any reference to assist in determining the

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[1331] See above, §380-385, 416-417.
[1332] Reasons for Judgement, §1190.
[1333] Reasons for Judgement, §1189-1190.
[1334] See above, §686-718.
[1335] Reasons for Judgement, §713.
[1336] Reasons for Judgement, §1110-1125, 1189-1192, 4005, 4292 and 4306.
[1337] Reasons for Judgement, §1191.
[1338] Reasons for Judgement, §1191.

evidence in support of these items leaving the Defence with little choice but to try to guess which evidence might have been used to substantiate such a finding.

752. The Chamber's analysis shows that there were "instructions […] to kill and purge Vietnamese persons during the period when they were expelled".[1339] Also, according to the Chamber, "the evidence established clear instructions to kill Vietnamese from the district level".[1340] Accordingly, these findings do not support a finding that instructions were issued to transport Vietnamese.

753. With respect to the reports, the Chamber mentioned only one report dated 8 May 1977 in Popel commune which stated that KK families were exchanged for Vietnamese. However, not only does this report not say anything about the number and provenance of the Vietnamese who had been exchanged but it could not as such evince any discriminatory intent against the Vietnamese in TK district.[1341]

754. Finally, the Chamber referred to the RF of April 1976 which disclosed that thousands of foreigners had been expelled from the country. However, the Chamber's speculations that this RF refers to the Vietnamese who were expelled cannot be taken as evidence of discriminatory intent against the Vietnamese in TK having regard to the acts of deportation in 1975 and 1976.[1342]

755. Accordingly, there was no evidence before the Chamber to support a finding that there existed any intent to target Vietnamese in TK district on the basis of their race having regard to the acts of deportation in 1975 and 1976. The Chamber's finding relating to *mens rea* must be set aside and KHIEU Samphan acquitted of the charge of CAH of persecution on racial grounds at TK.[1343]

VI. THE CHAMBER ERRED BY FINDING THAT VIETNAMESE HAD BEEN VICTIMS OF ENFORCED DISAPPEARANCES

756. Apart from the error of law committed by considering that the acts of enforced disappearances perpetrated at TK could target Vietnamese,[1344] the Chamber erred by finding that "Vietnamese persons were rounded in 1975 and 1976, following which they were deported and/or disappeared

[1339] Reasons for Judgement, §1157.
[1340] Reasons for Judgement, §1158.
[1341] Tram Kak District Record, 08.05.1977, **E3/2048**, ERN EN 01454946.
[1342] See above, §706-708.
[1343] Reasons for Judgement, §1110-1125, 1189-1192, 4005, 4292 and 4306.
[1344] See above, §547-549.

from Tram Kak district".[1345] To reiterate the argument concerning deportation,[1346] the use of the double preposition "and/or" shows that neither could the Chamber find that enforced disappearances had been established nor could it find that deportations had been established beyond reasonable doubt. In fact, the Chamber never even attempted to establish that the constitutive elements of the crime of OIA through enforced disappearances of ethnic Vietnamese had been established.[1347] Faced with this uncertainty, the Chamber could not assume, as it did, that this crime had been committed without violating the principle of the presumption of innocence.[1348] In fact, according to the principle of *in dubio pro reo*, any doubt should be resolved in favour of the accused. Thus, the Chamber should not have found that ethnic Vietnamese had been victims of enforced disappearances in TK district and convicted KHIEU Samphan for these disappearances.[1349]

VII. THE CHAMBER ERRED BY FINDING THAT KK HAD BEEN VICTIMS OF ENFORCED DISAPPEARANCES

757. The Chamber erred in law and in fact by finding that the KK had disappeared as a group,[1350] even though according to its own finding it was not properly seised of facts concerning the KK.[1351] As these facts fell wholly outside the scope of the trial, they could not, *a fortiori*, be "relevant to other charges".[1352] It was therefore wrong and completely unlawful for the Chamber to rely on this out-of-scope evidence in support of a finding that the constitutive elements of crimes such as OIA through enforced disappearances had been established. Thus, it should not have found that KK had been victims of enforced disappearances in TK district and convicted KHIEU Samphan for these disappearances. Accordingly, all of these findings must be reversed.[1353]

[1345] Reasons for Judgement, §1201.
[1346] See above, §692-693.
[1347] Reasons for Judgement, §1201-1204 (the Chamber's reasoning in support of its finding that the constitutive elements of the crime were established only refers to §1071 which deals with disappearances in TK district and not with Vietnamese).
[1348] See above, §237.
[1349] Reasons for Judgement, §1201, 3927, 3928, 4282 and 4306.
[1350] Reasons for Judgement, §1201.
[1351] Reasons for Judgement, §816.
[1352] See above, §687-688.
[1353] Reasons for Judgement, §1201, 3927, 3928, 4282 and 4306.

Section II. TRAPEANG THMA DAM

I. THERE WAS NO MURDER WITH *DOLUS EVENTUALIS*

758. According to the CO, the Chamber was initially seised of the charge of extermination. KHIEU Samphan was therefore charged with the CAH of extermination due to the deaths resulting from the living conditions imposed at the TTD worksite.[1354] However, absent evidence to substantiate the charge of extermination, the Chamber unlawfully recharacterised the facts as murder with *dolus eventualis*, thereby committing an error of law that invalidates its decision.[1355]

759. The Chamber further erred in its legal characterisation of the facts as CAH of murder. On the one hand, it erred in law by failing to legally characterise the nature and scope of the duty to act that falls upon the direct perpetrators of the deaths that occurred at the TTD worksite as a result of the living conditions. In fact, to charcaterise the *actus reus* of the CAH of murder, the Chamber considered that "the relevant act or omission is constituted by the imposition on the workers 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".[1356] The Chamber thus failed to identify the duty to act that had been allegedly violated and the rules which required the authorities in charge of the TTD worksite to take steps to ensure that the living conditions were "adapted" and "appropriate" to the workers' needs. And yet, in §627 of the Reasons for the Judgement under appeal, the Chamber had correctly recalled that "an omission will be culpable only where there is a duty to act." Thus, by contradicting itself in its reasons and by incorrectly characterising the authorities' duty to act, the Chamber committed an error of law that invalidates this finding.[1357]

760. On the other hand, with respect to the *mens rea*, the Chamber characterised *dolus eventualis* as follows:

> "The maintenance of these conditions for an extended period of time, including after their effects on the workers became apparent to the worksite authorities, shows 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. This satisfies the *mens rea* of murder

.[1354] CO, §1381, 1387; Reasons for Judgement, §1383.
[1355] Reasons for Judgement, §1383-1390. See above, §135-157.
[1356] Reasons for Judgement, §1388.
[1357] Reasons for Judgement, §1388.

in the form of *dolus eventualis*".[1358]

761. As indicated above in this brief, this application of *dolus eventualis* at the time of the facts constitutes an error of law.[1359] Between 1975 and 1979, the *mens rea* of the CAH of murder could only be characterised with a direct intent to kill. Furthermore, the Chamber also erred in its assessment of the *mens rea* of the CAH of murder. Assessing *mens rea* is a subjective exercise and it was therefore incumbent to start from the offender's perspective. However, 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. Accordingly, 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. Criminal intent is determined before a crime is perpetrated, not afterwards. The Chamber further erred in law by not assessing the evidence accurately in terms of its temporality. However, according to the Chamber it was "the maintenance of these conditions for an extended period of time" that constitutes the *mens rea*. It was therefore incumbent upon the Chamber to accurately specify this temporal scope based on the available evidence. In view of these circumstances, the Chamber's findings concerning the *mens rea* must be invalidated.[1360]

762. To conclude, the Chamber should have reasonably found that the said crime had not been established and acquitted KHIEU Samphan of the charges. Accordingly, the Supreme Court must invalidate all the findings.[1361]

II. PERSECUTION ON POLITICAL GROUNDS

763. The Chamber considered that it was seised of the crime of political persecution at the TTD worksite against "real or perceived enemies of the CPK" who were "subjected to harsher treatment and living conditions than the rest of the population".[1362] As seen above in the section on the scope of the trial, the Chamber was seised only of acts of political persecution against NP.[1363] According to

[1358] Reasons for Judgement §1389.
[1359] See above, §575-637.
[1360] Reasons for Judgement, §1389.
[1361] Reasons for Judgement, §1383-1390.
[1362] Reasons for Judgement, §1405; CO, §1418.
[1363] See above, §482-483.

the Chamber, it was established that NP were subjected to harsher treatment and living conditions than the rest of the population:

> "New People were excluded from having any leadership positions which were instead attributed to Old People with the task of monitoring the New People in their units."[1364]

764. This is the only finding of the Chamber characterising the discrimination against NP. The Chamber refers to § 1345 of the Reasons for the Judgement under appeal, which echoes the evidence of civil party SAM Sak. In fact, on the stand, SAM Sak stated:

> "I believed my feeling at the time was similar to all of those workers in the mobile unit, since mostly they were 17 April People. And yes, there were a handful of Base People in the mobile unit, but they were the one playing a different role. They would monitor our activities or the wor[d]s that we spoke."[1365]

765. On the one hand, the Chamber relied wholly on this Civil Party's evidence to support this finding of guilt; obviously, this is not sufficient. In fact, it was unreasonable to rely on a single testimony as a basis for general findings concerning the TTD worksite as a whole. On the other hand, although SAM Sak noted that Base People and New People had different roles, he also testified that his feelings were "similar to all of those workers in the mobile unit", most, but not all, of whom were indeed NP. To establish this finding of guilt, the Chamber distorted the Civil Party's evidence. Furthermore, in characterising the crime, the Chamber considered that:

> "[a]cts committed against these groups of workers infringed upon and violated their fundamental rights pertaining to life, personal dignity, liberty and security and freedom from arbitrary or unlawful arrest as enshrined in customary international law".[1366]

766. A review of SAM Sak's testimony on which the Chamber relies shows that Base People monitored what NP said and did. The treatment described, i.e. being monitored by workers who were Base People, did not fulfil the gravity requirement for the CAH of persecution on political grounds.[1367]

767. To conclude, the evidence concerning the treatment of NP was not sufficient to support a finding that any fundamental rights were violated or that these acts fulfilled the gravity requirement such that the Chamber could not find beyond reasonable doubt that the CAH of persecution on political

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[1364] Reasons for Judgement, §1409.
[1365] SAM Sak: T. 02.09.2015, **E1/340.1**, around 10.07.05.
[1366] Reasons for Judgement, §1411.
[1367] Reasons for Judgement, §1412.

grounds had been established. Accordingly, the findings should be invalidated and KHIEU Samphan acquitted.[1368]

Section III. 1st JANUARY DAM

I. THERE WAS NO MURDER WITH *DOLUS EVENTUALIS*

768. It should be recalled, primarily, that the Chamber was not seised of the facts relating to the executions that were committed at the Baray Choan Dek Pagoda,[1369] neither to the deaths due to accidents[1370] nor to the deaths that occurred outside the 1JD Worksite.[1371] It should also be borne in mind that the CAH of murder with *dolus eventualis* did not exist at the time of the facts and that the Chamber erred in law by adjudicating otherwise.[1372] Finally, and as stated above, absent evidence to substantiate the charge of extermination, the Chamber unlawfully recharacterised the facts as murder with *dolus eventualis*, thereby committing an error of law that invalidates its decision.[1373] In the alternative, the Chamber erred in law by characterising the *actus reus* of "culpable" omission (A) and also erred in fact by relying on unreasonable findings to establish the *actus reus* of murder with *dolus eventualis* (B).

A. Errors in law in relation to "culpable" omission

769. The Chamber erred in law by not characterising the duty to act that forms the basis of the culpability of the omission nor the criterion and reasoning underlying the finding that the measures taken were not appropriate.

770. First of all, the Chamber stated that the *actus reus* of the CAH of murder at the 1JD Worksite had been established, on one hand, by "[the imposition] on the workers of conditions that caused their death" and, on the other hand, by an omission, i.e. "the absence of appropriate measures to change or alleviate such conditions".[1374] It erred in law by failing to legally characterise the nature and scope of the duty to act that was incumbent upon the direct perpetrators of the deaths of six to ten workers at the 1JD worksite, those caused by the falling of embankments and the death "of a large

[1368] Reasons for Judgement, §1407-1413.
[1369] See above, §388-390.
[1370] See above, §391-392, 487-489.
[1371] See above, §484-486.
[1372] See above, §575-637.
[1373] Reasons for Judgement, §1138-1155. See above, §135-157.
[1374] Reasons for Judgement, §1672.

number of workers" at the 1JD worksite as a result of the living conditions.[1375] And yet, in §627 of the Reasons for Judgement, the Chamber had in fact correctly recalled that "an omission will be culpable only where there is a duty to act." However, it had failed to identify the duty to act that had been allegedly violated and the rule which required the authorities in charge of the 1JD worksite to take "appropriate measures to change or alleviate such conditions". This finding concerning the culpability of the omission is made outside any legal framework and without legal and factual analysis and must be invalidated.

771. Furthermore, the Chamber erred in law by applying an incorrect test in assessing the culpable omission which characterises the *actus reus* of murder. In fact, it did not legally characterise why the measures taken by the direct perpetrators were not appropriate nor which legal test was applied in determining their adequacy.[1376] Its failure to provide reasons on this point corresponds to its failure to effect an analysis and provide a legal definition. It also demonstrates its partiality. Accordingly, its finding that the *actus reus* had been established in relation to culpable omission must be invalidated.[1377]

B. Unreasonableness of the findings on which the *actus reus* of murder / *dolus eventualis* was based

772. The Chamber erred in fact by finding that the *actus reus* of murder with *dolus eventualis* was established at the 1JD Worksite.[1378] None of the cases cited in support of this finding was established to the requisite standard, be it the alleged deaths of six to ten workers at the 1JD Worksite (1), the deaths caused by accidents (2) or the inference that a large number of deaths had occurred (3).

1. Lack of evidence establishing to the requisite standard the alleged deaths of six to ten workers

773. The Chamber erred in fact by finding that six to ten workers died at the 1JD Worksite due to the working and living conditions that were imposed and the lack of effective medicines based on the items listed in §1629.[1379] § 1629 of the Reasons for Judgement states that few people died of illness

[1375] Reasons for Judgement, §1670, 1672.
[1376] Reasons for Judgement, §1672.
[1377] Reasons for Judgement, §1672-1673.
[1378] Reasons for Judgement, §1670, 1672-1673.
[1379] Reasons for Judgement, §1670, fn 5672 referring to §1629.

or injury at the 1JD Worksite, but that individuals who were sick were sent back to their village or to local clinics where they died.[1380] In fact, none of the evidence establishes to the requisite standard that deaths occurred at the 1JD Worksite. The items listed in the footnote merely state that individuals who were sick were evacuated from the site to their villages or the district hospital.[1381]

774. With regard to the deaths that occurred at the 1JD Worksite, MEAS Laihour's evidence is of low probative value. It was hearsay and what he said was very vague.[1382] Likewise KONG Uth's written record of interview makes no mention of any deaths occurring at the 1JD Worksite. She simply mentioned sick people stating that they were sent to hospital, but she never witnessed any deaths.[1383] For its part, UN Rann's evidence has been distorted by the Chamber. In fact, UN Rann simply stated that two sick people were sent to the district hospital. She did not say anything about them dying:

> "Yes, people became seriously ill and were sent to a hospital. And in fact, they became sick from dysentery, and it was real sickness and they did not pretend to be ill. And they said that they were sent to the district hospital. And I never saw them return. So I did not know whether they recovered from their illness or what happened to them. And that happened to two workers in my group. They just disappeared. They never returned."[1384]

775. When asked if she had heard of any other similar cases, she answered no.[1385] The Chamber has not stated what led it to infer from this testimony that it was established that sick people died at the 1JD Worksite. Similarly, the evidence provided by SEANG Sovida, who was 11 years old in 1975, only stated that sick people returned to their villages.[1386] OM Chy's evidence, which is vague, is

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[1380] Reasons for Judgement, §1629, fn 5543.
[1381] Reasons for Judgement, §1629, fn 5543.
[1382] MEAS Laihour: T. 26.05.2015, **E1/305.1**, between 13.46.03 and 13.48.18: ("I knew it while I was working. The unit chief would tell this particular individual died of diarrhoea because he could not be cured in time. I had no relation with the medic. My unit chief told me about this and I relayed this message further about the matter.")
[1383] KONG Uth, Written Record of Interview of Witness, 08.10.2008, **E3/7775**, ERN EN 00233534: ("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 dropping 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.")
[1384] T. 28.05.2015, **E1/307.1**, between 09.30.15 and 09.34.36.
[1385] T. 28.05.2015, **E1/307.1**, between 09.32.30 and 09.35.41: ("Q. (Thank you, Madam. You just stated you witnessed two incidents. Did you hear of other incidents like what you just stated? A. I witnessed only these two people. They were referred to the district hospital and they were gone. I do not know where they were actually sent for hospitalization.".)
[1386] T. 02.06.2015, **E1/308.1**, between 13.56.45 and 13.58.23: "Mostly the sick would be brought to the village by the one who was in charge of transporting food supplies to the worksite; and in other worksites the sick would be put on the same ox-cart used by the transporter of food supplies and transported back to their respective villages".

of very low probative value. In fact, she 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."[1387] She did not say how she knew that some people died at the hospital, relying blindly upon this testimony without undertaking any analysis.

776. IENG Chham's written record of interview has no probative value. Yet, the Chamber relied on a general and unsubstantiated answer that this witness gave to a leading question.[1388] In fact, the witness does not specify the "places" where he allegedly saw the sick people that he mentions nor how many there were, let alone where he got the information from concerning the training of the medics. Once again, the Chamber merely picked out the elements it considered inculpatory without subjecting them to the analysis that would be necessary in a reasonable assessment of the evidence.

777. SOU Soeurn, who did not mention any deaths in his testimony also did not support the Chamber's assertion that "sick people at the [1JD] were returned to their respective cooperatives after they had been hospitalised at the Kampong Cham hospital".[1389] In fact, a close scrutiny of his testimony raises questions about his credibility and, in any event, about the reliability of his memories. When questioned as to whether sick people returned to their village or were sent to hospital, he first of all replied: "I 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."[1390] He then added: "To my memory, sick people at the 1st January Dam site were returned [to] their respective cooperatives after they had been hospitalised".[1391] Finally, he stated: "Yes, it is correct. Those seriously ill were referred to Kampong Cham hospital; after they had recovered, they were sent back to work in their respective cooperatives. That is my recollection."[1392] His shifting recollections should have led to the Chamber to be more cautious in using his testimony.

[1387] T. 30.07.2015, **E1/326.1**, between 13.32.28 and 13.36.20.
[1388] Written Record of Interview, 08.11.2009, **E3/5513**, ERN EN 00410238: "Q. Did you see the patients die because they received treatment from those young medics? A 77: According to what I came across, I saw that there were many people working at some places; it lacked sanitation; there was no enough food to eat. the medics did not have quality or knowledge. These were the reasons causing death of the patients.".
[1389] Reasons for Judgement, §1629, fn 5543 "T. 4 June 2015 (SOU Soeurn), E1/310.1, p. 66, 73-74 (sick people at the 1st January Dam were returned to their respective cooperatives after they had been hospitalised at the Kampong Cham hospital)".
[1390] SOUS Soeurn: T. 04.06.2015, **E1/310.1**, around 14.38.32 (emphasis added).
[1391] T. 04.06.2015, **E1/310.1**, around 14.38.32.
[1392] T. 04.06.2015, **E1/310.1**, around 14.41.41.

778. In any event, in light of all the evidence about the 1JD Worksite, the Chamber has committed an obvious error of fact by finding that "individuals who were seriously sick were sent back to their villages [...] where they died when treatments failed".[1393] There is no evidence to support this finding beyond reasonable doubt. Accordingly, the Chamber's finding that "at least" six to ten workers died at the 1JD Worksite could not support the *actus reus* of murder.[1394]

2. Lack of evidence establishing to the requisite standard the deaths caused by accidents

779. The Chamber erred in fact by considering that it was established that several accidents had caused deaths, in particular when embankments of dirt fell and buried workers.[1395] It listed in a footnote the evidence of two eyewitnesses of a landslide, MEAS Laihour and NUON Narom.

780. MEAS Laihour's testimony was not sufficient to establish that several workers died due to a landslide to which he was a witness.[1396] The Chamber erred by presenting his testimony as certain although it is explicitly speculative. In fact, MEAS Laihour stated: "Sometime when I was carrying earth and I took a shelter at one particular place, and there was soil collapse and people may have died because of soil collapse."[1397] He also mentioned other incidents in general terms, which, however, he did not say that he had personally witnessed and therefore we do not know whether this was hearsay or an inference on his part: "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."[1398]

781. On her part, NUON Narom gave information that was not sufficient to support a finding that deaths had occurred as a result of soil collapse. In fact, she stated that "[w]hile we were working at that place for the period of six or seven months, no one died."[1399] Thus. even if she said that she had witnessed a landslide, the Chamber could not rely on her testimony to find that any death had

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[1393] Reasons for Judgement, §1629, fn 5543.
[1394] Reasons for Judgement, §1670, fn 5672 referring to §1629, 1672-1673.
[1395] Reasons for Judgement, §1670, fn 5675 referring to §1535.
[1396] Reasons for Judgement, §1535, fn 5236: "T., 25 May 2015 (MEAS Laihour), E1/304.1, p. 63; T., 26 May 2015 (MEAS Laihour), E1/305.1, p. 17, 30 (as a mobile unit worker, he witnessed a landslide on people who worked in another commune area, who were digging soil, killing them before they could be unburied)".
[1397] T. 25.05.2015, **E1/304.1**, between 13.40.08 and 13.42.08 (emphasis added).
[1398] T., 25.05.2015, **E1/305.1**, between 09.42.49 and 09.46.36.
[1399] T., 01.09.2015, **E1/339.1**, between 10.49.39 and 10.51.56 (emphasis added).

ensued.[1400] Finally, the testimonies of HUN Sethany, UN Rann and UTH Seng were only hearsay and could not serve as corroborating testimony concerning the death of a person caused by a landslide given the weakness of the alleged eyewitness evidence.[1401]

3. Unreasonable inference concerning a large number of deaths to make up for the lack of evidence

782. The Chamber erred in law and in fact 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 was that a large number of them died as a result of these conditions.[1402] It did not refer to any evidence or to other paragraphs of the judgement in this finding. As this is an extrapolation, it does not constitute reasons for Judgement on the number of workers or the living and working conditions on this worksite. The Chamber drew the least favourable finding for the Accused without correctly providing reasons for it. This finding must be reversed.

C. Lack of evidence of *dolus eventualis* for the deaths due to hunger and living conditions

783. The Chamber erred in fact by finding that the *mens rea* of murder was satisfied with respect to the facts in the form of *dolus eventualis*.[1403] First, it found that the perpetrators of the crimes at the worksite level and the Party Centre "knew that there was a lack of sufficient food and medicine at the [1JD Worksite], but nonetheless continued to push the workers at the Dam to complete […] the […] work".[1404]

784. According to the Chamber, the evidence listed in §1639 and 1640 prove that the perpetrators of the crimes were aware of this. However, the items appearing in the paragraphs cited are basically an excerpt from an RF dated October-November 1977 on the general situation in Cambodia.[1405]

[1400] T., 01.09.2015, **E1/339.1**, between 11.13.47 and 11.20.38: (Yes, I did. The youth were digging the ground, and actually they made a hole under the ground and the soil collapsed. And I actually saw that.")
[1401] Reasons for Judgement, fn 5236: "T., 26 May 2015 (HUN Sethany), E1/305.1, p. 95 (stating that she had shingles on the day of the landslide, but she was told that someone had died from the incident); T., 28 May 2015 (UN Rann), E1/307.1, p. 14, 80 (describing 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); T., 3 June 2015 (UTH Seng), E1/309.1, p. 54-55 (stating that he heard there was a fatal accident due to a landslide caused by earth which was dug very deep)" (emphasis added).
[1402] Reasons for Judgement, §1670.
[1403] Reasons for Judgement, §1671-1673.
[1404] Reasons for Judgement, §1671 (emphasis added).
[1405] Reasons for Judgement, §1639, fn 5572: "Some places, the problem of meals and drink has not yet been achieved according to the ration. In examining this aspect, it would continue to sink further. […] Where there are shortage[s] in

Regarding the willingness of the authorities to push the workers to complete the work despite noting the shortages, the Chamber cited evidence of inherently low probative value, namely an excerpt from the FBIS collection of 9 May 1977 although the author of the reported comments remains unknown. It could not therefore support the Chamber's theory that after becoming aware of the problems in October-November 1977, the perpetrators continued to push the workers to complete the work in May 1977. Accordingly, the Chamber erred in fact by making this unreasonable finding.

785. Next, assessing *mens rea* is a subjective exercise and it is incumbent to start from the offender's perspective. Acceptance of the risk of death by the perpetrators was dependent on this assessment prior to the offence. Criminal intent is determined before a crime is perpetrated, not afterwards. Under the circumstances, the Chamber erred in fact by not assessing the evidence accurately in terms of its temporality. The Chamber rested the *mens rea* on the knowledge of the shortages and the maintenance of the production goals by the perpetrators in spite of everything after October-November 1977.[1406] It erred in fact by not assessing the evidence accurately in terms of its temporality regarding the dates of the alleged deaths.

786. The Chamber did not determine that the *actus reus* and the *mens rea* were satisfied at a given T time with respect to the deaths due to the living and working conditions at the 1JD Worksite. No reasonable trier of fact would have reached this finding in the absence of evidence as the Chamber did. Accordingly, its finding that the *mens rea* of murder was satisfied must be reversed.

II. THERE WAS NO PERSECUTION ON POLITICAL GROUNDS

A. Treatment of NP

787. As stated above, the Chamber was not seised of the charge of "discrimination" on political grounds against NP at the 1JD Worksite.[1407] In the alternative, an impartial review of the inculpatory evidence admitted shows that the only reasonable finding was that there was no discrimination against NP (1) and that the alleged treatment found by the Chamber to exist did not infringe a fundamental right (2).

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terms of meals and drink, there must be resolution. Resolve things by helping to provide food is one thing. However, it is necessary to resolve the responsible cadres."

[1406] Reasons for Judgement, §1671-1672.

[1407] See above, §393-394.

1. There was no discrimination in fact against NP

788. The Chamber erred in fact by finding that it had identified "a number of ways in which New People were discriminated against at the worksite, particularly in comparison to Old People" in §1641-1653.[1408]

a. Exclusion of out-of-scope evidence

789. First of all, the Chamber erred in law by using out-of-scope evidence to "prove" that NP were subjected to discriminatory treatment by proposing an assessment "in a broader context" integrating elements about how NP were treated in the communities from which they were selected as well as the overall CPK policy.[1409] It erred in law by stating that it could rely on this out-of-scope evidence to clarify the context, establish by inference the *mens rea* of a crime and "demonstrate a deliberate pattern of conduct".[1410] Thus, the circumstances set out in §1642-1648 of the Reasons for Judgement cannot be used to support criminal findings.

b. Evidence of equal treatment

790. The Chamber erred in fact in §1641-1653 of the Reasons for Judgement by finding that it had identified "a number of ways in which New People were discriminated against [...] in comparison to Old People".[1411] The items listed in §1650 to 1653 of the Reasons for Judgement do not support the existence of forms of "discrimination". On the contrary, a reasonable trier of fact would have found that they received the same treatment as other members of the population.

- **Equal treatment**

791. The Chamber acknowledged that NP and Base People were subjected to the same harsh conditions on several occasions.[1412] In fact, the testimonies of KONG Uth, MEAS Laihour, OM Chy, OR Ho, SOU Soeurn and SUON Kanil (Case 002/01) are unambiguous in this respect.[1413] Accordingly, the

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[1408] Reasons for Judgement, §1688.
[1409] Reasons for Judgement, §1641. See above, §120-125.
[1410] Reasons for Judgement, §1641, see section 2.5.6.
[1411] Reasons for Judgement, §1688.
[1412] Reasons for Judgement, §1650: "In a number of ways, both New People and Old People were subjected to the same difficult conditions [...]"; §1653: "while conditions at the 1st January Dam were harsh for both New People and Old People"; §1688 "While conditions were harsh for most workers at the 1st January Dam".
[1413] Reasons for Judgement, §1650-1651, fn 5610, 5611, 5613 and 5614: T., 25.06.2015, **E1/322.1**, pp. 22-24; T., 25.05.2015, **E1/304.1**, pp. 83-85; T., 17.12.2012, **E1/155.1**, pp. 26-27; T., 19.05.2015, **E1/301.1**, between 09.34.53 and 09.46.11.

Chamber erred in fact by not drawing the consequences of these exculpatory testimonies. It also erred in fact by selectively disregarding the exculpatory testimonies of OM Chy and OR Ho on the sole ground that they were both supervisors who had an incentive to minimise their culpability for the mistreatment of workers or discrimination against particular groups.[1414] The Chamber used this argument on a number of occasions even though it should have assessed these testimonies by comparing them with the rest of the evidence. Yet, in this case, as we have just seen, their statements were corroborated by other witnesses. The Chamber therefore erred in fact by concealing this aspect which was not in line with its findings.

• **Confusion between discrimination in fact and aspirations to absolute equality**

792. The Chamber erred in fact in its identification of "reports of discrimination" against New People[1415] by having identified "a number of ways in which New People were discriminated against […] in comparison to Old People".[1416] The evidence that it listed in support of its finding regarding the treatment of NP would not allow a reasonable trier of fact to support a finding that discrimination occurred.

793. ***Allegations concerning concrete proof.*** According to the Chamber, the discrimination in fact could be proved by elements that can be characterised as objectives: NUON Narom stated that NP could not hold senior positions;[1417] civil party HUN Sethany stated that NP could not request to work in a specific place;[1418] UTH Seng stated that NP were not entitled to any new clothes or sandals;[1419] according to HUN Sethany, NP could not justify minor mistakes and had to accept criticism,[1420] and Base People were "a bit more privileged" because NP were not allowed to attend the inauguration ceremony.[1421]

794. The Chamber erred in fact by stating that OR Ho had testified that "[New People] were reprimanded for minor offences and if they committed serious wrongdoings, the commune chief

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[1414] Reasons for Judgement, §1651.
[1415] Reasons for Judgement, §1652.
[1416] Reasons for Judgement, §1688.
[1417] Reasons for Judgement, §1652, fn 5617: "T., 1 September 2015 (NUON Narom), E1/339.1, p. 25."
[1418] Reasons for Judgement, §1652, fn 5619: "T., 26 May 2015 (HUN Sethany), E1/305.1, p. 98."
[1419] Reasons for Judgement, §1652, fn 5620: "T., 3 June 2015 (UTH Seng), E1/309.1, pp. 26, 44. Some Old People also suffered from a lack of clothing. See above, para. 1600." (emphasis added).
[1420] Reasons for Judgement, §1652, fn 5622: "T., 27 May 2015 (HUN Sethany), E1/306.1, p. 11." (emphasis added).
[1421] Reasons for Judgement, §1652, fn 5624 and 5625: "T., 26 May 2015 (HUN Sethany), E1/305.1, p. 97; T., 27 May 2015 (HUN Sethany), E1/306.1, p. 67." (emphasis added).

could not guarantee their safety".[1422] In fact, what OR Ho said was different; in fact, he said: "As for New People and Base People, when they committed offences or wrongdoings, they received the same treatment. They were reprimanded in the same way."[1423] With respect to serious offences, he added: "if they committed serious wrongdoings, the commune chief did not reprimand them. The commune chief could not guarantee their safety. In my commune, people did not commit any serious offences or wrongdoings".[1424] As OR Ho had stated that he had never been faced with this situation in his commune, the Chamber could not make findings based on unsubstantiated hearsay.

795. This probative value evidence is of too low to prove to the requisite standard that NP were more easily reprimanded for misdemeanours or errors as a general rule.[1425] It is not sufficient to substantiate a finding of "discrimination in fact" which forms the *actus reus* of the CAH of persecution on political grounds.

796. ***Unsubstantiated subjective perceptions of unequal treatment.*** The other examples put forward by the Chamber are subjective. Thus, UTH Seng stated that NP were perceived as enemies and so they did not dare to be friends with Old People.[1426] HUN Sethany said that NP grew weaker due to their mistreatment.[1427] UN Rann stated that she could not rest as often as BP.[1428] These elements on which the Chamber relied are of very low probative value. In fact, the NP did not cite specific instances of their allegations of unequal treatment. These are simply statements that do not provide concrete proof of less favourable treatment than that of Base People. A reasonable trier of fact would have found that these elements could not substantiate a finding as to "discrimination in fact". In §1653 of the Reasons for Judgement, without any concrete proof falling within the scope of the trial, the Chamber wrongfully found that NP in general were in fear of being arrested or refashioned due to the presence of militiamen and because workers had disappeared at the 1JD Worksite.

[1422] Reasons for Judgement, §1652.
[1423] T., 19.05.2015, **E1/301.1**, around 09.43.55 (emphasis added).
[1424] T., 19.05.2015, **E1/301.1**, around 09.46.11.
[1425] Reasons for Judgement, §1688-1689.
[1426] Reasons for Judgement §1652, fn 5618: T., 3 June 2015 (UTH Seng), E1/309.1, p. 44.
[1427] Reasons for Judgement, §1652, fn 5626: T., 27 May 2015 (HUN Sethany), E1/306.1, p. 71.
[1428] Reasons for Judgement, §1652, fn 5627: "T., 28 May 2015 (UN Rann), E1/307.1, pp. 18-19 (adding that because New People were afraid for their lives, unlike Base People, they did not dare to ask co-workers questions about their origin)."

2. Alleged treatment of NP

797. To begin with, the Chamber erred in law by asserting that a fundamental right to equal treatment existed without providing any legal source in support of this assertion.[1429] It then erred in law and in fact by finding that the treatment violated the fundamental right of NP to equal treatment as demonstrated by a review of the description in §1653 of the Reasons for Judgement.[1430] However, there is no fundamental right to participate in hypothetical elections or to attend official ceremonies or any absolute right not to be "more readily" reprimanded, or to fear being arrested or refashioned (out-of-scope evidence).[1431] Finally, the Chamber erred in law by not characterising the requisite level of gravity for a finding of discrimination in fact that violates a fundamental right to be characterised as persecution. Each of these errors taken separately invalidates the Chamber's finding that the *actus reus* of persecution was established with regard to NP.

B. Treatment of ex-KR

798. The Defence submits, as its main argument that, as seen above, the Chamber was not properly seised of the charge that ex-KR were subjected to "discrimination".[1432] Furthermore, it erred in fact and in law by characterising the *actus reus* of persecution on political grounds against ex-KR and finding that this crime had been established.[1433]None of the cases cited in support of this finding has been established to the requisite standard whether it was a practice of identifying ex-KR for the purposes of arresting them at the 1JD Worksite (1), the arrest and disappearance of the father of HUN Sethany (2) or the arrest and disappearance of a group of former soldiers (3).

[1429] Reasons for Judgement, §1689, fn 5741 referring to §1653.
[1430] Reasons for Judgement, §1689, fn 5741 referring to §1653.
[1431] Reasons for Judgement, §1689.
[1432] See above, §490-492.
[1433] Reasons for Judgement, §1690-1692.

1. Lack of evidence establishing to the requisite standard of a practice of identifying ex-KR

799. The Chamber erred in fact by basing its overall finding that ex-KR considered to be enemies were arrested and disappeared on general considerations of a policy against enemies.[1434] Thus, it erred in fact by relying on its finding that there was a practice of compiling lists at the district and sector levels for the purposes of identifying soldiers of high rank to be arrested as a "fact" supporting the existence of discrimination in fact against ex-KR at the 1JD Worksite.[1435] The Chamber's method is particularly flawed. It did rely on the alleged existence of a policy – based on out-of-scope evidence - to establish the constitutive elements of a crime that it had been unable to establish based solely on the evidence relating to the sites of which it was seised.

2. Lack of evidence establishing to the requisite standard of the arrest/disappearance of HUN Sethany's father

800. HUN Sethany's testimony cited as the sole evidence of the arrest of her father on political grounds is hearsay. This what she stated on the stand:

> "MY sibling witnessed that incident. They were told that my father was asked and told to carry logs. Militiamen came to call my father. My younger sibling witnessed that incident and they knew about it. I was working; however, on the day I was sick because of my periods. I was sleeping at night-time. It was about 7 o' clock and the day after, my younger sibling -- my two younger siblings came to tell me that my father was taken away and he did not return."[1436]

801. Based on this single recount of the account of HUN Sethany's brothers and sisters about the arrest of an individual who had been a teacher during the LON Nol regime, the Chamber found that there was a pseudo "policy" targeting all ex-KR working at the 1JD Worksite. This is an unreasonable finding and it must be invalidated.

3. Lack of evidence establishing to the requisite standard of the arrest/disappearance of a group of ex-KR

802. The Chamber erred in fact by relying on the testimony of UTH Sen to assert that a group of workers made up of former LON Nol soldiers had been arrested and disappeared.[1437] While the witness

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[1434] Reasons for Judgement, §1660, fn 5646 referring to §3840 and 3847.
[1435] Reasons for Judgement, §1690, fn 5743 referring to §1660, 1662-1663.
[1436] Reasons for Judgement, §1162, fn 5655 T., 27.2015, **E1/306.1**, between 09.50.06 and 09.52.41.
[1437] Reasons for Judgement, §1690, fn 5744 referring to §1662-1663.

stated that he had directly witnessed two or three workers being taken away at night at the worksite,[1438] however, he clearly stated that he did not know who had taken them away.[1439] UTH Sen's account is in fact a mixture of hearsay and speculation about the alleged connection of these workers to LON Nol's regime. In fact, he simply stated: "[F]rom my recollection, my unit was working near workers from the new village and they were the 17 April People who had connection with the former Lon Nol soldiers." However, he was unable to specify the source of his assertion about this alleged connection.[1440] Regarding their execution, once again, this is hearsay. UTH Sen did not know exactly what had happened to these workers. Thus, he stated: "We saw and felt that they were in trouble for sure. We didn't know where they were taken away and killed. We only knew that they were in a pickle.".[1441] He also stated that the following day he heard the chief of the youth battalion joking with a member of the youth "militia":

> "It just happened that the chief of the youth battalion, and allow me to say that there was also militia for the youth battalion, they were all executioners, they actually were joking to each other and while passing by I accidentally overheard them saying that those few workers had been put in a well the previous night.".[1442]

803. Accordingly, the Chamber erred in fact by finding on the basis of two isolated facts recounted by HUN Sethany and UTH Seng that former soldiers and officials of the Khmer Republic suffered discrimination in fact. Without knowing whether these people had really been executed, or who allegedly gave the order for their arrest and for what reasons, the Chamber could not find that the CPK had ordered that NP be discriminated against. Nor could it find that the perpetrators had a specific intent to subject the latter to such treatment.[1443] This unreasonable finding must be invalidated.

III. THERE WAS NO PERSECUTION AGAINST RELIGIOUS GROUNDS

A. There was no discrimination in fact against the Cham

[1438] T., 03.06.2015, **E1/309.1**, around 09.23.13.
[1439] T., 03.06.2015, **E1/309.1**, around 09.23.13. "We could not know whether they were militiamen or soldiers because they all dressed in black-clad uniform."; around 09.25.43 "There were no soldiers armed with firearms there. They were unarmed and we could not distinguish anyone was a militiaman or not.".
[1440] T., 3.06.2015, **E1/309.1**, around 09.21.24.
[1441] T., 3.06.2015, **E1/309.1**, around 09.21.24 (emphasis added).
[1442] T., 3.06.2015, **E1/309.1**, between 09.21.24 and 9.23.13.
[1443] Reasons for Judgement, §1690.

804. As stated above, the Chamber was not seised of the charge of "discrimination" on religious grounds against the Cham at the 1JD Worksite.[1444] Furthermore, the Chamber erred in law by characterising the crime of persecution on religious grounds against the Cham absent an intent to exclude the Cham from society.[1445] After considering the preliminary issues (1), a review of the Chamber's factual findings relating to the treatment of the Cham at the 1JD Worksite shows that they were unreasonable and unsuitable to support a finding that there was discrimination in fact, the *actus reus* of the crime of persecution (2).

1. Preliminary issues

805. The Chamber did not provide a valid reference for its finding that the Cham were discriminated against at the 1JD Worksite and relied on evidence that fell outside the scope of the trial. It erred in fact by finding that it had been established that Cham workers at the 1JD Worksite had suffered discrimination (as they were forced to eat pork and prevented from practising their religion or speaking their native tongue) on the basis of § 1658 of the Reasons for Judgement. However, § 1658 deals with the testimony of KONG Uth which relates to a disappearance.[1446]

806. The Chamber also erred in law in addressing the facts that occurred at the 1JD Worksite by reference to events in various parts of the CZ and elsewhere in Cambodia and also in the context of the treatment of this group in the villages in Sectors 41, 42 and 43.[1447] These elements fall outside the scope of the trial and could not be used to establish the crimes committed within the geographic scope of the case.

2. There was no discrimination in fact against the Cham at the 1JD Worksite

807. A review of the evidence concerning the treatment of the Cham at the 1JD Worksite at §1656-1658 of the Reasons for Judgement shows that the Chamber erred in fact by considering that it was established that the Cham suffered discrimination as they were forced to eat pork, (a) prevented from worshipping (b) and prevented from speaking their native tongue (c).[1448]

[1444] See above, §395.
[1445] See above, §642-655, 657.
[1446] Reasons for Judgement, §1695, fn 5753 referring to §1658.
[1447] Reasons for Judgement, §1654-1655, referring to section 13.2.6.
[1448] Reasons for Judgement, §1659.

a. Allegations that the Cham were forced to eat pork

808. The Chamber erred in fact by finding that the Cham suffered discrimination at the 1JD Worksite because "[m]ultiple witnesses testified that the Cham were forced to eat pork when it was served (though this was infrequent) or to forego eating".[1449] The "multiple" witnesses referred to by the Chamber were actually only three in number: OM Chy, SEANG Sovida and MEAS Laihour. First of all, it seems essential to place OM Chy's statement in its proper context, that of a food shortage. Thus, with regard to the availability of food, he said:

> "A. On the matter of food, we were given rice in the morning, and for the dinner, we were given gruel. The soup provided to us was not sufficient. It was kind of sour soup with morning glory or with small fish and of course it was not sufficient. Once in a blue moon we were given pork to eat".[1450]

809. The availability of meat for consumption was therefore a welcome exception for the nutritional intake of the workers. The Chamber correctly noted that, according to the evidence, it was infrequently served.[1451] Moreover, the Cham were not "forced" to eat pork. Clearly, if they didn't want to eat it, they refrained from eating it. In fact, this is what OM Chy said:

> "A. The Cham people who strictly adhered to their religious practice would restrain themselves from eating pork and they would resort to eating salt instead while others who could not stand the hunger would eat the soup, not the pork."[1452]

810. Accordingly, the evidence does not show that the Cham were treated differently. On the contrary, they were treated like everyone else. Thus, the written record of interview cited in fn 5634 supporting the claim that the Cham were discriminated against is very clear: "As for their food it was the same as that of the ethnic Khmer."[1453] So the 1JD Worksite authorities treated the Cham like everyone else. They did not take affirmative action to provide an alternative meat option to the Cham at the 1JD Worksite. This was not sufficient to support a finding of discrimination.

[1449] Reasons for Judgement, §1656, fn 5637, 5638.
[1450] T., 30.07.2015, **E1/326.1**, between 13.30.16 and 13.32.28 (emphasis added).
[1451] Reasons for Judgement, §1656, fn 5637.
[1452] T., 30.07.2015, **E1/326.1**, between 13.30.16 and 13.32.28.
[1453] Reasons for Judgement, §1656, fn 5634: "Chuop Non Interview Record, E3/9349, 17 November 2008, p. 5, ERN EN 00244158 ("Q: Do you know about killings of the Cham people? A: The Cham in my team were not arrested or killed, but I don't know about [what happened to them] after they left my location. They did not let them speak the Cham language. As for their food it was the same as that of the ethnic Khmer. When there was pork in the soup, if they did not eat it, they had nothing to eat. As for observing their traditions, that was forbidden. In particular the women could not cover their heads with scarves.")." (emphasis added).

b. Prohibition of worship

811. The Chamber erred in fact by finding that the Cham were discriminated against at the 1JD Worksite because they could not practise their religion.[1454] The evidence is clear. Neither the Khmer nor the Cham were allowed to practise religion.[1455] This is also evidenced by several written statements.[1456] Accordingly, absent any differentiated treatment, the only available finding was that there was no discrimination in fact, regardless of the impact of the indiscriminate measures.

C. Prohibition to speak their mother tongue.

812. The Chamber erred in fact by finding that the Cham were not allowed to speak their language at the 1JD Worksite on the basis of two testimonies, that of OR Ho and that of MEAS Laihour.[1457] However, OR Ho never mentioned any prohibition on the Cham from speaking their language. This left only the isolated testimony of MEAS Laihour.

B. Equal treatment does amount to discriminatory treatment

813. The Chamber erred in law by characterising equal treatment as "indirect" discrimination and by describing as discriminatory a failure by the authorities of the 1JD Worksite to affirmatively provide an alternative meat option to the Cham who were at the 1JD Worksite. In so doing, it treated the concept of indirect discrimination in fact as a constitutive element of the CAH of persecution, broadly interpreting the *actus reus* of the crime outside any legal framework. However, in 1975, the crime of persecution under CIL did not include indirect discrimination. Accordingly, the *actus reus* of persecution on religious grounds is not satisfied absent evidence of direct discrimination. Accordingly, the Chamber's finding that the *actus reus* of persecution had been established must be reversed.[1458]

[1454] Reasons for Judgement, §1656, 1659, 1695.

[1455] T. 05.10.2015, **E1/353.1,** pp. 37-38, before 10.55.21; T. 06.10.2015, **E1/354.1**, before 11.01.45; Written record of witness interview, 06.07.2009, **E3/375**, ERN EN 00360759-00360760.

[1456] See, for example: Written record of witness interview of MAT Ysa, 14.08.2008, **E3/5207**, ERN EN 00242078 ("They wanted to eliminate all religions, including Islam and Buddhism"). Written record of witness interview of CHI Ly, 21.05.2009, **E3/5290**, ERN EN 00340171-00340172, ERN EN 00340173.

[1457]Reasons for Judgement, §1656, fn 5636: "T., 19 May 2015 (OR Ho), E1/301.1, pp. 20, 93; T., 25 May 2015 (MEAS Laihour), E1/304.1, p. 109.".

[1458] Reasons for Judgement, §1695-1697.

Section IV. KAMPONG CHHNANG AIRFIELD

814. According to the CO, KHIEU Samphan was charged with the crime of extermination on the basis of the many workers who died as a result of the conditions imposed on them at the KCA worksite, including the deprivation of food, poor accommodation, insufficient medical care and hygiene as well as the exhaustion due to the hard labour and the unsafe working conditions[1459] However, absent evidence to establish the crime of extermination, the Chamber unlawfully recharacterised the facts as murder with *dolus eventualis*, thereby committing an error of law that invalidates its decision.[1460]

815. In order to find that the *actus reus* of extermination was satisfied, the Chamber held 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."[1461]

816. The Chamber thus said that it was satisfied that these deaths were the result of "the same murder operation and [found] that in aggregate the scale element of extermination [was] established in the circumstances".[1462]

817. In this finding, it referred to § 1755 and 1758 of the Reasons for the Judgement under appeal. § 1755 refers to the testimonies of KEO Kin, NUON Trech and HIM Han, who stated that they had seen workers killed or injured as a result of rock blasts.

818. The Chamber went on to infer that it was established that "many people died as a result of the explosions and insufficient safety precautions, including the lack of protective gear".[1463] However, the issue of deaths in connection with work-related accidents, although it was discussed in the CO in §392, this was in violation of the CIJs' jurisdiction. Indeed, in §47 of the ISCP, two types of deaths are mentioned: those linked to lack of food and those linked to executions not characterised as extermination by the CIJs. Thus, it was never a matter of deaths due to accidents at the

[1459] Reasons for Judgement, §1695-1696; CO, §391-392, 1387.
[1460] Reasons for Judgement, §1383-1390. See above, §135-157.
[1461] Reasons for Judgement, §1800.
[1462] Reasons for Judgement, §1800.
[1463] Reasons for Judgement, §1755.

construction site. As a result, KHIEU Samphan did not have to answer for these facts arising from a procedural violation.

819. The Chamber went on to use these findings on work-related accidents to say that a review of the evidence showed "the direct perpetrators' indifference as to the fate of those workers or their acceptance of the likelihood of their death".[1464]

820. With regard to the lack of food, the judges held that "[the Chamber] found that food was provided to the workers, even though it was insufficient given the type and quantity of labour they were forced to perform".[1465]

821. On the basis of this evidence, the Chamber unlawfully changed the characterisation and said that the CAH of murder had been established.[1466] With respect to the *actus reus* of the crime, it considered that "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".[1467] Once again, the Chamber erred and contradicted itself in its reasons by failing to characterise the legal duty to act incumbent on the authorities in charge of the KCA Worksite.[1468]

822. The Chamber then characterised the *mens rea* of the CAH of murder with *dolus eventualis*. As indicated above[1469], in considering that murder with *dolus eventualis* existed between 1975 and 1979, the Chamber erred in law. At the time of the events, the *mens rea* of the CAH of murder was only characterised by a direct intent to kill. Furthermore, the Chamber also erred in its assessment of the *mens rea* by finding that:

> "the maintenance of these conditions for an extended period of time including after their negative effects on the workers became apparent, shows 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. This satisfies the *mens rea* of murder in the form of *dolus eventualis*."[1470]

[1464] Reasons for Judgement, §1801.
[1465] Reasons for Judgement, §1802.
[1466] Reasons for Judgement, §1804.
[1467] Reasons for Judgement, §1804.
[1468] Reasons for Judgement, §1804. See also Reasons for Judgement §627 and §674 above.
[1469] See above, §575-637.
[1470] Reasons for Judgement, §1805.

823. It was incumbent on the Chamber to start from the perspective of the perpetrators. The causal connection between the measures willingly implemented by the authorities to rehabilitate the country and factors arising beyond their control is inexpressible. The Chamber further erred in fact by not assessing the evidence accurately in terms of its temporality. Yet, it used the timing to characterise the *mens rea* by saying that "the maintenance of these conditions for an extended period of time" evidenced the perpetrators' intent. Accordingly, these flawed findings concerning the *mens rea* of the CAH of murder must be invalidated.[1471]

824. Consequently, all the findings concerning extermination and the recharacterisation of the facts as the CAH of murder must also be invalidated and KHIEU Samphan acquitted.[1472]

Chapter II. SECURITY CENTRES

Section I. S-21

I. PERSECUTION ON POLITICAL GROUNDS

A. Error concerning the sufficiently discernible group of "real or perceived enemies"

825. The Chamber erred by considering that the group of "real or perceived enemies" was sufficiently discernible.[1473] Indeed, it found that this group included "detractors of the socialist revolution and critics or opponents of the Party". In particular, it stated that "the specific categories of real or perceived enemies [...] are not exhaustive" and that they "had continued to expand over time".[1474] However, this finding is at odds with the strict determination of what a sufficiently discernible group must be.[1475] If there were several categories which fluctuated over time,[1476] the Chamber should have found that the group of "real or perceived enemies" was not sufficiently discernible. The very name of this group should have served as a tipoff. Indeed, it is only against the background of such a vague and broad title that the Chamber could consider that all those who were detained at S-21 were victims of politically motivated persecution, without taking into account the diversity

[1471] Reasons for Judgement, §1805.
[1472] Reasons for Judgement, §1800-1806.
[1473] Reasons for Judgement, §2600.
[1474] Reasons for Judgement, §2600.
[1475] Reasons for Judgement, §714.
[1476] Reasons for Judgement, §3839 where the Chamber refers to "the CPK's constant (re-) categorisation of different types of enemies and changing shifts in focus".

of the detainees.[1477] As the Chamber expressly referred to this group,[1478] it will also be seen in connection with the AuKg Security Centre that this same group was also not sufficiently discernible.[1479]

B. Error concerning discrimination in fact

826. The Chamber erred in considering that acts directed at real or perceived enemies introduced discrimination in fact. Indeed, it found that individuals "were arrested *en masse* […] particularly during the purges and in connection to the escalation of the conflict with Vietnam".[1480] However, this massive scale shows above all that the victims were "indiscriminately" targeted, which, according to the Supreme Court, precludes the requirement of discrimination in fact from being established.[1481] That is why in *Duch*, it reversed the Chamber's finding on persecution on political grounds:

> "As the revolution wore on, however, individuals were indiscriminately apprehended, mistreated and eliminated without any attempt at rational or coherent justification on political grounds, in actions that were no longer persecution but constituted a reign of terror where no discernible criteria applied in targeting the victims. [...] Absent any general criteria for targeting these victims, atrocities committed against them neither discriminate in fact nor originate from a discriminatory, persecutory intent. With respect to acts against these persons, the Supreme Court Chamber considers that the Trial Chamber committed an error of law by qualifying them as persecution on political grounds."[1482]

827. Although these are two different cases, the evidence relating to S-21 really evinced nothing new that would support a finding different from that of the Supreme Court. Accordingly, the Chamber's finding must be reversed again and KHIEU Samphan acquitted of this crime.[1483]

II. PERSECUTION ON RACIAL GROUNDS

828. The Chamber erred by finding that the CAH of persecution on racial grounds was established in respect of Vietnamese prisoners at S-21.[1484] Importantly, it erred by considering that they "were

[1477] Reasons for Judgement, §2600-2604.
[1478] Reasons for Judgement, §2600 fn 8790.
[1479] See below, §849-853.
[1480] Reasons for Judgement, §2601.
[1481] *Duch* Appeal Judgement, 03.02.2012, §277.
[1482] *Duch* Appeal Judgement, 03.02.2012, §283.
[1483] Reasons for Judgement, §4306.
[1484] Reasons for Judgement, §2607-2610.

targeted on the basis that they were considered by the CPK to be racially distinct from the Cambodian people".[1485]

A. <u>There were no racial considerations at S-21</u>

829. The evidence cited by the Chamber does not support such a finding. S-21 notebooks – the use of which remains questionable – do indeed show mistrust of the Vietnamese and the threat they posed for the integrity of DK territory. These notebooks date from 1978, after a major territorial invasion by the Vietnamese in late 1977. In this context, any reasonable trier of fact should have found that Vietnam was perceived as a military and political enemy that had infringed the territorial sovereignty of DK. The Chamber's finding referring to race is disconnected from the facts.

830. In addition, it relied to a large extent on its findings concerning the identification of Vietnamese and matriarchal ethnicity.[1486] However, these findings, although disputed,[1487] concerned in all cases ethnic Vietnamese living in Cambodia and not Vietnamese detained at S-21 who were Vietnamese nationals. Indeed, the Chamber found that the Vietnamese detained at S-21 "were arrested from various locations near the border with Vietnam and in Cambodian territorial waters".[1488] Thus, once again, the Chamber has conflated the various groups and this must be sanctioned.

831. Furthermore, the Chamber found that the Vietnamese prisoners were "also seen as political enemies". It added that the "Vietnamese who were detained, interrogated and ultimately executed at S-21 were labelled as Vietnamese spies or soldiers who were enemies of the CPK and the revolution".[1489] This is indeed what Duch had clearly explained. According to him, the Vietnamese were interrogated in order to obtain confessions, some of which were broadcast on the radio. The aim was to show that Vietnam's goal was to invade Cambodia and create an Indochinese federation.[1490] If the CPK considered Vietnamese detainees as Vietnamese spies or soldiers, it was

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[1485] Reasons for Judgement, §2607.
[1486] Reasons for Judgement, §2608, fn 8810 referring to the identification of Vietnamese and the matrilineal ethnicity of ethnic Vietnamese living in Cambodia.
[1487] See below, §1043-1048, 1096.
[1488] Reasons for Judgement, §2607.
[1489] Reasons for Judgement, §2608.
[1490] T. 13.06.2016, **E1/436.1**, pp. 82-84, between 15.01.08 and 15.04.36: "There was an order from the upper echelon regarding the questioning of 'Yuon' soldiers. and the purpose was for them to confess that they invaded Kampuchea and they wanted to use Kampuchea as an umbrella of Indo-China Their voices would be recorded and broadcast and that required two segments of five minutes each per week."; T. 16.06.2016, **E1/439.1**, pp. 17-19, between 09.44.07 and 09.48.30: "I said it was a waste of time to interrogate 'Yuon' soldiers about other matters. The questions which were very important were the ones about the intention of their leaders to invade Cambodia. That was the information

because they were perceived as such. In the midst of the armed conflict with Vietnam, it is clear that race was not the reason for their arrest but rather their connection to an enemy country, Vietnam, which, according to the CPK had expansionist ambitions. Thus, the Chamber's finding that the Vietnamese detained at S-21 were targeted on the basis of their race is unreasonable and must be reversed.

B. Failure to address the Defence's arguments

832. The Chamber failed to address the Defence's arguments that the Vietnamese were not targeted on the basis of their race and that they had not, *inter alia,* been treated differently from other detainees.[1491] On the other hand, it adopted a so-called POL Pot directive that all interrogations of Khmers had to be stopped and the focus put on foreigners.[1492] However, as raised by the Defence, Duch explained that this plan had been aborted.[1493] Furthermore, the Defence reiterates its position that it has not been established that there existed a differentiated treatment between Vietnamese and other detainees.[1494] It was explained at the hearing that all foreign prisoners, including Westerners and Thai fishermen, were recorded as "spies".[1495] In fact, Duch testified that: "So the main task of S-21 was to conduct activities to counter espionage regarding any spies from Vietnam or the U.S. or any other country".[1496] The Vietnamese were therefore considered to be opponents of the revolution just as much as CIA and KGB agents.

833. In light of these elements, no reasonable trier of fact would have found that Vietnamese had been targeted because of their race. In fact, this is the reasoning that the Chamber adopted in *Duch*.[1497] He was indeed convicted by the Trial Chamber of persecution on political grounds because the detainees at S-21 were targeted as opponents of the regime.[1498] In its analysis, the Chamber included the Vietnamese detainees in its finding that they had been persecuted on political grounds.

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most important for the world to be aware of, so we asked only about the invasion of 'Yuon' and those confessions were broadcast on the radio. The other matters were useless, and I agreed with this principle by my Party."; T. 001, 10.06.2009, **E3/525**, ERN 00339601-00339603.

[1491] Reasons for Judgement, §2606. See also CB 002/02, §1202-1211 and 1214-1219.

[1492] Reasons for Judgement, §2608, fn 8811 referring to §2469.

[1493] T. 14.06.2016, **E1/437.1**, pp. 51-55, between 11.10.07 and 11.19.44.

[1494] CB 002/02, §1205.

[1495] LACH Mean: T. 25.04.2016, **E1/421.1**, pp. 97-98, between 15.54.55 and 15.56.14. *Duch*: T. 16.06.2016, **E1/439.1**, pp. 30-31, between 10.40.09 and 10.41.36.

[1496] T. 16.06.2016, **E1/441.1**, pp. 84-85, around 15.05.49.

[1497] *Duch* Trial Judgement, 26.07.2010, §386-387.

[1498] *Duch* Trial Judgement, 26.07.2010, §381-396.

Indeed, according to the Chamber, "the CPK policy concerning Vietnamese nationals as well as religious and other minorities was to regard all such individuals as spies acting against the Party".[1499] Although these findings are questionable with respect to religious and cultural minorities, they have the merit of reflecting the reality as regards the Vietnamese at S-21.

834. In fact, the Supreme Court had not contradicted the Chamber on this point, but reversed the findings as to persecution on political grounds with respect to an unknown number of detainees at S-21 who were allegedly targeted indiscriminately.[1500] Indeed, it had considered that:

> "As the revolution wore on [...] individuals were indiscriminately apprehended, mistreated and eliminated without any attempt at rational or coherent justification on political grounds, in actions that were no longer persecution but constituted a reign of terror where no discernible criteria applied in targeting the victims."[1501]

835. The Chamber did not take this reasoning into account, without justifying why in this case the interpretation of the evidence was different. In light of the evidence concerning the status and reasons for the arrests of the Vietnamese detainees at S-21, its finding that the Vietnamese were targeted on the basis of their race must be reversed. Accordingly, the CAH of persecution on racial grounds was not established at S-21 and KHIEU Samphan must be acquitted of this crime.[1502]

Section II. KRAING TA CHAN

836. It should be recalled that the Chamber was improperly seised of the facts relating to "discrimination" against NP, ex-KR and the "group" of real or perceived enemies at the KTC Worksite. Accordingly, the related findings must be invalidated.[1503]

837. The Chamber erred in law by finding that "the underlying conduct of enforced disappearance can be committed more than once in relation to the same person".[1504] The underlying act of enforced disappearance is indeed continuous criminal behaviour. A person disappears during a period X during which there is a refusal to provide information on the fate of the disappeared persons. Although enforced disappearances were not an autonomous crime in CIL in 1975, the General

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[1499] *Duch* Trial Judgement, 26.07.2010, §386.
[1500] *Duch* Appeal Judgement, 03.02.2012, §284
[1501] *Duch* Appeal Judgement, 03.02.2012, §283.
[1502] Reasons for Judgement, §2610 and 4306.
[1503] See above, §495-510.
[1504] Reasons for Judgement, §2854.

Comment of the Working Group on Enforced or Involuntary Disappearances as a Continuous Crime is illuminating about the nature of this conduct. The experts thus observed that:

> "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 [...]."[1505]
>
> "The crime cannot be separated and the conviction should cover the enforced disappearance as a whole."[1506]

838. The Chamber's compartmentalisation by which it found that two crimes of OIA through conduct characterised as enforced disappearances had been committed at KTC with respect to the same persons as the facts already characterised as enforced disappearances in relation to the TK cooperatives is invalid. It erred in law by finding that the events that occurred at KTC as OIA through conduct characterised as enforced disappearances should be considered in isolation whereas many of those persons had disappeared from TK and that the Chamber had already found that the CAH of OIA through conduct characterised as enforced disappearances was established in relation to the latter facts.[1507]

839. Logically, the deprivation of liberty which began with the arrests in the TK cooperatives continued throughout the detention phase at KTC.[1508] Although the conduct involved several perpetrators, the Chamber erred in finding that two crimes of OIA through conduct characterised as enforced disappearances had been committed, one at the TK cooperatives and the other at KTC in relation to the disappearance of the same individuals.[1509] This finding must be reversed.

840. Accordingly, the Chamber erred in law by considering that the *actus reus* of the CAH of OIA through conduct characterised as enforced disappearances had been established.[1510] Its finding as well as all subsequent findings concerning KHIEU Samphan's responsibility must be reversed.[1511]

[1505] Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/16/48, 26.01.2010, §39-1 (emphasis added).
[1506] Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/16/48, 26.01.2010, §39-5.
[1507] Reasons for Judgement, §2853.
[1508] Reasons for Judgement, §2854.
[1509] Reasons for Judgement, §2858.
[1510] Reasons for Judgement, §2858
[1511] Reasons for Judgement, §3986-3987, 4306.

Section III. AU KANSENG

841. It should be recalled that the Chamber was not properly seised of the facts related to the crimes of persecution on political grounds against "real or perceived enemies", persecution on racial grounds against the Vietnamese and OIA through attacks against human dignity at the AuKg site. Accordingly, all these findings must be invalidated.[1512]

I. MURDER AND EXTERMINATION OF SIX VIETNAMESE NATIONALS

842. The Chamber erred by considering that the CAH of murder of six Vietnamese had been established.[1513] Indeed, its findings are based solely on a written statement by CHHAOM Se.[1514] In his written record of interview, he said:

> "Shortly before 1979 before the strong Vietnamese attacks in 1979 I saw that a group of six Vietnamese civilians had been taken prison on the Au Ya Dav [...] Village battlefield along the border because those people had come to do reconnaissance along Route 19 along which the Vietnamese were attempting to attack. After their interrogations were completed upper echelon decided to finish off [...] those persons in accordance with the orders of the Division 801 commander who made the decision to finish them off. My office only had the right to interrogate and to prepare the documents and report to upper echelon for them to decide, that's all."[1515]

843. The Chamber initially acknowledged that it could not base a conviction solely on a written statement.[1516] Furthermore, it is evident from this written statement that CHHAOM Se was not involved in these executions, nor did he appear to have witnessed the executions. He gave no explanation of the circumstances of the executions of these Vietnamese. Given the low probative value and lack of specificity of this statement, it could not be used to support a finding that six Vietnamese had been murdered.

844. However, the Chamber considered that this statement was allegedly confirmed by the testimony of the witness in Case 002/01. However, on the stand, CHHAOM Se mentioned the execution of a

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[1512] See above, §511-513, 416-419.
[1513] Reasons for Judgement, §2959.
[1514] Reasons for Judgement, §2926 referring to the Written Record of Interview of Witness CHHAOM Se, 31.10.2009, **E3/405**, ERN EN 00406215-00406216.
[1515] Written Record of Interview, 31.10.2009, **E3/405**, ERN EN 00406215-00406216.
[1516] Reasons for Judgement, §69.

group of six people without more: "Regarding the group of six people, I receive instructions from Sao Saroeun for them to be executed."[1517]

845. The Chamber considered that it could rely on this evidence because it permitted the parties to put questions to the witness that were relevant to the scope of Case 002/02.[1518] However, it simply allowed the Prosecution to ask these questions under the guise that this was about "the military structure" or about "communication structures".[1519] It is clear that the parties did not dwell on seeking clarification on facts falling outside the scope of Case 002/01. The executions committed at AuKg were clearly not one of them.

846. Accordingly, not having been meaningfully cross-examined on this particular point, CHHAOM Se's statements relating to the executions at AuKg have no more probative value than a written statement, just as much as his written record of interview. No questions were asked in order to clearly determine who constituted this group of six people he referred to. The limited probative value of this statement, coupled with the lack of specificity about these executions, should have precluded a finding on this basis alone that six Vietnamese had been murdered.

847. Accordingly, the findings of murder and extermination relating to the executions of six Vietnamese must be set aside and KHIEU Samphan acquitted of these crimes.[1520]

II. PERSECUTION ON POLITICAL GROUNDS

848. The Chamber erred in considering that the group of "real or perceived enemies" was sufficiently discernible (A) and that the treatment of this group amounted to discrimination in fact (B).

A. Error concerning the sufficiently discernible group of "real or perceived enemies"

849. The Chamber erred in considering that the group of "real or perceived enemies" was sufficiently discernible.[1521] It held that the CPK considered "counter-revolutionaries, detractors and traitors of the revolution, feudalists and those engaging in feudalistic practices, the Vietnamese, foreign

[1517] T. 11.01.2013, **E1/159.1**, after 15.55.14; T. 08.04.2013, **E1/177.1**, around 09.58.48.
[1518] Reasons for Judgement, §2860.
[1519] T. 11.01.2013, **E1/159.1**, around 15.21.48.
[1520] Reasons for Judgement, §2959, 2967, 2968 and 4306.
[1521] Reasons for Judgement, §2983.

agents and collaborators" as falling into this group.[1522] However, the disparity in this list does not in any way strictly reflect what a sufficiently discernible group should be.[1523]

850. The Chamber held that the CPK had effected "constant (re-)categorisation of different types of enemies".[1524] It defined several categories of enemies, including internal enemies from within "the ranks of the party or the army – *i.e.* insiders – or civilians" and external enemies who were "from outside the organisation or outside the country".[1525] It acknowledged that "the line between the two categories was often blurred".[1526]

851. According to the Chamber, those considered as supporting pacifism, revisionism, capitalism or those whose conduct was considered counter-revolutionary also belonged to the category of "real or perceived enemies".[1527] The Chamber then identified particular categories of enemies including ex-KR,[1528] NP, [1529]returnees from abroad,[1530] monks [1531]and CIA, KGB and "*Yuon*" (Vietnamese) agents.[1532]

852. There is no doubt, therefore, that the category of "real or perceived enemies" covers a whole host of sub-categories that encompass a variety of people who were regarded differently by the CPK. The Chamber should therefore have followed the Supreme Court's position that:

> "As the revolution wore on, […] individuals were indiscriminately apprehended, mistreated and eliminated without any attempt at rational or coherent justification on political grounds in actions that were no longer persecution but constituted a reign of terror where no discernible criteria applied in targeting the victims."[1533]

853. Having failed to define a sufficiently discernible group, the Chamber could not consider that the crime of persecution on political grounds had been established at AuKg. This finding must be set aside and KHIEU Samphan acquitted of this crime.

[1522] Reasons for Judgement, §2983.
[1523] Reasons for Judgement, §714.
[1524] Reasons for Judgement, §3839.
[1525] Reasons for Judgement, §3842.
[1526] Reasons for Judgement, §3844.
[1527] Reasons for Judgement, §3845-3846.
[1528] Reasons for Judgement, §3847.
[1529] Reasons for Judgement, §3848.
[1530] Reasons for Judgement, §3849.
[1531] Reasons for Judgement, §3850.
[1532] Reasons for Judgement, §3851-3853.
[1533] *Duch* Appeal Judgement, 03.02.2012, §283 (emphasis added).

B. Error concerning discrimination in fact

854. The Chamber erred in considering that 100 Jarai, PHON Thol, MOEURNG Chandy and military prisoners were subjected to "harsher treatment and living conditions" that the rest of the population as a result of their perceived enemy status.[1534] Yet, the Chamber explained that "[d]etention regimes varied between serious offenders, light offenders, and women and children".[1535] Serious offenders were held in a place where they were shackled and could not get out. Light offenders were not shackled and could move about freely during the day.[1536] As for women and children, the Chamber admitted that they "were treated more leniently", [1537]noting that the differences in treatment were based more on the nature of the offence than on political grounds.

855. Moreover, with regard to the Jarai, the Chamber considered that the "cramped conditions to which they were subjected" supported a finding that they "continued to be viewed as enemies throughout their detention".[1538] These elements do not prove that they were allegedly subjected to a different regime from the other persons detained at AuKg. The cramped conditions were attributable to the fact that the buildings at AuKg were not designed to accommodate so many prisoners at the same time.[1539] There is no evidence that the Jarai were subjected to any particular ill-treatment.[1540] They were not the only prisoners to have been executed.[1541] Thus, the Chamber has not shown how they were subjected to harsher treatment than others.

856. The same applies to the case of PHON Thol. According to the Chamber, he was subjected to re-education and attacks against his human dignity.[1542] However, according to the Chamber, re-education was meant for all persons accused of the least serious offences and was applied at security centres, worksites and throughout the country.[1543] While the witness explained that he

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[1534] Reasons for Judgement, §2986-2990.
[1535] Reasons for Judgement, §2909.
[1536] Reasons for Judgement, §2910.
[1537] Reasons for Judgement, §2910.
[1538] Reasons for Judgement, §2986.
[1539] Reasons for Judgement, §2943.
[1540] Reasons for Judgement, §2935-2958.
[1541] Reasons for Judgement, §2933-2934.
[1542] Reasons for Judgement, §2987.
[1543] Reasons for Judgement, §3972 "[T]he Chamber finds that the CPK maintained a policy of re-educating enemies whose alleged offending or status was not deemed to be serious according to the revolutionary framework. This policy was directly implemented at security centres (and worksites) throughout the country and entailed the refashioning of "bad-elements" through political indoctrination, criticism/self-criticism and work assignments designed to temper counter-revolutionary tendencies. Revolutionary Army of Kampuchea (RAK)This policy was carried out by the Party's entire administrative network of zone, sector, district and local-level secretaries, CPK cadres and Revolutionary Army

lived in fear of being killed,[1544] the evidence shows that he received more lenient treatment than others. Indeed, he himself stated that he witnessed other prisoners being beaten and electrocuted during interrogation.[1545] Moreover, he was by no means the only one from the rubber plantation to have been arrested.[1546] In light of all this, the Chamber's finding that "PHON Tol was ... subjected to harsher treatment and living conditions" than the rest of the population is erroneous.[1547]

857. The Chamber also failed to explain how MOEURNG Chandy was "subjected to harsher treatment and living conditions" than the rest of the population.[1548] Like PHON Thol, she was arrested as other rubber plantation workers and subjected to the same treatment as the others.[1549] The Defence does not question the suffering and fear experienced by PHON Thol or MOEUNG Chandy during their incarceration. However, their treatment does not evince discrimination in fact on political grounds. Accordingly, the Chamber's finding that they were victims of persecution on political grounds must be set aside.

858. Finally, the Chamber also failed to explain how the military prisoners arrested at AuKg were subjected to harsher treatment than other prisoners. Civilian prisoners were also arrested, detained and subjected to harsh living conditions at AuKg.[1550] These elements do not support a finding that they were discriminated in fact on political grounds. Accordingly, the CAH of persecution on political grounds could not be established. KHIEU Samphan must be acquitted of this crime.[1551]

III. PERSECUTION ON RACIAL GROUNDS

859. It should be recalled that the Chamber's findings on the arrest and murder of a group of six Vietnamese are based solely on the vague written statement of CHHAOM Se.[1552] Absent direct and substantiated evidence, the Chamber could not make such findings. Thus, it could also not base its finding that the CAH of racial persecution had been committed with respect to those six

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of Kampuchea (RAK) personnel."
[1544] Reasons for Judgement, §2922.
[1545] Reasons for Judgement, §2902.
[1546] Reasons for Judgement, §2887 and 2895.
[1547] Reasons for Judgement, §2987.
[1548] Reasons for Judgement, §2988.
[1549] Reasons for Judgement, §2895.
[1550] Reasons for Judgement, §2909-2925.
[1551] Reasons for Judgement, §4306.
[1552] See above, §842-847.

Vietnamese solely on this evidence. Accordingly, KHIEU Samphan must be acquitted of this crime.[1553]

860. Moreover, the Chamber erred by considering that these Vietnamese were allegedly persecuted on racial grounds.[1554] Indeed, it took into account "evidence of the arrest and execution at S-21 of Vietnamese "spies" and perceived Thieu-Ky soldiers in late 1978".[1555] Thus, the arrest of the Vietnamese was based on the same reasons as the Jarai, who, according to the Chamber, were arrested for political reasons. However, the Chamber does not explain why similar situations of armed conflict between the soldiers of the Thieu-Ky regime before and during the DK regime,[1556] on the one hand, and the SRV, on the other, should be treated differently.[1557] There is no reason for this differentiation, especially since the Chamber also included the group of "Vietnamese" into its nebulous category of "real or perceived enemies" targeted for political reasons.[1558]

861. Notwithstanding the fact that CHHAOM Se's written statement is of low probative value, it is the only evidence mentioning the arrest of these six Vietnamese. However, even its content does not support the findings of the Chamber. Indeed, according to the witness's account, the six Vietnamese were arrested "[s]hortly before 1979, [...] at the Au Ya Dav village battlefield along the border".[1559] Thus, there was no evidence that their arrest was racially motivated. On the contrary, it appeared to result from the fact that they were on a battlefield in the midst of the armed conflict with Vietnam. Accordingly, even if Vietnamese had been arrested at AuKg, it was impossible to find that they were arrested for racially motivated reasons. The Chamber's finding must be set aside and KHIEU Samphan acquitted of the crime of persecution on racial grounds with respect to the six Vietnamese at AuKg.[1560]

Section IV. PHNOM KRAOL

862. It should be recalled that the Chamber was not properly seised of the facts related to the crimes of persecution on political grounds against "real or perceived enemies", enslavement at the K-17 and

[1553] Reasons for Judgement, §2999 and 4306.
[1554] Reasons for Judgement, §2996.
[1555] Reasons for Judgement, §2996.
[1556] Reasons for Judgement, §2949-2950.
[1557] Reasons for Judgement, §2996.
[1558] Reasons for Judgement, §2983.
[1559] Written Record of Interview, 31.10.2009, **E3/405**, ERN EN 00406215-00406216.
[1560] Reasons for Judgement, §2999 and 4306.

PK sites, OIA through attacks against human dignity with respect to the facts related to torture at the PK site, and those related to OIA through enforced disappearances at K-11 and PK.[1561]

I. MURDER

A. Errors in finding that *Heus* was intentionally murdered

863. The Chamber considered that the CAH of murder was established in PK in relation to the death of a prisoner named Heus.[1562] It based this finding on the following reasoning:

> "The Chamber was satisfied that UONG Dos and SOK El witnessed the assault and killing of their fellow inmate, Heus, by Phnom Kraol Prison guards. Taking into account the brutal nature of the attack preceding the victim's death, being a physical assault with wooden implements to the point of unconsciousness, as well as the infliction of grievous bodily harm by stabbing the victim with a bayonet, the Chamber finds that the prison guards intended to kill Heus. The Chamber is satisfied that both the *actus reus* and *mens rea* of murder are established".[1563]

864. It should be recalled that the Chamber said that 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.[1564] In reaching its finding that this crime was established, the Chamber erred in its assessment of the evidence (1) and violated the guiding principles of the right to a fair trial (2).

1. Errors in the exclusive use of inherently weak evidence

865. In finding that the CAH of murder at PK had been established, the Chamber relied on the two written statements of UONG Dos and SOK El (deceased), both made on 29 October, 2008, in the same Raing Sy village in Mondolkiri province. Following this testimony before the CIJ, the two men were joined as civil parties. [1565] The Chamber first erred in considering that the crime had been established on the basis of accounts on which the Defence was unable to question any of the civil parties. Indeed, neither UONG Dos nor SOK El testified at the hearing.

866. Because the credibility of the statements of these civil parties could not be tested in court, the Chamber then erred in failing to note the circumstances under which the statements of the two civil

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[1561] See above, §397-403, 514-516.
[1562] Reasons for Judgement, §3115.
[1563] Reasons for Judgement, §3115.
[1564] Reasons for Judgement, §627; Case 002/01 Trial Judgement, 07.08.2014, §412.
[1565] UONG Dos Civil Party Application, **E3/6260**; SOK Ei Civil Party Application, **E3/6314**.

parties provided a similar account. Indeed, given the identical time and place in which these first written records of interview were prepared by the CIJs, there was objective circumstantial evidence concerning the possibility of collusion between the accounts, at the very least of "contamination". Indeed, both were first heard by the CIJs in their village of Raing Sy on 29 October 2008. According to the investigators, SOK El was heard at 10:10 am and UONG Dos at 10:15 am.[1566] These objective elements suggest that their interviews were conducted side by side, making the apparent "*corroboration*" of their stories highly questionable. It is nevertheless worth remembering that during the trial in Case 002/01, the Chamber had stated on several occasions that "absent the opportunity to examine the source or author of evidence, less weight may be assigned to that evidence".[1567] Having failed to apply this essential fair trial rule in the first trial, the Chamber had been rebuked by the Supreme Court in relation to:

> "interview records collected in the course of the investigation, civil party applications and victim complaints. This evidence is of an inherently low probative value, a fact the Trial Chamber had only acknowledged in general terms, but apparently not applied in practice. Indeed, in relation to the evidence at issue, the Trial Chamber did not explain why it considered that, despite its inherently low probative value, it could, on this basis, reach findings beyond reasonable doubt as to individual incidents of killings".[1568]

2. Violation of the principles of adversarial proceedings and equality of arms

867. By holding that the CAH of murder had been established at PK solely on the basis of two civil party statements – which, moreover, were collected at the same time – absent any opportunity for confrontation with the accused,[1569] the Chamber breached the principles of the law of evidence, which it had itself recalled.[1570] The Supreme Court also held in the Case 002/01 Appeal Judgement that:

> "in accordance with persuasive jurisprudence of the European Court of Human Rights, a conviction may not be based solely or to a decisive degree on evidence by a witness whom the defence has not

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[1566] UONG Dos, Written Record of Witness Interview, 29.10.2008, **E3/7703**; SOK El, Written Record of Witness Interview, 29.10.2008, **E3/7702**.
[1567] Case 002/01 Trial Judgement, 07.08.2014, §34 and fn 94; Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, 20.06.2012, **E96/7**, §21-22, 24-25, 27, 29, 34; 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, 15.08.2013, **E299**, §19.
[1568] Case 002/01 Appeal Judgement, 23.11.2016, §430.
[1569] The fact that SOK Ei is deceased does not add credibility to his written statement.
[1570] Yet the Chamber itself had recalled that written statements are of inherently low probative value. See above, §293-305.

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".[1571]

868. Indeed, the ECtHR has repeatedly held that the right to a fair trial is violated when conviction is based on testimony that the accused was never in a position to discuss and when the accused was at no time given the opportunity to confront the Prosecution witness.[1572] Therefore, no decision can be based on evidence that was not subject to adversarial argument. The principle of adversarial proceedings is an unquestionable corollary of the right to a fair trial. The Criminal Division of the French Court of Cassation applies a similar reasoning.[1573] Under paragraph 2 of Article 427 of the Code of Criminal Procedure: "[t]he judge may only base his decision on evidence which was submitted in the course of the hearing and adversarially discussed before him."

869. The Chamber could therefore not say that the crime of murder of prisoner Heus was established at PK on the basis of these two civil party written statements, the authors of which the Chamber never heard on the stand and whom the Defence thus never had the opportunity to examine. It failed to demonstrate the stringency required to establish a conviction. Accordingly, its findings concerning the murder of Heus must be invalidated and KHIEU Samphan acquitted.[1574]

B. Errors committed in finding that Touch was murdered with *dolus eventualis*

870. The Chamber considered that the murder with *dolus eventualis* of a prisoner named Touch was established at PK on the basis of a written statement by SOK El, a deceased civil party.[1575] The Chamber could not base a conviction exclusively on this evidence. In so doing, it erred in law in its assessment of the evidence (1) and on the legality of the *mens rea* of the crime (2).

1. Errors committed by relying exclusively on the written statement of a deceased person as the basis for a conviction

871. According to the Reasons for the Judgement under appeal, the Chamber considered SOK Ei's statements concerning the death of the prisoner named Touch to be credible. SOK El is said to have

[1571] Case 002/01 Appeal Judgement, 23.11.2016, §296.
[1572] See above, §293-305; *Unterpertinger .v Austria* Appeal Judgement (ECtHR), 24.11.1986, §31; ECtHR, *Saïdi v.France* Appeal Judgement (ECtHR), 20.09.1993, §43-44.
[1573] See §293-305 above.
[1574] Reasons for Judgement, §3115.
[1575] Reasons for Judgement, §3116.

seen the latter "lying dead with his head hanging down and his tongue sticking out".[1576] In the 002/01 Trial Judgement, the Chamber clarified that it may use statements of deceased persons, as in the present case, but that in such a situation, "it would not base any conviction decisively thereupon".[1577] The Supreme Court validated this approach.[1578] It nevertheless limited the use of written statements and had, in this connection, recalled the case law of the ECtHR, according to which:

> "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".[1579]

872. The Chamber considered that it could rely on the written statement of a deceased witness, including where it relates to the acts and conduct of the Accused. It nevertheless indicated that they have limited probative value and that "a conviction may not be based solely or decisively thereupon".[1580] Thus, if a written statement of a deceased witness is admissible, it must be considered with utmost caution and the Chamber has a duty to provide rigorous reasons.[1581] However, in this case, it has failed to provide any reasonable reasons, and simply stated that SOK El was credible, although her 2008 statement was not corroborated by any other evidence and does not make it possible to actually identify the prisoner in question.

873. Accordingly, the Chamber could not find that the *actus reus* of the crime of murder had been established with regard to the prisoner named Touch.[1582] Its erroneous finding will be invalidated.

2. Errors committed in the application of the *mens rea* of the crime of murder

874. In holding that the *mens rea* of the crime of murder had been established in respect of the prisoner named Touch, the Chamber noted that:

> "the Closing Order envisages the death of prisoners as a result of detention conditions under the legal characterisation of murder, the Chamber is satisfied that the voluntary subjection of prisoners to abject conditions, or indeed the failure to remedy deleterious conditions of detention or hygiene, constitutes

[1576] Reasons for Judgement, §3116
[1577] Case 002/01 Judgement, 07.08.2014, §31.
[1578] Case 002/01 Appeal Judgement, 23.11.2016, §284-294.
[1579] Case 002/01 Appeal Judgement, 23.11.2016, §296; See above, §293-305.
[1580] Reasons for Judgement, §71-72.
[1581] See above, §293-305.
[1582] Reasons for Judgement, §3116.

> manifest indifference to human life by Security Centre personnel, thereby fulfilling the element of *dolus eventualis*. The *mens rea* of murder is therefore established with regard to Touch's death."[1583]

875. As indicated above in this brief, the Chamber erred in law concerning the legality of murder with *dolus eventualis* at the time of the events.[1584] Between 1975 and 1979, the crime of murder could only be established on the basis of direct intent. Accordingly, the Chamber erred in law by finding that *dolus eventualis* had been established with regard to the murder of Touch. Accordingly, the findings regarding this murder must be invalidated.

C. General errors concerning the failure to consider exculpatory evidence

876. In its assessment of these two murders, it appears that the Chamber deliberately disregarded exculpatory evidence. The testimony of the witnesses examined in court were not sufficient to support a finding beyond reasonable doubt that murders had occurred at the PK prison. The Chamber failed to consider exculpatory evidence.

877. CHAN Tauch, a detainee at PK, thus indicated that to his knowledge those detained with him "were not sent to be killed",[1585] going on to say that in his previous statements to investigators, he had drawn a "personal conclusion".[1586]

878. CHAN Tauch also indicated that he did not know anything about executions while he was in detention, adding that he learned about them "later on".[1587] In any event, his hearsay account did not situate the executions within the PK prison.[1588] Likewise, witness NET Savat, also a former detainee, when questioned on this matter and confronted with his prior statements, said he had not personally witnessed any executions, having only recounted rumours stating that "a vehicle [...] drove away," but that he did not know "what happened to them later.[1589] The Chamber therefore

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[1583] Reasons for Judgement, §3116 (emphasis added).
[1584] See above, §575-636, 638.
[1585] CHAN Tauch: T. 10.03.2016, **E1/399.1**, pp. 20-21, before 09.57.24
[1586] CHAN Tauch: Written Record of Interview, 23.10.2008, **E3/7694,** ERN EN 00242144; with respect to the Written Record of Interview: T. 10.03.2016, **E1/399.1**, pp. 27-28, before [10.14.16]: "And it is my personal conclusion that when those people were taken out, it means that they were taken out and killed.".
[1587] CHAN Tauch: T. 10.03.2016, **E1/399.1**, p. 44, between 11.07.26 and 11.09.49.
[1588] CHAN Tauch: T. 10.03.2016, **E1/399.1**, p. 44, between 11.07.26 and 11.09.49.
[1589] NET Savat: T. 11.03.2016, **E1/400.1**, pp. 37-39, between 11.11.03 and 11.17.55: "Q. Did you ever hear where these people were taken? Did you ever hear anything about executions of people who had been detained and where it was that people were taken to be executed? A. I did not know about that. However, what I could say is that some detainees were taken and placed on a vehicle and drove away. And I did not know what happened to them later. Q. I want to read another short excerpt from your DC-Cam interview, E3/7696; Khmer 00231531; English: 00384152; French: 00384258. You said: "Some killings happened, but not at the prison. They did along the way to Kratie. And

chose to omit this evidence which cast doubt on the occurrence of the crime of murder within the PK prison, although it came from witnesses who gave evidence at the hearing which had greater weight than that cited in the Reasons for the Judgement under appeal. In fact, their testimony should have caused the Chamber to assess the difference between apparently accurate written statements which subsequently turned out to be their unreliable hearsay evidence.

879. **In conclusion**, given the lack of evidence, the Chamber could not find beyond reasonable doubt that these two murders had been established at the PK Security Centre. In reaching such findings, the Chamber violated the law of evidence and contradicted itself in its reasons. Accordingly, all findings relating to these two murders must be invalidated and KHIEU Samphan acquitted.

II. ENSLAVEMENT

A. The CIJs were unlawfully seised of the facts charged

880. As explained by the Defence in the section of this brief dealing with the scope of the judicial investigation and the trial, the CIJs went beyond the initial scope of the judicial investigation by including events that occurred at the K-17 site and PK prison to say that the crime of enslavement had been established even though they were only seised of events that occurred at K-11.[1590] Accordingly, the Chamber could only address the CAH of enslavement committed within the limits of K-11.

B. Insufficient evidence to find that the crime was established

881. The evidence to establish that the crime was committed at the K-11 site is clearly insufficient. The sole reference to the K-11 site in the legal characterisation of the facts is that of the in-court testimony of civil party KUL Nem and the Written Record of Interview of AUM Mol.

882. First, with respect to KUL Nem, the civil party testified in the trial segment on Regulation of Marriage. He referred to the PK Security Centre and the K-11 office only during his statement of harm suffered under the policy to regulate marriage, i.e. after the parties had examined him.[1591]

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earlier in the interview, you said that people on the upper floor had been transported to the west. Who is it that you heard... who is it that told you that prisoners who were taken away were sent to the west to the – in the direction of Kratie? Who is it that you heard that from? A. I heard it from other people, but I personally did not see that. People whispered from one to another about this".

[1590] See above, §397-398.

[1591] KUL Nem: T. 24.10.2016, **E1/488.1** around 15.16.10.

The Defence was therefore unable to examine him on this matter, which was not the focus of his testimony. Second, the Chamber referred to a Written Record of Interview of AUM Mol,[1592] a deceased witness who could not be examined, so that this item is of inherently low probative value.[1593]

883. In both cases, the opportunity for confrontation with the Appellant was limited and the unreliability of the evidence gathered should have caused the Chamber to find that it could not consider that the crime had been established on the basis of that evidence alone. There was not enough evidence before the Chamber to find that the CAH of enslavement was established at K-11. Accordingly, the findings regarding the CAH of enslavement must be invalidated and KHIEU Samphan acquitted of these facts.

III. PERSECUTION ON POLITICAL GROUNDS

884. The Chamber considers that the *actus reus* of discrimination in fact is established where a victim is targeted because of the victim's membership in a group defined by the perpetrator on specific grounds (namely on a political, racial or religious basis).[1594] With regard to the *mens rea*, the Chamber considers that the crime requires the specific intent to persecute on political grounds.[1595]

885. As explained in the section dealing with the scope of the judicial investigation and trial, the CO neither identified nor defined the group persecuted with respect to the facts concerning the PK Security Centre.[1596] This failure to define the persecuted group has a direct impact on the legal characterisation since, in the absence of a defined and identified group, the criteria on which the alleged discrimination is based cannot be explained. In defence of this lack of identification, the Chamber stated that it was "satisfied that real or perceived political enemies included, but were not limited to, the three groups particularised in the Closing Order."[1597] It therefore considered that:

> "the CPK identified as enemies counter-revolutionaries, detractors and traitors of the revolution, foreign agents including the Vietnamese, as well as collaborators of the foregoing categories, among others. Accordingly, the Chamber is satisfied that the target group of "real or perceived enemies of the CPK" was sufficiently discernible in order to determine whether

[1592] Written Record of Interview of AUM Mol, 29.08.2008, **E3/7700**.
[1593] See above, §293-305.
[1594] Reasons for Judgement, §714.
[1595] Reasons for Judgement, §715.
[1596] See above, §514-516.
[1597] Reasons for Judgement, §3138.

the requisite consequences occurred for the group."[1598]

886. However, as has been pointed out many times, under the CO, the Chamber was only seised of the persecution of three groups: the ex-KR, NP and Cambodians returning from abroad. The "real or perceived enemies of the CPK" do not fit into these groups so that no charge could be laid. The Chamber therefore erred in law by holding that the crime of persecution on political grounds had been established with respect to the facts committed at PK.[1599] KHIEU Samphan must be acquitted of this charge.

IV. OIA THROUGH ENFORCED DISAPPEARANCES

887. According to the Reasons for the Judgement under appeal, the Chamber considered that the CAH of OIA through conduct characterised as enforced disappearances was established at all PK sites.[1600] However, as indicated above in the part on the scope of the judicial investigation and the trial,[1601] the CIJs were only seised by the Prosecution of disappearances at the site identified as "Phnom Kraol" in §64 of the ISCP, specifically K-17.[1602] No other disappearances were mentioned in the Supplementary Submission regarding K-11 or PK.[1603] Accordingly, KHIEU Samphan only had to answer for the acts of enforced disappearances that occurred at K-17.

888. However, the two persons heard on this subject, CHAN Tauch and UONG Duos, were only detained at PK and not at K-17.[1604] Accordingly, there was no evidence before the Chamber relating to enforced disappearances at the K-17 site. Furthermore, the only evidence relating to the K-11 and PK sites is based on 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

[1598] Reasons for Judgement, §3139.
[1599] Reasons for Judgement, §3151.
[1600] Reasons for Judgement, §3160-3166.
[1601] See above, §401-403.
[1602] See above, §1353-1364.
[1603] Co-Prosecutors' Clarification of Allegations Regarding Five Security Centres and Execution Sites Described in the Introductory Submission, 11.09.2009, **D202,** §8-11.
[1604] CB 002/02, §1407-1410.

> Kratie after being removed from Phnom Kraol without explanation. The Chamber is satisfied that the removal of prisoners constitutes the deprivation of liberty."[1605]

889. Although it did not characterise it directly, the Chamber itself noted that the evidence it used was nothing more than hearsay. It failed to cite any direct evidence and the conviction was based solely on extrapolation.

890. Finally, the Chamber used the testimony of SAO Sarun, former Sector Secretary, to find that the alleged disappearances at the security centre were carried out by DK authorities or with the authorisation, support or acquiescence of the CPK.[1606] Here again, it made a partial selection and only inculpatorily of this testimony. Indeed, in its finding, the Chamber surprisingly found SAO Sarun not credible when he provides exculpatory rather than exclusively inculpatory evidence:

> "In light of his tendency to minimise his role at Phnom Kraol, the Chamber accords no weight to SAO Sarun's imputation of interrogations solely onto his predecessor's tenure or description of his own role at the time.[1607]
>
> "SAO Sarun provided further evidence relating to K-17 that was internally inconsistent and in stark contrast to other accounts before the Chamber.[1608]
>
> "The Chamber attributes the inconsistencies in SAO Sarun's testimony to a consciousness of guilt, motivation to lie and minimise his own responsibility, and desire to shift overall responsibility for the conditions at K-17. Consistently with the Chamber's approach to this witness's uncorroborated evidence, and to the extent that it has not addressed his assertions in the following regard, the Chamber accords no weight to SAO Sarun's testimony regarding prisoner numbers or conditions at Phnom Kraol Security Centre."[1609]

891. Thus, the Chamber inconsistently assessed the testimony of SAO Sarun that it used. By applying this double standard, it violated the rules of evidence.[1610] Consequently, not only was it not lawfully seised of the facts it judged, but also, in light of the palpable insufficiency of the evidence, it could not find beyond reasonable doubt that the crime was established. Accordingly, the Supreme Court must invalidate all of these findings and acquit KHIEU Samphan.

[1605] Reasons for Judgement, §3161 (emphasis added).
[1606] Reasons for Judgement, §3162. See also below §1856-1861.
[1607] Reasons for Judgement, §3089 (emphasis added).
[1608] Reasons for Judgement, §3091 (emphasis added).
[1609] Reasons for Judgement, §3092 (emphasis added).
[1610] See above, §234.

Chapter III. SPECIFIC GROUPS

Section I. THE CHAM

892. The Defence submits, as its main argument that, as noted above, the Chamber erred in its adjudication of facts of which it was not properly seised. In fact, its subject-matter jurisdiction did not include acts of "discrimination" on religious grounds against the Cham at the 1JD Worksite, and it therefore erred in law in judging those acts.[1611] Nor was it ever seised of facts concerning murder as a CAH in relation to Trea village and could therefore not find that the CAH of murder had been established with respect to the Trea Security Centre in 1978.[1612] The Chamber also erred in law by asserting jurisdiction to try acts of persecution on political grounds and OIA through conduct characterised as forced transfer during MOP2.[1613] It erred in law by judging facts of forced transfers committed during MOP2 under the legal characterisation of CAH of OIA through conduct characterised as forced transfer when it should have held that they had already been finally decided.[1614] Moreover, it should be recalled that the Chamber failed to determine how the measures characterised as persecution were intended to marginalise or exclude the group from society. By failing to do so, the Chamber erred in law.[1615]

893. In the further alternative, the Chamber erred in fact and in law with respect to the crimes of murder (I), extermination (II), torture (III), persecution on political grounds (IV) and on religious grounds (V) and OIA through conduct characterised as forced transfer (VI).

I. INSUFFICIENT EVIDENCE CONCERNING THE MURDERS IN TREA AND AT WAT AU TRAKUON

A. Lack of specificity and generalisation about executions at the Trea Village Security Centre

894. The Chamber erroneously found, on the basis of three testimonies, that in 1978 a large number of Cham from Kroch Chhmar district were arrested and executed in Trea village because they were Cham.[1616] These are the testimonies of IT Sen relating to one incident, of civil party NO Sates and

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[1611] See above, §804-813.
[1612] Reasons for Judgement, §3306-3308. See above, §517-519.
[1613] Reasons for Judgement, §3184, 3320. See above, §538-543.
[1614] Reasons for Judgement, §3184, 3335. See above, §544-546.
[1615] See above, §642-655, 657.
[1616] Reasons for Judgement, §3306, fn 11223 referring to §3281.

MATH Sor, which do not corroborate each other contrary to what the Chamber considered, relating to a second incident.

895. First, IT Sen reportedly escaped from the house where he and 40 other men had been placed. With respect to executions, the Chamber distorted his testimony. According to the Chamber, he allegedly saw through the bushes behind which he was hiding that blindfolded Cham had been taken to the river and drowned.[1617] On the contrary, IT Sen stated that he had observed this scene from a distance from the house where he was detained.[1618] The distance is important because the Chamber unreasonably found that these people were Cham, whereas the witness himself indicated that it was impossible to determine whether someone was Cham if he or she was not wearing traditional clothing or praying at the mosque.[1619]

896. Furthermore, even considering that civil party NO Sates's account was credible, her testimony would be limited to proving that about 10 women from Khsach Prachheh Kandal were taken away by a soldier after they said they were Cham.[1620] With regard to the executions, in fact, she finally admitted that she had lied to YSA Osman about what she said she had seen.[1621]

897. While MATH Sor's account corroborates NO Sates' account of their arrest and detention in a house in Trea, it differs greatly on the rest of the facts, in particular on the matter of the number of detainees.[1622] More importantly, MATH Sor is the only one who asserts having seen the execution of women who did not claim to be Khmer through a hole in the house.[1623] However, the conditions in which she observed the scene could not support a finding that her testimony was reliable.

[1617] Reasons for Judgement, §3276.
[1618] T. 7.09.2015, **E1/342.1**, around 15.22.24.
[1619] T. 7.09.2015, **E1/342.1**, around 11.27.13: ("Besides the costumes, you could identify a person was a Muslim when he went to a mosque to do daily prayers, and they fast on certain occasions. That was how they could be distinguished. Sometimes they could not be recognized as Muslims by clothing, in particular, when they put on casual clothes.").
[1620] Reasons for Judgement, §3277-3278.
[1621] Written Record of Interview, 08.07.2008, **E3/5193**, ERN EN 00274704.
[1622] MATH Sor: T. 13.01.2016, **E1/375.1,** around 10.34.38 ("about 20 -- of 30 people in the house…"), after 11.27.05 ("Q. Among the 30 or so people in that group […]"), around 14.14.56 ("And I stand by my previous statement, including the testimony that I made this morning. And I cannot tell you about No Sates' statement."); NO Sates: 300 women were detained, and 30 women were not taken away because they said they were Khmer. T. 28.09.2015, **E1/350.1,** around 14.15.08 (placed us in a long line, there were about 300."), around 14.21.25 ("A. There were about 30 of us remained."), around 15.23.07 "A. Only our group, the group of 30 women were instructed to eat that pork soup.").
[1623] T. 13.01.2016, **E1/375.1**, around 15.22.58 ("I was sitting rather far from the window. However, after people were sent out of the house two at a time, then I moved myself closer to the window and that's when I tried to look through the crack of the window and saw what happened.").

Essentially, she says she saw the executions through a crack, at night, and at a distance of more than eight metres from the house.[1624] Her testimony about these executions is also uncorroborated, as NOS Sates admitted that she saw nothing. Accordingly, the Defence submits, as its main argument that the Chamber could not consider that the *actus reus* of murder had been established at Trea solely on the basis of this testimony.[1625] Its finding must be reversed.

898. In the alternative, even if the testimony of NO Sates and MATH Sor had been credible and was sufficient to establish the execution of the 10 Cham women from Khsach Prachheh Kandal beyond reasonable doubt, the Chamber did not provide reasons as to how this established beyond reasonable doubt that in 1978 "a large number of Cham people from Kroch Chhmar district were arrested and taken to Trea Village Security Centre [...] and those who were deemed to be Cham were executed".[1626] This is an unreasonable extrapolation without evidence; this finding must also be reversed.[1627]

B. Insufficient evidence concerning the alleged executions at Wat Au Trakuon

899. The Chamber erred in fact by finding that it had found "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".[1628] Indeed, it unreasonably inferred from indirect evidence of low probative value that Cham civilians were executed *en masse* at the pagoda.[1629] The evidence on which the Chamber based its inference is itself based on evidence of low probative value regarding the arrests of Cham (1) and their presence and execution at the pagoda (2).

1. Insufficient evidence concerning the arrests of Cham in the villages

900. The Chamber erroneously considered that there was sufficient evidence to find that Cham were being rounded up in various villages in Kang Meas District and taken to the pagoda.[1630] It should have drawn the consequences of its finding that it had before it essentially only "hearsay accounts".[1631] In fact, the Chamber heard only four direct witnesses of events that took place in the

[1624] T. 13.01.2016, **E1/375.1**, 10.54.30, 15.46.43.
[1625] Reasons for Judgement, §3306, fn 11223 referring to §3281.
[1626] Reasons for Judgement, §3281; Reasons for Judgement, §3306, fn 11223 referring to §3281.
[1627] Reasons for Judgement, §3306, fn 11223 referring to §3281.
[1628] Reasons for Judgement, §3306 fn 11222 referring to §3302.
[1629] Reasons for Judgement, §3302.
[1630] Reasons for Judgement, §3302.
[1631] Reasons for Judgement, §3302.

villages of Peam Chi Kang commune (a) and Angkor Ban Village 2 (b), evidence that was insufficient to allow it to find beyond reasonable doubt that people were arrested solely for the reason that they were Cham.

a. Villages in Peam Chi Kang commune in early 1977

901. The Chamber erred in law by finding that "[w]ithin Peam Chi Kang commune, hundreds of Cham were arrested by members of the Long Sword Group in early 1977".[1632] According to a footnote, the Chamber relied on three testimonies of two witnesses and one civil party and four interview records. These elements analysed separately and together could not support a finding beyond reasonable doubt that hundreds of Cham were arrested in Peam Chi Kang commune.[1633] The interview records cited by the Chamber are of inherently low probative value. Moreover, they are vague: it is not possible to determine whether they are direct witnesses or whether what they are saying is hearsay and, more generally, what the sources of the information reported are. Since the Chamber did not conduct any analysis, it should not have relied on them for its findings.

902. With regard to the in-court testimonies, SEN Srun testified about alleged arrests in the villages in Peam Chi Kang commune "around 1977".[1634] A member of the Long Sword Group, he mentioned the arrest of 200 to 300 Cham in the villages without explaining how he had arrived at this figure.[1635] He did not indicate how he knew these individuals were Cham. He also didn't say anything about why they were arrested.

903. Another incident was recounted by civil party HIM Man, who stated that he and his wife had managed to escape as the Long Sword Group started rounding up the Cham in Sach Sou village and taking them to the pagoda.[1636] When they were captured, they were spared by Kan who was the head of the district on the ground, amongst others, that HIM Man was not "associated with

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[1632] Reasons for Judgement, §3292.
[1633] Reasons for Judgement, §3292, fn 11162.
[1634] T., 14.09.2015, **E1/346.1**, around 10.43.55 ("Cham people were arrested in around 1977 although I'm not clear which month it was.") and T., 14.09.2015. **E1/346.1**, around 10.57.40 ("I referred to only the Cham people, who were in Peam Chi Kang cooperative and to my knowledge about what happened at Peam Chi Kang commune and I cannot refer or claim to know what happened in other communes.").
[1635] T., 14.09.2015, **E1/346.1**, between 10.55.48 and 10.57.40 ("A. As I said the figure of 200 and 300 people were for those Cham people who had been arrested at the villages and if you add the number of the Cham people who were arrested at the worksite, the figure rose to about 400 to 500. So that is the figure that I personally made and that I refer to the entire Cham people in the Peam Chi Kang commune who had been arrested at the time.")
[1636] Reasons for Judgement, §3293.

anyone" and had "not done anything".[1637] Thus, it appears from his testimony that at the district level, the grounds for arrest were related to wrongful conduct and not to fact of being Cham. In fact, HIM Man confirmed the indiscriminate nature of the arrests by stating that it was not only the Cham but also the Khmer who were taken away and killed. He thus stated:

> "They rounded up the Cham people in a certain way in order not to make mistake in rounding up the Khmer people, for that reason the Khmer people were instructed to go and work in the field and only the Cham people were instructed to remain at home. And actually later on, those people who were instructed to work outside the village were taken away and killed too." [1638]

904. Finally, witness SAY Doeun, a member of the Long Sword Group for two months in Peam Chi Kang commune, said he arrested Cham in "late 1978"[1639] in his village of Sambuor Meas Ka. According to him, this incident did not occur in early 1977. When questioned by Judge FENZ and after hesitation,[1640] he finally stated that he had arrested two people.[1641]

b. Arrests in Angkor Ban village 2

905. SENG Kuy said he saw the Cham in his village being arrested in 1977. He allegedly heard the chief of the commune security scolding Cham people, but his testimony does not shed any light on the reason for the arrests.[1642] As such, these testimonies from the only direct witnesses to the arrests in 1977 could not lead the Chamber to find that the Cham were allegedly have been arrested because they were Cham. It extrapolated and its findings on this matter must therefore be reversed.

2. Insufficient evidence concerning the presence of Cham and their execution at the pagoda

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[1637] T., 17.09.2015, **E1/349.1**, around 14.03.20 "Kan himself said that I could be spared due to the fact that I had not associated with anyone. He himself knew that I had not done anything but stayed in the pond where buffalos hung out").
[1638] T., 17.09.2015, **E1/349.1**, around 11.26.04 (emphasis added).
[1639] T., 12.01.2016, **E1/374.1**, between 15.28.28 and 15.30.16
[1640] T., 12.01.2016, **E1/374.1**, between 14.19.31 and 14.23.26 ("My question is how many people did you in your village personally arrest? How many people were arrested by you physically? A. I cannot recall that. Q. Again, I don't expect you to give me an exact number but you were only working for two months in the Long Sword militia group. You made only one arrest. Surely you would be able to give us an estimate as to how many people you arrested. A. I cannot remember it. I forget about it.").
[1641] T. 12.01.2016, **E1/374.1**, between 15.11.35 and 15.13.32 ("Q. Now, you already said you didn't know how many people who you had arrested, and I am now only talking about your group and the people you arrested. I will make a last attempt. If I give you three numbers, 10, 50 or 100 people, can you make an estimate on how many people your group arrested on that day or can you not? A. I cannot recall. It was probably two people who were arrested. Q. Your group arrested two people? A. Yes, only two people were arrested.")
[1642] Reasons for Judgement, §3296.

906. The Chamber also erred in finding that a large number of people, including a **majority** of Cham from Chang Mea district, were executed at Wat Au Trakuon in 1977 even though the evidence indicates that there were also Khmer, and that the identification of the Cham by witness MUY Vanny or SOR Chhang was not sound.[1643]

907. The assertion that "killings at Wat Au Trakuon were further corroborated by members of the security forces" is incorrect.[1644] Indeed, only civil party HIM Man stated that he had been an ear witness – from the bush where he was hiding – to the murders of Cham that he never situated at the pagoda but in his Sach Sou village,[1645] and more than two months before his meeting with Kan and the Long Sword Group.[1646] Accordingly, the testimonies of members of the pagoda security forces could not corroborate his testimony since they referred to different facts.

908. The Chamber also erred by asserting that "the majority of the persons brought to the pagoda were Cham" according to MUY Vanny's testimony, which was based solely on hearsay.[1647] In any event, many witnesses said that the arrests targeted everyone. Thus, SAMRETH Mony stated that he saw Cham and Khmer being taken to the pagoda from the Sambuor Meas cooperative, casting doubt on the specific nature of the alleged arrests and executions. Thus, he stated: "from 1977 to 1979. Actually, not only the Cham people were killed, but also the Khmer people".[1648]

909. With respect to the written records of interview "corroborat[ing]" the massacre of the Cham at the pagoda, it must be noted that, as the witnesses did not appear and there was no opportunity to question them, the probative value of these written records of interview is very low. In fact, SOR

[1643] Reasons for Judgement, §3306.
[1644] Reasons for Judgement §3297.
[1645] T., 17.09.2015, **E1/349.1**, around 11.28.27 ("I was lying in the bush and I remained there until it became dark and maybe it was around 7 o'clock at night, then the Cham people – – the started to kill the Cham people and why could I say that; because the place where I was hiding was about 100 metres away from the pit where they were killing the Cham people."); T., 17.09.2015, **E1/349.1**, around 11.24.00 ("However, we could not leave the outskirts of the village yet as I observed that there were armed people situated along the edge of the village so we hid ourselves in a small bush. Luckily, they did not see us.") HIM Man did not talk about the Long Sword militia group as he described assailants carrying firearms: T. 17.09.2015, **E1/349.1**, around 11.24.00: "They dressed in black and were carrying AK rifles although I did not know who they were".
[1646] It should be noted that HIM Man puts his meeting with Kan after "having stayed there perhaps for eight days" and "three months and 29 days" "into a pond": T. 17.09.2015, **E1/349.1**, between 13.45.09 and 13.46.23; around 13.49.06; 13.56.14.
[1647] T., 11.01.2016, **E1/373.1**, around 13.52.53 ("Q. And among these people who arrived at the pagoda, how did you learn that some of them were Cham? Earlier you saw that Cham were taken to the pagoda. So did you see that yourself or did you learn about that from other people that those people were Cham? A. I heard people say that there was a plan to round up the Cham people. I heard people spreading that word.") (emphasis added).
[1648] T., 15.09.2015, **E1/347.1**, around 16.00.22

Chheang, who was interviewed by the CIJs, did not explain how he could have known that the 20 prisoners he claims to have seen were Cham, nor how he could have determined where the 50 to 100 people taken each day to be held at the security office came from.[1649] The same is true of THONG Kim Khun's written record of interview which states that he allegedly saw 500 Cham being escorted from a ferry boat towards the pagoda.[1650]

910. Thus, the Chamber erred in fact and in law by unreasonably finding that there was "direct evidence" of "Cham people being tied up and held at the pagoda before being taken away *en masse*".[1651] This circumstantial evidence was not established and was not sufficient to establish beyond reasonable doubt that Cham were being executed. Accordingly, the *actus reus* of the crime of murder of Cham people was not established to the requisite standard with respect to the victims in Wat Au Trakuon.[1652]

II. EXTERMINATION

A. Unreasonable findings about the numeric threshold of established executions

911. Recalling its findings on the murder in relation to the executions at Trakuon pagoda and Trea village, [1653]the Chamber erred in fact by extrapolating and speculating on the number of victims.[1654] As noted above, however, it has not proved the alleged executions in these two places to the requisite standard.[1655] This imprecise finding must therefore be reversed. Therefore, the *actus reus* of the crime of extermination is not established.

B. Unreasonable findings about an intention to kill the Cham on a large scale

912. The Chamber based the requisite intent to kill the Cham on a large scale as regards executions of Cham at Wat Au Trakuon and Trea village on the existence of orders and CPK meetings aimed at identifying and arresting enemies, including the Cham.[1656] In particular, in footnotes it referred to § 3275 and 3281 to support the existence of orders to purge all Cham. However, the evidence

[1649] Reasons for Judgement, §3300.
[1650] Reasons for Judgement, §3300.
[1651] Reasons for Judgement, §3302.
[1652] Reasons for Judgement, §3306.
[1653] Reasons for Judgement, §3311.
[1654] Reasons for Judgement, §3311.
[1655] See above, §894-910.
[1656] Reasons for Judgement, §3313.

presented to support the findings in §3275 did not lead to the finding that KE Pauk would have given such an order at a meeting (1). As for § 3281, it refers to the alleged executions of Cham in Trea village as appear in the testimonies of two witnesses and a civil party, which, as noted above, were not sufficient to support the Chamber's finding.[1657] Moreover, the latter did not give reasons for this finding in the legal characterisation of the facts, nor did it provide a correct reference to support the existence of CPK orders and meetings in relation to the central zone.[1658] In any event, even its findings about the crime of murder were not reasonable given the evidence. (2)

1. Lack of evidence of an order given by KE Pauk to destroy the Cham

913. The Chamber erred in fact by considering it established that a meeting of the leaders of the East Zone took place in Kampong Thma, during which KE Pauk allegedly asked BAN Seak to destroy all Cham.[1659] There is no evidence to the requisite standard of the existence of such an order. This finding is a speculation of the Chamber based on a distortion of the testimony of VAN Mat, who referred to a meeting of officials of the East Zone chaired by KE Pauk where there was allegedly talk of "smashing" enemies and then purging the Cham which allegedly took place in Chummik village.[1660]

914. However, VAN Mat stated he had heard discussions about the policy of smashing "the ones who betray the Angkar, regardless of their ethnicity, whether Cham or Khmer".[1661] He also confirmed that there had been no mention of a plan aimed more specifically at the Cham.[1662] His testimony is corroborated by that of BAN Seak, whose exculpatory testimony could not be dismissed on the grounds that he was trying to minimise his role while VAN Mat was also trying to do the same.[1663] The Chamber therefore erred in relying on these testimonies to find that there was an order by KE Pauk against the Cham. Its finding must be reversed.

2. Lack of evidence of an order given at the zone level in the Central Zone

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[1657] See above, §894-898.
[1658] Reasons for Judgement, §3313.
[1659] Reasons for Judgement, §3275.
[1660] Reasons for Judgement, §3274.
[1661] T., 09.03.2016, **E1/398.1**, around 10.43.25 (emphasis added).
[1662] T., 09.03.2016, **E1/398.1**, around 13.41.22.
[1663] Reasons for Judgement, §3273.

915. In the context of the legal characterisation of the facts with respect to the crime of murder, the Chamber erred in fact by finding that there were orders targeting the Cham in the central zone issued from the upper echelon.[1664] However, it did not provide any valid references to support its finding.

a. Evidence relating to the Kampong Siem district

916. The Chamber relied on the testimony of PRAK Yut, head of the Kampong Siem district, who testified that the upper echelon had given orders to purge the Cham in Sector 41.[1665] However, she did not explain how that part of the statement of a cadre whom she considered willing to minimise his liability was credible.[1666] The other testimonies did not corroborate her testimony on this matter.

917. SEN Srun reported having attended a meeting at Wat Au Trakuon convened by AO An. As the Chamber was forced to acknowledge, he stated that the Cham were not mentioned at that meeting.[1667] However, this exculpatory evidence was erroneously discarded, as only the witness's suppositions that the Cham were to be regarded as enemies of POL Pot's regime were upheld by the Chamber.[1668] The same process was used for YOU Vann's alleged corroboration of the existence of an order given, who stated that she took part in preparing a list with the names of the "soldiers of SIHANOUK regimes, the ethnic Cham people and the Vietnamese people" of the Kampong Siem district.[1669] Not only was it not a list specific to the Cham, but the Chamber did not explain how it would prove the existence of a meeting during which PRAK Yut was allegedly ordered to kill the Cham.

918. Furthermore, the Chamber noted that it was not possible to establish whether the instruction given by PRAK Yut to YOU Vann to compile the lists took place before or after the meeting in Prey Totueng.[1670] As indicated by YOU Vann, AO An's instructions were limited to the fact that

[1664] Reasons for Judgement, §3307 fn 11224 referring to §3290.
[1665] Reasons for Judgement, §3290.
[1666] Reasons for Judgement, §3191.
[1667] Reasons for Judgement, §3286, fn 11136: "T., 14 September 2015 (SEN Srun), E1/346.1, pp. 97-98".
[1668] Reasons for Judgement, §3286.
[1669] Reasons for Judgement, §3287.
[1670] Reasons for Judgement, §3288, fn 11148.

"[p]eople who were part of and connected with these ethnic groups" were to undergo "purges", word to be understood in the limited sense of preparing a list.[1671]

b. Evidence relating to the district of Santuk

919. YEAN Lon, a member of the Kampong Thma commune militia in Santuk district, whose testimony was used by the Chamber, did not have access to information. His reference to an "order to arrest the Cham [issued] by the sector and the province" is hearsay and conjecture. [1672] He did not attend any meetings himself. The Chamber therefore erred in drawing findings from his testimony.

b. Evidence relating to the district of Kang Meas

920. The Chamber relied on the testimony of SAY Doeun, a member of the Long Sword Group in the Peam Chi Kang commune, who stated that the orders to arrest the Cham came from Pheap, head of the commune, who may have received an order from Kan.[1673] However, SAY Doeun himself indicated that he was not present at the meeting between Pheap and Kan, stating: "They had a meeting of their own, so I did not know about the meeting between them. ".[1674] Therefore, his statements about the origin of the order to arrest the Cham are speculation.

921. SAY Doeun was also more than confused about what he had allegedly heard. Although he claimed to have heard Pheap say "he plans that no Cham, no single Cham were to be spared", when asked about what exactly he would have said about the plan, he simply replied: "I cannot recall her words.".[1675] Therefore, the Chamber could not reasonably rely on this unsubstantiated hearsay to find on the origin of an order from a higher level.

922. Similarly, the fact that SAY Doeun saw a list of names of Cham at the commune level whom he then went to arrest with members of the Long Sword Group simply attests to the existence of a practice of drawing up lists before making arrests in Peam Chi Kang.[1676] His testimony, however,

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[1671] Reasons for Judgement, §3288.
[1672] T., 16.06.2015, **E1/317.1**, between 14.08.14 and 14.10.22: ("The commune chief went to receive those instructions, and when he returned to the commune, he implemented the instructions.").
[1673] Reasons for Judgement, §3285.
[1674] T., 12.01.2016, **E1/374.1**, around 14.33.50.
[1675] T., 12.01.2016, **E1/374.1**, between 14.07.54 and 14.09.27.
[1676] Reasons for Judgement §3289

did not provide any information about the reasons for the arrests or on the existence of an order from a level above that of the commune.

923. Lastly, the witness SAMRIT Muy testified that he attended a meeting in Damnak Svay village chaired by Kan during which speeches were made informing the population that they should respect *Angkar*.[1677] He didn't report anything about the Cham. Therefore, connecting this meeting with the arrest of Cham is speculation on his part. The Chamber erred taking such extrapolation as a basis for its finding.

924. Thus, the Chamber's finding that an order to kill a large number of Cham existed is based on weak and uncorroborated testimonies. The lack of both direct and indirect evidence prohibited it from establishing the existence of the intent necessary to characterise the CAH of extermination to the requisite standard, and thus to consider this crime established in relation to the executions at the Wat Au Trakuon and Trea village. Its finding must be reversed.[1678]

III. TORTURE

925. The Chamber erred in fact in considering that the beatings of IT Sen and the Cham men at the security centre in Trea village on the day of IT Sen's arrest in 1978 were inflicted in order to establish whether the detainees were members of the Cham group.[1679] First of all, it relied exclusively on the unsubstantiated testimony of civil party IT Sen, which could not establish the *actus reus* of torture beyond reasonable doubt.[1680] Moreover, the civil party's testimony is contradictory, since IT Sen stated that the purpose of the beatings would have been to establish whether the detainees were members of the Cham group when the perpetrators would already have known that they were. [1681] The Chamber therefore erred in fact by relying solely on his statements to find that the crime of torture had been established.[1682] This finding should be annulled.

IV. LACK OF PERSECUTION ON POLITICAL GROUNDS

A. Lack of discrimination in fact against the Cham during the MOP2

[1677] Reasons for Judgement, §3286.
[1678] Reasons for Judgement, §3313.
[1679] Reasons for Judgement, §3318.
[1680] Reasons for Judgement, §3317 fn 11238 referring to §3276.
[1681] T. 07.09.2015, **E1/342.1**, between 14.37.03 and 14.39.32: ("In fact, they knew that we were Cham.").
[1682] Reasons for Judgement, §3318-3319.

926. The Chamber erred in law and in fact in maintaining that the transfer of the Cham as part of the broad transfer of the population from the East Zone to the Central Zone could be qualified as discriminatory.[1683] It did, however, correctly note that "this dispersion was part of a broader movement of people from the East Zone to the Central (old North) Zone aimed at distributing the population throughout Cambodia".[1684] It had also correctly recalled the findings of the Supreme Court in 002/01 with respect to the alleged persecution during MOP2 of New People.[1685] On the other hand, the Chamber erred in law by not applying the test adopted by the Supreme Court that:

> "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'."[1686]

927. In application of this test, the Supreme Court had reversed the Chamber's finding by holding that "since these transfers did not affect only 'New People', it cannot be said that they were discriminatory in fact or expressions of discriminatory intent".[1687] The application of this test to the facts of the case should have led the Chamber to find that the transfer of Cham was not discriminatory since it was not limited to Cham, invalidating its finding of different treatment of Cham in the context of MOP. It therefore erred in considering the *actus reus* of persecution on political grounds against the Cham as established and its findings to that effect are to be reversed.[1688]

B. Error regarding the main aim of MOP

928. The Chamber erred in fact by characterising discriminatory intent targeting the Cham in the East Zone due to rebellions and by finding that "the purpose of the dispersal was to break up their communities", making this objective prevail over any other objective.[1689] In §3268, it found that it is established that the Cham were dispersed in the CZ "in order to ease tensions" after the rebellions of Koh Phal and Svay Khleang.[1690] In doing so, it relied exclusively on its interpretation of a single

[1683] Reasons for Judgement, §3268, 3322.
[1684] Reasons for Judgement, §3268. See also §3322.
[1685] Reasons for Judgement, §3321.
[1686] Case 002/01 Appeal Judgement, 23.11.2016, §701 (emphasis added).
[1687] Case 002/01 Appeal Judgement, 23.11.2016, §702.
[1688] Reasons for Judgement, §3268, 3322.
[1689] Reasons for Judgement, §3322, fn 3268, 3323.
[1690] Reasons for Judgement, §3262 fn 11015, and 11016 referring to §3212.

document, Telegram 15, dated 30 November 1975.[1691] However, it should have taken into account three factors that contradict this finding.

929. The Chamber initially agreed with the Defence that the transfer of 50,000 Cham was part of a project to distribute the population throughout Cambodia,[1692] but "also" considered that there had been a dispersal of Cham in order to ease tensions.[1693] It did not, however, explain what legal criterion or reasoning prompted it to give precedence to the second consideration over the indiscriminate objective of population distribution. This finding is unreasonable.

930. Secondly, the Chamber did not mention the relocation of the Cham living on the Vietnamese border that was justified by the armed hostility. This is a fundamental element from the evidence in the case file.[1694] Last but not least, it was incorrect to find that there was a will to use displacements as punishment when the evacuations had been planned prior to the Kaoh Pham and Svay Khleang revolts.[1695]

931. Thus, the Chamber erred in disregarding these three factors that would have been taken into account by any reasonable trier of fact, the proper finding being that the displacements were not specifically aimed at the Cham for the purpose of dispersing them. Therefore, the *mens rea* of the crime of persecution is not established and the Chamber's erroneous finding must be reversed.[1696]

C. Unlawful mention of out-of-context arrests in an attempt to establish the required level of severity

932. The Chamber erred in law in assessing the severity of the acts by including unsubstantiated, unreferenced and unrelated "arrests" in the allegations of persecution on political grounds with respect to MOP2 as defined by the Chamber.[1697] Therefore, displacements of the Cham population occurring in a broad context of population displacement for mainly economic and security reasons

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[1691] Telegram of DK, 30.11.1975, **E3/154**, ERN EN 0185064-0185065.
[1692] Reasons for Judgement, §3212.
[1693] Reasons for Judgement, §3212.
[1694] Telegram of DK, 30.11.1975, **E3/154**, ERN EN 0185064-0185065: "We have deported only the Cham from along the river and the border but not from Tboung Khmum district"." (emphasis added).
[1695] See CB 002/02, §1611-1613; Record of the Standing [Committee's] visit to the Northwest Zone 20-24 August 1975, **E3/216**; "Examination of control and implementation of the policy line on restoring the economy and preparations to build the country in every sector", September 1975, **E3/781**. See also Judgement 002/01, 07.08.2014, §631.
[1696] Reasons for Judgement, §3268.
[1697] Reasons for Judgement, §3325. See also §3320.

could not be given the legal characterisation of discrimination in fact constituting the *actus reus* of the CAH of persecution. The finding that the displacement of the Cham population from the East Zone to the Central Zone is a crime of persecution on political grounds must therefore be reversed.[1698]

V. ABSENCE OF PERSECUTION ON RELIGIOUS GROUNDS

933. The Chamber erred in characterising the crime of persecution on religious grounds against the Cham in the lack of evidence of discrimination in fact (A). Moreover, these restrictions were not imposed with the intention of discriminating against the Cham because of their religious and cultural practices. (B). Secondly, the breach of basic rights necessary to characterise as persecution is not met (C). Finally, the threshold of severity of the acts characterising discrimination in fact to constitute the *actus reus* of persecution is not met (D).

A. Lack of evidence of discrimination against the Cham

1. Evidence of undifferentiated treatment with regard to food supplied and restrictions on religious and cultural practices under DK

934. The Chamber erred in fact by failing to draw the consequences of undifferentiated treatment of the whole population with regard to food supplied and restrictions on religious and cultural practices under DK.[1699] Its invalid findings on the treatment of Cham at 1st January Dam could not serve as a basis for a finding to the contrary (a). There is no evidence of a "policy" of taking special measures against the Cham as a distinct ethnic and religious group (b). Restrictions on religious and cultural practices were applied to the entire population – including the Cham – and therefore were the result of equal treatment. (c).

a. Invalid findings of the Chamber regarding the treatment of Cham at 1 January Dam

935. By finding that the treatment of the Cham was discriminatory, the Chamber recalled its finding that they had been forced to eat pork, prohibited from practising their religion and speaking their mother tongue.[1700] It was considered that these findings were not supported by sufficient evidence and should therefore be reversed.[1701]

[1698] Reasons for Judgement, §3326.
[1699] Reasons for Judgement, §3328, 3329.
[1700] Reasons for Judgement, §3328, fn 11258 referring to section 11.2.22.
[1701] See above, §804-813.

b. Lack of evidence of a "policy" of taking special measures against the Cham as a distinct ethnic and religious group

936. In arguing that the treatment of the Cham was discriminatory, the Chamber found that the CPK had implemented a "policy" of taking special measures against the Cham as a distinct ethnic and religious group.[1702] Paragraph 3228, to which reference is made in the footnote, states that the CPK is said to have had a policy towards the Cham "that evolved over time":

> "[1] 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. [2] When the Cham resisted abandoning their ethnic and religious identity, "rebellions" were brutally suppressed, leaders of the rebellions were executed and Cham communities dispersed. [3] A final shift occurred between 1977 and 1978, when purges of all Cham were ordered.".[1703]

937. This factual finding is contradictory since, if one follows the Chamber's reasoning, phase 1 of assimilation would have lasted during "the early years of Democratic Kampuchea", i.e. several years from 17 April 1975.[1704] There would have then been phase 2 following the rebellions, after which the chiefs were executed and the communities dispersed. However, the rebellions mentioned during the conflicts took place respectively in September 1975 in Kho Phal and in October 1975 in Svay Kheang, i.e. in the early months of the DK regime. As the Defence noted, the repression was not due to the religion of the Cham but to the fact that there had been an attack on a local official.[1705]

938. Moreover, the Chamber has referred exclusively to the implementation of the policy[1706] to seemingly infer its existence. This is invalid circular reasoning that is not supported by any tangible evidence. And for good reason: neither written documents nor speeches from CPK have ever called for any action specific to the Cham group[1707]

c. Restrictions on religious and cultural practices of the Cham as a result of equal treatment

939. The Chamber erred in fact by finding that the restrictions imposed on the Cham constituted "discrimination in fact": "[1] prohibition on daily prayers, [2] forcing Cham to eat pork [3] wear

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[1702] Reasons for Judgement, §3328 fn 11259 referring to §3228.
[1703] Reasons for Judgement, §3228.
[1704] Reasons for Judgement, §3228 (emphasis added).
[1705] See CB 002/02, §1630-1642.
[1706] Reasons for Judgement, §3288, fn 10888 referring to §3229-3250 (corresponding to section 13.2.6 "Restrictions on Cham Religious and Cultural Practices"; fn 10889 referring to §3251-3268 (where §6260-3268 refer to Phase 2 of the displacement of the population); fn 10890 referring to section 13.2.9: Killing and Detention of the Cham.
[1707] See below, §1561-1574.

the same dress and haircuts as the Khmer people, [4] forcing them to only speak the Khmer language, [5] as well as burning Korans and [6] dismantling mosques or using them for purposes other than that of a place of worship. [7] Those Cham who resisted were arrested and/or killed".[1708] No reasonable trier of fact would have found discriminatory treatment on the basis of the evidence on the record by way of evidence of undifferentiated treatment of the Cham in the Kroch Chhmar district, in various locations in the Central Zone, and elsewhere in Cambodia throughout the DK period.

• Undifferentiated treatment of Cham in Kroch Chhmar district, various parts of the CZ and elsewhere in Cambodia throughout the DK

940. **Kroch Chhmar district**. The Chamber erroneously found that there were "specific measures" on the basis of meetings that were "open to all" where "instructions banning religion and religious practices – such as long hair and head scarves – applied to both Khmer and Cham" were formulated.[1709] To do so, it erred by not focusing on whether these measures applied indiscriminately to everyone, but only considering their impact on the Cham by claiming that they "were predominantly and particularly affected by them because they had to radically change their lifestyle and religious practices to abide by them".[1710] However, the issue of discrimination should have been considered objectively by focusing on whether or not there was a differentiated treatment between different members of the population. This was not the case for the KR regime. Similarly, with regard to the imposition of the Khmer language on the entire population, the Chamber erred in fact by finding that, despite its indiscriminate nature, it "targeted Cham culture whether or not it is interpreted as merely imposing the Khmer language for all".[1711] As such, it erred in law and in fact by finding that the restrictions on Cham religious and cultural practices in the Kroch Chhmar district listed in §3238 were specific measures when they applied to everyone.[1712] Of the acts listed by the Chamber, the only acts that could have been characterised as discriminatory were the

[1708] Reasons for Judgement, §3328.
[1709] Reasons for Judgement, §3232, fn 10899, 10901.
[1710] Reasons for Judgement, §3232.
[1711] Reasons for Judgement, §3233.
[1712] See below §954-956.

requirement to eat pork and the allegations that the Korans were burned. For these two types of acts below, the evidence does not support the findings drawn by the Chamber.[1713]

941. **At various locations in the Central Zone** Similarly, the Chamber erred in fact by characterising instructions that applied to everyone without distinction as "specific measures",[1714] It did acknowledge, however, that "the prohibition on religion applied to other religious groups including to Khmer Buddhists".[1715] It should have found that the prohibition applied to all religions without exception and therefore the treatment of the Cham was undifferentiated. No reasonable trier of fact would have found discriminatory treatment on the basis that "the Cham were specifically targeted in practice" i.e. by taking into account exclusively the impact of these measures and not the intention of those who took them.[1716] The Chamber erred in law by characterising undifferentiated treatment as discrimination when the basis of discrimination is the intention of differential treatment.[1717] Moreover, the above shows the errors committed by the Chamber in finding discriminatory treatment of the Cham on the 1 January Dam.[1718] Of the acts listed by the Chamber, the only acts that could have been characterised as discriminatory were the requirement to eat pork and the allegations that copies of the Koran were burned. For these two types of acts seen below, the evidence does not support the Chamber's findings regarding the CZ. [1719]

942. **Other locations in Cambodia throughout the DK period.** The Chamber erred in fact by finding that it was established that the restrictions imposed on the Cham "in various parts of the country" constituted specific measures establishing discrimination in fact. [1720] These specific measures consisted of restrictions on Cham religious and cultural practices "At other locations in Cambodia" in the form of a ban on daily prayers, forcing Cham to eat pork and wear the same clothes and haircuts as the Khmers, speaking Khmer, burning Korans and dismantling mosques.[1721] However, these restrictions applied to the entire population without distinction and therefore could not be characterised as discriminatory simply because they had a significant impact on the way of life of

[1713] See below §944-948
[1714] Reasons for Judgement, §3242, 3328.
[1715] Reasons for Judgement, §3242.
[1716] Reasons for Judgement, §3242.
[1717] See below §954-956.
[1718] See above, §804-813.
[1719] See below §945-949.
[1720] Reasons for Judgement, §3250, 3328, 3329.
[1721] Reasons for Judgement, §3250.

the Cham. Only the alleged obligation to eat pork and the alleged burning of copies of the Koran could constitute differential treatment.

• **Allegations of unequal treatment of the Cham not supported by the evidence**

943. A review of the evidence relied upon by the Chamber reveals that no reasonable trier of fact would have found that only these two types of measures existed.

No obligations to eat pork

944. **Kroch Chhmar district**. The Chamber erred in fact by finding that the Cham were forced to eat pork.[1722] In reality, this is not apparent from the evidence in the case file. Instead, it transpires that, in a period of food rationing, there was only one diet for everyone, as the KR did not systematically provide an alternative menu for the Cham. civil party SOS Min simply stated: "In 1975, the regime began to impose restrictions on our religious practice. We were forced to eat pork and they didn't allow us to fast".[1723] However, she did not indicate under what conditions the authorities would have forced the Cham to eat pork. We do not know whether they were given the same food as everyone else, whether they had the choice to eat or not, and whether they were punished for doing so. These different possibilities were important and should have been considered by the Chamber before making any findings, because the experiences were diverse. For example, witness VAN Mat stated: "When they had pork to eat, we tried to eat something else. We ate salt, for example, because we could not eat pork.".[1724] It appears from his testimony that the Cham could refuse to eat pork for lack of an alternative option to pork. civil party MAN Sles related a similar experience.[1725] In these circumstances, no reasonable trier of fact would have found that the Khmer Rouge forced the Cham to eat pork. It appears from the testimonies that during the common meals in the cooperatives, everyone ate the same thing without distinction, and that they were not provided with an alternative choice to pork. The nuance is important.

945. **At various locations in the CZ.** As with the Kroch Chhmar district, the evidence does not show that the Cham were forced to eat pork, but rather that there was a feeding regime for everyone without a special menu for the Cham. The Chamber's finding is based solely on the testimony of

[1722] Reasons for Judgement, §3238, fn 10925 referring to §3232-3236.
[1723] Reasons for Judgement, §3235, fn 10912.
[1724] T., 9.03.2016, **E1/398.1**, at 11.27.34.
[1725] T., 29.02.2016, **E1/393.1**, at 09.28.32.

civil party HIM Man and the minutes of the hearing of witnesses who did not go before the judges. However, according to HIM Man's statement, there was no surveillance.[1726] The minutes of the hearing listed in the footnote, the low probative value of which should also be recalled, confirm a general menu for the whole cooperative without alternative meat for the Cham.[1727] The Chamber's finding must be reversed.

946. **Other locations in Cambodia throughout the DK period.** Again, the nature of this "obligation" to eat pork needs to be clarified. Testimonies show that the Khmer Rouge provided the same food to everyone. There was simply no alternative to pork when it was served. This is not a specific measure but rather indiscriminate treatment in terms of a single meal for the entire cooperative. civil party MEU Peou testified that the Cham were forced to eat pork because they did not receive any other food.[1728] It is of note to remember that the whole country was facing food shortages. Although MEU Peou mentioned his father's death from malnutrition due to his continued refusal to eat pork[1729], he did not mention any KR sanctions following his father's refusal to eat pork. In the SWZ, civil party LEOP Neang explained that she was allegedly served pork in gruel with someone with a gun standing behind her waiting for her to finish her food.[1730] This is the only testimony that really speaks of threats on the subject. The Chamber erroneously considered that it could generally find that the Cham were forced to eat pork under threat[1731] on the basis of this testimony alone when experiences were diverse across the country. For the NEZ, HUON Choeurm testified that some Cham who refused to eat pork would have been punished, but she gave no details about the nature of the punishment, and this part of her testimony is hearsay. The rest of her direct testimony is exculpatory:

> "A. I knew about this through some of the ethnic Cham people who also worked with me in the fishing unit at the river. They told me that and I told them not to worry because at my area, they did not have

[1726] T., 17.09.2015, **E1/349.1**, around 11.07.48: ("when we actually were having meal, nobody came to inspect whether we were having pork or not.").
[1727] Written Record of Interview of Witness CHUOP Non, 17.11.2008, **E3/9349**, ERN EN 00244158-00244159:("As for their food it was the same as that of the ethnic Khmer. When there was pork in the soup if they did not eat it they had nothing to eat). Written Record of Interview of Witness YIM Kisan, 10.12.2009, **E3/5528**, ERN EN 00421619: ("They had those *Cham* eat pork just like the ethnic Khmer did.")
[1728] T., 29.02.2016, **E1/393.1**, between 09.29.51 and 09.30.53.
[1729] T., 29.02.2016, **E1/393.1**, around 09.29.51.
[1730] T., 3.04.2015, **E1/288.1**, between 15.47.18 and 15.48.39.
[1731] Reasons for Judgement, §3242 ("The Cham were closely monitored by the Khmer Rouge and if they refused to abide by the instructions restricting their religious practices, for example by refusing to eat pork, they would be considered as opposing *Angkar* and punished.");§3245 ("the CPK forcibly imposed restrictions on Cham religious and cultural practices in various locations within the Zone. These restrictions included [...] forcing Cham to start eating pork"; §3328 ("Such restrictions included [...] forcing Cham to eat pork").

to eat pork, but they had to follow orders, not oppose the orders."[1732]

947. The other two testimonies, those of HUN Chhunly and PE CHUY Chip Se, given during Case 002/01, even if they refer to the fact that the Cham were allegedly forced to eat pork, do not provide precise information on the conditions of this obligation.[1733] No information is given on the origin of the information from these two witnesses, nor is it known who would have formulated the order or how it would have been applied. In addition, the speculation by YSA Osman, whose bias has been raised,[1734] on the exculpatory evidence does not support the Chamber's finding. Even if one were to follow his assumption that "the cases where some Cham were not forced to eat it were probably due to the fact that local chiefs showed sympathy for them", [1735]this would demonstrate that the local chiefs were managing these issues autonomously and that there was therefore no directive from the CPK leadership. Thus, no reasonable trier of fact would have found it was established that the CPK had "forcibly" made the Cham eat pork throughout Cambodia under penalty of punishment.[1736]

Burning and destruction of copies of the Koran

948. **Kroch Chhmar district**. There is no credible evidence that Korans were burned in the Kroch Chhmar district. Essentially, civil party NO Sates has contradicted himself on this matter. First, she said that the Korans would have been "collected and destroyed" [1737] and then explained she did not know "where Korans were sent to and put".[1738] On the other hand, while witness VAN Mat stated that all Korans were burned and some were used as "toilet paper" in Chumnik village,[1739] he did not, however, give any source for this general information. His testimony is therefore of low probative value. Here again, the details are important because civil party SOS Min claimed that the

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[1732] T. 18.10.2016, **E1/485.1**, around 10.49.26 (emphasis added).
[1733] HUN Chhunly: T. 06.12.2012, **E1/149.1**, between 15.44.43 and 15.46.51. The witness merely states "they were also forced to eat pork" (in Battambang); PE CHUY Chip Se: T. 14.11.2012, **E1/144.1**, 09.25.28 and 09.27.46 "they were forced to eat pork as well. So, in order to survive, they had to follow the order.").
[1734] See CB 002/02, §1595-1605.
[1735] Reasons for Judgement, §3247.
[1736] Reasons for Judgement, §3245.
[1737] T., 28.09.2015 (NO Sates), **E1/350.1**, between 15.32.22 and 15.34.52 ("Before that time, before 1975, they wanted to ban religion, Korans were collected and burned, we were prohibited from praying, practicing our religion, we were no longer allowed to have Korans, and Korans were taken from every house.").
[1738] 28.09.2015 (NO Sates), **E1/350.1**, around 15.34.52 ("In 1975, when we were evacuated, Korans were also collected [...] I did not know where Korans were sent to and put.").
[1739] T., 09.03.2016, **E1/398.1**, between 09.40.05 and 09.42.12.

Korans were collected to be placed in offices or the house of the village chief.[1740] Therefore, she did not mention any destruction.[1741] Thus, on the basis of this evidence, no reasonable trier of fact would have found that the KR burned copies of the Koran in the Kroch Chhmar district. The Chamber's finding must therefore be reversed.[1742]

949. **At various locations in the CZ**. The evidence supporting the finding that copies of the Koran were destroyed is inconclusive. The witness SOS Kamri stated on the stand: "The holy book, there were no longer holy book or religious books. And stuff - I mean holy books had been destroyed, and those who had the holy books with them, they did not dare to use those holy books. And some people, Cham people, destroyed and burned down their holy books.".[1743] civil party HIM Man, for his part declared: ("In 1975, when we were evacuated, Korans were also collected [...] I did not know where Korans were sent to and put.".[1744] No reasonable trier of fact would have found on the basis of this contradictory evidence that the KR authorities had destroyed copies of the Koran in the CZ. The Chamber's finding must be reversed.

950. **Other locations in Cambodia throughout the DK period.** The Chamber erred in law and in fact by relying solely on the interviews of Nate THAYER du *Social Science Research Council* to find that "all over the country [...] copies of the Koran were seized and burned".[1745] These interviews were conducted by Nate THAYER and his working group with refugees in Thailand in the 1980s. These are interviews conducted outside the judicial framework, which were not subject to an adversarial debate and were conducted using a pre-established form in English and completed by hand. Moreover, the Chamber erred in not drawing the consequences of the fact that no witnesses had testified to that effect. No reasonable trier of fact would have made that finding on the basis of such evidence.

[1740] T., 08.09.2015 (SOS Min), **E1/343.1**, around 16.00.21 ("Korans that I found were […] at the house of the village chief.") and between 15.57.19 and 16.00.21: ("as for 19 the Korans, they were collected and placed in their office. All the Korans had been collected, even the smallest ones.").
[1741] T., 08.09.2015 (SOS Min), **E1/343.1**, between 15.57.19 and 16.00.21 ("as for 19 the Korans, they were collected and placed in their office. All the Korans had been collected, even the smallest ones.").
[1742] Reasons for Judgement, §3234, 3238.
[1743] T., 06.04.2016, **E1/415.1**, around 10.41.39.
[1744] T., 17.09.2015, **E1/349.1**, around 15.34.52. [The timestamp does not exist in the transcript].
[1745] Reasons for Judgement, §3249, 3250.

951. Thus, the Chamber erred in fact in characterising measures restricting religious practice that were applied equally to everyone as "specific measures".

2. Prohibited restrictions on freedom of religion

952. The Chamber erred in law by finding, without providing any analysis, that it "does not consider such restrictions [on religious and cultural practices of the Cham] permissible."[1746] It limited itself to a footnote reference to the section on persecution in the law applicable to § 719 to §721. One can only assume that the Chamber may have heard particular reference to the following excerpts:

> "The Chamber concurs with the NUON Chea Defence that the right to manifest one's religion may be subject to some restrictions. Such restrictions must be prescribed by law and necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others".[1747]
>
> "The Chamber will assess any restrictions on freedom of religion or the manifestation of religion on the facts of the case in view of these provisions and customary international law between 1975 and 1979 in order to determine whether they constituted permissible restrictions or breaches of the fundamental right of freedom of religion amounting to persecution on religious grounds".[1748]

953. However, it erred in law in assessing the material constitutive element of the "discrimination in fact" by including an assessment of the requirement that the act "denies or infringes upon a fundamental right laid down in international customary or treaty law" in one sentence and without legal analysis.[1749] It breached its duty to state reasons by failing to explain why these restrictions were not permitted in law. The Chamber also erred in law by confusing the question of whether there was differential treatment of the Cham with the question of whether there was a violation of a fundamental right. These two issues are distinct constitutive elements of persecution. Its "finding" is all the more incongruous in that it did not consider that these acts infringed freedom of religion.[1750] It must be declared null and void.

3. Unlawful criminalisation of alleged indirect discrimination

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[1746] Reasons for Judgement, §3328, fn 11264. T., 08.09.2015, **E1/343.1**, between 14.16.39 and 14.18.35.
[1747] Reasons for Judgement, §720 (emphasis added).
[1748] Reasons for Judgement, §721 (emphasis added).
[1749] Reasons for Judgement, §3328.
[1750] Reasons for Judgement, §3330. "[T]he Chamber finds that acts committed against this group 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".

954. The Chamber erred in law by characterising undifferentiated treatment that has a particular impact on a class of individuals as discrimination in fact.[1751] It argued that the measures were specific despite their indiscriminate nature – given they applied to the entire population in the same way – because they would have had specific effects on the Cham.

955. In reality, the Chamber has tried to characterise it as indirect discrimination, without expressly saying so. More seriously, it did not explain how discrimination in fact in the broadest sense, including indirect discrimination, was included in the CAH definition of persecution in 1975. Indirect discrimination is not a criminal law concept, but a recent human rights concept. Within the Human Rights Committee, the concept of indirect discrimination emerged in 1995.[1752] It is only since the end of the 2000s that it has been recognised in ECtHR case law in relation to discrimination. This concept was tentatively introduced by the ECtHR in the Judgement *Hugh Jordan v. United Kingdom* in 2001.[1753] It was only enshrined in 2007 in the Grand Chamber judgement in the case of *D.H. and Others v Czech Republic*, which states that "a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group [...] such a situation may amount to "indirect discrimination", which does not necessarily require a discriminatory intent".[1754]

[1751] Reasons for Judgement, §3328.

[1752] Human Rights Committee, *Simunek et consorts* c. *République tchèque*, remarks of 19 July 1995, Communication no. 516/1992, CCPR/C/54/D/516/1992, §11.7: "But an act which is not politically motivated may still contravene article 26 if its effects are discriminatory."; *Althammer et al. v. Austria*, remarks of 8 August 2003, Communication no. 998/2001, CCPR/C/78/D/998/2001, §10.2: "The Committee recalls that a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate.(7) [FN7] However, such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionally affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds. In the circumstances of the instant case, the abolition of monthly household payments combined with an increase of children's benefits is not only detrimental for retirees but also for active employees not (yet or no longer) having children in the relevant age bracket, and the authors have not shown that the impact of this measure on them was disproportionate. Even assuming, for the sake of argument, that such impact could be shown, the Committee considers that the measure, as was stressed by the Austrian courts (paragraph 2.3 above), was based on objective and reasonable grounds".

[1753] ECtHR, Case of *Hugh Jordan v. United Kingdom*, (Request no. 24746/94), 4 May 2001, §154: "*Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group*".

[1754] ECtHR, Case *D.H. et al. v. the Czech Republic,* (Request no. 57325/00), 13 November 2007, §184.

956. Fundamentally, the notion of indirect discrimination which does not require discriminatory intent is not compatible with the crime of persecution as defined at the time of the events. Thus, "discrimination in fact" as a material constitutive element of the CAH of persecution at the time of the facts did not include indirect discrimination in fact. Consequently, the Chamber could not consider that the *actus reus* of persecution was established in the present case.

B. Lack of intent to discriminate on the basis of religious/cultural practices

957. The Chamber erred in law by finding that the restrictions mentioned were imposed with the intention of discriminating against the Cham because of their religious and cultural practices.[1755] There is no evidence of discriminatory intent on religious grounds (1). The Chamber then erred in failing to explain how the Cham could be persecuted under the DK on both political and religious grounds (2).

1. Lack of evidence of discriminatory intent on religious grounds

958. The Chamber could not characterise the grounds of discrimination of the Cham as a religious group by merely stating that the alleged measures had been "deliberately perpetrated with the intent to discriminate against the Cham because of their religious and cultural practices".[1756] It did not give any legal reasons for that legal finding. It did not indicate any references in the footnotes. It would appear that the Chamber relied on its erroneous findings that there were measures affecting religious and cultural practices to find that there was discriminatory intent. However, these are two different constitutive elements, each of which requires motivation. In addition, as demonstrated above, the Chamber attempted to characterise discrimination as indirect discrimination in fact without discriminatory intent.[1757] Finally, persecution on cultural grounds does not exist in international criminal law. Thus, only persecution on religious grounds could constitute a crime within the Court's competence and it was not established beyond reasonable doubt.

2. Incompatibility of the findings on persecution on political and religious grounds

959. In the section on the legal characterisation of the acts relating to the crime of persecution on political grounds, the Chamber found that the Cham were discriminated against as a political group

[1755] Reasons for Judgement, §3329.
[1756] Reasons for Judgement, §3329 (emphasis added).
[1757] See above, §954-956.

on the grounds that they were considered to be enemies because of their rebellions in the East Zone.[1758] In the section on the legal characterisation of the acts relating to the crime of persecution on religious grounds, the Chamber found tersely that the alleged discrimination has been imposed "with the intent to discriminate against the Cham because of their religious and cultural practices".[1759] It did not explain why it had made a change to the grounds of persecution in its analysis of the charge of persecution on religious grounds. Were the Cham not targeted because of their rebellions in the East Zone, according to the same judges? Its lack of reasoning on this point invalidates its findings.

C. Breach of fundamental rights

960. The Chamber erred in law by characterising the breach of fundamental rights by means of acts unrelated to those characterising discrimination in fact. None of the listed restrictions it cites to characterise discrimination in fact breach any of the fundamental rights listed. According to the Chamber, the following "acts" are discriminatory: "[1] prohibition on daily prayers, [2] forcing Cham to eat pork [3] wear the same dress and haircuts as the Khmer people, [4] forcing them to only speak the Khmer language, [5] as well as burning Korans and [6] dismantling mosques or using them for purposes other than that of a place of worship. [7] Those Cham who resisted were arrested and/or killed".[1760]

961. The Chamber erred in law by finding these acts "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 in customary international law".[1761] In this paragraph, it should be stressed that the Chamber did not consider that these acts breached freedom of religion. Above all, it did not explain how the restrictions on the religious and cultural practices of the Cham used as a basis for discrimination in fact breached the rights and freedoms listed in §3330 of the Reasons for Judgement.

D Finally, the threshold of severity of the acts characterising discrimination in fact

962. The Chamber erred in law and in fact in conducting an assessment of the degree of severity of the "discriminatory treatment" by failing to address the facts set out in the part of its reasoning that

[1758] Reasons for Judgement, §3323.
[1759] Reasons for Judgement, §3329.
[1760] Reasons for Judgement, §3328.
[1761] Reasons for Judgement, §3330.

legally characterise the discriminatory treatment. It erred in characterising the threshold of severity of the discriminatory acts required:

> "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)".[1762]

963. First of all, not all of the acts mentioned at this stage of the reasoning were qualified as discriminatory treatment in §3328 of the Reasons for Judgement. The Chamber has never considered the CAH of murder, extermination, imprisonment, MOP, torture or genocide as a basis for the discriminatory treatment of the alleged persecution on religious grounds. They could not be introduced in this way to assess the degree of severity of the discriminatory treatment required to characterise as persecution. Then, as demonstrated above, the constitutive elements of these crimes have not been established beyond reasonable doubt[1763] and, as regards genocide, KHIEU Samphan was acquitted of this crime. In addition, the Chamber focused on specific geographically limited acts to legally characterise the persecution of the Cham throughout the country and throughout the DK period. This shortcut is problematic when it has only used factual elements in different localities to infer a general policy decided by the CPK, even though there is no document to support this finding. Thus, the Chamber's finding that "these facts", without it being possible to identify which attained the degree of severity required to characterise as persecution, by their cumulative effect, must be invalidated.[1764]

VI. BREACH OF THE PRINCIPLE OF RES JUDICATA

A. Reminder on the lack of discriminatory nature of forced transfers during the MOP2

964. The Chamber began its reasoning by recalling its finding that the CAH of persecution on political grounds was established for the forced transfers of the Cham population from the EZ to the CZ in September 1975 and October 1975.[1765] As seen above, the Chamber erred in characterising the crime of persecution on political grounds against the Cham when there is no evidence of discrimination in fact against the Cham during the MOP2 and their dispersal was not primarily

[1762] Reasons for Judgement, §3331.
[1763] See above, §894-965.
[1764] Reasons for Judgement, §3331.
[1765] Reasons for Judgement, §3336, fn 11274 referring to §2993.

aimed at breaking up their community.[1766] Since it failed to establish that the movement of the Cham in MOP2 was discriminatory, it should have found that they were included in the MOP2 already examined by the same judges in 002/01.

B. Breach of the principle of res judicata

965. The Chamber ruled in breach of the principle of res judicata.[1767] KHIEU Samphan has already been tried and convicted definitively for the CAH of OIA through forced transfers under the MOP2.[1768] In the Case 002/01 Appeal Judgement, the Supreme Court upheld the ruling that the CAH of OIA had been established in respect of the facts of the MOP2 regarding the "300,000 to 400,000 people [who] were transferred between September 1975 and early 1977 between the Zones."[1769] With regard to the alleged discriminatory nature of the population transfer, the Supreme Court held that "it cannot be said that it has been established that the transfer of people itself was carried out in a discriminatory manner or with discriminatory intent" and "the movement of the population during Population Movement Phase Two was not, as such, discriminatory or an emanation of persecutory intent."[1770] The transfers of the Cham population from the EZ towards the CZ occurred in September 1975 and in October 1975.[1771] They have therefore already been the subject of a final judgement and the Case 002/01 Appeal Judgement has res judicata concerning these acts.

Section II. VIETNAMESE

I. DEPORTATION

966. First and foremost, it should be recalled that the Chamber was improperly seised of facts constituting the crime of deportation, and thus any conviction based on those facts is prohibited.[1772] Moreover, quite apart from that error of law, the Chamber could not possibly find that the CAH of deportation had been committed "in relation to the large number of Vietnamese expelled from Prey Veng province in 1975 and 1976".[1773] Unless the Chamber was indeed justified in extrapolating

[1766] See above, §926-931.
[1767] See above, §544-546.
[1768] See above, §546 and Case 002/01 Appeal Judgement, 23.11.2016, disposition.
[1769] Case 002/01 Appeal Judgement, 23.11.2016, §658.
[1770] Case 002/01 Appeal Judgement, 23.11.2016, §705-706.
[1771] Reasons for Judgement, §3336, fn 11274 referring to §2993.
[1772] See above, §380-385.
[1773] Reasons for Judgement, §3507.

(A), it could not reach a finding based on the evidence that the deportation of Vietnamese did in fact take place (B) under coercion (C), nor even that the intent to deport them was present (D).

A. Unwarranted extrapolation by the Chamber

967. The Chamber has determined that there were specific cases of families from three Prey Veng province villages having been gathered together and evacuated by boat.[1774] The Chamber did not, however, explain why it then made the finding that, according to witnesses and Civil Parties, "a number of Vietnamese [were] gathered and evacuated [...] throughout Prey Veng province."[1775] The same holds for the Chamber's finding that a "large number" of Vietnamese were expelled from Prey Veng province.[1776]

968. As the evidence presented pertained to three villages only, the Chamber's findings were clearly the result of unreasonable extrapolation. As such, they must be discarded, all the more so as the evidence itself is insufficient to establish the specific cases of family deportations from these three villages.

B. It is impossible to establish instances wherein Vietnamese were gathered and expelled

969. As regards the facts concerning deportation in Prey Veng province, the Chamber relied on the testimony of two witnesses heard in court,[1777] two Written Records of Interview[1778] and an annex to a civil party application.[1779] However, in order to be able to factually establish instances of deportation, the Chamber did not hesitate to commit a breach of the standards governing the assessment of evidence that it itself had set out.

1. Misrepresentation of the testimony of SAO Sak

970. The Chamber erred in relying on the testimony of SAO Sak to find that Vietnamese from Anlung Trea village had been deported to Vietnam. The Chamber indeed failed to take the witness's full testimony into account, thereby causing her testimony to be misrepresented. The Chamber stated

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[1774] Reasons for Judgement, §3505.
[1775] Reasons for Judgement, §3505 (emphasis added).
[1776] Reasons for Judgement, §3507.
[1777] SAO Sak testified as a witness on 03.12.2015 and 07.12.2015. DOUNG Oeun testified as a civil party on 25.01.2016.
[1778] Written Record of Interview of Witness EM Bunnim, 04.04.2009, **E3/7760.** Written Record of Interview of Witness BUN Reun, 15.01.2009, **E3/7811**.
[1779] Annex to PEOU Hong's Civil Party Application, 14.11.2007, **E3/7165a**.

that SAO Sak saw Vietnamese people from her village being gathered together.[1780] However, elsewhere in her testimony, she explained that she did not in fact witness those events, adding that they took place out of sight and often at night.[1781] Despite such conflicting accounts, the Chamber has not explained why it preferred to retain one version rather than the other.

971. The Chamber has also stated that the witness had heard it said that the assembled Vietnamese were sent to the lower part, in other words to Vietnam.[1782] However, it has omitted the portion of SAO Sak's testimony wherein she went on to say that the Vietnamese had not actually been sent to Vietnam. She claimed that she was told that they had been sent to an unspecified location to be executed.[1783] Those vague, conflicting statements are moreover based on hearsay. The Chamber should not have relied upon them as evidence.

972. Furthermore, the Chamber has neglected to indicate the dates when those events occurred. That information is particularly pertinent because, according to its own interpretation of the scope of its referral, the Chamber is only seised of facts concerning deportation that allegedly occurred in 1975 and 1976. During her testimony, SAO Sak mentioned two incompatible temporal reference points. In the first instance she said, "That happened after the event involving SO Phim",[1784] and then she stated, "After I think about this, I think it started gradually from the time of the war with the Lon Nol regime."[1785] The first event took place in 1978 while the second began in 1970 and continued thereafter. It was therefore impossible for the Chamber to situate the events at issue as having taken place in 1975 or 1976.

973. In light of the foregoing, the Chamber could not rely on the testimony of SAO Sak as a basis for its finding that Vietnamese from Anlung Trea village had been deported to Vietnam.

2. <u>Erroneous reliance on written records of interview</u>

974. The two Written Records of Interview retained by the Chamber likewise fail to support the finding that Vietnamese from Anlung Trea village were in fact deported to Vietnam.[1786] First, the two

[1780] Reasons for Judgement, §3430.
[1781] T. 07.12.2015, **E1/363.1**, after 09.42.45.
[1782] Reasons for Judgement, §3430.
[1783] T. 07.12.2015, **E1/362.1**, after 15.20.15.
[1784] T. 07.12.2015, **E1/362.1**, at 15.21.30.
[1785] T. 07.12.2015, **E1/362.1**, at 15.22.33.
[1786] Reasons for Judgement, §3430.

individuals interviewed could not be cross-examined in court so as to clarify the information provided in their records of interview. As a result, the documents have low probative value and cannot in and of themselves serve as a basis upon which to establish a constitutive element of the crime.[1787]

975. It would appear from EM Bunnim's written statement that, as he was only a young child at the material time, he did not take part in any meetings nor did he know of any plans to expel the Vietnamese. Thus he does not explain how he might have learned that the civil authorities had called on the Vietnamese to return to Vietnam, nor under what circumstances he might have seen Vietnamese leaving by boat towards Neak Loeung.[1788] BUN Reun's statement is likewise very vague. He did not give any indication as to the fate of the Vietnamese child referred to by the Chamber nor whether the child in question had actually been summoned. The information that Vietnamese may have been sent to Vietnam is therefore based on hearsay.[1789] Given the lack of detail and reliability, as well as the low probative value of these Written Records of Interview, the Chamber should not have used them as a basis for its findings.

976. No other evidence is presented that corroborates those statements. It has in fact been shown that SAO Sak's statement concerning the fate of the Vietnamese is unreliable and it is impossible to ascertain exactly when the events took place.[1790] Moreover, the statements in question refer to separate and distinct facts. Hence, they cannot be used to corroborate each other.[1791] Accordingly, based solely on this evidence, the Chamber was neither able to establish beyond reasonable doubt that any Vietnamese were gathered in Anlung Trea village, nor that any Vietnamese did in fact cross the border into Vietnam. As the foregoing constitutive elements cannot be established, the Chamber's finding that Vietnamese from Anlung Trea village were deported to Vietnam must be discarded.[1792]

[1787] See above, §293-305.
[1788] Written Record of Interview, 04.04.2009, **E3/7760**, ERN EN 00322930-00322931.
[1789] Written Record of Interview, 15.01.2009, **E3/7811**, ERN EN 00282553-00282554.
[1790] See above, §970-973.
[1791] See above, §241-242.
[1792] Reasons for Judgement, §3436, 3505.

3. Erroneous reliance on the testimony of DOUNG Oeun

977. The Chamber erred by finding that Vietnamese from Pou Chentam village were deported to Vietnam.[1793] That finding is based solely on the testimony of civil party DOUNG Oeun.[1794] However, her testimony, according to which Vietnamese from her area such as Ta Ki, Yeay Min and their children had to return to Vietnam, is based on hearsay, as the Chamber has noted.[1795] The Chamber has also acknowledged that the circumstances surrounding their return were not clarified further. The Chamber has not explained how it arrived at its finding, based solely on limited and unsubstantiated information, that Vietnamese from POU Chentam had in fact been deported to Vietnam. In the absence of any direct and detailed evidence, the Chamber's finding must be discarded.

4. Erroneous reliance on an annex to a civil party application

978. The Chamber erred by relying on the annex to a civil party application as the basis for its finding that Vietnamese from Angkor Yuos village had been expelled. While it has deemed that evidence to be of very limited probative value, it has erred however by asserting that the evidence in question was used solely in that it "corroborates the existence of a pattern of displacements of Vietnamese in Prey Veng province in 1975", and then far exceeding that limited use in its findings.[1796] Indeed, in its legal characterisation of the facts, the Chamber held that "[s]pecific instances of families being gathered, removed and seen leaving by boats were found in [...]Angkor Yos village".[1797] The Chamber has thereby failed to abide by its own standards concerning the assessment of evidence.[1798] Its finding, based solely on the annex in question, must be dismissed.

979. Nor could the Chamber use the annex in question to "corroborate[s] the existence of a pattern of displacements of Vietnamese in Prey Veng province in 1975".[1799] First, the other evidence cited does not support such a finding. Second, and more importantly, the Chamber has once more departed from its standards of evidence by holding that separate and distinct facts can be used to

[1793] Reasons for Judgement, §3505-3507.
[1794] Reasons for Judgement, §3431.
[1795] Reasons for Judgement, §3431.
[1796] Reasons for Judgement, §3432.
[1797] Reasons for Judgement, §3505.
[1798] Reasons for Judgement, §73. See above, §314-316.
[1799] Reasons for Judgement, §3432.

corroborate each other.[1800] Indeed, facts concerning specific individuals that took place in Angkor Yuos village cannot be used to corroborate facts concerning other individuals in other villages. Lastly, the only individuals mentioned by name in the annex, the Hong family in this instance, had to come back because they were considered as Khmer.[1801] Clearly, the Chamber could not retain those facts as grounds to find that expulsion to Vietnam had occurred.

980. **Conclusion.** Taken as a whole, the evidence was insufficient to make the finding that in Anlung Trea, Pou Chentam and Angkor Yuos villages, there were specific instances of families being gathered together and evacuated by boat.[1802] Nor was there sufficient evidence to justify the finding that the families in question had actually been deported across the Vietnamese border. Without those constitutive elements of the crime, the Chamber could not find that the CAH of deportation had been established with regard to Vietnamese from Prey Veng province. KHIEU Samphan must be acquitted of this crime.[1803]

C. Error in finding that the forcible character of the expulsion was established

981. The Chamber erred by ruling that it was established that "Vietnamese leaving Prey Veng and Svay Rieng in 1975 and 1976 were forced into doing so".[1804]

982. With regard to Svay Rieng province, however, the Chamber found that it had not been able to establish beyond reasonable doubt that there had been any instances of the deportation of Vietnamese. Finding nevertheless that such instances had "very likely"[1805] occurred is a breach of the principle *in dubio pro reo* and fails to meet the standard of evidence required in criminal proceedings. Thus, it was not possible to establish that Vietnamese were forced to leave Svay Rieng province.

983. With regard to Prey Veng, the Chamber has found that the Vietnamese were forced to leave the province because of the coercive environment created by "the CPK policy publicly targeting the Vietnamese, the preparation of lists and the implementation of a matrilineal policy".[1806] However,

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[1800] See above, §241-242.
[1801] Annex to PEOU Hong's Civil Party Application, 14.11.2007, **E3/7165a**, ERN EN 00824527-00824528.
[1802] Reasons for Judgement, §3505.
[1803] Reasons for Judgement, §3502-3507 and 4306.
[1804] Reasons for Judgement, §3503.
[1805] Reasons for Judgement, §3439 and 3505.
[1806] Reasons for Judgement, §3503.

the Chamber has committed a number of errors which render it unable to determine that such a policy or matrilineal approach did in fact exist.[1807]

984. Moreover, the pieces of evidence cited are general in scope. They do not exempt the Chamber from its duty to establish that a coercive environment existed specifically in Prey Veng, the relevant province, and, above all, to establish the forcible character of expulsion there. This is an essential component of the crime of deportation.[1808] Moreover, there is no evidence that lists of Vietnamese were drawn up in Prey Veng.[1809] SAO Sak stated that such lists pertained to the Khmer people in the village and that she was not aware of lists being drawn up for the Vietnamese.[1810] In the absence of evidence relating to the forcible character of the assembling and expulsion of Vietnamese from Prey Veng province, the Chamber could not establish beyond reasonable doubt one of the elements constituting the crime of deportation. Its finding must therefore be reversed.[1811]

D. Error by failing to establish intent with regard to the deportation of the Vietnamese in Prey Veng province

985. The Chamber erred by finding that "the displacements of the Vietnamese across the Cambodian border outlined above were intentional".[1812] The Chamber has indeed based its finding on the existence of a policy to expel the ethnic Vietnamese living in Cambodia. However, the Chamber has committed a number of errors rendering it unable to determine that such a policy did in fact exist.[1813] Moreover, by relying solely on that general policy, the Chamber erred by not fulfilling its duty to establish intent with regard to the deportation of the Vietnamese in Prey Veng province.

986. It should be recalled that "[t]he *mens rea* of deportation requires the intent to forcibly displace the victim across a national border".[1814] In the present instance, the victims in question are the Vietnamese living in Prey Veng province. The Chamber, however, has only considered evidence relating specifically to the Vietnamese living in Anlung Trea, Pou Chentam and Angkor Yuos villages. Having failed to provide evidence of an intent to deport the Vietnamese living in those

[1807] See below, §1043-1048, 1555-1559.
[1808] Reasons for Judgement, §682.
[1809] Reasons for Judgement, §3420-3423.
[1810] T. 07.12.2015, **E1/363.1**, at 09.40.13.
[1811] Reasons for Judgement, §3503.
[1812] Reasons for Judgement, §3507.
[1813] See below, §1551-1552.
[1814] Reasons for Judgement, §686.

villages, the Chamber's finding must be discarded and KHIEU Samphan must be acquitted of that crime.[1815]

II. MURDER OF VIETNAMESE

A. Erroneous finding regarding the murder of four Vietnamese families in Svay Rieng

987. The Chamber has committed a factual and legal error by finding that specific instances of murder had been established in relation to the murder in 1978 of four Vietnamese families in Svay Rieng province.[1816] The sole support for that finding comes from the testimony of SIN Chhem, whose statements are based entirely on hearsay or indeed on hearsay within hearsay. When she stated that the Vietnamese families who lived nearby were taken away and had disappeared, she repeatedly stated that she did not witness those events.[1817] Thus, contrary to the Chamber's assertion, there could be no doubt as to whether SIN Chhem had or had not in fact witnessed the events at issue.[1818]

988. The individuals who reportedly told SIN Chhem that the Vietnamese had been executed had not witnessed the executions either.[1819] Moreover, the lack of precise detail in SIN Chhem's testimony makes it impossible to identify the human remains she claims to have seen.[1820] Furthermore, it appears from her Written Record of Testimony that the remains might have been those of 17 April people.[1821] Given how unclear the information is, it is possible that the remains were those of Khmer. The Chamber's finding that the remains may have been those of Vietnamese is therefore not the only reasonable finding possible. [1822] It must be declared null and void.

989. Finally, it is not clear when the events occurred. The witness contradicted herself when she explained that the arrests of the Vietnamese people had taken place in late 1977, prior to her husband's arrest. She then changed her testimony and situated the events as having happened after

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[1815] Reasons for Judgement, §3502-3507 and 4306.
[1816] Reasons for Judgement, §3455, 3490, 3491 and 3497.
[1817] T. 14.12.2015, **E1/367.1**, after 10.44.35 "That person who came to replace my husband he collected those Vietnamese families. I did not know them."; after 15.43.01 "I only heard from other people because I was busy working. I rarely stayed home."; after 15.44.04 "They said those people had been taken away the night before."; after 15.55.30 "I did not witness the arrests myself."; after 15.59.44 "I myself did not witness the event".
[1818] Reasons for Judgement, §3453, fn 11636.
[1819] T. 14.12.2015, **E1/367.1**, between 15.59.44 and 16.00.44.
[1820] T. 14.12.2015, **E1/367.1**, at 15.16.27.
[1821] Written Record of Testimony, 05.12.2008, **E3/7794**, ERN EN 00251405-00251406.
[1822] Reasons for Judgement, §64.

her husband had been arrested.[1823] According to her Written Record of Testimony, her husband's arrest occurred at the same time as Cambodians were being selected for evacuation.[1824] Although the date of that selection was not specified, the evacuation itself apparently took place in 1978 during the rice transplanting season.[1825] Such contradictions regarding the date the Vietnamese were allegedly arrested further weaken SIN Chhem's testimony.

990. In conclusion, the Chamber has based its finding solely on the testimony of SIN Chhem, who did not herself witness the arrest or execution of any Vietnamese. The individuals who purportedly gave her the information were not identified, nor did they themselves witness the execution of any Vietnamese. The human remains may equally well have been those of Khmer or Vietnamese individuals. Thus, contrary to the stated rules of evidence, the Chamber has failed to take into account that "the source of the hearsay has not been cross-examined".[1826] As the evidence in question has not been corroborated by any other reliable and credible source, the Chamber has failed to act with the proper degree of caution.[1827] No reasonable trier of fact could have found that four Vietnamese families were murdered in Svay Rieng on the basis of that evidence alone. The Chamber's finding must therefore be reversed and KHIEU Samphan must be acquitted of that crime.[1828]

991. It should be noted that when the Chamber was presented with the same type of hearsay evidence with regard to other facts, it was unable to find that Vietnamese in Prey Nob district had in fact been murdered:

> "The Chamber finds that the uncorroborated hearsay evidence, where the sources of the hearsay remain unidentified, and the fact that the date of the Civil Party's relatives' disappearance remains unclear, is not sufficient to prove beyond reasonable doubt that the alleged killings of Vietnamese occurred [...]".[1829]

992. Thus, it would have been logical for the Chamber to reach the same finding with respect to the murder of the four Vietnamese families, as it too was based on uncorroborated hearsay evidence

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[1823] T. 14.12.2015, **E1/367.1**, before 10.44.35 and after 10.44.35.
[1824] Written Record of Testimony, 05.12.2008, **E3/7794**, ERN EN 00251406-00251407.
[1825] Written Record of Testimony, 05.12.2008, **E3/7794**, ERN EN 00251405-00251406.
[1826] Reasons for Judgement, §63.
[1827] Reasons for Judgement, §63. See also *Muvunyi* Appeal Judgement (ICTR), 29.08.2008, §68-70.
[1828] Reasons for Judgement, §3455, 3490, 3491, 3497 and 4306.
[1829] Reasons for Judgement, §3462-3464.

provided by unidentified sources and on facts that could not be dated with any certainty. Such a double standard with regard to the assessment of evidence must be sanctioned.[1830]

B. Erroneous findings regarding the murder of Vietnamese at sea

993. First and foremost, it should be recalled that the Chamber was improperly seised of facts constituting the crime of murder with regard to Vietnamese captured at sea.[1831] In the alternative, the Chamber could not have found that there were specific instances of the murder of Vietnamese in DK territorial waters occurring after April or May 1977 and on 19 March 1978.[1832]

994. Before proceeding to discuss these errors more fully, it is relevant to identify the specific instances of murder which the Chamber took into account when determining its legal findings. The Chamber found that "a number of Vietnamese fishermen and refugees were intentionally killed by CPK forces as a result, specifically 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".[1833]

995. From its factual analysis, the Chamber determined that a baby was murdered in the port of Ou Chheu Teal after April or May 1977 by being thrown into the sea.[1834] With regard to 19 March 1978, the incidents relate to the murder of Vietnamese in a boat that was allegedly sunk, on the one hand, and on the other, the murder of two Vietnamese who apparently fell into the water.[1835] That analysis would appear to be borne out by the estimate of the number of deaths given by the Chamber in its legal characterisation of extermination. According to the Chamber's estimate, it is reasonable to assume that there were eight deaths in DK territorial waters.[1836] Indeed, where the evidence is not sufficiently explicit as to the actual number of deaths, the Chamber retained that on average, there were at least two deaths per family and at least five deaths per boat. Although the Chamber's approach is both risky and questionable,[1837] it does allow the Defence to follow the Chamber's reasoning. On the basis of those estimates, it is clear that the Chamber reached a finding

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[1830] See above, §234.
[1831] See above, §520-521.
[1832] Reasons for Judgement, §3490, 3493 and 3497.
[1833] Reasons for Judgement, §3493.
[1834] Reasons for Judgement, §3459 and 3461.
[1835] Reasons for Judgement, §3460 and 3461.
[1836] Reasons for Judgement, §3499, fn 11787.
[1837] See below, §1026-1027.

of murder with regard to a baby, two people who fell into the water and five people who drowned when their boat was sunk.

996. However, the Chamber could not find that the CAH of murder had been committed on 19 March 1978 with respect to the Vietnamese in question. Indeed, the Chamber has committed a number of factual and legal errors by relying solely on the copy of a document of low probative value (1), by finding that the CAH of murder was committed against non-civilians (2) and by determining that the two individuals who fell into the sea had been killed intentionally (3).

1. Erroneous reliance on a copy of a contemporaneous document of low probative value

997. The Chamber erred by finding on the sole basis of a report from Division 164 that Vietnamese were murdered on 19 March 1978. It should be recalled that this is not an original document but rather a copy obtained under unknown circumstances.[1838] Consequently, the document is of little probative value and thus the Chamber cannot reach a finding on that basis alone that Vietnamese were in fact murdered. Its finding must therefore be annulled.

998. Moreover, the events as reported in the document are unclear. Nothing is said concerning the fate of the Vietnamese present on the boat that sank. On the other hand, the report indicates that there were several Vietnamese boats present.[1839] It is thus plausible that the people on the boat that sank were in fact rescued by the other Vietnamese boats. In the absence of any further details, the Chamber's finding that the Vietnamese in question died is not the only reasonable finding possible. It must be discarded.

999. In reaching its finding that Vietnamese had been murdered, solely based on that evidence, the Chamber has applied a double standard in its assessment of evidence. Indeed, elsewhere it has held that it could not find that "100 Vietnamese people" had been murdered based on a telegram from the WZ dated 4 August 1978 because "this telegram alone is insufficient to prove to the requisite standard a distinct incident or incidents of killings beyond reasonable doubt". Indeed, "this telegram does not provide any precise information on the exact circumstances of the killings, is

[1838] See above, §320-323. See also CB 002/02, §518-519.
[1839] Rapport du KD, 20.03.1978, **E3/997**, ERN FR 00233649 [in French only]: "we fired at the Vietnamese boats" (emphasis added).

unclear as to the sources concerning the number of deaths reported and is not corroborated by other evidence". [1840]

1000. As has been noted previously, the telegram dated 20 March 1978 is also unclear as to the exact circumstances surrounding the alleged murders and, above all, as to whether the individuals actually died. No other evidence corroborates that document. As a result, the Chamber should have applied the same standard in its evaluation of the evidence and thus have set it aside. Its finding as regards the murder of Vietnamese on 19 March 1978 must be reversed.

2. Erroneous finding of the CAH of murder against a non-civilian population

1001. The events that occurred on 19 March 1978, as recounted in a telegram from the DK navy, took place in the midst of escalating armed conflict with Vietnam. According to the document, DK armed forces opened fire on a Vietnamese boat and sank it. The document does not specify whether the Vietnamese were civilians or soldiers. However, the witnesses, who had been serving in the navy at the time and who came forth to testify concerning the events, explained that DK forces would fire on Vietnamese boats only in response to attacks or if the boats entering DK territorial waters were armed.[1841] It would thus have been reasonable to find that the Vietnamese on the boat might be soldiers or perhaps armed fishermen involved in the hostilities. It is therefore clear that such an attack or response was directly related to the AC with Vietnam at the time, and was not part of a generalised, systematic attack on the civilian population.[1842] The Chamber could therefore not characterise those events as a CAH. Its finding must therefore be annulled.[1843]

3. Error regarding the murder of Vietnamese fishermen and refugees

1002. The Chamber erred by finding that two Vietnamese who fell out of a small boat had been deliberately murdered.[1844] Indeed, the limited information in the document indicates that the 76 Vietnamese who were arrested were then brought ashore. During the arrest, however, two people reportedly fell into the water when their small boat pitched.[1845] Thus, it does not appear from the

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[1840] Reasons for Judgement, §3471.
[1841] MAK Choeun: T. 13.12.2016, **E1/512.1**, at 09.19.55, 09.24.35, around 09.30.43 and around 10.46.21. MEAS Voeun: T. 02.02.2016, **E1/386.1**, p. 69, around 14.10.16.
[1842] Reasons for Judgement, §310. See also *Kunarac et al.* Appeal Judgement (ICTY), 12.06.2002, §91.
[1843] Reasons for Judgement, §3461 and 3493.
[1844] Reasons for Judgement, §3493.
[1845] Report of DK, 20.03.1978, **E3/997**, ERN FR 00623220 [in French only].

facts that these people fell into the water voluntarily. On the contrary, MEAS Muth, who wrote the report, stated further: "[W]e were not able to find them".[1846] Based on the evidence, no reasonable trier of fact could have found that there had been an intent to kill those two individuals. The Chamber's finding with respect to the murder of those two individuals must therefore be dismissed.

C. Erroneous finding of murder as regards Vietnamese in the Western Zone

1003. First and foremost, it should be recalled that the Chamber was improperly seised of facts constituting the crime of murder with regard to Vietnamese living outside Prey Veng and Svay Rieng provinces.[1847] Nonetheless, in the alternative, the Chamber erred by relying solely on the testimony of PRAK Doeun to find that his mother-in-law, his wife, his son and the members of six other families were murdered.[1848] Indeed, PRAK Doeun clearly stated that he did not witness the executions in question.[1849]

1004. Furthermore, the Chamber failed to note that Hoem, the person who allegedly came to tell him that his family had been executed, had not witnessed the executions either.[1850] Thus, the Chamber has failed to take into account that Hoem, the source of the hearsay evidence, could not be tested in court.[1851] No other reliable, credible evidence corroborates PRAK Doeun's testimony. Thus, the Chamber did not act with proper caution.[1852] No reasonable trier of fact could have found that Vietnamese were murdered in the WZ on the basis of that evidence alone. The Chamber's finding must be reversed.

1005. It has also committed an error by finding that "PRAK Doeun's [...] children [...] were deliberately executed on Ta Mov island [...] in late 1977".[1853] The Chamber has stated only that PRAK Doeun's youngest son was allegedly taken to Ta Mov island.[1854] Three of his daughters allegedly died "in the co-operative and mobile units",[1855] but this information is hearsay from an unidentified

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[1846] Report of DK, 20.03.1978, **E3/997**, ERN FR 00623220 [in French only].
[1847] See above, §435-438.
[1848] Reasons for Judgement, §3471, 3490, 3494 and 3497.
[1849] T. 03.12.2015, **E1/362.1**, before 11.29.44, at 13.38.11, before 13.40.58.
[1850] T. 20.06.2017, **E1/362.1**, between 13.42.56 and 13.49.44.
[1851] Reasons for Judgement, §63.
[1852] Reasons for Judgement, §63. See also *Muvunyi* Appeal Judgement (ICTR), 29.08.2008, §68-70.
[1853] Reasons for Judgement, §3494 (emphasis added).
[1854] Reasons for Judgement, §3467.
[1855] Reasons for Judgement, §3467.

source.[1856] Moreover, the Chamber has not determined the circumstances surrounding the deaths of the three daughters.[1857] In light of the foregoing, no reasonable trier of fact would have found that they had been killed, much less on Ta Mov Island. The Chamber's finding must therefore be reversed.

C. Erroneous finding of murder as regards Vietnamese at Wat Khsach

1006. First and foremost, it should be recalled that the Chamber was improperly seised of facts constituting the crime of murder with regard to Vietnamese living outside Prey Veng and Svay Rieng provinces.[1858] In the alternative, the Chamber erred by finding that Yeay Hay and Ta Khut were murdered (1) and that members of Chum's family were murdered (2). The Chamber has also wrongly found that all the Vietnamese in and around Yeang village were killed at Wat Khsach (3) and that the executions were carried out on orders from the upper echelon (4).

1. Erroneous findings as regards the murder of Yeay Hay and Ta Khut

1007. The Chamber should not have found that Yeay Hay and Ta Khut were executed. SEAN Song in fact stated that he did not know what happened to them. He heard it said that they were executed one day before 7 January 1979.[1859] This information is based on hearsay from an unidentified source. From the many contradictions in UM Suonn's testimony, it appears that he did not in fact actually witness the execution of Chantha and her grandparents.[1860] The witness confirmed that he could not identify the people killed at Wat Khsach and that he knew nothing about the possibly later execution of Chantha's grandparents.[1861] Y Vun explained that he learned from people living in Chak village that Yeay Hay and Ta Khut had been executed at Andong Nourn just as the Vietnamese trucks were arriving in 1979.[1862] The witness further stated that Ta Khut was apparently executed after the arrival of the Vietnamese troops.[1863]

[1856] T. 02.12.2015, **E1/361.1**, at 15.30.49.
[1857] Reasons for Judgement, §3467.
[1858] See above, §435-438.
[1859] T. 28.10.2015, **E1/358.1**, at 13.37.07.
[1860] T. 11.12.2015, **E1/366.1**, between 09.27.00 and 09.37.15.
[1861] T. 11.12.2015, **E1/366.1**, between 10.40.51 and 10.51.03. It should be noted that here once again the Chamber has shown bias by completely ignoring the Defence's cross-examination.
[1862] T. 15.12.2015, **E1/368.1**, before 11.07.51.
[1863] T. 15.12.2015, **E1/368.1**, before 10.02.35.

1008. Based on the foregoing evidence, no one in fact witnessed what happened to Chantha's grandparents. It is also possible that the events occurred after the arrival of the Vietnamese and are thus beyond the temporal scope of the present proceedings. Therefore, the Chamber should not have found that these two individuals were murdered. Its finding must be reversed.

2. Erroneous finding of murder as regards members of Chum's family

1009. The Chamber erred by finding that the Vietnamese members of Chum's family were killed.[1864] Its finding is based on the testimonies of Y Vun and UM Suonn, and on the Written Record of Interview of LAUNH Khun. UM Suonn stated that they were allegedly killed during "the first process" without explaining to what that phase referred. In any case, he further stated that he had not had any knowledge of "that incident".[1865] Y Vun explained that he did not see Chum's family being assembled at the pagoda. He did not explain how he knew that the family had been executed at the pagoda, as he did not witness any executions.[1866] Finally, the Written Record of Interview of LAUNH Khun is of lesser probative value as it is a written statement. Moreover, in the Written Record, it is stated that she did not witness any executions either. Her conclusion that Chum and her family were executed at Khsach are in fact only suppositions.[1867] The Chamber has not acted with proper caution in the absence of any direct evidence of those executions. The Chamber should not have found that those individuals were executed.

1010. Lastly, Y Vun also stated that Chum's mother was Vietnamese and her father was Chinese.[1868] He further stated that Chum, who was of Chinese descent, spoke "only Chinese".[1869] It is thus possible that the family was targeted for reasons other than their Vietnamese ethnicity. Whatever the case may be, the findings regarding those murders must be reversed.

3. Erroneous findings regarding the executions of Vietnamese at Wat Khsach

1011. The Chamber erred by finding that "all Vietnamese living in and around Yeang village, Chi Kraeng district (Sector 106), Siem Reap province were brought to and killed *en masse* at Wat Khsach".[1870]

[1864] Reasons for Judgement, §3479.
[1865] T. 12.12.2015, **E1/365.1**, after 13.56.25.
[1866] T. 02.12.2015, **E1/836.1**, before 10.12.26 between 10.47.22 and 10.52.55.
[1867] Written Record of Testimony, 26.08.2008, **E3/7686**, ERN EN 00275406-00275407.
[1868] T. 15.15.2015, **E1/368.1**, before 09.41.15.
[1869] T. 15.15.2015, **E1/368.1**, before 09.43.25.
[1870] Reasons for Judgement, §3482.

The Chamber's findings are based on the testimonies of SEAN Song and Y Vun. The information provided by SEAN Song, however, according to which the people gathered together came from a number of villages in Chi Kraeng district is in fact hearsay.[1871] With regard to Y Vun's testimony, he was not asked how he knew that some of the people came from Ou Krom.[1872] He further stated that he did not see those individuals being taken to the pagoda.[1873] Moreover, whilst the Chamber's finding with respect to the execution of Yeay Hay and Ta Khut is incorrect, it determined that the two men were killed "later" and not at Wat Khsach.[1874] The Chamber was therefore unable to reconcile the two accounts.

1012. The Chamber could not reach the finding that all the Vietnamese living in or around Yeang village were killed at Wat Khsach on the basis of such evidence. The Chamber's unreasonable extrapolation must therefore be discarded.

4. <u>Erroneous finding that the murders at Wat Khsach were carried out on orders from the upper echelon</u>

1013. The Chamber erred by finding that the killings at Wat Khsach were carried out on "orders from the upper echelon".[1875] To reach its finding, the Chamber has once more relied on the testimony of SEAN Song and Y Vun. Whilst it has acknowledged that the information in question is hearsay, it has nonetheless deemed that SEAN Song's testimony is reliable and credible, and thus could support the Chamber's finding.[1876] Yet, the Chamber had explained quite clearly that the issue with hearsay evidence lies in the fact that the person at the source of the hearsay cannot be cross-examined. For that reason, this type of information must be approached with the utmost caution.[1877] Thus, the village headman who was the source of the hearsay in this instance could not be examined. Accordingly, no reasonable trier of fact would have found on such a basis that the executions at Wat Khsach were in fact carried out on orders from the upper echelon. The Chamber's finding must therefore be reversed.[1878]

[1871] T. 28.10.2015, **E1/358.1**, before 09.23.59 and 09.27.21 and before 14.38.17.
[1872] T. 15.12.2015, **E1/368.1**, at 10.12.26.
[1873] T. 15.12.2015, **E1/368.1**, before 10.12.2026.
[1874] Reasons for Judgement, §3479.
[1875] Reasons for Judgement, §3480, 3482 and 3495.
[1876] Reasons for Judgement, §3480.
[1877] Reasons for Judgement, §63.
[1878] Reasons for Judgement, §3480, 3482 and 3495.

E. Erroneous finding of murder as regards Vietnamese in Sector 505 (Kratie)

1014. First and foremost, it should be recalled that the Chamber was improperly seised of facts constituting the crime of murder with regard to Vietnamese living outside Prey Veng and Svay Rieng provinces.[1879] In the alternative, the Chamber erred by basing its finding that murders took place in Sector 505 on the account given by a civil party who came forward to testify about the suffering he had endured.[1880] That account is of little inherent value in itself given that it was provided by a party to the proceedings who came to testify about his own suffering. Thus, he is biased by definition, and without further objective evidence, the Chamber could not rely exclusively on his testimony to find that murders were committed. The probative value of his account is further diminished by the fact that the civil party himself was not an eyewitness to the executions.[1881] His account of events is therefore the result of information obtained through hearsay. In light of the scant probative value of this sole piece of evidence, the Chamber's finding with regard to the murder of Vietnamese in Sector 505 must be reversed.[1882]

1015. Furthermore, the Chamber erred in its assessment of the number of murders reported by the Civil Party. It accepted that 13 members of the Civil Party's family were murdered, as well as the spouses and children of three or four other Khmer living in Kratie.[1883] However, the Chamber has not said who the 13 members of UCH Sunlay's family supposedly were, apart from his wife, his three children and his wife's parents and sister.[1884] The identity of the six other family members is not specified, and no indication is given of the circumstances and reasons for their deaths. In the absence of any further explanation, and therefore in the absence of motive, the Chamber has erred by reaching a finding of murder.

1016. The error in the Chamber's finding is compounded by its failure to establish the circumstances surrounding the deaths of the Civil Party's parents-in-law and sister-in-law. Indeed, whilst he recounted the alleged circumstances concerning the execution of his wife and three children, he did not do so with respect to his parents-in-law and sister-in-law's deaths, which the Chamber

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[1879] See above, §435-438.
[1880] Reasons for Judgement, §3483-3485, 3488 and 3496.
[1881] Reasons for Judgement, §3483.
[1882] Reasons for Judgement, §3483-3485, 3488 and 3496.
[1883] Reasons for Judgement, §3488.
[1884] Reasons for Judgement, §3483 and 3484.

stated occurred in "separate" incidents.[1885] In the absence of an explanation as to the circumstances of the death of those individuals, the Chamber's finding must be reversed. The Chamber's error is further aggravated by a contradiction in its findings. Indeed, a few paragraphs later, the Chamber found that the evidence did not enable it to establish the murder of the Civil Party's mother-in-law.[1886]

1017. In light of the many errors committed, the Chamber's finding with regard to the murder of Vietnamese in Sector 505 must be reversed.[1887]

III. EXTERMINATION OF VIETNAMESE

1018. First and foremost, it should be recalled that the Chamber was improperly seised of facts constituting the crime of extermination with regard to Vietnamese living outside Prey Veng and Svay Rieng provinces.[1888] In the alternative, under no circumstances could the Chamber could reach a finding of the CAH of extermination in relation to the murder of Vietnamese in Svay Rieng, Kampong Chhnang, Wat Khsach, Kratie and in DK territorial waters.[1889] Indeed, it has committed multiple errors in order to establish those murders of Vietnamese.[1890]

A. Incorrect overall finding with respect to events that are separate and distinct

1019. First, the Chamber erred by finding that a very large number of Vietnamese were murdered in Svay Rieng, Kampong Chhnang, Wat Khsach, Kratie and in DK territorial waters.[1891] Indeed, the Chamber has estimated that the specific instances of murder established in five different zones total approximately 60 deaths.

1020. Although there is no minimum number of deaths required in order to characterise killings as extermination, the deaths of a large number of people and the culpable intent to commit murder on a massive scale must nonetheless be proven in order to establish the crime of extermination.[1892]

[1885] Reasons for Judgement, §3483 "In September 1978, 13 of his relatives including his three children, his half-Vietnamese wife, and her parents and sister were killed in separate incidents".
[1886] Reasons for Judgement, §3486.
[1887] Reasons for Judgement, §3488, 3496 and 3497. In fn 11787, the Chamber estimated the number of deaths in Kratie province to be 19.
[1888] See above, §435-438.
[1889] Reasons for Judgement, §3501.
[1890] See above, §987-1017.
[1891] Reasons for Judgement, §3499 and 3500.
[1892] Reasons for Judgement, §655.

The isolated instances of murder that may have been established do not meet the requisite standard of breadth of scale.

1021. The Chamber has committed factual and legal errors by establishing some 60 deaths, reaching that finding by taking a number of unrelated events together as a whole, and yet still failing to meet the requisite standard of breadth of scale. The events in question, when examined separately, did not in fact establish the deaths of more than 19 individuals.[1893]

1022. To justify its grouping of separate events, the Chamber determined that the executions in Svay Rieng, Kampong Chhnang, Wat Khsach, Kratie and in DK territorial waters "were all part of the same murder operation". To justify its grouping of separate events, the Chamber determined that the executions in Svay Rieng, Kampong Chhnang, Wat Khsach, Kratie and in DK territorial waters "were all part of the same murder operation".[1894] The Chamber found, *inter alia*, that "the general evidence" established that the CPK indeed targeted the Vietnamese and called for their deaths. In its view, the Vietnamese were targeted as members of a collective group rather than as individuals.[1895] That statement is incorrect, as will be shown below,[1896] and is too general in character to prove that the specific instances of the murder of Vietnamese outlined did in fact take place during "the same murder operation".

1023. To support its finding, the Chamber compared events to one another, seeking similarities.[1897] However, the events in question took place in different places, on different dates, under different circumstances and over an extended period of time. They in fact occurred in five different zones of the country on dates which, although they are often somewhat vague, are all different. Hence, with regard to the killings carried out in DK territorial waters, the Chamber has placed the events in April or May 1977 and in March 1978.[1898] The events in Kampong Chhnang were placed in late 1977,[1899] those in Svay Rieng at some point in 1978,[1900] those in Kratie in September 1978[1901] and

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[1893] Reasons for Judgement, fn 17789 where the Chamber estimates that 19 people were executed in Kratie.
[1894] Reasons for Judgement, §3500.
[1895] Reasons for Judgement, §3500.
[1896] Contrary to the Chamber's claims, the evidence, including CPK official documents and speeches, never targeted Vietnamese civilians as such. See below, §1480-1488, 1551-1560.
[1897] Reasons for Judgement, §3500.
[1898] Reasons for Judgement, §3493.
[1899] Reasons for Judgement, §3466.
[1900] Reasons for Judgement, §3490.
[1901] Reasons for Judgement, §3496.

those at Wat Khsach sometime in late 1978.[1902] Thus, the dates span a period of more than a year and a half.

1024. Not only are the dates spread out over an extended period of time, but the Chamber has failed to explain how events that took place in the navy in April or May 1977 could be attributed to "the same [...] operation" as the killings at Wat Khsach in the new NZ in late 1978. Nor has it given any justification for its contention that killings that occurred in unknown circumstances in Kampong Chhnang in late 1977 were part of "the same [...] operation" as killings in Kratie in September 1978.

1025. As the Chamber itself recalled, to establish the CAH of extermination, "[i]t is not sufficient to collectively consider distinct events committed in different locations, in different circumstances, by different perpetrators, and over an extended period of time".[1903] Yet that is exactly the error that the Chamber has committed. That procedure must be sanctioned, and the Chamber's finding must be reversed.

B. Extrapolation as regards the number of victims

1026. Lastly, the Chamber erred by estimating that approximately 60 Vietnamese were murdered.[1904] To calculate that number, the Chamber considered it reasonable to estimate the average number of deaths as two per family and five per boat. However, there is no evidence or other objective basis for such a discretionary estimate. The Chamber in fact decided to adopt that estimate even though it itself notes that "the evidence was not specific".[1905]

1027. The Chamber erred by carrying out random estimates that fail to compensate for the lack of evidence and demographic data pertaining to the actual number of Vietnamese who were living in Cambodia at the material time. Accordingly, the Chamber's estimate that a total of approximately 60 Vietnamese were killed is groundless and must be discarded.

IV. PERSECUTION ON RACIAL GROUNDS

[1902] Reasons for Judgement, §3495.
[1903] Reasons for Judgement, §656.
[1904] Reasons for Judgement, §3499, fn 11787.
[1905] Reasons for Judgement, §3499, fn 11787.

1028. The Chamber erred by finding that "that the crime against humanity of persecution on racial grounds is established in relation to Vietnamese in Prey Veng and Svay Rieng".[1906] Indeed, it is as a result of factual and legal errors that the Chamber was able to find that the Vietnamese as it defined them were sufficiently discernible as a racial group (A), that they were persecuted through acts of deportation, arrest and murder (B) and that these acts constituted discrimination in fact (C). Lastly, the Chamber erred by finding that the Vietnamese were deliberately targeted in Prey Veng and Svay Rieng provinces (D).

A. Error as regards the Vietnamese as a sufficiently discernible racial group

1029. The Chamber erred by finding that the group of "Vietnamese living in Cambodia" was sufficiently discernible as a racial group.[1907] To support its finding, the Chamber refers to its discussion of CIA, KGB and *Yuon* agents.[1908] Those groups, however, do not correspond to the Vietnamese living in Cambodia at the time. Moreover, the Chamber has not clearly defined exactly which people the CPK were calling agents of the *Yuon*. According to the Chamber's own findings, almost anyone suspected of treason could in fact be described as being an agent of the *Yuon*. In that way, the Chamber was able to explain that CHAN Chakrei had been accused of being an agent of the *Yuon*,[1909] which amounts to saying that Cambodians too were part of the group in question.

1030. Moreover, the Chamber has found that the "one against 30" policy outlined in a speech by POL Pot targeted Vietnamese armed forces as well as civilians. In so finding, it has clearly misrepresented that speech.[1910] As will be seen below,[1911] the Chamber has shown its bias by failing to take into account the detailed, corroborating statements made by former military personnel who explained that the speech was intended to encourage the outnumbered DK forces. In any event, the Chamber had no grounds to find that the speech in question targeted the Vietnamese living in Prey Veng and Svay Rieng.

1031. The Chamber's error may be explained by the fact that throughout the Reasons for Judgement it has systematically confused the agents of the *Yuon*, the Vietnamese troops, Vietnamese civilians in Vietnam and Vietnamese civilians in Cambodia. By encompassing all of the above people under

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[1906] Reasons for Judgement, §3513.
[1907] Reasons for Judgement, §3511.
[1908] Reasons for Judgement, §3411, fn 11815.
[1909] Reasons for Judgement, §3851.
[1910] See below, §1551-1560.
[1911] See below, §1551-1560.

the general term ''Vietnamese'', the Chamber has failed to determine whether it was the Vietnamese in Cambodia who were being specifically targeted in the speeches or other CPK documents.

1032. The Chamber's failure to provide a clear and precise definition of the collective group of Vietnamese, which could, depending on the section of the Reasons for Judgement, encompass a number of different groups of individuals including Cambodians, effectively prevents the Chamber from finding that the group was sufficiently discernible so as to satisfy the legal definition required to characterise the crime of persecution.[1912]

B. Erroneous finding that the Vietnamese were persecuted through deportation, arrests and killings

1033. In its Reasons for Judgement, the Chamber states that Vietnamese in Prey Veng and Svay Rieng were persecuted through acts of deportation from Prey Veng to Vietnam in 1975 and 1976, through arrests in both provinces between 1977 and 1979 and through the killings of Vietnamese civilians in Svay Rieng in 1978.[1913] However, as discussed above, the Chamber erred by finding that the crime of deportation was established in Prey Veng province. The evidence accepted by the Chamber was insufficient to establish beyond reasonable doubt that acts of deportation of Vietnamese had occurred.[1914] The same holds true for the Chamber's finding as regards the killings established in Svay Rieng in 1978.[1915]

1034. As regards the arrests of Vietnamese between 1977 and 1979, the Chamber refers to § 3451 of the Reasons for Judgement.[1916] That paragraph concerns the Chamber's finding with regard to its factual analysis of the events in Prey Veng province. The Chamber found, however, that there was uncertainty surrounding the dates of the events described by LACH Kry, THANG Pal and DOUNG Oeurn in their accounts.[1917] It was therefore unable to establish whether the arrests and disappearances of those individuals in fact took place starting in April 1977. In light of that uncertainty, the Chamber should not have retained those events as being acts of persecution occurring between 1977 and 1979.

[1912] Reasons for Judgement, §714.
[1913] Reasons for Judgement, §3512.
[1914] See above, §966-986.
[1915] See above, §987-992.
[1916] Reasons for Judgement, §3510, fn 11813.
[1917] Reasons for Judgement, §3450 and 3451.

1035. As regards the arrests of families of Vietnamese in Svay Rieng which the Chamber has also found to be acts of persecution, there is no reference in its Reasons that would enable the identification of the specific arrests that are characterised as persecution. Based on its factual analysis, the Chamber found that SIENG Chanthy's father committed suicide and that the four Vietnamese families were murdered, a finding that is contested elsewhere in the present submission.[1918] It has not found that there were in fact other arrests.

1036. The the acts of deportation in Prey Veng, the murders in Svay Rieng and the arrests in both provinces have thus not been established beyond reasonable doubt. The Chamber has committed factual and legal errors by finding that the Vietnamese in Prey Veng and Svay Rieng were victims of persecution by reason of those acts. The Chamber's finding should be dismissed.

C. Erroneous finding that the acts in question were discriminatory in fact

1037. The Chamber erred by finding that the acts perpetrated against the Vietnamese were discriminatory in fact.[1919] It is not because the acts targeted Vietnamese that this is discriminatory in fact, it must also be established that they were targeted on the basis of their race. Proving that they belonged to a collective group, which incidentally has not been done, is not sufficient to find that the acts committed against them were discriminatory in fact. The Chamber has failed to explain why and in what way those individuals were allegedly targeted. It has, however, found that there were numerous grounds for arrest during the DK era. Some of the witnesses indeed explained that some members of their families, although of Vietnamese extraction, may have been targeted for other reasons as a result of their past activities.

1038. DOUNG Oeurn, for example, testified that her husband was a former Vietnamese soldier who had engaged in trading and possibly smuggling activities that led him to travel to Vietnam.[1920] Given

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[1918] See above, §987-992.

[1919] Reasons for Judgement, §3511.

[1920] T. 25.01.2016, **E1/381.1**, between 13.36.18 and around 13.42.40 "Q. So he was in fact a Vietnamese soldier; correct? A. Yes, that is correct." and around 13.45.15. DC-Cam interview, 23.02.2000, **E3/7562**, EN 01170682-01170686 (She further explained that he didn't have a real profession. He simply sold opium. It was all clandestine, otherwise it would have meant imprisonment.) See also: LACH Kry: DC-Cam Interview, 10.03.2000, **E3/7559**, EN 00890521-00890524, ERN EN 00890525-00890527 (Chuy came to Cambodia in 1970 after LON Nol's coup d'état. He used to go back and forth between Vietnam and Cambodia on business. His standard of living at the time was pretty good). DC-Cam Interview of NEOU Sam, 10.03.2000, **D230/1.1.49b**, ERN EN 00822156-00822157 (Chuy was a soldier before he came to live in the village in 1971, and after that he sold all kinds of goods). There is no E3 document number, but the document itself was brought before the court during Civil Party LACH Kry's testimony: T. 21.01.2016, **E1/380.1**, pp. 71-77, between 14.43.12 and around 14.58.32.

the conflict with Vietnam that was going on at the time, her husband may have been arrested as a result of those activities. Similarly, SIENG Chanthy related that her brothers had been members of the former regime.[1921]

1039. In view of the foregoing, the Chamber erred by failing to explain in what way the Vietnamese were allegedly persecuted on the basis of their race. The Chamber's finding should be dismissed.

D. Erroneous finding that the Vietnamese were intentionally targeted at Prey Veng and Svay Rieng

1. Error as regards the identification of Vietnamese through the creation of lists

1040. The Chamber erred by deeming it established that "from April 1975, the Vietnamese were identified by the CPK through the creation of lists".[1922] The Chamber refers to its assessment of the evidence relating to the existence of a policy concerning the Vietnamese, in particular with regard to their identification.[1923] The Chamber's overall finding that the Vietnamese were identified by means of the creation of lists is, however, erroneous.[1924] In any event, it does not apply to Prey Veng and Svay Rieng provinces.

1041. There is no evidence specifically referring to those two localities in relation to the issue at hand. The sole evidence cited that pertains to Prey Veng and Svay Rieng provinces is the testimony of SIENG Chanty and SAO Sak.[1925] However, there is nothing in their testimony to support the finding that lists of Vietnamese were drawn up. SAO Sak further stated: "When they did the statistics, they did about the ethnic Khmer, I did not know about the ethnic Vietnamese".[1926] The Chamber has therefore used that testimony to claim incorrectly that the upper echelons knew which families were of Vietnamese descent.

1042. In the absence of relevant evidence, the fact that lists were created elsewhere in the country does not justify the Chamber's finding that such was also the case in Prey Veng and Svay Rieng. None

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[1921] T. 29.02.2016, **E1/393.1**, p. 91, after 15.38.32: "we met my two brothers were also evacuated from Phnom Penh. They were soldier and policeman."; T. 01.03.2016, **E1/394.1**, pp. 8-9, between 09.20.28 and 09.22.14: "Another elder brother of mine, Chanthan, was a policeman. He was also a second lieutenant in the Lon Nol regime.", p. 21 after 09.50.08: "At that time, they collected biography, and we told Khmer Rouge that they had been in the police and army.".
[1922] Reasons for Judgement, §3510, and 3513.
[1923] Reasons for Judgement, §3510, fn 11811 referring to §3423.
[1924] See below, §1551-1560.
[1925] Reasons for Judgement, §3420, fn 11531.
[1926] T. 07.12.2015, **E1/363.1**, 09.40.10.

of the testimony presented in court with regard to those two provinces made any reference to the creation of lists of Vietnamese. The Chamber has therefore incorrectly drawn on evidence from outside the provinces of Prey Veng and Svay Rieng to find that the Vietnamese in those localities were intentionally targeted because of their race.

2. Erroneous finding regarding matrilineal ethnicity

1043. The Chamber erred by deeming it established that "mixed families were targeted on the basis of matrilineal ethnicity".[1927] As will be discussed below, that finding is erroneous. The evidence retained by the Chamber is based solely in fact on personal conclusions reached by some of the individuals who came to testify. Above all, none of the witnesses or Civil Parties cited testified that their information had come from the upper echelon.

1044. DOUNG Oeun explained that she did not know where the information came from.[1928] SIN Chhem's testimony is based on hearsay.[1929] UCH Sunlay is not from either Prey Veng or Svay Rieng provinces. Moreover, his testimony does not provide support for matrilineal ethnicity as he only talked about the case of children whose mothers were Vietnamese and not about those whose fathers were Vietnamese. The source of the rumour that one must "dig up the roots" could not be ascertained.[1930] LACH Kry explained: "I learned about this through my own observation. However, it was not mentioned by any cadre. It was widely known to villagers, including me."[1931] PRAK Doeun is not from either Prey Veng or Svay Rieng provinces and his statements are the result of his own personal observations.[1932] BOU Van's DC-Cam statement, quite apart from being of little probative value,[1933] does not support matrilineal ethnicity.[1934]

[1927] Reasons for Judgement, §3510, and 3513.
[1928] T. 25.01.2016, **E1/381.1** before 14.14.56 "I have said what I knew about it. I knew that the children – all the children were taken away, and I did not know anything else. And I also cannot recall anything else.
[1929] T. 14.12.2015, **E1/367.1**, around 10.49.38. She is recalling comments made by a man who used to work with her husband.
[1930] T. 02.03.2016, **E1/395.1**, after 09.16.28
[1931] T. 20.01.2016, **E1/379.1**, around 14.31.00.
[1932] T. 02.12.2015, **E1/361.1**, around 14.41.33.
[1933] See above, §306-311.
[1934] DC-Cam Interview of BOU Van, 29.08.2005, **E3/7498**, ERN EN 00884966 (BOU Van explains that the children of two other Vietnamese women were also taken away. He does not however mention the case of children whose fathers were Vietnamese and who were spared.

1045. The Chamber also relies on the DC-Cam Interview of CHAN Kea.[1935] The interviewee's written statement, however, contradicts the Chamber's finding as regards matrilineal ethnicity. CHAN Kea in fact explained that in a mixed family where the father was Vietnamese and the mother Khmer, the children were taken away together with the Vietnamese father.[1936] Similarly, the Chamber has misrepresented HENG Lai Heang's testimony by holding that her statements indeed support the claim that there was a policy regarding matrilineal ethnicity.[1937] The Chamber knowingly cut off part of the Civil Party's answer, in which she stated that in the case of a Vietnamese mother and a Khmer father, some of the children were able to survive. The civil party also stated that "some other people who were half-blood survived".[1938]

1046. The Chamber erred by treating the Defence's submissions of instances that run counter to the principle of matrilineal ethnicity as being simply isolated occurrences.[1939] On the contrary, as has just been shown, the evidence in support of matrilineal ethnicity is sparse and based solely on the personal conclusions of some individuals. There are in fact instances cited that contradict the theory retained by the Chamber, and which when added to those that the Defence has brought forward, show that it is no longer a matter of a few isolated occurrences.[1940]

1047. Lastly and above all, it should be noted that there are no official CPK documents or speeches that refer to the existence of such a theory. In fact, the Chamber has mentioned only one document, which refers to the surveillance of certain mixed families.[1941] The document, however, does not mention whether any action was taken against those families. In any event, it does not support the theory of matrilineal ethnicity as retained by the Chamber.

1048. It is clear, therefore, that the Chamber did not have sufficient evidence to find matrilineal ethnicity. It has thus used it incorrectly in its characterisation of the *mens rea* of persecution on racial grounds as regards the Vietnamese in Prey Veng and Svay Rieng.

3. Error by regarding CPK statements and speeches as targeting the Vietnamese in

[1935] Reasons for Judgement, §3424, fn 11547.
[1936] DC-Cam Interview of CHAN Kea, 30.08.2005, **E3/7525**, ERN EN 00885013-00885015.
[1937] Reasons for Judgement, §3424, fn 11547.
[1938] T. 19.09.2016, **E1/476.1**, before 14.31.09
[1939] Reasons for Judgement, §3427.
[1940] CB 002/02, §1992-2000.
[1941] Reasons for Judgement, §3426.

Cambodia

1049. The Chamber erred by retaining "publications in the Revolutionary Flag and speeches of leading CPK figures targeting the Vietnamese" to establish *mens rea*.[1942] The Chamber does not cite any specific sources as the basis for its factual finding. It is thus impossible for the Defence to ascertain on what evidence the Chamber has relied to reach its finding that the crime of persecution on racial grounds targeted the Vietnamese living in Prey Veng and Svay Rieng. The Chamber has erred by referring to CPK documents and speeches in general without determining in what way they may have targeted the Vietnamese living in Prey Veng and Svay Rieng. In light of the Chamber's failure to provide its reasoning, its finding must be dismissed.

1050. Furthermore, contrary to the Chamber's assertions, in its interpretation of DK official statements with respect to Vietnam, the Chamber has failed to take the ongoing armed conflict with Vietnam into account.[1943] As will be shown below, the claim that those statements targeted the Vietnamese living in Cambodia is a misinterpretation and must be reversed by the Supreme Court.[1944]

V. GENOCIDE

1051. First and foremost, it should be recalled that the Chamber was improperly seised of facts constituting the crime of genocide by killing members of the Vietnamese group outside the provinces of Prey Veng and Svay Rieng.[1945] In the alternative, the Chamber has committed a number of errors which have led it to reach the incorrect finding that the *actus reus* (A) and the *mens rea* (B) of genocide by murder were established outside those two provinces as well.

A. Errors relating to *actus reus*

1. Error relating to the murder of Vietnamese

1052. As was discussed above, the Chamber erred in finding, solely on the basis of CHHAOM Se's written statements, that six Vietnamese were killed at Au Kanseng Security Centre.[1946] With respect to S-21, the Chamber has also committed an error in finding that the crimes against

[1942] Reasons for Judgement, §3513.
[1943] Reasons for Judgement, §3416.
[1944] See below, §1059-1097.
[1945] See above, §435-438.
[1946] See above, §842-847.

humanity of murder and extermination are established in relation to the Vietnamese.[1947] Indeed, in the Chamber's reference to its legal finding of murder at S-21, there is no specific mention of the murder of Vietnamese.[1948] It would seem that a confusion has arisen with wilful killing, a grave breach of the Geneva Conventions allegedly committed against the Vietnamese, according to the Reasons for Judgement.[1949] However, as will be shown below, those Vietnamese are not members of the protected group subjected to genocide.[1950]

1053. Lastly, as was discussed above, the Chamber has committed errors by finding that Vietnamese were murdered in Svay Rieng, Kratie and Kampong Chhnang.[1951] It has also committed errors by finding that Vietnamese were murdered at sea on 19 March 1978 and that Chantha's grandparents and Chum's family were murdered at Wat Khsach.[1952]

1054. Having failed to establish those killings beyond reasonable doubt, the Chamber could not use them as grounds for its finding that the crime of genocide by murder[1953] with which KHIEU Samphan has been charged was established with respect to the ethnic Vietnamese.[1954]

2. Erroneous finding that the six Vietnamese executed at Au Kanseng were members of the protected group

1055. Assuming that the killings of six Vietnamese at AuKg are accepted as established, the Chamber erred by considering that the Vietnamese in question were executed because of their membership in the protected group.[1955] The Chamber has asserted that the Vietnamese living in Cambodia at that time constituted a distinct racial, national and ethnic group and were therefore a protected group.[1956] However, the six Vietnamese allegedly arrested and executed at AuKg lived in Vietnam, not in Cambodia. According to CHHAOM Se, they were arrested just before 1979 along the border

[1947] Reasons for Judgement, §3515.
[1948] Reasons for Judgement, §3515, fn 11824 which refers to §2560-2571 of the Reasons for Judgement corresponding to the legal characterisation of murder at S-21.
[1949] Reasons for Judgement, §2620-2622.
[1950] See below, §1056.
[1951] See above, §987-992, 1003-1005, 1014-1017.
[1952] See above, §993-1002, 1006-1013.
[1953] Reasons for Judgement, §796.
[1954] Reasons for Judgement, §3514-3519.
[1955] Reasons for Judgement, §3515-3516.
[1956] Reasons for Judgement, §3514, fn 11822 referring to §3419 according to which the Vietnamese living in Cambodia constituted a distinct racial, national and ethnic group.

that they had just crossed so as to spy on Cambodia.[1957] Thus, the Chamber should not have considered these Vietnamese as belonging to the collective group of Vietnamese living in Cambodia. It could not include those killings in its legal finding of genocide.

3. Erroneous finding that the Vietnamese executed at S-21 were members of the protected group

1056. The Chamber erred by finding that the Vietnamese executed at S-21 were members of the protected group of Vietnamese living in Cambodia.[1958] It recalled in fact that the charges brought for grave breaches of the Geneva Conventions relate to acts against members of the armed forces and SRV nationals.[1959] It further found that the Vietnamese detainees at S-21 were either Vietnamese soldiers or Vietnamese nationals, most of whom were arrested near the borders or in DK territorial waters.[1960] Thus, the Chamber should not have considered those individuals as belonging to the protected group of Vietnamese living in Cambodia. Those individuals could not be regarded as the victims of genocide. The Chamber's finding in that respect must be dismissed.

4. Erroneous finding that the Vietnamese at sea were members of the protected group

1057. Assuming that the killings of Vietnamese at sea were committed on 19 March 1978, the Chamber erred by finding that those individuals were members of the protected group subjected to genocide.[1961] As discussed above, no reasonable trier of fact would have found that the Vietnamese referred to in the DK report dated 20 March 1978 were in fact civilians.[1962] In any event, the child killed at Ou Chheu Teal port after April or May 1977, and the Vietnamese killed on 19 March 1978 were Vietnamese nationals, not Vietnamese living in Cambodia.[1963] As they were not members of the protected group, the Chamber could not characterise their murder as genocide. Its finding should therefore be annulled.

[1957] Written Record of Interview, 31.10.2009, **E3/405**, ERN EN 00406215: "Shortly before 1979, before the strong Vietnamese attacks in 1979, I saw that a group of six Vietnameses (civilians) had been taken prisoner on the Au Ya Dav village battlefield along the border because those people had come to do reconnaissance along Route 19, along which the Vietnamese were attempting to attack."
[1958] Reasons for Judgement, §3514-3516.
[1959] Reasons for Judgement, §3012. See also CO, §1481.
[1960] Reasons for Judgement, §2460-2484 and 2622.
[1961] Reasons for Judgement, §3514-3516.
[1962] See above, §1001.
[1963] Reasons for Judgement, §3459-3461.

B. Errors relating to *mens rea*

1058. The Chamber is incorrect in its finding that the existence of the *mens rea* of the crime of genocide has been demonstrated. In order to establish the crime of genocide, a specific intent to destroy the protected group as such, in whole or in part, must be established, however.[1964] The Chamber erred by failing to determine whether there was in fact an intent to destroy the group "in whole or in part" (1) and by finding that there was an intent to destroy the protected group (2).

1. Error by failing to determine the existence of an intent to destroy the group "in whole or in part"

1059. In its legal findings with respect to the crime of genocide, the Chamber found that "that the actions of the physical perpetrators in the above instances of killings demonstrate the specific intent to destroy the Vietnamese group, as such".[1965] However, the Chamber has never determined whether the intent was to destroy the group in whole or in part, and in the latter case, whether a substantial part of the group was targeted. That is, however, an essential component of the crime of genocide. Moreover, as the Chamber had recalled:

> "Where a conviction for genocide relies on the intent to destroy a protected group 'in part', the part must be a substantial part of the protected group, and the part targeted must be significant enough to have an impact on the group as a whole."[1966]

1060. The Chamber has also cited the *Krstić* Judgement, which further clarifies that particular component of the definition of the crime of genocide:

> "The aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted must be significant enough to have an impact on the group as a whole.
> Although the Appeals Chamber has not yet addressed this issue, two Trial Chambers of this Tribunal have examined it. In *Jelisić,* the first case to confront the question, the Trial Chamber noted that, '[g]iven the goal of the [Genocide] Convention to deal with mass crimes, it is widely acknowledged that the intention to destroy must target at least a *substantial* part of the group'. The same finding was reached by the *Sikirica* Trial Chamber: 'This part of the definition calls for evidence of an intention to destroy a substantial number relative to the total population of the group.' As these Trial Chambers explained, the substantiality requirement both captures genocide's defining character as a crime of massive proportions and reflects the Convention's concern with the impact the destruction of the targeted part will have on the overall survival of the group.".[1967]

[1964] Reasons for Judgement, §797.
[1965] Reasons for Judgement, §3518.
[1966] Reasons for Judgement, §802.
[1967] *Krstić* Judgement (ICTY), 19.04.2004, §8 (italics in the original, emphasis added).

1061. To determine whether a substantial part of the group has been targeted, it is clear from the same judgement that the numeric size is the first criterion to be evaluated:

> "The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration.".[1968]

1062. The Chamber has therefore committed a serious error in omitting an essential part of the definition of the crime of genocide. This crime is singular in its specific intention and in its 'mass' scale.[1969] But the pieces of evidence retained by the Chamber do not only support that a substantial part of the group was targeted. It has been seen that these findings concerning the majority of the murders of Vietnamese should be dismissed.[1970] Thus, it is clear that the isolated murders which could have been established by the Chamber could not provide support for the claim that a substantial part of the group has been targeted. This would be to denature the 'mass' characterisation of genocide.

1063. Even though these murders had been established beyond reasonable doubt, the Chamber could only total the murder of eight ethnic Vietnamese in Svay Rieng province, 14 in Kampong Chhnang province, 19 in Kratie province and 10 in the pagoda in Ksach. The Vietnamese who were executed at AuKg, at S-21 and in territorial waters did not belong to the protected group of ethnic Vietnamese.[1971] Such figures do not support that a substantial part of the group of ethnic Vietnamese was targeted. To that needs adding the fact that it is not possible to compare such figures with the total population of ethnic Vietnamese living in Cambodia when these murders were committed.

1064. It is clear that, without exploitable demographic data,[1972] it was impossible to create any statistics about the number of Vietnamese living in Cambodia, and even more so to establish the number of deaths compared with the total population of the group. Thus, the Chamber was wrong to decide that it had no need for this demographic information to establish the crime of genocide. It was

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[1968] *Krstić*Judgement (ICTY), 19.04.2004, §12.
[1969] *Krstić* Judgement (ICTY), 19.04.2004, §10 citing Raphaël Lemkin: "the Convention applies only to actions undertaken on a mass scale".
[1970] See above, §987-1017, 1052-1054.
[1971] See above, §1052, 828-835.
[1972] Reasons for Judgement, §3197. See also Decision on Nuon Chea's request to summons Patrick Heuveline and to admit two related documents 06.12.2016, **E444/1**, §22. See CB 002/02, §1921-1924.

incapable of establishing whether a substantial part of the group had been targeted. So, without this essential element, the Chamber could not establish the intent to destroy all or part of the group and therefore the crime of genocide. The genocide of ethnic Vietnamese not having been established, it could not consequently sentence KHIEU Samphan for this crime.

2. Error in finding for an intent to destroy the Vietnamese group as such

1065. Neither could the Chamber find for the existence of the specific intention to destroy the Vietnamese group as such. In trying to establish this intent, the Chamber counted mainly, if not only,[1973] on the existence of a CPK policy to remove the Vietnamese from Cambodia and then destroy them.[1974] In effect, in a brief legal characterisation of the facts, it found that this policy existed based on POL Pot's "one against 30" speech, on speeches by KHIEU Samphan, on a declaration by NUON Chea and on the analysis of certain political training sessions conducted by the Accused.

1066. However, this finding could only be made by making numerous errors both in fact and in law.[1975] Because the charges of genocide against KHIEU Samphan targeting the ethnic Vietnamese living in Cambodia, the Chamber was required to establish that the intention did indeed target this group. Thus, it was incumbent on the Chamber to clearly distinguish this group from the other Vietnamese. This was all the more necessary as there was armed conflict between the two nations. It was careful not to make this quite essential distinction.

1067. In effect, the Chamber systematically made no distinction between the various Vietnamese groups: the country called Vietnam, its political representatives, its armed forces, its civilian population, people labelled "agents of Vietnam" and the ethnic Vietnamese living in Cambodia before and during the DK era. Often, it did not even take the trouble to explain who the Vietnamese expressly mentioned in the documents or in the various statements by members of the CPK were. On the rare occasions when it was specified, the fact that ethnic Vietnamese were targeted did not feature as the grounds for the finding.

a. Denaturing the evidence concerning diplomatic relations with Vietnam

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[1973] Reasons for Judgement, §3517-3518 if one includes the establishment of lists and the matrilinearity of ethnic membership, all these policy elements having been analysed in paragraphs §3382 to 3428.
[1974] Reasons for Judgement, §3517 and 3518 referring systematically to the part pertaining to the existence of a policy which consisted in taking specific measures against the Vietnamese.
[1975] See below, §1551-1560.

• **Errors concerning the consequences of the 1973 Paris Peace Accords**

1068. First, the Chamber erred in considering that, since the deterioration of the relations between the DK and Vietnam after the signing of the 1973 Paris Peace Accords, the CPK considered that the ethnic Vietnamese living in Cambodia should receive special attention.[1976] The evidence cited does not support such an affirmation.

1069. The Chamber effectively based its view on NUON Chea's testimony before the Court explaining the consequences of signing these accords. But in this declaration there was never any mention of, or any allusion to, ethnic Vietnamese living in Cambodia.[1977] It also used an undated interview with KHIEU Samphan referring to the displeasure of the Vietnamese when POL Pot refused to respect the accords to mark his independence from them.[1978] However, it is clear that this concerned the diplomatic relations between the representatives of the two States and not ethnic Vietnamese or any policy relating to them. Finally, the reference to the book by Elizabeth Becker cited in support of the same finding also does not make any reference to ethnic Vietnamese living in Cambodia.[1979] The Chamber therefore denatured the evidence which did not provide grounds to find that ethnic Vietnamese in Cambodia were targeted with a view to their destruction. Its finding should therefore be invalidated.

• **Errors concerning the RF of April 1976**

1070. Additionally, the Chamber spent a lot of energy to explain that tensions existed between the two countries since the 1970s and the meetings between their leaders in 1975.[1980] On the other hand, the Chamber denatured the sense of the April 1976 edition of the RF by finding that it reflected the hostility between the CPK and foreigners.[1981] In effect, it truncated part of the text enabling it to compare the affirmation according to which certain foreigners accused of having stolen property from the population and in the past caused the loss of territory with another affirmation according

[1976] Reasons for Judgement, §3382.
[1977] T. 14.12.2011, **E1/22.1**, between 09.56.27 and 10.08.06.
[1978] Minutes of undated KHIEU Samphan hearing, **E3/4038**, ERN EN 00790140-00790141.
[1979] Book by E. Becker, *When the war was over*, **E3/20**, ERN EN 00237847-00237851 and 00238058-00238060.
[1980] Reasons for Judgement, §3116 -3386. This piece of evidence, not being in support of a policy of destroying ethnic Vietnamese, will not be contested here
[1981] Reasons for Judgement, §3197.

to which "hundreds of thousands of foreigners" have been deported. Read in this way, the text could give the impression that the foreigners expelled referred to Vietnamese.[1982]

1071. But when read in its entirety, the text explains that this is an old problem as the "exploitation classes" sold land to foreigners and the Khmer Rouge movement fought successfully against the "imperialists".[1983] The statement that the movement has expelled hundreds of thousands of foreigners out of the territory follows on from this passage.[1984] Above all, it states that the problem was specifically solved on 17 April 1975,[1985] i.e. the day on which the Khmer Rouge arrived in the capital. It is well known that, before the arrival of the Khmer Rouges in Phnom Penh, many foreigners, Americans and Europeans among others, lived in the capital. Those who had not already fled were gathered in the French Embassy and expelled from the country. Any reasonable judge should have considered these events in interpreting this issue of the RF.

1072. The Chamber could not use the RY, RF and other documents dating from 1978 and 1979 for an interpretation of the RF dated April 1976.[1986] The context clearly evolved between these two dates, and only a global analysis of the text in the RF of April 1976 would enable such analysis to be objective. Vietnamese were not the only foreigners on Cambodian soil in 1975. The biased interpretation by the Chamber was neither reasonable nor the only one possible. It should therefore be dismissed.[1987]

• **Errors concerning declarations attributed to the leaders**

1073. The Chamber affirmed that, from May 1976 onwards, the CPK never ceased to describe the Vietnamese as 'enemies'".[1988] An analysis of the sources in support of this affirmation shows that the target was Vietnam as a country, the Vietnamese soldiers or members of the DK accused of being Vietnamese "agents" such as CHAN Chakrei.[1989] The Chamber's affirmation that SON Sen

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[1982] Reasons for Judgement, §3387-3388.
[1983] Revolutionary Flag, April 1976, **E3/759**, ERN EN 00517853-00517854.
[1984] Revolutionary Flag, April 1976, **E3/759**, ERN EN 00517853-00517854: "it was done by going along with the imperialists and by following proper methods following our revolutionary principles. That is, the great typhoon of the national movement and the great typhoon of our democratic revolution swept hundreds of these foreigners clean and expelled them from our country, got them permanently out of our territory".
[1985] Revolutionary Flag, April 1976, **E3/759**, ERN EN 00517853-00517854: "However, our revolution, in particular on 17 April 1975, sorted this issue out cleanly and sorted it out entirely".
[1986] Reasons for Judgement, §3388.
[1987] Reasons for Judgement, §3388.
[1988] Reasons for Judgement, §3389.
[1989] Reasons for Judgement, §2271, 3775, 3793-3794 and 3797. See also E. Becker T. 11.02.2015, **E1/261.1**, pp. 49-50.

had indicated "that dangerous elements required screening and particular caution of those whose family members had been purged" was not at all a reference to the Vietnamese.[1990]

1074. The same error was committed with the political training sessions at which POL Pot, NUON Chea and KHIEU labelled the Vietnamese or Vietnamese "agents" as enemies.[1991] Apart from the criticisms levelled at these training sessions, the context did not provide grounds to find that reference was being made to ethnic Vietnamese but rather to the Vietnam State and their representatives. In fact when NUON Chea talks about the "*Yuon*" enemy having the ambition to integrate the DK into the Indo-Chinese Federation, it is clear that reference is being made to their history with the Vietnamese Communist Party and in no case the ethnic Vietnamese.[1992] As for the expression Vietnamese "agents", this was a direct reference to those Khmers, members of the DK, accused of having links with Vietnam.[1993]

1075. In addition, the Chamber should not have retained the comments that EK Hen attributes to KHIEU Samphan during a supposed meeting in Borei Keila.[1994] The numerous inconsistencies in her testimony and between her various declarations demonstrate the lack of credibility and reliability of such declarations.[1995] The Chamber should have dismissed them given their limited probative value. In any case, the remarks that she attributes to the Appellant are not grounds for determining what he meant in saying that "there were no '*Yuons*' in Cambodia". Various interpretations were possible. It could mean that, starting from April 1975, all Vietnamese soldiers and civilians had been repatriated to Vietnam. But it was above all a message extolling solidarity among workers.[1996]

[1990] Reasons for Judgement, §3389 referring to §3797 which refers to minutes of a meeting of Secretaries and Logistics Officers of Divisions and the independent Regiment, 15.12.1976, **E3/804**, ERN EN 00233718-00233719.
[1991] Reasons for Judgement, §3390.
[1992] Reasons for Judgement, §3390, fn 11436 referring to the transcript of OU Dav relating comments by NUON Chea during a meeting that was stated to have taken place in 1976.
[1993] Reasons for Judgement, §3404 "Concerning the June 1978 Central Committee Guidance, although persons who ceased their 'traitorous activity' were nominally subject to re-education under this policy, the Chamber finds that, while it was nominally applicable to those who *inter alia* were 'serving as *Yuon* (Vietnamese) agents', it is unclear whether this category extended beyond Khmer people who colluded with Vietnam to encompass people who were ethnic Vietnamese themselves" (emphasis added). See also Revolutionary flag, May-June 1978, **E3/727**, ERN EN 00185333 which expressly names Chakrey, Chhouk, Thuch, Doeun, SAO Phim, Si, KEO Meas and Chey as agents of the CIA and of Vietnam.
[1994] Reasons for Judgement, §3390.
[1995] KHIEU Samphan's Request for Admission of Additional Evidence, 08.10.2019, **F51**, §20-29.
[1996] T. 03.07.2013, **E1/217.1**, before 11.23.50, "He spoke about the work, about the struggle, and that we should allow one another and assist one another. He gave us good advice. He did not want us to argue with each other, but rather to consolidate and to strive to work hard to build the country, as the war had just ended".

These remarks, true or not, could in no way support the existence of a policy designed to destroy the ethnic Vietnamese in Cambodia.

1076. The same may be said of the hand-written notes attributed to IENG Sary which talk about enemies in general.[1997] When talking about 1976, the phrase "the revolution has uprooted and removed their roots" could not be a reference to the ethnic Vietnamese.[1998] The Chamber itself indicated that the RF of April 1977 referred to Vietnamese "agents" whom we have already said were members of the DK.[1999]

1077. Moreover, the Chamber has already admitted that the remarks attributed to KHIEU Samphan referring to Vietnam as the "hereditary enemy" were made when the armed conflict was intensifying and that he was referring to Vietnam as a country.[2000] On the other hand, it did not explain what it was trying to establish concerning the RF of August 1977 and the testimony of MEAS Voeun.[2001] In any case, MEAS Voeun explained that the purpose of the message in that edition of the RF was to make people aware of the subterfuge carried out by the "*Yuons*" and to flush out those of the enemy who had already infiltrated. At no point in time did the Chamber establish that it was ethnic Vietnamese who had infiltrated. On the contrary, the evidence indicates that it was rather the DK members suspected of having links with Vietnam.[2002]

1078. The Chamber recalled correctly that the armed conflict had intensified in 1977.[2003] Thus, without any mention of ethnic Vietnamese, the CPK's anti-Vietnamese rhetoric should logically have been interpreted in the light of the conflict in which, objectively, Vietnam was the enemy country. However, the Chamber committed the same error several times in considering that such rhetoric was also targeting the civilian Vietnamese.

• **Failure to take account of the armed conflict with Vietnam**

FBIS and SWB documents

[1997] Reasons for Judgement, §3391. See also criticisms of the notes below §1458, 1464.
[1998] Hand-written notes from IENG Sary, January 1997, **E3/925**, ERN EN 00003330-00003331.
[1999] Reasons for Judgement, §3392.
[2000] Reasons for Judgement, §3392-3393.
[2001] Reasons for Judgement, §3395.
[2002] Revolutionary flag, May-June 1978, **E3/727**, 0052 EN 00185333.
[2003] Reasons for Judgement, §3396.

1079. Such failure characterises the Chamber's analysis of two FBIS documents dated by the Chamber on 24 February 1978 and 10 April 1978[2004], the probative value of which is extremely weak.[2005] The first document consists of a report apparently appearing in the French newspaper *Humanité Rouge*, but the author's name was not revealed.[2006] The name of the author of the second document also remains a mystery. Not only can these remarks not, in any circumstances, be attributed to the CPK but, above all, they appeared just after a large-scale offensive by Vietnam against Cambodia.[2007] In this context, the finding by the Chamber that civilian Vietnamese had been targeted is simply incomprehensible. In addition, it did not explain how it had arrived at such a finding, nor whether it had made any distinction between civilian Vietnamese and ethnic Vietnamese in Cambodia. Its finding should therefore be annulled.

April 1978 speeches from KHIEU Samphan

1080. The Chamber equally committed an error by considering that in two speeches, on 15 April 1978 and on 17 April 1978, KHIEU Samphan had targeted "all Vietnamese without distinction".[2008] But, although the Chamber relies on two distinct documents, one an SWB document and the other a collection of documents distributed by the Committee of DK patriots in France,[2009] in reality they concern one and the same speech. In fact, it is a re-transcription of the speech by KHIEU Samphan on 15 April 1978 during a mass meeting in Phnom Penh to celebrate the third anniversary of the victory of 17 April. However, the two re-transcriptions do not match up at all which, if truth be told, is hardly surprising given the lack of reliability that can be attached to this type of foreign document, the re-transcriptions of which are translated and incomplete.[2010] It is therefore clear that these documents cannot be granted any probative value. They should therefore be dismissed.

1081. However, no reasonable judge of fact could find that this speech by KHIEU Samphan targeted "all Vietnamese without distinction". In effect, the DK had just suffered an armed attack by Vietnam. KHIEU Samphan, in his role of President of the State Presidium, logically delivered a speech

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[2004] Reasons for Judgement, §3398.
[2005] See above, §320-323. See in particular below, §1898-1903.
[2006] Dossier FBIS, 24.02.1978, **E3/292**, ERN EN 00169281.
[2007] Reasons for Judgement, §289.
[2008] Reasons for Judgement, §3399 and 3400.
[2009] Reasons for Judgement, §3399 referring to an FBIS dossier re-transmitting a speech given in Phnom Penh and celebrating the third anniversary of victory on 17 April, 16.04.1978, **E3/562** and §3400 referring to a collection of documents distributed by the Committee of DK patriots in France, 17.04.1978, **E3/169**.
[2010] See below, §1898-1903.

calling for the killing of the Vietnamese enemy which is none other than the opposing Vietnamese State's army. Nothing in this speech could lead to the finding that KHIEU Samphan could be targeting the civilian Vietnamese and even less the ethnic Vietnamese in Cambodia. The Chamber's finding should be dismissed.

1082. The Chamber also committed an error by basing its findings in part on a book by SIHANOUK to establish that a CPK policy existed targeting the Vietnamese.[2011] It had, however, noted the low probative value which one could accord this document, which did not prevent it from using it. In any case, in the context of AC with Vietnam, it was reasonable to find that the aggressive remarks towards Vietnam were part of the propaganda of war to unite the Cambodian people behind the Party against the aggressor – Vietnam.

POL Pot's "one against thirty" speech

1083. In the same way, the Chamber erred in considering that POL Pot's "one against thirty" speech was aimed at "the ethnic Vietnamese population in its entirety".[2012] In making this finding, it completely denatured the content and ignored the context of the speech which was also given just after the Vietnamese aggression on Cambodian territory. The Chamber made a mistake by considering that because POL Pot drew a parallel with the total populations of Vietnam and Cambodia, the measures that he announced in the speech were also aimed at the civilian population.[2013] Such an interpretation is unreasonable.

1084. It is clear that POL Pot dressed a picture of the power struggle between the two countries, explaining that the Cambodian forces were decidedly inferior to the Vietnamese forces and that therefore it was necessary to redouble the effort if the enemy was to be beaten.[2014] Moreover, the Chamber committed an error by rejecting the declarations made during the hearings of former soldiers at the time explaining that the speech and the "one against 30" slogan were aimed at galvanising the DK troops faced with an enemy with vastly superior numbers.[2015] Questioned about

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[2011] Reasons for Judgement, §3401.
[2012] Reasons for Judgement, §3402.
[2013] Reasons for Judgement, §3402.
[2014] Revolutionary flag, "The presentation of the comrade secretary of the communist party of Kampuchea on the occasion of the 3rd anniversary of the great victory of 17 April (…) ", 17.04.1978, **E3/4604**, ERN EN 00519832-00519833.
[2015] PRUM Sarat: T. 26.01.16, **E1/382.1**, pp. 68-70, between 15.35.43 and 15.41.34 "In fact, this was a comparison of military forces, one against 30. It is clear in the document […] which quotes the statement of comrade secretary. It was

references in the speech to 60 million Vietnamese and 2 million Cambodians, PRUM Sarat explained:

> "(In fact), there were not 60 million Vietnamese soldiers and 2 million Cambodian soldiers. No, it was a speech destined to inspire the Cambodian soldiers to prepare the lines of attack and seize victory".[2016]

1085. It is important to remember that to understand the sense to be given to a public declaration, the relevant factor is how it was interpreted by the people to whom it was directed.[2017] However, not only did the Chamber not take this element into account but it provided no element either to support the reasons for its finding. The Supreme Court had, however, already censured the Chamber's interpretation of KHIEU Samphan's speech given on the occasion of taking Oudong.[2018] In the context of armed conflict, the Chamber was reproached for not having explained in what way the term "enemy" does not only designate a military target.[2019] The Chamber decided to deviate from the directives of the Supreme Court. Its finding should therefore be invalidated. In any case, an objective analysis of this speech – notably taking into account the techniques of guerilla warfare – [2020] could not support the existence of any policy designed to destroy the group of Vietnamese living in Cambodia.[2021]

May-June and July 1978 editions of the RF

1086. The RF editions for May-June 1978 and July 1978 should be read in the same context.[2022] The Vietnamese enemy of whom it is said was "the most deadly" clearly referred to the Vietnamese country "invaders, expansionists, territory-swallowers" but also to the "agents" that are described just before as being former members of the DK such as, among others, Chakrey, SAO Phim, Doeun

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meant to encourage the soldiers to find the strategies to smash enemies": CHUON Thy: T. 25.10.2016, **E1/489.1**, p. 93, around 15.16.41, p. 95, around 15.23.08.

[2016] T. 26.01.16, **E1/382.1**, around 15.38.48. See also CB, 00/02 §734-740 and 2245.

[2017] *Reasons of Judge Geoffrey Henderson*, Gbagbo case (ICC), 16.07.2019, §291 and 293.

[2018] Case 002/01 Appeal Judgement, 23.11.2016, §883.

[2019] Case 002/01 Appeal Judgement, 23.11.2016, §930.

[2020] Revolutionary flag, "The presentation of the comrade secretary of the communist party of Kampuchea on the occasion of the 3rd anniversary of the great victory of 17 April (…) ", 17.04.1978, **E3/4604**, ERN EN 00519832-00519833.

[2021] Reasons for Judgement, §3517.

[2022] Reasons for Judgement, §3403.

and Chey.[2023] No reasonable judge of facts could find that these remarks could be directed at the ethnic Vietnamese living in Cambodia.

1087. The contents of the notes by MAM Nai referring to the principle of "one against 30" add nothing new.[2024] It has already been explained that this principle served as propaganda and to galvanise the troops faced with a much more powerful Vietnamese aggressor.[2025] Neither should the Chamber have used the notes from the S-21 interrogators.[2026] In effect, the author is not identified, which makes the probative value of such documents extremely suspect. And again, these notes refer yet again to the "*Yuons*" the "agents" who, as has already been explained, were DK members suspected of having links with Vietnam. Moreover, they bear the date 1978, that is after the Vietnamese military offensive. Absolutely nothing in these documents provides for the identification of ethnic Vietnamese living in Cambodia.

1088. The RY and RF magazines and the FBIS dossiers of 1978 use systematically the same language: it is necessary to defend against the "*Yuons*" and protect the "Kampuchean race".[2027] Remaining in the context of the AC, after the two Vietnamese aggressions, any reasonable judge of facts would have found that this was a propaganda speech designed to galvanise the troops and encourage the Cambodian people to remain united faced with the attacks on their country. The Chamber however refrained from giving the interpretation of these texts. Once again though, it is clear that nothing could justify saying that they applied to the ethnic Vietnamese living in Cambodia. This goes for the speeches by POL Pot, KHIEU Samphan and NUON Chea cited by the Chamber and all using the same rhetoric.[2028]

1089. The language concerning the Vietnamese and their "agents" used in the CPK's publications between 1977 and 1979 and taken up by the Chamber correlate with the escalation of the armed conflict with Vietnam.[2029] Such documents are examples of war-time propaganda directed against the Vietnamese enemy and their "agents". These documents do not specifically designate the ethnic

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[2023] Revolutionary flag, May-June 1978, **E3/727**, ERN EN 00185333.
[2024] Reasons for Judgement, §3405.
[2025] See above, §1030, 1065, 1083-1085.
[2026] Reasons for Judgement, §3405.
[2027] Reasons for Judgement, §3406.
[2028]Reasons for Judgement, §3406, fn 11484 and 11485.
[2029] Reasons for Judgement, §3407.

Vietnamese living in Cambodia, the internal enemies referring to the members of the DK accused of links with Vietnam.

Out of context telegrams and evidence

1090. The Chamber erred in fact by finding that contemporary telegrams talked about executions of civilian Vietnamese.[2030] These telegrams related to clashes along the border with Vietnam. In fact, the Chamber did not take account of the context of the armed conflict which consisted essentially in incursions by small "guerilla" groups on both sides. Or rather its appreciation was selective, and ... decidedly partial. In effect, earlier in the Reasons for Judgement, the Chamber had used these same telegrams to evoke the skirmishes taking place along the frontier.[2031] But when it came to establishing a supposed policy, the references to attacks, clashes and the seizing of arms were ignored. However, it is clearly mentioned in these telegrams that the Vietnamese who were arrested or killed were military and not civilian targets.[2032] The Defence had pointed this out to the Chamber to avoid the shortcomings of the Prosecution in cutting and denaturing these telegrams.[2033] No reasonable judge of facts could find, based on these pieces of evidence, that civilian Vietnamese had been killed. In addition, the Chamber had wrongly invoked telegrams mentioning attacks in Vietnamese territory whereas such facts were expressly excluded from the scope of the trial at the time of the severance of the case file.[2034] This error in law should be sanctioned. From all points of

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[2030] Reasons for Judgement, §3408.

[2031] Reasons for Judgement, §284, fn 746 citing the same passage in telegram **E3/1061**. See also §288, fn 760. In paragraph §291 and fn 775, 776 and 779, the Chamber cites the same passages in telegrams **E3/928**, **E3/1012** and **E3/1062**.

[2032] See for example: Telegram from the DK, 25.12.1976, **E3/1079**, ERN EN 00877020-00877021; Undated telegram from the DK, **E3/1132**, ERN EN 00548773, "we captured a Yuon. […] […] previously he beat a combatant to death. The Yuon drove their car(s) along Road 13, however they returned when they saw the road was blocked with trees" (emphasis added); Undated telegram from the DK, **E3/1061**, ERN EN 00538730-00538731; Telegram from the DK, 14.02.1978, **E3/181**, ERN EN 00340537; "South of Road number 1 in the area of Mestha ngork, the enemy dug the trenches facing us. Previously there was no trench and they were far away. At the Doeum Ampil market and Kong Ang there were many vehicles moving in and out for the whole last night until this morning". (emphasis added); Telegram from the DK, 22.03.1978, **E3/1012**, ERN EN 00305369, "On 19 March, fightings occurred at a place north and south of Route 19, 24 of the Yuon enemies were killed. We seized a number of their weapons and managed to protect our territory." (emphasis added); Telegram from the DK, 01.04.1978, **E3/928**, ERN EN 00143507, "Total number of arrested and fired Vietnamese from 27.3.78 to 30.3.78 are 102 people. In this period, we also confiscated 5 machine boats of 10CC to 37CC machine mighty, a number of weapons included a M79 and other materials. (emphasis added); Telegram from the DK, 08.04.1978, **E3/1062**, ERN EN 00322059, "On 6, 7, and 8 April, we smashed more than 100 of the enemy and seized nearly 100 weapons of all types" (emphasis added).

[2033] T. 26.02.2016, **E1/392.1**, at 10.39.28.

[2034] Telegram from the DK, 02.03.1978, **E3/992**, ERN EN 00795287: "On 27 February 1978, our unit cooperated with Sector units to plan an attack on one position of the '*Yuon*' enemy located on National Road No. 13, one kilometre from our territory. After one-day-one-night, we were able to gain mastery over the position and completely smash the

view, there can be no doubt that these telegrams were not talking about ethnic Vietnamese living in Cambodia.

1091. The Chamber considered that three telegrams merited particular attention, without explaining why.[2035] The telegram from MEAS Muth is dated 31 December 1977, the day that the official declaration of the severing of diplomatic relations with Vietnam was announced following their first large-scale attack.[2036] It simply expressed support for the CPK from the 164th division.

1092. The telegram from RUOS Nhim is one of the only documents specifically mentioning Khmer-Vietnamese families.[2037] The secretary of the SWZ seeks advice from the *Angkar* as to the procedure to follow concerning the apparently terrified families. The Chamber does not explain what it found from this document. RUOS Nhim indicated that these people manifested no opposition and that, had they done so, action would have been taken.[2038] Although it is possible to find that in May 1978, a period when the armed conflict was at its height, these families were under surveillance, this document shows that at that period no action was taken against them. This therefore contradicts the Chamber's assertion that a policy existed to eliminate ethnic Vietnamese from April 1977. The fact that it was expressly stated that action would be taken against these individuals only if they proceeded to "actions of opposition" shows that neither nationality, ethnicity nor race were the grounds for such surveillance.

1093. As for the telegram from the WZ dated 4 August 1978, the first part points to people who have acted to "provoke conflict", "lead attacks", "resist" in fact the individuals of 17 April, former civil servants, Chinese nationals and Vietnamese.[2039] Concerning the reference to eliminated Vietnamese, as nothing could establish their origins, the Chamber could not find that they were ethnic Vietnamese.

The 2 January 1979 declaration

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enemy. The outcome is summarised as follows: We smashed and killed 98 'Yuon' enemies on the spot.".
[2035] Reasons for Judgement, §3408.
[2036] Declaration from the DK, 31.12.1977, **E3/1265**, ERN EN 00282392-00282393. See also CB 002/02, §810.
[2037] Reasons for Judgement, §3409.
[2038] Telegram from the DK, 17.05.1978, **E3/863**, ERN EN 00321962, "but there is not yet any sign of opposing activities. If any of them make some [suspicious] activities, we will decide to take them out.".
[2039] Telegram from the DK, 04.08.1978, **E3/1094**, ERN EN 00315368.

1094. The Chamber committed an error in considering that a declaration from the DK Government, protesting against the Vietnamese aggression, was aimed at all Vietnamese "without distinction".[2040] It was absurd to find, because the declaration mentioned that all the people of Kampuchea were against Vietnam, the hereditary enemy, that all Vietnamese were targeted. However, again the Defence had alerted the Chamber to this erroneous interpretation by the Prosecution.[2041] This declaration was delivered at a time when Vietnamese troops were on the point of invading Cambodia. No reasonable judge of facts could make any other finding than that which affirms that the Government's declaration was condemning the invasion of its country by Vietnam and its military forces.

Testimony of HENG Lai Heang and omission of exculpatory evidence

1095. Finally the Chamber erred in using the testimony of civil party HENG Lai Heang, who was the only person to state expressly that there was a policy to eliminate the ethnic Vietnamese.[2042] However, the probative value of this declaration is questioned by the fact that the civil party had lost members of his family. It therefore lacks objectivity. In addition, as the Chamber itself admitted, this person has not been witness to any execution.[2043] And she indicated that there were no Vietnamese in her commune and that she therefore did not know what really was happening concerning the Vietnamese.[2044] People had talked to her about the policy towards the Vietnamese just once at the beginning of the regime, and it was nothing but hearsay.[2045] She explained that she had ceased her role in charge of propaganda on the local committee of her commune in early 1977. And from that moment she became an "ordinary member of the village" again.[2046] Finally, the Chamber omitted to recall that the civil party, confirming the contents of the hearing minutes, indicated that "whoever was against the revolution, irrespective of his or her ethnic family, Vietnamese or not, was concerned".[2047] And the Chamber ignored the testimony of the former DK

[2040] Reasons for Judgement, §3412.
[2041] CB 002/02, §2251.
[2042] Reasons for Judgement, §3414 and 3415.
[2043] Reasons for Judgement, §3487. See also T. 19.09.2016, **E1/476.1**, around 14.43.46.
[2044] T. 19.09.2016, **E1/476.1**, after 14.34.12: "But at my base there were no ethnic Vietnamese", after 14.36.52, around 14.43.46.
[2045] T. 19.09.2016, **E1/476.1**, before 14.41.45: "Based on what I heard", "Based on the information I received from my relatives", before 15.59.13.
[2046] T. 19.09.2016, **E1/476.1**, before 15.14.32
[2047] T. 19.09.2016, **E1/476.1**, around 16.10.48.

soldier affirming that there was never any policy aimed at executing civilian Vietnamese, as well as all the other elements that contradicted its arguments.[2048]

Errors concerning the establishment of the lists and matrilinearity

1096. The establishment of lists is the last element put forward by the Chamber to find that a policy existed for attacking the civilian Vietnamese population.[2049] But this element was not grounds to establish such an intent. In effect, under the DK, the Vietnamese were not the only ones to be the subject of a census. It was the same for everybody, new people, members of the former regime and Khmers in general.[2050] It was all part of the need to plan for rations and supplies in the cooperatives. Finally, it has been seen above that matrilinearity in the ethnic group has not been verified.[2051]

1097. **Conclusion**. After examining all the documents retained by the Chamber to establish the existence of a policy concerning the Vietnamese, it is clear that the Chamber erred by finding that this concerned the ethnic Vietnamese living in Cambodia. The Chamber states that it has taken into account the armed conflict but, apart from one or two exceptions,[2052] its findings demonstrate the contrary. It also has completely ignored the ever-present propaganda in the documents which, in a period of armed conflict, was designed to unite the Cambodian people faced with the Vietnamese enemy. The accusation of genocide is directed at the protected group of ethnic Vietnamese living in Cambodia. The Chamber has found that those murdered in Svay Rieng, in territorial waters, in Kampong Chhnang, and in the pagoda of Ksach and Kratie were ethnic Vietnamese. However, not a single document cited by the Chamber made any reference to these events. The Chamber has not established an intent to destroy those Vietnamese who were murdered. Neither has it established the existence of a policy in place from April 1977 designed to destroy ethnic Vietnamese. Consequently, no reasonable judge of facts would have found that the *mens rea* of the crime of genocide was established through some state policy. KHIEU Samphan must therefore be acquitted of this crime.

[2048] MEAS Voeun: T. 03.02.2016, **E1/387.1**, at 09.15.00: "There was no document or any instruction to – in relation to the smashing of the internal 'Yuon' at all. However, the policy at the time was to counter the attempts to invade Cambodia by the external 'Yuon'".
[2049] Reasons for Judgement, §3518.
[2050] SAO Sak: T. 03.12.2015, **E1/362.1**, at 09.40.13 where she explains that she was aware of the lists for the Khmers but not for registering the Vietnamese.
[2051] See above, §1042-1048.
[2052] Reasons for Judgement, §3411 and 3413.

Chapter IV. MARRIAGE AND RAPE IN THE CONTEXT OF MARRIAGE

Section I. MARRIAGE

I. ERRORS CONCERNING THE LEGALITY OF FORCED MARRIAGES AS OIA BETWEEN 1975 AND 1979

1098. The Chamber erred in law in its interpretation of the condition of formal unlawfulness (A) and in not proceeding with an enumeration of the rights and prohibitions in the international instruments at the time of the facts (B). These errors led to a violation of the principle of legality and the corollaries which ensue (C).

A. Erroneous analysis of the condition of formal unlawfulness

1099. The Chamber committed errors in law by carrying out an erroneous examination of the condition of formal unlawfulness, which does not respect the principle of legality. The applicable law at the time did not indicate that the facts for which KHIEU Samphan is accused was a criminal offence. The Chamber rejected the Defence's arguments designed to demonstrate the failure of applying the condition of formal unlawfulness to the facts in these proceedings for reasons that:

> "[c]rimes against humanity and other inhuman acts existed in customary international law at the time of the facts in question and its definition is not limited to a list of particular behaviour. It is not necessary that forced marriage be recognised as a particular category of crime against humanity in 1975 nor as a particular type of behaviour belonging to other inhuman acts at that time".[2053]

1100. By limiting its reasoning to just these points to ensure respect for the principle of legality and in giving an erroneous definition of the elements evoked by the Supreme Court in Case 002/01 Judgement, the Chamber committed errors in law. The Chamber limited its reasoning to the fact that it was not necessary that the marriage be recognised as a CAH at the time of the facts, nor even as a particular type of behaviour belonging to the category of OIA at the time.[2054] These assertions are insufficient. The Chamber was obliged to apply the condition of formal unlawfulness developed by the case law from the Supreme Court[2055], in order to ensure respect for the principle of legality and that the said behaviour was both foreseeable and accessible by the Defendant.

[2053] Reasons for Judgement, §741.
[2054] Reasons for Judgement, §741.
[2055] See above, §658-665.

1101. Concerning the enumeration of the basic rights and prohibitions contained in the international instruments prevailing at the time of the facts, the Judges interpret the jurisprudence from the Supreme Court as follows: "The fact of determining whether the behaviour violates "basic human rights, such as accepted by international legal instruments" constituted one of the means of introducing a "condition of formal unlawfulness"".[2056]

1102. The interpretation of the Chamber is once more erroneous and constitutive of an error in law. In effect, the Judges only partially resume the reasoning of the Supreme Court implying that the condition of formal unlawfulness consists solely in determining the violated basic rights guaranteed in the international instruments applicable at the time of the events. Such logic is both false and dangerous. It should be recalled that the reasoning used in the 002/01 judgement makes it clear that the rights of man may not, by themselves, constitute the grounds for a criminal law standard.[2057]

1103. This additional step, completely ignored by the Chamber, must be understood to mean a desire for a strict guarantee of the principle of legality and the corollaries which ensue.[2058] It is surprising to see that in the Reasons for the Judgement under appeal, although they recall about half of the condition of formal unlawfulness by referring to basic rights, the Chamber did not even use all of this truncated condition in its part pertaining to the legal characterisation of facts of OIA in the guise of forced marriages[2059], and not even in the determination of the applicable law.[2060] The Chamber has not carried out any in-depth search of basic rights in the international instruments which existed at the time of the events. Only the UDHR is briefly mentioned in the part pertaining to the applicable law, in terms of which it is estimated that:

> "The right to marry is a basic right enshrined in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations, which stipulates that 'marriage may only be carried out with the freely-given consent of the future spouses'".[2061]

[2056] Reasons for Judgement, §726.
[2057] Case 002/001 Appeal Judgement, 23.11.2016, §584.
[2058] Case 002/001 Appeal Judgement, 23.11.2016, §584.
[2059] Reasons for Judgement, §3686-3694.
[2060] Reasons for Judgement, §740-749.
[2061] Reasons for Judgement, §743.

1104. The principle of legality demands a rigorous analysis and a brief reference to a single disposition cannot guarantee that this principle is respected.[2062] In the absence of such grounds indispensable for establishing the said crime, the Chamber violated the principle of legality.

1105. In the part dealing with the applicable law, the Reasons for Judgement embark upon a catalogue of jurisprudence from the SCSL and the ICC whereas these cases are not within the temporal jurisdiction of the ECCC. [2063] It is nevertheless an essential difference. In effect, although the so-called "*AFRC*" judgement of 22 February 2008 recognised that forced marriage constituted an OIA, this only applied to facts committed after 30 November 1996.[2064] Moreover, the context of the *Bush Wives* is objectively not comparable in the degree of gravity with the facts in these proceedings. The *Bush Wives* were subjected to sexual violence, sexual enslavement and rape committed by the militia. They were captured and led into the jungle to be married to other militia men and forced to carry out household chores. These women, dishonoured by Sierra Leone society, have continued to be stigmatised even after the conflict.[2065]

1106. It cannot be understood, therefore, why the Chamber talks endlessly about the jurisprudence from the SCSL, which does not enter its temporal scope, when it does not even take the trouble to identify the applicable law at the time of the DK. Moreover, the statutes of international tribunals do not contain measures relating to forced marriage. Whereas the Rome Statute established new CAHs such as sexual enslavement, forced prostitution and forced pregnancy, it makes no reference to forced marriage. In the same way, there is no reference to forced marriage in the statutes of the ICTY (1993) or of the ICTR (2010). This absence of any reference to forced marriage in the above-mentioned statutes, although such cases had been discussed, particularly before the ICTR, suggests that the repression of forced marriage was not sufficiently established to integrate this behaviour into the category of OIA constitutive of a CAH.[2066]

[2062] See Consolidated decision on the requests for investigative action concerning the crime of forced pregnancy and forced impregnation 13.06.2016, 004/2-**D301/5**, §52-63.
[2063] Reasons for Judgement, §744-747.
[2064] *AFRC* Appeal Judgement (SCSL), 22.02.2008.
[2065] Article by Neha JAIN, *Forced marriage as a crime against humanity- Problems of Definition and Prosecution*, JICJ, 2008, pp. 1015-1016, 1025-1026.
[2066] Article by Neha JAIN, *Forced marriage as a crime against humanity- Problems of Definition and Prosecution*, JICJ, 2008, p. 1026.

1107. By committing the error of saying that the OIA through forced marriage existed in customary law at the time of the facts,[2067] as if that were sufficient, and not in any way analysing the condition of formal unlawfulness, the Chamber erred in law and directly prejudiced KHIEU Samphan. To demonstrate that the criminalisation of forced marriage could be accessible and foreseeable to the Accused, the Chamber should have proceeded with understanding the rights and prohibitions laid out in the texts applicable at the time of the events.

B. Lack of real enumeration of the rights and prohibitions at the time

1108. Several international instruments prior to the DK period guaranteed the right to respect of private and family life. The UDHR of 1948[2068], the ECtHR of 1950[2069], the ICCPR of 1966[2070] (which Cambodia only joined in 1992), the American Convention on Human Rights of 1969.[2071] Only the UDHR makes express reference to the institution of marriage saying that it "shall be entered into only with the free and full consent of the intending spouses".[2072] On the other hand, the other instruments speak of the right to a private and family life without any reference to the institution of marriage or to the notion of free consent of the intending spouses.

1109. This absence of any reference to marriage in the international instruments at the time is perfectly understandable given the evolution that this institution has undergone as a tool of social structuring. For a long time, numerous legal systems reflected a traditional vision of the institution of marriage, which was received as an accomplishment of the group or the clan. Marriage as a social pact was a grouped family choice enacted with differing parameters depending on the society (level of education, social or religious) and not as an individual choice as it can be today. The progress in human rights has enabled this concept to evolve and new family values have emerged. Marriage now participates in the construction of the individual and no longer that of the group. The idea of

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[2067] Reasons for Judgement, §74.
[2068] DUDH, 1948, article 16-2: "Marriage shall be entered into only with the free and full consent of the intending spouses".
[2069] ECtHR, 1950, article 8 relative to the right to respect for private and family life: "Everyone has the right to respect for his private and family life, his home and his correspondence".
[2070] ICCPR, 1966, article 17: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks".
[2071] American Convention on Human Rights, 1969, article 11: "No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honour or reputation".
[2072] See below the regulation of marriage and the consent of the spouses, §1260-1270.

marriage as an affirmation of individuality is a very contemporary idea in many societies. This is illustrated by recent legislative modifications in certain States, including Cambodia.[2073]

1110. The ICJ adopted a position similar to the terms of a decision refusing to conduct investigative acts for crimes of forced pregnancy and insemination. After a thorough analysis of the condition of formal unlawfulness, they believed, given the insufficient nature of the instruments available at the time, that these crimes could not be characterised as OIA.[2074] Thus, they attempted to explain this legal void:

> "The gradual, but slow, acknowledgement of forced pregnancy as a crime in international criminal law highlights the divide between collectivist and individualistic legal traditions, where differences in norms have resulted in contrasting views on reproductive choice, sexual relations, abortion, and the expansion of women's rights". [2075]

1111. A single international convention is manifestly insufficient for finding for the existence of formal unlawfulness. No reference to marriage can be found within any of the international instruments relative to the law pertaining to war. Nothing can be found in the Lieber Code of 1863,[2076] the Hague Conventions of 1899 and 1907,[2077] the Nuremberg and Tokyo Charters,[2078] the Geneva Conventions and Additional Protocols,[2079] Control Council Law no. 10,[2080] and neither in the IMT for the Far East.[2081]

[2073] See below §1133-1136.
[2074] Consolidated decision on the requests for investigative action concerning the crime of forced pregnancy and forced impregnation 13.06.2016, **004/2-D301/5**.
[2075] Consolidated decision on the requests for investigative action concerning the crime of forced pregnancy and forced impregnation 13.06.2016, **004/2-D301/5**, §74 (emphasis added).
[2076] The Lieber Code, *Instructions for the Government of Armies of the United States in the Field* dated 24.04.1863.
[2077] Conventions concerning Laws and Customs of War on Land and its annex: Regulations concerning Laws and Customs of War on Land, 29.07.1899; Convention concerning Laws and Customs of War on Land and its annex: Regulations concerning Laws and Customs of War on Land, 18.10.1907.
[2078] IMT Charter, annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 08.08.1945.
[2079] GC for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field and the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 12.08.1949, United Nations -Treaty Series, vol. 75, p. 85; GC relative to the treatment of prisoners of war, 12.08.1949, United Nations -Treaty Series, vol. 75, p. 135; Protocols additional to the GC relative to the protection of civilian persons in time of war, 12.08.1949 and to the protection of international armed conflicts, 08.06.1977.
[2080] Control Council Law No. 10, 20.12.1945.
[2081] IMT for the Far East, special declaration of the Supreme Commander for the Allied Powers in the Far East in Tokyo, 19.01.1946 (amended on 26.04.1946).

1112. In the *Duch* Appeal Judgement, the Supreme Court Chamber recalled that a Chamber may rely on the domestic law applicable at the time of the facts to establish whether the Accused could reasonably be aware that the facts of which he is accused were prohibited and punishable.[2082]

1113. The Penal Code of the Kingdom of Cambodia in 1956 contains no disposition criminalising forced marriages. On the other hand, the Civil Code of 1920 and its dispositions relative to marriage do allow an understanding of the perception of this institution both before and after the period of the DK regime. The 1920 Civil Code was applicable before and after the events, up until 2007.[2083] It helps in the understanding of the state of the law in Cambodia between 1975 and 1979. Article 125 of the said Code states: "Should one of the parties wishing to marry be a minor, the consent of parental authority holders or guardian shall be obtained". And Article 133 states: "Adult fiancés are equally required to obtain for their marriage **the consent of the same persons as for minors**". No disposition refers to the consent of the intending spouses.[2084]

1114. From these dispositions, it is clear that only the consent of the parents counted and that the absence of the consent of the intending spouses was a legal practice for finding a marriage prior to the DK. This institutionalisation of the absence of the consent of the intending spouses also confirms the absence of domestic unlawfulness.

C. Impossibility to sentence KHIEU Samphan

1115. As already argued, the supplementary category of the OIA participates in the desire to build international criminal law.[2085] This construction must be carried out respecting the principle of *nullum crimen sine lege* and the corollaries which ensue.[2086] The analysis of the condition of unlawfulness satisfies this requirement. For the ICJ, using such sources during the analysis of this condition "also serves the purposes of determining whether it was foreseeable and accessible to accused persons that they could be investigated and prosecuted for such conduct".[2087] Also, the

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[2082] *Duch* Appeal Judgement, 03.02.2012, §96.
[2083] On the 1920 Civil Code being valid until 2007: Kram Royal NS/RK/0511/007, *The Law on Implementation of the Civil Code*, 31.05.201, article 82: "*Management of the old Civil Code: the old Civil Code which was promulgated by the King on February 25, 1920 and was continually amended until April 17, 1975 has no further effects*".
[2084] Cambodian Civil Code of 1920 (emphasis added), (attached).
[2085] See above, §658-665.
[2086] See above, §658-665.
[2087] Consolidated decision on the requests for investigative action concerning the crime of forced pregnancy and forced impregnation 13.06.2016, **004/2-D301/5**, §63.

proposed analysis must lead to "the conclusion that there must be a customarily accepted standard, tied to the appropriate human right, by which the 'inhumanity' of the act is judged. [2088]

1116. In conclusion, it is clear that, before the DK period, international instruments contained neither a clear definition of forced marriage, nor standard norms of protection designed to prevent such behaviour and that the absence of consent by the intending spouses in a marriage in Cambodia was legal at the time of the facts in this case. Therefore in fact, the Chamber violated the principles of accessibility and foreseeability for KHIEU Samphan.[2089] Faced with this manifest insufficiency, it could not find beyond reasonable doubt that "the crime against humanity of other inhumane acts was committed nationwide through conduct characterised as forced marriage".[2090] If by some unlikely chance, the present jurisprudence here wished to characterise retrospectively the facts, subsidiarily the examination of the constitutive elements also does not allow the crime of which KHIEU Samphan is charged to be established.

II. ERRORS IN THE EXAMINATION OF THE CONSTITUTIVE ELEMENTS FOR OIA THROUGH FORCED MARRIAGE

1117. The Chamber erred in law and in fact concerning the constitutive elements for OIA. It gave a bad interpretation of the criterion of the nature and gravity similar to that of the other listed CAHs (A), of the suffering endured (B) and of the intent (C).

A. Errors in examining the criterion of the nature and gravity similar to that of the other listed CAHs

1118. The assessment of the nature and gravity similar to other CAHs enables characterisation of the *actus reus* of OIA. Although the Chamber admitted that the condition of formal unlawfulness was helpful in examining the said element, its incomplete analysis led it to commit numerous errors whereas forced marriage was not a criminal offence before the facts (1), nor after the facts (2) and not even at the time of the facts (3). The Chamber tried to cover up these errors by creating an artificial distinction between arranged marriages and forced marriages (4).

1. Forced marriage was not a criminal offence prior to the facts

[2088] Consolidated decision on the requests for investigative action concerning the crime of forced pregnancy and forced impregnation, 13.06.2016, **004/2-D301/5** §64, referring to the article by Tehri JYRKKIÖ, *Other inhumane acts as Crimes against humanity,* Helsinki Law Review, 2011, p. 204 (fn 107).
[2089] Reasons for Judgement, §3686-3694.
[2090] Reasons for Judgement, §3694.

Prior to the facts, forced marriage was not a criminal offence neither in domestic law (a) nor in any international instruments (b).

a. The absence of consent in domestic law

1119. The Chamber committed errors in its analysis of the pre-DK law. First, it considered that "[a]rranged marriage in Cambodian culture pre-DK regime was based on mutual trust between parents and children ".[2091]

1120. The Chamber erred in fact and in law in retaining that arranged marriages found their legal basis in the "mutual confidence between parents and children". The Chamber provided no legal characterisation of the facts for this socio-anthropological description. This idea was supported by the testimony of the expert Kasumi NAKAGAWA.[2092] This expert has carried out surveys concerning marriage in Cambodia. The surveys were carried out using a sociological approach. When the expert testifies by giving the Chamber certain information, such as the notion of "mutual confidence", it is for the judges' office to give a legal characterisation to this information. The Chamber is obliged to give reasoned grounds which should come from a legal characterisation of the facts. Instead of that, it allowed itself to provide moral judgements by attempting to legitimise the absence of consent of the intending spouses prior to the DK regime. Such reasoning has no place in a criminal trial.

1121. Marriage being a civil contract and today recognised as being a meeting of minds, the following legal question must be asked: was the consent of the intending spouses indispensable for the validity of a marriage prior to the DK? The answer is no.[2093] Legally, it was the consent of the parents that was required for a contract of marriage to be valid.

1122. In misrepresenting the absence of consent of the intending spouses by the abstract idea of "mutual confidence", the Chamber did not draw any legal finding from it. This "confidence" implies legally an absence of consent which implies *a fortiori* **a constraint**. The legal vocabulary of Gérard CORNU gives several definitions of constraint: 1 .Hold (in the eyes of the Law), legally obliged; employed in this sense before physical implementation of the constraint. ; The power to constrain

[2091] Reasons for Judgement, §3688 (emphasis added).
[2092] Kasumi NAKAGAWA: T. **E1/473.1**, 14.09.2016, p. 11-12, see fn 12302 in the Reasons for Judgement.
[2093] See above, §1113-114, Cambodian Civil Code 1920 (Annex).

belongs to the State authorities (which enters notably into the definition of the rule of Law) and by extension he or she who is the recognised holder of a right in order to have that right respected. (translation ours).[2094]

1123. Constraint may therefore be legal because it is instituted in law and issued by the State. Such was the case under the authority of the 1920 Civil Code. By delegating to the parents and not to the intending spouses the consent required to validate the marriage, a double constraint is employed. One legal and the other, moral. In effect, in Cambodian society at the time, that is in a collectivist society based around the family, it is difficult to believe that the intending spouses could freely refuse the marriages proposed. The only reference to constraint is the following: "Generally, arranged marriages do not include an element of force".[2095] There is no footnote supporting this affirmation enabling the Chamber to exclude the notion of constraint in arranged marriages prior to the DK period. And with good reason. By using the word "generally", the Chamber bases a finding, essential for the legal characterisation of the facts, on a completely groundless generality. From the very beginning of this analysis, the Chamber was under the obligation of defining constraint legally in order to understand the context in which the offence is situated.[2096] The Chamber justifies this absence of finding as follows:

> "Finally, to what extent and how often social pressure in traditional marriages impacted the ability to freely consent is not of relevance for the facts charged in these proceedings".[2097]

1124. By saying that the context of traditional marriages, meaning arranged marriages, is irrelevant to the current proceedings, the Chamber committed an error in law and in fact. This error is the result of a subjective position taken by the Chamber which has led it to a biased reasoning. First, it refused to categorise constraint within arranged marriages legally by hiding behind a series of groundless banalities. Second, it completely excluded the context which would enable it to understand the cultural particularity in which the offence is situated.

[2094] Définition du Vocabulaire juridique, [Definition of Judicial Vocabulary] Gérard CORNU, PUF, 2003, p. 222 (emphasis added). See also other definitions: "3. Victim of an act of force or of violence" (); "4. (pen.) External pressure which justifies he or she who acts under the influence of such a force (human violence, force majeure) without being able to resist it", p. 222-223 (); Black's Law Dictionary: Compulsion; constraint; compelling by force or arms. ().
[2095] Reasons for Judgement, §3688.
[2096] Jurisprudence examples of the definition of constraint: *RUF* Judgement (SCSL), 02.03.2009, §1471; *AFRC* Judgement (SCSL), 20.06.2007, §694; *Kunarac et al.* Judgement (ICTY), 12.06.2002, §129. Black's Law Dictionary: Compulsion; constraint; compelling by force or arms. ().
[2097] Reasons for Judgement, §3688.

1125. Thus, this reasoning is completely antinomic: the Chamber dwells long on the mutual confidence between parents and children and on the manner in which traditional ceremonies were carried out. In fact, therefore, it dwelt on just a part of the context. On the contrary, it chose to exclude arbitrarily another part of the context when this is relative to the capability that the intending spouses had to consent to marriage. This is however an essential element for the discussion relative to legal characterisation of the facts. The Chamber therefore excluded elements which were exculpatory for the Accused.

1126. This erroneous affirmation is also contrary to ICT jurisprudence relative to the degree of gravity in the characterisation of OIA and in terms of which it is clear that, to appreciate the gravity of an act, it is necessary to take account of the context in which the act is committed.[2098] The Chamber was obliged to take account in its entirety of the legal and cultural context of marriage before the DK. The offence in these proceedings, by reason of its cultural particularity, raises enormous difficulties which go even beyond the confines of the Court. Numerous articles of doctrine and earlier cases have already expounded on the complexity and the difficulty of characterising this novel notion. The earlier context, taken in its entirety, was therefore clearly useful, and necessary for an understanding of the facts in these proceedings.

1127. Once again, this reasoning can only be explained by a desire to bypass the legal questioning which should have allowed the disqualification of the charge in question. The expert Kasumi NAKAGAWA, during her testimony before the Chamber, had however given indications of the social context prior to the DK period:

> "In my interviews, I asked the people when they were children before the Khmer Rouge, how were their family life. And I specifically asked were their mothers, fathers beating up them, did the teacher use violence in the school. And everybody said yes. "My mother beated me when I lost the cow. My father beated me when I came back home late. My teacher beated me". So, violence was very rampant even before the Khmer Rouge, but those people saw those violence as not a tool to terrifying them, but as a symbol of affection, as a symbol of education that the adults were guiding them to be a good citizen. It's a part of their affectionate way of education for personal development".[2099]

1128. Violence was predominant before the DK regime. One can define constraint as violence or pressure applied to a person to oblige that person to do something or to prevent that person from doing

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[2098] Judgement 002/01, 07.08.2014, §735; *Krnojelac* Judgement (ICTY), 15.03.2002, §131; *Simić* Judgement (ICTY), 17.10.2003; *Vasiljević* Judgement (ICTY) 29.11.2002; *Galić* Judgement (ICTY), 05.12.2003, §153, §235; *Brđanin* Judgement (ICTY), 01.09.2004, §1013; *Martić* Judgement (ICTY), 12.06.2007, §84.
[2099] Kasumi NAKAGAWA: T. 14.09.2016, **E1/473.1**, p. 11-12, between 09.33.14 and 09.34.21 (emphasis added).

something the person wished to do, and such violence or pressure may be physical or moral. Social pressure, characterised by physical or moral pressure, enabled, prior to the DK, exercising a constraint on the intending spouses in the conclusion of marriage. Prior to the DK, marriage regulations were governed by the 1920 Civil Code in which the consent of the intending spouses was not required. Concluding a marriage contract required only the consent of the parents, who chose the spouse for the children.[2100]

1129. The expert NAKAGAWA gave details of the predominant role of parents prior to the DK:

> The traditional marriage in Cambodian society was arranged by the parents and agreed upon by the parents. In regard to the women's decision-making power, it was almost zero, so a daughter was given the instruction or order to marry somebody by her parents. (…) Traditionally, in Cambodian culture, as in many other cultures, children were not understood as a person who has the full rights. Parents (sic) [children] were understood as not properties, but belonging to the parents.… (…) It's not only for the marriage. Children's life were decided by the parents".[2101]

1130. The Chamber committed numerous errors in law and in fact concerning its finding on marriage prior to the DK notably in not giving grounds for its finding, in not legally characteriseing the facts and by being partial in excluding exculpatory elements for KHIEU Samphan.

b. Forced marriage not covered by the international instruments

1131. There was no prohibition on forced marriage at the time of the events. The law of armed conflict makes no reference to this offence or any similar behaviour. Similarly, as mentioned earlier, the international conventions still do not establish marriage and free consent as fundamental rights.[2102]

2. The offence of forced marriage is still not evident according to the facts

1132. The Chamber's faulty reasoning is due to the fact that, even today, the inculpation of forced marriage is a delicate issue. Forced marriage is not an evident criminal offence in Cambodia and the ASEAN countries (a), just as it is not evident at international level and in international law (b), This difficulty is specifically due to many countries' reticence to criminalise their own cultural practices (c).

[2100] See above. Absence of real distinction between the rights and prohibitions published in the texts applicable at the time of the facts §1108-1114.
[2101] Kasumi NAKAGAWA: T. 14.09.2016, **E1/472.1**, p. 39, between 10.41.16 and 10.42.34 (emphasis added).
[2102] See above: Mistaken evaluation of formal unlawfulness §1099-1107.

A. Inculpation of forced marriage is still not evident at the Cambodian or regional level

1133. At ASEAN level, forced marriage is still an established cultural practice in numerous countries. On 8 March 2019, the Organisation held a seminar calling for an end to child, early and forced marriage.[2103] In Cambodia, arranged/forced marriage is still very common practice, especially in rural areas. In a 2007 report, the LICAHO (Cambodian League for the Promotion and Defense of Human Rights) stated that:

> "*Marriage in Cambodia encompasses many social and cultural issues and traditions that are prevalent in Cambodian society today. Cambodian women are often seen as inferior to their husbands and this creates problems for women, particularly those suffering abuse or wanting to divorce their husbands. Traditionally, women are encouraged and sometimes pressured by their families to marry at a young age. Arranged marriages still occur, particularly in rural areas, and once a couple is married there is great pressure on them to stay married.*"[2104]

1134. Similarly, a 2014 Government ministerial report warns about the situation:

> *"Arranged marriage is still prevalent and once a couple is married there is great pressure on them to stay married. However, attitudes toward marriage are changing and the proportion of women whose families arranged their marriage fell from 51 percent in 2000 to 35 percent in 2005. The traditional practice of child marriage still prevails and some parents pressure their daughters to marry a man they selected when she was still a child.*"[2105]

1135. And yet, the Cambodian Penal Code has still not made forced marriage an offence. These recent studies on ASEAN and Cambodia allow us to return to the distinction between arranged and forced marriage. Arranged marriage is in no way legitimate in these studies or reports, as the Chamber tried to explain in the Reasons for the Judgement under appeal. The forced marriages they cover are arranged marriages: as both notions cover traditional marriages in which the families choose the spouses without the spouses' consent. Expert NAKAGWA also mentioned the constraints of contemporary marriage in Cambodia by establishing a distinction between urban and rural marriages:

[2103] ASEAN website news article: ASEAN calls for ending child, early and forced marriage, seminar of 08.03.2018 organised in partnership with UNICEF and UNFPA. Available at the following url: https://asean.org/asean-calls-ending-child-early-forced-marriage/

[2104] Report by the LICAHO NGO: "*Violence against Women: How Cambodian laws discriminate against women*," 2007, p. 13-14.

[2105] Government Report, Ministry of Women's Affairs of Cambodia, Policy brief 2, *Gender relations and attitudes Cambodia Gender assessment*, 2014, p. 14. Available at the following url: https://www.kh.undp.org/content/dam/cambodia/docs/DemoGov/NearyRattanak4/Neary%20Rattanak%204%20-%20PB%20Gender%20Relations%20and%20Attitudes%20Eng.pdf.

> "In urban areas, I would estimate, perhaps, approximately half of the women are now expressing their opinion to their parents and asserting their opinion with whom they want to marry; around 50-50, I would say, because I still see my students being forced into unwanted marriage. But in the rural areas, on the contrary, I would say approximately 90 percent of the younger girls, they are waiting their parents to assign them to marry somebody or they dare not to express their opinions or they even cannot tell their parents that they have boyfriend."[2106]

1136. So forced and arranged marriages are simply two terms that describe a single, same situation. They are indistinguishable. The term 'arranged' marriage has evolved to 'forced' marriage through the evolution of fundamental rights. Mutual consent of the spouses is a recent notion that appeared in the Cambodian legal framework via the 1993 Constitution[2107] and the 1989 Law on marriage and family.[2108] It was only after this latter law that it became an essential condition for a valid marriage. In summary, from 1920 to 1989, marital consent was not a condition for a marriage to be valid as the parents held the power to give consent.

b. The inculpation of forced marriage is still not evident at international level or in national laws

1137. Forced marriage is a new form of crime inspired by civil law that did not exist at the time of the alleged events.[2109] A quick look at the criminal codes allows us to understand the contemporary nature of this offence and its addition under the terms of recent modifications to the legislation. Germany in 2005,[2110] Norway in 2007,[2111] Belgium in 2005 and again in

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[2106] Kasumi NAKAGAWA: T. 14.09.2016, **E1/473.1**, p. 68-69, around 13.37.15.
[2107] Cambodia's Constitution of 21.09.1993, article 45-3: "Marriage shall be done according to the conditions set by the law and based on the principles of mutual consent and monogamy."
[2108] *Law of 1989 on the Marriage and Family, 26.07.1989*. Available at the following url: https://www.refworld.org/docid/3ae6b55c0.html.
[2109] See above, §1098-1116.
[2110] *Strafgesetzbuch* [German penal code] of 19.02.2005, section 240 (4). (source: Sahra MEKBOUL, *Le Mariage forcé: réponse du droit et enjeux juridiques*, [Forced marriage: legal solutions and issues] Centre d'information et d'études sur les migrations internationales, 2008/5, n°119) ().
[2111] Norwegian penal code, Law of 2007, article 222-2. (source: Sahra MEKBOUL, *Le Mariage forcé: réponse du droit et enjeux juridiques*, [Forced marriage: legal solutions and issues] Centre d'information et d'études sur les migrations internationales, 2008/5, n°119) ().

2013,[2112] Benin in 2012[2113] and Switzerland in 2012.[2114] France made forced marriage a criminal offence in the Law of 5 August 2013, but only in cases where a person was forced to sign or enter into a marriage abroad.[2115]

1138. Most States prefer to stick to civil law as the best route to addressing forced marriage. While it is not a criminal offence in all States, most national legislation now deems that a marriage is null and void in the absence of freely given consent by the spouses.

1139. The issue has still not been harmonised at European level. It has been subject to shy advances. In 2002, the Committee of Ministers of the Council of Europe adopted a recommendation to prevent and combat violence against women that specifies forced marriage among the acts of violence and encourages Member States to take all necessary measures to ban marriages without the spouses' consent.[2116] In 2018, the Council of Europe and the Parliamentary Assembly began to debate the possibility of harmonising inculpation across all EU Member States. In a report published on 5 June 2018, the European Parliamentary Assembly "*considers it essential for member States to step up their efforts to prevent and combat forced marriages and put an end to the violence and violation of rights that they entail.*" It therefore calls on Member States to "*criminalise conduct forcing an adult or a child to enter into a marriage*".[2117] This supports the creation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210, "I*stanbul Convention*"), which prohibits forced marriage in its Article 37.[2118] This convention has been

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[2112] Belgian penal code, first law of 2005 and second law of 02.06.2013, article 391 sexies. (source: Sahra MEKBOUL, *Le Mariage forcé: réponse du droit et enjeux juridiques*, [Forced marriage: legal solutions and issues] Centre d'information et d'études sur les migrations internationales, 2008/5, n°119) ().

[2113] Penal code of the Republic of Benin, Law of 09.01. 2012. (source: Sahra MEKBOUL, *Le Mariage forcé: réponse du droit et enjeux juridiques*, [Forced marriage: legal solutions and issues] Centre d'information et d'études sur les migrations internationales, 2008/5, n°119) ().

[2114] The Swiss Criminal Code, Law 2012, article 212 (article by Géraldine BROWN, Thierry DELESSERT and Marta ROCA I ESCODA, *Du devoir marital au viol conjugal. Etude sur l'évolution du droit pénal suisse*, (From Conjugal Duty to Marital Rape. A Study of the Evolution in the Swiss Criminal Code), Lextenso Droit et société, 2017/3 n°97).

[2115] French penal code of 05.08.2013, article 222-14-4. (available on the légifrance website).

[2116] EU Recommendation on the protection of women against violence, (Rec(2002)5), 2002. Available at the following url: https://www.coe.int/fr/web/genderequality/recommendation-rec-2002-5-and-other-tools-of-the-council-of-europe-concerning-violence-against-women.

[2117] Report by the Parliamentary Assembly of the Council of Europe, *Forced Marriage in Europe - Report*, Commission for Equality and Non-Discrimination, 05.06.2018, p. 3. Available at the following url: http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=24806&lang=en

[2118] Council of Europe Convention on preventing and combating violence against women and domestic violence, Council of Europe, 01.08.2014. Ten ratifications on the day it entered into force.

only partially successful as although it is in force in 34 States, six States have neither signed nor ratified it and an additional 11 signatory States have not ratified it.

c. The inculpation of forced marriage is not always evident, given the cultural issues involved

1140. The difficulty of inculpating forced marriage is not unique to the ECCC. It also raises numerous national legal questions for States that have recently tried to criminalise it. There is a divide between what are seen to be archaic cultural practices and the evolution of human rights which has led to the multiplication of specific international conventions. Some authors believe this raises the issue of universalism versus relativism, which is legitimate in the context of forced marriage. The allegation of this offence must be analysed very carefully as it is directly related to Cambodian culture between 1975 and 1979. While the Chamber declared that in assessing the credibility of a witness it referred the issue to its Cambodian members "in order to avoid cultural bias"[2119] in its in-depth analysis of the evidence, we nevertheless note that it has characterised the facts through contemporary glasses.

1141. Indeed, while the UDHR alone established the law of spouses' free consent between 1975 and 1979, the Cambodian Civil Code legalised the lack of spouses' consent by only considering that of their parents. It is important to understand that while today and throughout the examination of the evidence in Case 002/02, the idea of forced marriage (i.e. of a union entered into without the consent of one or both of the spouses,) seems unanimously condemned by a large number of States, this was not the case at the time of the alleged events.

1142. In an article on the legal issues involved in forced marriage, Sahra MEKBOUL wonders about *the complex issue of inter-culturality versus human rights and underlying legal issues* (translation ours).[2120] In questioning the stand-off between various legal systems over this notion, the author deems:

> "There is a social and legal gap between European and other national legal concepts that is beginning to open concepts in which the complex notions of universalism and pluralism used to understand human relationships and their translation into law, take opposing positions in an egalitarian and complementary relationship (...) This opposition between "universalism/individualism" also allows us to perceive the implicit desire for the supremacy of (the universalism of) human rights, in the logic

[2119] Reasons for Judgement §62; see above, §254-256.
[2120] Sahra MEKBOUL, *Le Mariage forcé: réponses du droit et enjeux juridiques [Forced marriage: legal solutions and issues]*, Centre d'information et d'études sur les migrations internationales, 2008/5, No. 119, p. 83 ().

> of transposing Northern countries' legal models to Southern states in a way that leaves little room for their specificities (translation ours)."[2121]

1143. This is interesting in the present case and leads us to ask: Would KHIEU Samphan have been tried for these acts in a court established at the end of DK? The very definition of this notion raises a variety of polemical debates in an anthropological/legal approach that the Chamber has tended to vulgarise.

1144. During her statement, expert Peg LEVINE explained why the term "forced" was a term never used in her study samples.[2122] She noted that the term "forced" appeared during the ECCC trials, and created a sense of "shame" among those questioned:

> "It was after the word 'forced' became an agenda item to be evaluated at the ECCC that people began to feel as if they were ashamed to tell their children about where and how they were married. That's the first part of my answer to your question. And secondly, they did not change their interpretation of their weddings as being authentic, but they were concerned about how public they could be given the context of media representation of their weddings."[2123]

1145. Her conclusions illustrate the schism between cultural reality and legal construction as well as the complexity of a legal opinion on acts that concern not only the period of DK but also Cambodia and its culture throughout history.

3. Forced marriage was therefore not an offence at the time of these events

1146. The Chamber recalled the Supreme Court's opinion that formal international unlawfulness allowed us to verify whether the examined behaviour was as grave as the other CAH.[2124] But the Chamber has not carried this analysis out, which means that it has also failed to analyse whether or not the facts were similar in gravity and nature to the other CAH.[2125]

1147. The criminal character of an act is of unquestionable help when it comes to assessing its nature and gravity. But analysis of the condition of formal unlawfulness has demonstrated that, at the time of the events, the international instruments contained no sufficient protection or prohibition that

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[2121] Sahra MEKBOUL, *Le Mariage forcé: réponses du droit et enjeux juridiques [Forced marriage: legal solutions and issues]*, Centre d'information et d'études sur les migrations internationales [Centre for information and research on international migration], 2008/5, No. 119, p. 97-98 ().
[2122] Peg **LEVINE**: T. 11.10.2016, **E1/481.1**, p. 4, around 09.09.05: "In my entire sample, the word 'forced' was never used." (emphasis added).
[2123] Peg **LEVINE**: T. 11.10.2016, **E1/481.1**, p. 4-5, between 09.09.05 and 09.10.14.
[2124] Reasons for Judgement, §726.
[2125] Reasons for Judgement, §3692.

would allow us to establish whether the crime was then lawful. This lack of international criminality allows us to reasonably believe that the alleged criminal acts were not seen as equivalent in nature and gravity to the other CAH. Moreover, legalisation of the lack of spouses' consent in the 1920 Civil Code allows us to introduce objective reasoning into a complex issue that the Chamber has tried to vulgarise with a Manichaean presentation of the distinction between arranged and forced marriage. Forced marriage seems rather to be the continuity of an existing cultural practice, which was institutionalised in DK. You cannot say the same of murder, extermination, enslavement, deportation, etc.

1148. Neither did the Chamber believe it useful to apply the rule of *esjudem generis* to appreciate the *actus reus*. In characterising the crime of CAH, the *esjudem generis* rule could have helped determine if the alleged act or omission was as grave as the acts specified as being CAH in Article 5 of the ECCC Law. In order to determine which types of acts may have a similar character, (in terms of both their nature and gravity,) the Chamber should have examined the case law and evaluated the types of act or omission defined as OIA.[2126] In relying exclusively on objective criteria to determine the *actus reus*, it has committed a mistake of law, as it was unable to establish the *actus reus* beyond reasonable doubt.

1149. The rights and prohibitions contained in the international instruments at the time of the events are insufficient to allow us to conclude that the offence was covered by the principle of legality and that it was foreseeable and available to the Accused. Should it rule otherwise, and retroactively incriminate the Accused, failure to apply the condition of formal unlawfulness combined with the cultural specificity of the offence and the contemporary debates surrounding this issue would make it impossible to affirm beyond reasonable doubt that the *actus reus*, i.e. the requirement that the acts be as grave as the other CAH, is established. All of the Chamber's findings regarding OIA through forced marriage must therefore be annulled.[2127]

4. Erroneous Chamber findings resulting from an artificial distinction between arranged and forced marriage

1150. To make up for this lack of a legal demonstration of the offence, the Chamber tried to base its reasoning on an artificial distinction between arranged and forced marriage:

[2126] Case 002/01 Appeal Judgement, 23.11.2016, §581-585. Supreme Court application of the *esjudem generis* rule.
[2127] Reasons for Judgement, §3686-3694.

> "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".[2128]

1151. The Chamber made errors of law and fact in its findings about the context of marriage in DK. The Judges made the mistake of generalising the marriage practice, while the evidence very clearly shows it is impossible to establish a standard practice throughout DK territory.[2129] To the contrary, DK documents show that marriage regulations were based on consent and greater status for women (abolishment of polygamy, increase in the minimum legal age of marriage, etc.).[2130] The Chamber dismissed the element of coercion in arranged marriages to underline "the fear of being punished by the Party" in order to characterise constraint in DK. This kind of analysis reveals two kinds of constraint. The first is legitimate as it is exercised by the parents and the other is criminally reprehensible as it is institutionalised at national level. This analysis of the evidence is variable, which is an obvious injury to KHIEU Samphan.

1152. The distinction made between arranged and forced marriage is so artificial that the Chamber itself confused these notions. Indeed, it continues, stating that:

> "The Chamber has found that DK authorities **arranged** marriages throughout the DK period and in numerous geographical locations throughout the territory of Cambodia".[2131]

1153. The Chamber's distinction is so sterile that it has lost itself in its own language.[2132] In evaluating the validity of consent, the Chamber again formulates a generalisation that has no place in the legal characterisation of the facts:

> "[...] the consent purportedly given either before or during wedding ceremonies did not amount in most cases to genuine consent".[2133]

1154. Such a finding, with direct consequences for the characterisation of the crime and KHIEU Samphan's responsibility, must be annulled as it relies on an affirmation and poor analysis of the

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[2128] Reasons for Judgement, §3688 (emphasis added).
[2129] See below, §1189-1280.
[2130] See below, §1189-1280.
[2131] Reasons for Judgement, §3690 (emphasis added).
[2132] This confusion is not the result of a translation error in the French version of the Reasons for the Judgement as the same term is used in the English version. "*The Chamber has found that DK authorities arranged marriages throughout the DK period and in numerous geographical locations throughout the territory of Cambodia".* (emphasis added).
[2133] Reasons for Judgement, §3690 (emphasis added).

evidence.[2134] This erroneous description of the context of marriage in DK then allows the Chamber to conclude that the *actus reus* of the crime is established.[2135] This finding is solely based on the distinction made. The Chamber therefore committed an error in law in basing its reasoning on a mistaken and subjective version of the facts, in only applying objective criteria to evaluate the equivalent nature and gravity of this act to the other CAH and in failing to provide any legal reasoning. If it had provided a legal characterisation of the context of traditional arranged marriages and followed this by one of marriage in DK and then applied the *esjudem generis* rule, the Chamber could not reasonably have found that the *actus reus* had been established.

1155. Defining forced marriage as an OIA crime is complex and poses an enormous number of questions. Numerous authors disagree on this subject. Their doctrinal oppositions illustrates the uncertainty surrounding this characterisation.[2136] On the one hand, there can be no doubt over an OIA as "their overall consequences must offend humanity in such a way that they may be termed 'inhumane'".[2137] And on the other, if there is any doubt, the decision must always favour the Accused. This artificial distinction is particularly evident in the way in which the Chamber describes the suffering endured.

B. Errors in the analysis of the suffering endured in these marriages

1156. The Chamber erred in fact and in law by finding that the factual allegations of CAH of OIA through forced marriages were constituted by considering that the alleged facts were as grave as the other CAH specified.[2138] These findings result from an erroneous and biased analysis of the statements about forced marriages that notably masked key aspects of traditional weddings (1) and based generalisations on specific cases that are not representative of all of the evidence (2).

1. Poor analysis of the evidence and mistaken ideas of traditional marriage

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[2134] See below on the question of consent §1260-1270.
[2135] Reasons for Judgement, §3692.
[2136] See in particular: Article by Valerie OOSTERVELD, *Forced Marriage and the Special Court for Sierra Leone: Legal Advances and Conceptual difficulties*, International Humanitarian Legal Studies 2011, p. 147; Article by Nicolas Azadi GOODFELLOW, *The Miscategorization of 'Forced Marriage' as a Crime against humanity by the Special Court for Sierra Leone*, p. 866; Article by Iris HAENEN, *Classifying acts as crimes against humanity in the Rome Statute of the International criminal court,* German Law Journal, 01.07.2013, p. 796-822, and the book by Iris HAENEN, *Force & Marriage: The criminalisation of forced marriage in Dutch, English and international criminal law*, Intersentia, 2014.
[2137] *Kupreškic Judgement (*ICTY), 14.01.2000, §622.
[2138] Reasons for Judgement, §3691-3692.

1157. To try and avoid the consequences of devolved (parental) consent in traditional marriages,[2139] the Chamber committed a series of factual errors in order to conclude that forced marriages were the rule in DK, in spite of the official rules. It deems 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 because, as a principle, 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".[2140]

1158. Following on from this mistaken analysis, the Chamber found that "[b]oth men and women were forced to marry during the DK regime throughout the territory",[2141] on the basis of a biased analysis of the evidence that aimed to confirm its thesis that people had no other choice than to respect and entirely submit themselves to Angkar orders in every area.[2142]

a. <u>Refusal to consider the social pressure in traditional Khmer weddings</u>

1159. The Chamber distorted the arguments of the Defence CB, demonstrating the similarity between marriage in DK, which required the approval of the authorities and traditional weddings which required the approval of the parents or guardians (where relevant). In both cases, the aim was to provide couples with a formal and socially accepted framework for starting a family.[2143] As we will see below, the Chamber's findings about the implementation of the rules are erroneous, but before arriving at that criticism,[2144] we must note that it wrongly dismissed Defence arguments on the importance of social pressure in traditional Khmer weddings.[2145] It considered that traditional marriages were different from those organised in DK because the *caring family trust* shared by parents and their children meant they were free of any constraints.[2146] (paraphrase ours). This finding is not only an error in law as we saw above,[2147] but it also contradicts the evidence.

[2139] See above, §1119-1130.
[2140] Reasons for Judgement, §3548, fn 11927.
[2141] Reasons for Judgement, §3690, fn 12308.
[2142] Reasons for Judgement, §3686-3690.
[2143] CB 002/02, §2425 ("[W]hile parental authority was replaced by local authority, the goal still remained that of enabling people to get married and start a family") and §2374 ("Even though authority changed hands from the parents to the local authorities and to Angkar, the process was very similar to the arrangement made according to tradition.").
[2144] See below, §1191-1242.
[2145] Reasons for Judgement, §3688, 3697.
[2146] Reasons for Judgement, §3688.
[2147] See above, §1119-1130.

1160. Indeed, several witnesses have explained that social and parental pressure did not allow them to contest their parents' choice of spouse.[2148] Moreover, this was confirmed by expert witness Kasumi NAKAGAWA in her presentation of the ways in which traditional marriages were organised.[2149] Accordingly, the Chamber erred in fact by taking an idealised view of traditional marriage and creating an artificial distinction between it and marriages in DK.[2150] This view is all the more erroneous as the imposition of parental choice remains a problem in Cambodia today.[2151] The Chamber therefore erred in refusing to consider that marriages arranged by and under the traditionally incontestable authority of the parents was no different to that which it described as a contest of coercion or widespread fear. Yet this transfer of parental authority to the local authorities was significant, not only to understanding the cultural context in which CPK cadres operated, but also for assessing its impact on the spouses. The Chamber therefore stained its analysis with error, which invalidates its decision.[2152]

1161. This error also means that it failed in its obligation to justify its decision. On the one hand, it failed to consider the progress that gathering the consent of the future spouses, in addition to that of the local authorities, represented.[2153] As we will see below, the fact that the regulation was badly applied does not diminish the CPK's political desire to update the tradition. And, given the cultural context, the Chamber has not qualified how the kind of arranged marriage that was an integral part of Cambodian culture long before the DK regime could be considered as a CAH of OIA with the same degree of gravity as the other crimes specified.

[2148] OM Yoeurn: T. 23.08.2016, **E1/462.1**, around 10.34.08; OUM Suphany: T. 26.01.2015, **E1/252.1**, around 09.59.51; MEAS Laihuor: T. 26.05.2015, **E1/305.1**, between 15.16.50 and 15.23.47; KANG Ut: T. 25.06.2015, **E1/322.1**, around 10.55.41.

[2149] Kasumi NAKGAWA: T. 13.09.2016, **E1/472.1**, around 10.50.45, around 10.42.34, around 10.49.20, around 10.53.01; T. 14.09.2016, **E1/473.1**, around 09.53.56, around 09.28.51, around 10.50.07.

[2150] Reasons for Judgement, 14.3.8.2 Context of coercion, §3670, 3674, 3676, 3690. See also §3654 in which it bases its reasons on the opinion of Kasumi NAKAGAWA. The Chamber deemed that individuals did not give their free consent to the marriage and therefore sexual relations under that marriage were also not freely consented to. Under the hypothesis of a traditional marriage in which only parental consent was required and in which arranged marriages gave little attention to the bride's opinion, it should therefore have found that traditional or other kinds of marriage also lacked the future spouses' proper consent.

[2151] For example, see the article entitled "Arranged marriage blamed for failing families", MARCHER A., Phnom Penh Post, 20.08.1999, **E3/7288**, in which the author mentions the social problems resulting from families torn apart following marriages to which they did not give their consent. Also see Khmer novels like Tum Teav and Pka Sropaun, which have been included in the school curriculum to criticise or at least draw parents' attention to decisions about their children's marriage.

[2152] Reasons for Judgement, §3688.

[2153] See below, §1191-1242.

1162. Moreover, the Chamber became bogged down in contradictory reasoning. Indeed to support its finding on the suffering endured by the victims of forced marriages, it referred to §3689 in which it found that "CPK policy deemed that Angkar could replace parents or should be put above them".[2154] The Chamber has not only distorted the Defence's arguments concerning this transfer of parental authority to Angkar,[2155] it has also failed to follow its own reasoning to its logical finding: if Angkar indeed took over the parental role in terms of consent, then the Chamber should have noted that the future spouses' consent was no more required before or during DK. The Defence had to search other sections of the Reasons for Judgement to try and understand its reasoning, firstly concerning the alleged suffering resulting from the different way of organising marriages before and during DK, then the suffering caused by such marriage.

b. Suffering resulting from the way in which marriages were held

1163. The Chamber relied on several civil party statements and written statements to reach findings about the suffering caused by the lack of religious rituals and parental absence at wedding ceremonies.[2156] But a reasonable analysis of this evidence would not allow us to conclude that the general suffering was as grave as that caused by the other CAH specified.

1164. The Chamber also used civil party MOM Vun's statement which mentioned the case of "60 couples" being married in the same ceremony, who cried because "there was no permission at all from our parents".[2157] Beyond the credibility issues of this civil party,[2158] her reactions on the day of the ceremony do not allow us to conclude that it had "caused serious mental harm with lasting effects on the victims."[2159] The other evidence also fails to allow us to make such a finding, as the Chamber has not provided a fair analysis of the gravity of the suffering caused by parental absence. For example, LING Lrysov stated that she had been "really disappointed" by the fact that her parents weren't authorised to attend her wedding.[2160] However, her disappointment does not tell us

[2154] Reasons for Judgement, fn 12315 (§3692) which refers to §3689.
[2155] Reasons for Judgement, §3687-3688. See below, §1252.
[2156] Reasons for Judgement, §3681. See also CB 002/02, §2337-2338.
[2157] Reasons for Judgement, §3680, fn 12281 and §3681, fn 12284 (parental absence).
[2158] See below, §1262-1263.
[2159] Reasons for Judgement, §3692.
[2160] LING Lrysov: T. 20.08.2015, **E1/334.1**, before 14.16.24.

whether she suffered very seriously.[2161] The same is true of KHIN Vat's statement.[2162] The Chamber also distorted the content of written statements that did not allow readers to conclude whether the suffering was of a similar gravity to that caused by the other CAH specified.[2163]

1165. The question of how long people suffered after non-traditional arranged marriages has also been eluded. While PREAP Sokhoeurn mentioned her mental and physical suffering, she also explained that this wasn't the case for other couples married at the same time.[2164] The Chamber was careful not to highlight the part of her statement that reveals similarities between the way in which couples perceived Angkar's authority and the way in which they may have traditionally perceived their parents, which included an element of respect for a choice made for their good. This would at least show that the perception and feelings of the couples concerned does not match those described in the Chamber's findings.

c. Suffering examined in part 14.3.12.1 *incidents of forced marriage*

1166. While we do not question that the civil parties suffered as the result of their situation, it is worth analysing this suffering in the light of the period context, and of the applicable law on CAH of OIA. The failure to consider the diversity of civil party experiences and feelings shows how the

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[2161] LING Lrysov: T. 20.08.2015, **E1/334.**1, between 14.07.21 and 14.24.47. See also the Khmer (original) version concerning her feelings about her parents' absence from her wedding, p. 50.

[2162] KHIN Vat: T. 29.07.2015, **E1/325.1**, before 15.32.40, before 15.40.44. See the Khmer version p. 68, L.12. She does not mention that her parents' absence from her wedding caused great suffering, she herself declares that her initially undesired marriage did not stop her feeling for her husband, as might have been the case in a traditional marriage.

[2163] While civil parties VA Limhum and MEAS Saran mentioned the pain suffered by their parents' and families' lack of involvement in the marriage process and absence from the wedding ceremony, they nevertheless did not mention suffering similar to that caused by the CAH specified. Written Record of Interview of Civil Party VA Limhum, 15.09.2014, **E3/9756**, Q/A 45, 48, 50 (She loved her husband and never thought about leaving him because he was kind. After spending time together, they ended up feeling pity for each other.); Written Record of Interview of Civil Party Applicant MEAS Saran, 29.12.2014, E3/9736, Q/R 110, 112, 114, 117 ("Q. Because you were married during the Khmer Rouge regime, were there any problems in your second marriage? A 110: No, there were no problems. Q. Did you ever mourn for your first husband? A111. Before, when I went to pagodas, I burnt incense and candles dedicated to him, but now I have stopped doing this. Q: Because you were forced to have sexual intercourse the first time, was there any impact on sexual intercourse with your second husband? A 112: No, there were no problems."). She petitioned for her husband to be executed in reparation for her suffering in her Civil party application, 23.01.2008, **E3/6190**, ERN FR 001301179, [English version quite different from French version]. This suggests that she considered him to be the main perpetrator of her suffering.

[2163] PREAP Sokhoeurn: T. 24.10.2016, **E1/488.1**, at 09.35.53: "[M]any of them got along well with each other because they thought they were arranged by Angkar, they obeyed the Angkar's instruction, so many of them got along. And they lived together well". [English version different from French version].

[2164] PREAP Sokhoeurn: T. 24.10.2016, **E1/488.1**, at 09.35.53: "[M]any of them got along well with each other because they thought they were arranged by Angkar, they obeyed the Angkar's instruction, so many of them got along. And they lived together well.". [English version different from French version].

Chamber made mistakes analysing the evidence. It failed to correctly apply the methodology for evaluating these statements.[2165] Indeed, the Chamber essentially relied on the story told by the civil parties summoned on the marriage segment to recount their marital experiences, which were selected to be particularly painful, without their representing the majority of experiences of people married under the regime.[2166] By refusing to provide an impartial, overall analysis of the evidence and ignoring the major contradictions in some of the statements, the Chamber used very specific cases to reach a general finding about the degree of suffering of those married under the regime.

- **Lack of consideration of contrasting civil party statements.**

1167. Firstly, the description of the suffering by civil parties summoned specifically to talk about their marriage under the regime does not allow us to conclude that their marriage and its consequences caused suffering of the same level of gravity as the other CAH specified. Their statements make this clear. Indeed, if we look at their final impact statements, which allowed them to present their suffering and the harm suffered, marriage under the regime is not focussed on.[2167] While KUL Nem mentioned how he suffered at being unable to marry his first fiancée, his final statement concentrated on the suffering of not being able to have a child with his wife under the regime.[2168] In the same way, the suffering mentioned by NGET Chat relates to mourning her first husband. Moreover, she explains that she re-married under the DK regime at her friends' advice.[2169] Only SAY Naroeun questioned the Accused on their lack of consideration of the feelings involved in marriage.[2170]

1168. The question of how representative these testimonies are, lies at the heart of criticism of the Chamber's findings on the alleged CPK policy and will be examined below.[2171] However, it is first

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[2165] Reasons for Judgement §3528 answering the Defence' arguments in CB 002/02, §2323-2328 concerning the specific nature of the civil party statements.
[2166] The Defence refers to its arguments regarding civil party statements, CB 002/02, §2441.
[2167] SAY Naroeun: T. 25.10.2016, **E1/489.1**, around 11.35.18. NGET Chat: T. 25.10.2016, **E1/489.1**, before 09.20.53. KUL Nem: T. 24.10.2016, **E1/488.1**, around 15.42.15.
[2168] KUL Nem: T. 24.10.2016, **E1/488.1**, around 14.35.14 ("I feel painful and that's the reason why I lodged my complaint with counsel to express about the harms and suffering inflicted upon me and my wife. And such incident of having no children did not happen to only me, but also to other people.") at 14.26.19 ("And I got married to my wife and I decided to take care of her").
[2169] NGET Chat: T. 25.10.2016, **E1/489.1**, around 09.54.53.
[2170] SAY Naroeun: T. 25.10.2016, **E1/489.1**, around 11.35.18. Her testimony recalled her suffering as the result of losing her virginity as a Khmer, T. 25.10.2016, **E1/489.1**, before 10.48.15.
[2171] See below, §1189-1280.

worth highlighting the numerous errors that stained its examination of the marriage experiences described by the civil parties who appeared in this segment. The civil parties specifically summoned to give statements concerning their forced marriage are: NOP Ngim, PEN Sochan, KUL Nem, PREAP Sokhoeurn, NGET Chat, SAY Naroeun, CHEA Deap, SOU Sotheavy and OM Yoeurn. The Chamber also based its reasoning on the written statements provided by CHANG Srey Mom, EM Oeun, PO Dina and three others included in Case files 003 and 004: SUM Pet and KHET Sokhan, and witness SUON Yim.[2172]

1169. The Chamber has systematically examined this evidence and made findings about the level of suffering without highlighting either nuances or contradictions. Accordingly, even though NOP Ngim mentioned her initial feeling of not wanting to marry someone she had never seen, she went on to specify "we loved each other after we got married."[2173] (translation ours). It also ignored other relevant evidence from her testimony that favours the defence, notably her reasons for not wanting to share her initial reticence at her marriage and the positive progression of her relationship with her husband, whose concurrent statement is also included in the case file.[2174] Similarly, the Chamber ignored part of OM Yoeurn's statement,[2175] in failing to highlight that she re-married her same DK husband again after the regime fell.[2176] Moreover, while NGET Chat and CHEA Deap unquestionably mentioned that they suffered as the result of their forced marriage, this is not what they say caused their greatest suffering.[2177] All these elements prevent us from finding that the suffering reached the required level of gravity for a CAH of OIA.

[2172] Reasons for Judgement, §3679.

[2173] Reasons for Judgement, §3679, fn 12274. NOP Ngim: T. 05.09.2016, **E1/469.1**, before 10.43.40.

[2174] NOP Ngim: T. 05.09.2016, **E1/469.1**, at 15.49.56. She declared that she did not express her dissatisfaction about the marriage because she believed she was *quite mature* () to consent to the marriage and to get on with her husband so that they could take care of each other. T. 05.09.2016, **E1/469.1**, at 11.12.40, around 14.19.56: They accepted that they should live together and have children. (). As for her husband PREAP Kab (with whom she still lives), he has not spoken of any particular suffering, specifying that he obeyed orders to get married. He nevertheless did specify that no-one privately gave him any orders about marital, life, Written Record of Witness Interview, 03.11.2014, **E3/9818**, Q/A 75-77.

[2175] Reasons for Judgement, §3679, fn 12278. OM Yoeurn: T. 23.08.2015, **E1/462.1**, around 09.31.31. While the civil party indeed declared her pain at having to marry against her will, she did not mention the resulting suffering in her final statement.

[2176] OM Yoeurn: T. 23.08.2015, **E1/462.1**, around 09.31.53.

[2177] NGET Chat: T. 25.10.2016, **E1/489.1**, before 09.20.53. Invited by her lawyer to speak of the pain she would have felt as a result of her marriage under the regime, she spoke more about the pain at the death of her late husband A: "I endured the pain the most. I told my children that it was a great misery, and it stays inside me. Without my children stayed late at school, I would have been dead. And even at the moment, I have a heart problem because every time when I think of the times that my husband was taken away, I almost stopped breathing. I also have lower back pain."

1170. **Generalisation based on the specific situation of SOU Sotheavy.** The Chamber erred in fact and in law by using her testimony to support general findings about the impact of forced marriage on couples during DK. Once again, it is not a question of denying the individual suffering of the civil party, but of highlighting that she suffered most due to her position as a transgender woman and also suffered sexual attacks – the Chamber should have followed its reasoning to the logical finding.[2178] Transgender people in Cambodia (at least those who came out) were exceptions in the 1970s. Their lack of social acceptance and the ill-treatment they suffered were related to Khmer culture. The suffering related to the specific situation of SOU Sotheavy could not therefore serve the Chamber as the basis for general findings about every couple married under the regime.

1171. **Partial examination and written statements.** In addition to the low probative value of written statements by SUON Yim and SUM Pet (as they could not be interrogated by the parties,) the Chamber's examination of this evidence was partial as it omitted the evolution of their mental state. Accordingly, several elements of the written statement evoking NOP Ngim's long-term suffering have been ignored.[2179] All these nuances and the diverse range of experiences described in the statements should have been enough to lead the Chamber to note that the degree of civil party suffering due to forced marriages was not as grave as the other CAH specified.[2180]

(our emphasis on the important passage not retained by the Chamber). More importantly, NGET Chat repeated this in her biased final impact statement which mentioned not a single word about her marriage under the regime: T. 25.10.2016, **E1/489.1,** at 10.07.11." CHEA Deap: T. 31.08.2016, **E1/467.1**, after 14.21.29 ("I still recall of my younger brother and all my relatives who died in the period and I could not continue working. It is so painful to me, Mr. President. After the fall of the regime, what I have had is the pain with me until today. It is unforgettable the bad experience that I went through.")

[2178] Reasons for Judgement, §3679, fn 12277. SOU Sotheavy: T. 23.08.2015, **E1/462.1**, at 14.28.53, before 14.39.15, before 14.40.41. T. 24.08.2015, **E1/463.1**, before 14.03.51. It is also important to note that homosexuality was not recognised in Khmer culture prior to and even after the DK regime.

[2179] Written Record of Witness Interview SUON Yim, 24.11.2014, **E3/9829** Q/A 29-30 (where the civil party mentions the lack of physical or mental problems following her sexual relations), Q/A 38 ("Q. Do people in Cambodia think of you differently from other people because you married during the Khmer Rouge regime? Is your marriage a topic that you can talk about publicly? A 38. I do not feel ashamed because the Khmer Rouge forced me to get married."), Q/A 40 ("At the time, I felt angry and sad. About four to five years later, I felt angry once in a while. After the Vietnamese arrived, we focused only on earning a living and the arguments decreased. (our emphasis on the passage omitted from the Reasons for Judgement). SUM Pet's statement was also partially used by the Chamber, although the civil party indicated the way in which he and his wife managed to integrate their life into the rest of the family: Written Record of Interview of Civil Party SUM Pet, 04.08.2014, **E3/9824**, Q/A 31 ("For me, it felt troubled because we did not understand each other's feelings. My wife also felt frightened, but we tried to compromise in the circumstances." (our emphasis on the section not included). Another favourable piece of evidence: Q/A 43 (after the wedding, he and his wife decided to move in with his mother). Similarly, Written Record of Witness Interview KHET Sokhan, 27.11.2013, **E3/9830**, Q/A 86. (although she mentions the suffering of an undesired marriage, she decided to continue living with her husband).

[2180] Written record of witness interview of civil party KHET Sakhan, 27.11.2013, **E3/9830**, Q/A 81-82 (Her husband

- **Contradictions and hidden inconsistency of some testimony.**

1172. The Chamber also made a mistake in failing to highlight the sometimes flagrant contradictions that should have led it to note the lack of credibility of some civil parties. Its lack of discernment regarding the fantastical statements made by EM Oeun is particularly revealing of its bias in examining the evidence. Although she presented herself as a victim of forced marriage, EM Oeun maintained that he himself chose his wedding date, specifying that he could have refused to get married.[2181] Any reasonable trier of fact would have noticed that this statement did not allow us to conclude that there was either a forced marriage, or that great suffering resulted from this marriage, especially as EM Oeun's testimony contained numerous other inconsistencies.[2182] The Chamber failed to observe the very low probative value of his testimony and should not have used it.

1173. **Re-marriages.** The Chamber erroneously made generalisations about the suffering of widows forced to remarry on the basis of insufficient evidence: the statements by NGET Chat and MOM Vun and the written statement by civil party PO Dina, who was a witness in the 002/01 trial.[2183] No reasonable trier of fact would have cited MOM Vun's statement to support their findings, given her contradictory evidence.[2184] Instead of pure and simply dismissing her statement for its lack of credibility, in §3649 of the Reasons for the Judgement under appeal, the Chamber found that these

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asked her to have sexual intercourse but did not force her to do so, two or three nights after the wedding).

[2181] EM Oeun: T. 23.08.2012, **E1/113.1**, after 16.03.21 ("I chose the 17th of April as the date when I got married because people who loved me, who attended my marriage, without their support or their presence during my wedding, I would never choose to get married.". It is worth noting that EM Oeun appeared in the Case 002/01 proceedings, when he was not questioned about his marriage, it is only his spontaneous statements on this subject that have been included in the case file.

[2182] EM Oeun's other contradictions include the fact that, in his Victim information form, he states that he is still married to the wife he married during the DK regime, but he seems to have divorced in 2002 and re-married if we believe his statements during the hearing: T. 28.08.2012, **E1/116.1**, between 14. 47.50 and 14.57.58. KHIEU Samphan Defence Response to the Prosecution's Appeal in Case 002 02, 23.09.2019, **F50/1**, §56-59.

[2183] fn 12279 (in §3680).

[2184] Reasons for Judgement, §3680, fn 12281. MOM Vun's statement was confused and contradictory on points that were crucial to establishing her credibility, notably the information provided about the identity and fate of her first husband. See CB, 002/02, §2398. This husband was variously described as a former LON Nol soldier, palm tree climber and even teacher. Similarly, MON Vun gave numerous versions of the circumstances of their separation: on one occasion, they were divorced before the 1972 regime, on another he disappeared in 1975 and in a third version the couple were still together in 1977. She provided no coherent explanation for the different versions when confronted about these more than significant contradictions in court: MOM Vun: T. 16.09.2016, **E1/475.1**, between 15.50.41 and 16.01.33 (on one occasion she rejects any blame for her husband, and on the other occasion she was unable to answer), translation issue in the FR, see the KH version, p. 82, L. 10-14 concerning contradictions concerning her first husband's position; T. 20.09.2016, **E1/477.1**, between 09.19.07 and 09.24.52 ("but when you put such question to me, I do not know how to respond. because I returned to the village in '77 and my husband was called for a study session in '75. But the statement you put to me, it is difficult for me to respond.").

events concerning her first husband should be considered as "minor inconsistencies" But this finding is mistaken in that the Chamber relied on the existence and death of the first husband to make findings about MOM Vun's suffering regarding forced re-marriage following the loss of that husband. In any case, MOM Vun's contradictions and attitude in court should have led any reasonable judge to dismiss her testimony. To make a finding about the suffering caused by forced re-marriage, the Chamber used PO Dina's written statement in which she explained that her planned second marriage eventually failed to take place as she refused to do so, and was subsequently punished. Moreover, she did not mention this attempted marriage as a cause of suffering under the regime – she mentioned the loss of her family.[2185] The Chamber therefore committed an error in basing its findings on her statement.

1174. **Thwarted marriages.** The Chamber also made a mistake in its findings on people who were already engaged being forced to marry other people, in misinterpreting the evidence. [2186] Even if YOS Phal stated that he was sad at not being able to marry his fiancée, he finally developed feelings for the wife he married under the regime and with whom he had children. [2187]. Again, the Chamber erred in failing to consider all of his statement and the evolution of his mental state after the marriage. It followed the same erroneous process in its use of the statement by KUL Nem.[2188]

1175. **General findings that do not represent the diversity of the testimonies.** The Chamber has therefore erred in making general findings about marriages without highlighting the disparity between the various stories and their impact.[2189] The Chamber relied exclusively on testimony by civil parties included in the marriage segment[2190] to make findings about the long-term impact and trauma caused by these marriages, and we have just seen their diverse nature in addition to their contradictions. As the Defence argued in its CB,[2191] the suffering resulting from arranged or forced

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[2185] PO Dina: T. 30.05.2013, **E1/199**, around 15.40.42.
[2186] Reasons for Judgement, Fn 12282 (in §3680). YOS Phal: T. 25.08.2016, **E1/464.1**, at 10.53.07.
[2187] YOS Phal: T. 25.08.2016, **E1/464.1**, at 10.39.47, at 10.59.15, before 11.05.33. In his particular case, it was the alleged connections of his fiancée's family to an alleged network of traitors that prevented their marriage. Moreover, he explained that in general love marriages were authorised if they both had good biographies. T. 25.08.2016, **E1/464.1**, before 09.50.05, at 09.59.50.
[2188] KUL Nem: T. 24.10.2016, **E1/488.1**, at 14.28.07, after 14.35.14. While KUL Nem mentioned his regret at not having been able to marry his fiancée, the suffering he described in court was the fact that he was unable to have a child with the woman he married under the regime, and with whom he still lives.
[2189] Reasons for Judgement, §3682: "These experiences have had a long-lasting impact on the victims and many of them are still haunted by this to this day".
[2190] Reasons for Judgement, §3682, fn 12287.
[2191] See CB, 002/02, §2380.

marriages under the DK regime varied depending on the circumstances of each individual. Accordingly, all of the Chamber's findings are stained with mistakes of fact, not only due to its biased approach to the evidence but also in its masking of the issue of the representative nature of these experiences. By selecting evidence to illustrate its findings about the suffering endured, it failed to provide correct reasoning for its findings. In fact, an examination of all of the evidence would not allow it to conclude that these events were as grave as the CAH specified.

2. Examination of all the evidence and its representative nature

1176. The Chamber committed several errors in failing to respect the principle that obliges it to examine witness and civil party statements in the light of the entire case file. It should have taken contradictions and other potentially reasonable findings into account before making findings that go against the Appellant. Its mistaken approach failed to examine all of the evidence before making general findings. This prior phase was fundamental to enable assessment of their probative value and the representative nature of the statements gathered in the marriage segment, which tend (a) not to match the other segments under Case 002/02 (b), or the written statements (c).[2192]

a. Statements under the segment dedicated to marriage

1177. The Chamber heard a total of two experts, two witnesses, nine civil parties and three civil parties to the crimes for the marriage segment.[2193] As we saw above, the Chamber used the great majority of these civil parties' statements to conclude that their degree of suffering was representative of the entire country. It also used a partial, incriminating selection of these statements.

1178. **Three civil parties on the negative impact of the crimes**[2194]: As we explained above, they did not emphasise the suffering experienced as a result of their marriage in their final impact statements.[2195] The Chamber should have taken this key aspect into consideration, but failed to do so. **Two witnesses**[2196]: PHAN Him stated that she was married without consent at her husband's proposition. She nevertheless described how their sentiments evolved before they consummated

[2192] See Annexes B1-B9.
[2193] CB 002/02, §2322, fn 2354.
[2194] NGET Chat, SAY Naroeun and KUL Nem (men).
[2195] NGET Chat: T. 25.10.2016, **E1/489.1**, around 09.20.53. SAY Naroeun: T. 25.10.2016, **E1/489.1**, around 11.35.18 (her questions to the Accused were more about forced marriages and the fact that love cannot be imposed). KUL Nem: T. 24.10.2016, **E1/488.1**, around 15.42.15.
[2196] PHAN Him and NOP Ngim.

their marriage and continued to live together even after the regime.[2197] NOP Ngim had a similar experience.[2198] None of the testimonies supported findings that the suffering endured was as grave as that of the other CAH specified. **Nine civil parties appeared to describe their marriage**[2199]: The Chamber used seven of the nine statements to analyse the suffering resulting from marriage. The Defence therefore refers to its arguments above.[2200] The Chamber was unable to conclude whether the other two, SENG Soeun and HENG Lai Heang, experienced long-term suffering as the result of their marriage.[2201] Accordingly, in the marriage segment alone, even after the Chamber selected witnesses, examination of the various stories does not allow us to conclude that long-term suffering caused by marriage under the regime was as grave as the specific CAH. The Chamber has wrongly found otherwise, especially as the other statements did not support this argument either.

b. Statements obtained under the 002/02 case file outside the marriage segment

1179. Examination of the evidence produced in the case file from outside the marriage segment demonstrates a notable difference in the stories of victims of forced marriages. It is useful to see what the Chamber has neglected, segment by segment, and to summarise this now.

1180. **TK Segment.** Of the 14 witnesses and civil parties who mention marriage in DK, only witness CHANG Srey Mom stated that she was married against her will. While she mentioned her initial sadness at a marriage she did not consent to, she stated that she believed her marriage was a happy one as the couple had gradually developed feelings for each other and founded a family that is still

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[2197] PHAN Him: T. 31.08.2016, **E1/467.1**, around 15.41.31.

[2198] See above, §1166-1175. NOP Ngim: T. 05.09.2016, **E1/469.1**, before 10.43.40.

[2199] OM Yoeurn, CHEA Deap, PREAP Sokhoeurn, MOM Vun, HENG Lai Heang, PEN Sochan, SENG Soeurn (man), and YOS Phal (man) and SOU Sotheavy (transgender woman).

[2200] See above, §1166-1175.

[2201] While SENG Soeurn declared that he married his superior's cousin at the senior officer's insistence, he made no mention of the suffering caused by his marriage, either in his final statement or when discussing the events. SENG Soeurn: T. 29.08.2016, **E1/465.1**, at 10.07.42; T. 30.08.2016, **E1/466.1**, at **11.38.06**. Although she mentioned the suffering caused by her marriage, HENG Lai Heang spoke above all of the suffering following her husband's arrest after accusations of treason and of working after giving birth. HENG Lai Heang: T. 19.09.2016, **E1/476.1**, before 09.48.04, at 14.01.24 (parents were informed of and invited to the wedding ceremony), around 09.54.02, after 10.01.15, at 11.23.06. (She was not watched over on the night of the wedding and had sex much later because they did not love each other "at that time"). She mentioned her husband's death under the regime in her final impact statement at the end of her hearing: **E1/476.1**, after 16.12.09 ("Personally, I constantly suffered. The husband whom was matched by Angkar was later on arrested and disappeared and I was accused of having ties to a traitor. And for that reason, my right was removed.") and at 16.14.20.

together today. Moreover, she mentioned the development of her husband's feelings.[2202] This statement therefore does not allow us to characterise her suffering as being grave enough to characterise for the CAH OIH of forced marriage.

1181. **1JD Worksite Segment.** Of the 10 witnesses and civil parties who mention marriage in DK, only civil party CHAO Lang stated that she was married against her will.[2203] However, she did not mention any suffering resulting from her marriage either in describing the events or in her end of hearing statement.[2204]

1182. **TTD Segment.** Of the nine witnesses and civil parties who mentioned weddings under DK, one woman stated having been married against her will and one married man mentioned that his marriage was arranged by Angkar to a woman he did not know.[2205] LING Lrysov: his wife talked of her suffering at her parent's absence from the wedding and of divorcing a husband she did not love after the regime.[2206] Although her experience is regrettable, it would not allow a reasonable judge to conclude that her suffering was grave enough to be characterised as the CAH of OIA. As for MEAN Loeuy, his statement goes against the Chamber's finding. In the same vein as for traditionally arranged marriages, he believed that: "So, I thought that even though we did not know each other before, or we were arranged by Angkar, we had to love each other.".[2207] At the end of

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[2202] CHANG Srey Mom: T. 29.01.2015, **E1/254.1**, before 10.45.45 ("I kept praying, actually, if this man was my destined partner, then I hope I would feel for him. I prayed to God every day. If this person was my destined partner, I prayed that I would feel for him and pity him. From time to time we could live along with each other, and I started to love him."), before 10.49.52; T. 02.02.2015, **E1/255.1**, before 09.29.19 ("Q. ("but as you've testified before you stayed married after 1979, you had two children with your husband after 1979, you're still together with him happily married, as you testified. Can you explain that to me in the light of the fact that you didn't choose your husband, that your husband was forced upon you?? A. I'd like to say that for my husband, he did not force upon me, but we decided to get along, to be together. Whoever selected by Angkar to marry, we could not oppose it. [...] Although we physically stayed together as a husband and wife, but inside, our feeling was different."). The witness went on to describe the development of her husband's feelings: T. 29.01.2015, **E1/254.1**, at 10.49.52: "I understand that my husband did not love me. [...] Looking from his outside appearance, he - it does not - it did not mean that he did not love me. He kept saying that that lady was not his destined partner."

[2203] Of the 10 witnesses and civil parties, three declared that they were married without being forced into this arrangement under DK.

[2204] CHAO Lang: T. 01.09.2015, **E1/339.1**, before 14.40.37, after 15.32.23 (while she mentions that they divorced in 1988-1989, she states that this was not because of their relationship: "The divorce was not because of our relationship, it was because the in-law family was not satisfied with me, was not happy with me.").

[2205] LING Lrysov: T. 20.08.2015, **E1/334.1**, around 14.03.06; MEAN Loeuy: T. 02.09.2015, **E1/340.1**, between 14.10.07 and 14.15.38.

[2206] LING Lrysov: T. 20.08.2015, **E1/334.1**, before 14.16.24, after 14.22.30.

[2207] MEAN Loeuy: T. 02.09.2015, **E1/340.1**, before 14.20.31, between 14.10.07 and 14.15.38, at 14.17.56 ("I have learnt a lot about the virtues, good deeds, and whatever that I had to do the good things. So, after the marriage, I had to love my wife.").

his appearance, he evoked the great suffering caused by the death of his wife, whom he married during DK, mentioning his feelings towards her,[2208] and giving another vision of arranged marriages under DK that the Chamber has not taken into consideration.

1183. **Other segments of Case 002/02.** Of the 21 witnesses and civil parties who stated that they had got married during the regime, two men and two women stated that they had done so against their will and one woman stated that her marriage was arranged by Angkar.[2209] The Chamber only used KHIN Vat's statement in its reasons. But as we have seen above, her testimony did not allow the Chamber to make findings regarding the severity of the suffering endured.[2210] It is interesting to highlight that none of the others described their suffering as a result of their marriage in such a way as to allow us to conclude whether it met the required level of gravity.[2211]

c. Written statements

1184. The Chamber erred in fact and in law by failing to make findings based on the examination of all the written statements by witnesses who stated they were married against their will. Once again, the lack of evidence about the gravity of the suffering endured as a result of being married under DK, does not allow us to characterise the CAH of OIA.

1185. **Case file 002/01 transcripts.** Only two of all the civil parties who testified about their marriages under DK stated that they were married against their will: EM Oeun and YOS Phal. Both of their statements are mentioned in the Chamber's findings. Yet neither of them mentioned suffering from

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[2208] MEAN Loeuy: T. 02.09.2015, **E1/340.1**, around 14.27.34, at 14.54.38: "I never feel happy after that. I actually missed my late wife. I missed the times that we were together although it was for a brief period of time but it was the happiest time that I had with her as a husband and wife"

[2209] MEY Savoeun, CHEAL Choeun, KHIN Vat, and CHUM Samoeurn (forced marriage), and THUCH Sithan (marriage arranged by *Angkar*).

[2210] See above, §1157-1175.

[2211] CHEAL Choeun: T. 17.10.2016, **E1/484.1**, after 10.01.48. Did not mention suffering. MEY Savoeun: T. 17.08.2016, **E1/459.1**, after 14.20.24 civil party MEY Savoeun also did not mention the suffering resulting from her marriage in her final impact statement. CHUM Samoeurn: T. 24.06.2015, **E1/321.1**, at 14.27.20. This civil party was married towards the end of 1978 and separated from her husband three days after the wedding and never saw him again. She also did not mention the suffering resulting from her wedding under DK. Finally, THUCH Sithan, although she indicated that she had her eyes on another man before her arranged marriage, she did not describe any particular suffering. Nevertheless she explained that she chose to marry an intellectual rather than a peasant: THUCH Sithan: T. 21.11.2016, **E1/500.1**, after 14.59.13 ("I had to force myself to get married to my husband because I thought again if I refused I would be arranged to get married with workers or farmers."), around 14.54.58 ("my utmost concern was whether he already had a wife or a French girlfriend. I was reluctant at that time.").

their marriage in their final statements.[2212] In any case, their stories do not allow us to characterise the degree of gravity required to establish the CAH of OIA.

1186. **Written statements supporting the CO.** Of the 116 witness statement records, 21 stated having been married against their will under DK, of whom five appeared in the proceedings for Case 002/02 (LING Lrysov, CHANG Srey Mom, SOU Sotheavy, HENG Lai Heang and YOS Phal). Among the remaining 16 witness statement records, four mentioned pressure or threats forcing them to get married, but nobody mentioned grave suffering resulting from their respective marriages.[2213] To the contrary, numerous witnesses and civil parties not only mentioned developing feelings for their partner, they also indicated that they had a better life after their marriage.[2214] This aspect was wrongly ignored by the Chamber, which again demonstrates its biased examination of the evidence.

1187. **Written statements from the 003-004 case files.** Of 86 witness and civil party statement records in the 002 Case file, when asked by the Prosecution to describe their marriage under DK, 30 people stated that they had been married against their will. Five of these statements were already examined above and were mentioned by the Chamber in support of its findings about marriages.[2215] Some of the remaining witness records failed to express any suffering resulting from their marriage. Others stated having developed feelings for their partner after their wedding and subsequently led a normal

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[2212] See above, §1174, 1329.

[2213] Written Record of Interview of Civil Party TES Ding, 10.09.2009, **E3/5560**, ERN EN 00377170-00377171 (Au cours du mariage, les hommes n'ont pas pleuré. En revanche, du côté des filles, elles ont beaucoup pleuré dans leur cœur [During the ceremony the men did not cry, however the women cried a lot in their hearts] (); Written Record of Interview of Civil Party MAO Kroeun, 10.09.2009, **E3/5561**, ERN EN 00384788-00384790 (penalty for refusing to marry); Written Record of Interview of Witness VAN Sorn, 19.11.2008, **E3/953**, ERN FR 00274345 (penalty for refusing and reminder that the regime favoured people after marriage) (); Written Record of Interview of DUK Suo, 10.11.2009, E3/408, Q/A 90-92 ("Q. Were people happy to get married? A90. We felt okay with that but we did not dare to refuse because the power was in the hands of Angkar. Q. Did some people refuse to marry? A91. No. Everyone had to respect the discipline of Angkar. Q. Were the married couples forced to have sex intercourse with each other? A92. Some could live together while others could not live together and split. Q/A 92.).

[2214] Written Record of Interview of KHIEV Horn, 09.09.2009, **E3/5559**, ERN EN 00377369-00377370 (they lived together as siblings under the regime and re-married after the regime fell at their mother-in-law's request); Record of Witness TAN Wardeny, 11.06.2009, E3/102, ERN FR 00342196 (after marrying an intellectual such as her, the couple were able to join the husband's father in the Ministry of Foreign Affairs); Written Record of Witness CHEA Thy, 17.06.2008, **E3/5184**, ERN EN 00225528-00225529 (He and his wife moved to her home village after the regime fell); Written Record of Interview of Civil Party HORNG Orn, 09.09.2009, **E3/5558**, ERN EN 00381009-00381010 ("I was willing to make other children with him because in the meantime I started to like my husband". They divorced after DK as her husband cheated on her with two or three other women).

[2215] Case of SUON Yim, KHET Sokhan, SUM Pet, MEAS Saran, VA Limhum. See above, §1157-1175.

married life. Yet others primarily mentioned the suffering resulting from the death of the spouse whom they married during the regime or indicated that their bad experiences faded with time.[2216]

1188. **Findings on the errors in view of all of the elements.** The Chamber erred by not examining the evidence in the case file as a whole before finding on the degree of severity of the suffering endured or by ignoring the counter-evidence to its findings. In fact, it is clear from a careful analysis of the evidence as a whole that it committed serious errors in finding that the accounts selected were representative to illustrate the suffering experienced by the victims of forced marriages. No reasonable trier of fact would have arrived at such a finding which was contrary to most of the items of evidence submitted with a considerable difference being demonstrated between the selected civil parties on the matter and the other witnesses. For all these reasons, the Chamber therefore could not find that there had been suffering that reached a degree of severity similar to the other CAH of OIA that took the form of forced marriages. All of these findings should therefore be reversed.[2217]

C. Errors on the regulation of marriage and its implementation

1189. The Chamber did not establish the *actus reus* of the CAH of OAI that took the form of forced marriages.[2218] On this foundation alone, the Supreme Court should therefore overturn the conviction. If, exceptionally, it were to consider despite everything that these CAH of OIA were constituted, it should nonetheless establish that the Chamber committed a number of errors in finding on the culpable intent of the Appellant to commit these crimes. In fact, it committed errors on the contents of the regulation of marriage (1) and its implementation (2), sullying its findings on the existence of a criminal policy of the CPK of forced marriages to which KHIEU Samphan was a party, thus characterising his culpable intent to commit the crimes (3).

1190. [*duplicate paragraph deleted after correction, but retained for* numbering][2219]

[2216] See, for example: Written Record of Interview of Civil Party Applicant KEO Theary, 08.12.2014, **E3/9662**, Q/R 55-59 (they loved one another after their marriage), Q/A 86 (they felt the same way as other couples married by consent after spending some years together). She did not mention her marriage in the "Injury" part of her Civil party application, 15.01.2010, **E3/4963**; hearing of civil party SREY Soeum, 16.12.2014, **E3/9826**, Q/R 168 ("In the past I was disappointed because I was not able to marry like we do now No achar layman and no relatives were present We just shook hands during the marriage and that was it. Now time has passed so that grief has gradually faded away.").
[2217] Reasons for Judgement, §3691-3692.
[2218] See above, §658-665.
[2219] See above, §658-665.

1. Errors on the contents of the regulation of marriage under DK

1191. The Chamber committed gross errors regarding the contents of the regulation of marriage under DK. To do this, it chose to ignore the principle of consent that was nonetheless clearly set out by the official authorities of the CPK for marriages (a) and to arrive at unreasonable findings about the objectives of the official regulation (b) by distorting and deforming the items of evidence produced before it.

a. Errors regarding the two conditions of marriage set out by the CPK

1192. The Chamber wrongfully found that the forced marriages evoked by some witnesses and civil parties were the result of instruction from the highest echelon of the CPK. It disregarded the official documentation from the CPK on the conditions of marriage as well as all the testimonies of the former cadres of the regime that contradicted its findings. In fact, to find on the existence of a policy of forced marriages, it adopted incorrect reasoning: because there had been forced marriages, this was the evidence that there was a policy of forced marriage. Its entire analysis was then concerned with trying to maintain this starting premise by selecting the testimonies and distorting the official documents and speeches instead of an impartial examination of the evidence.

- **Incorrect analysis of the official documentation**

1193. The Chamber erred in fact in its interpretation of the regulation of marriage. In a partial analysis of the evidence, in both senses of the word, it dismissed the concept of consent to marriage, which was nonetheless essential in the principles of the KR. However, it stated in an RY issue dated November 1978 of the CPK aimed at young men and women revolutionaries the two conditions for marriage: "- First, both parties agree- Second, the collective agrees, and then it's done. […]".[2220] In order to deny the probative value of this document, which is nonetheless clear, the Chamber wrongfully argued about the late date of these rules. [2221] On the contrary, the evidence in the case file demonstrates that this principle of consent to marriage came long before 1978. Indeed, it appears in the twelve moral principles of the CPK, which were the fundamental principles of the party instilled since 1968 in the revolutionary combatants and cadres. The Chamber erred in fact and in law by concealing the testimony of numerous witnesses who had not only talked about the

[2220] RY, October 1978, **E3/765**, p. 19, ERN EN 00539994.
[2221] Reasons for Judgement, §3542.

existence of these twelve moral principles but also and above all had highlighted their importance for the party.[2222] The error is all the more serious when the witnesses confirmed to the court that the conditions regarding consent to marriage of individuals existed from around that time.[2223] By ignoring these important elements because they did not serve its purposes, the Chamber erred by demonstrating partiality.

- **Corroboration of the cadres wrongfully dismissed**

1194. The deliberate nature of the Chamber's error is all the more apparent in that it systematically dismissed the testimony of the former cadres that confirmed the need for consent from individuals on the grounds that they "tended to minimise their own responsibility".[2224] However, they came from different regions of the country and had a variety of duties both at civilian and military level. Not only did most of them state that they had not had to process any marriages as part of their duties but, above all, the majority of them had obtained an assurance of non-prosecution from the Prosecutor and therefore it was not in their interests to lie.[2225] Furthermore, none of them were

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[2222] These moral principles are the rules that "every revolutionary must respect and follow each provision by absorbing and being aware", RY, October 1978, **E3/765**, p. 13, ERN EN 00539988-00539990. Several witnesses confirmed these moral principles and their importance to the court: SALOTH Ban: T. 23.04.2012, **E1/66.1**, around 09.58.31, before 10.23.09, after 15.04.19, before 15.38.26 ("Q. During those meetings, could people be criticized in relation to the 12 moral principles you referred to and did people also air any weaknesses they had? A. Indeed, yes. If you were toward the side of the devil, then you would need to change yourself. If you do not change, then you will self-destruct yourself and also destroy the country."); T. 24.04.2012, **E1/67.1**, at 15.24.59; YUN Kim: T. 20.06.2012, **E1/89.1**, at 09.34.37 ("During the Democratic Kampuchea regime, I had received trainings on morality because this matter was very important. It was vital because if it was breached, it would violate the Party's policy. So it was a kind of severe offence regarded by the regime. So the people and I, myself, had to be very careful with this, and we also had to pay great attention to the young people. We did give them rights to get married, but they had to report to their respective superior for such proposals"); *Duch*: T. 20.03.2012, **E1/51.1**, T. 13.06.2016, between 11.08.32 and 11.10.57, **E1/436.1**, after 09.29.42 and around 09.37.21; KIM Vun: T. 23.08.2012, **E1/113.1**, after 10.11.26; NY Kan: T. 28.05.2012, **E1/76.1**, after 15.33.21.

[2223] PECH Chim: T. 22.04.2015, **E1/290.1**, from 13.47.11 (From 1970 or 1971, couples who wished to marry had to consent for the marriages to be held."); *Duch*: T. 20.03.2012, **E1/51.1**, from 11.08.32; T. 13.06.2016, **E1/436.1**, after 09.29.42 and after 09.45.10 (he recalled the twelve principles that had existed since 1968 and what he did to ask for his wife's hand in 1974).

[2224] Reasons for Judgement, §3623, which referred to §3617 (EK Hoeun, PAN Chhuong, OR Ho, SAO Sarun, RIEL Son, MEAS Voeun, TEP Poch and YOU Vann), §3675, §3613.

[2225] See for example *Assurance regarding non-prosecution of witness*, UL Hoeun, 24.12.2014, E202/146.1, document only available in Khmer; *Assurance regarding non-prosecution of witness* OR Ho, 12.03.2015, **E202/167.1**; *Assurance regarding non-prosecution of witness* SAO Sarun, 04.03.2016, **E202/256.1**; *Assurance regarding non-prosecution of witness* RIEL Son, 24.12.2014, **E202/145.1**; *Assurance regarding non-prosecution of witness* MEAS Voeun, 26.09.2012, **E202/17/2**; *Assurance regarding non-prosecution of witness* TEP Poch, 17.05.2016, **E202/273.1**; *Assurance regarding non-prosecution of witness* YOU Vann, 06.01.2016, **E202/235.1**. Those who testified that they did not organise marriages: EK Hoeun: T. 08.05.2015, **E1/299.1**, around 15.16.27; RIEL Son: T. 18.03.2015, **E1/279.1**, after 11.08.16.

mentioned in the evidence or by the civil parties as being responsible for the organisation of forced marriages. In addition, these cadres were in the best position to know the regulations or instruction coming from the CPK leadership to be applied on the ground. Asserting without foundation that they tended to minimise their responsibility even though their testimonies were corroborated by the official documents of the CPK and other witnesses who were not cadres[2226] was therefore not a reasonable finding.

1195. Furthermore, as recalled above, the witnesses who mentioned the twelve moral principles, among which the principle of consent to marriage clearly appeared, were not all cadres. On this point, the Chamber also committed a manifest error of evaluation by rejecting the request from the Defence to recall François PONCHAUD as a witness.[2227] In fact, he was in Cambodia prior to 1975 and talked about the twelve moral principles in his written work.[2228] Due to the severance of the charges, he was unable to be questioned about the regulation of marriage. The Chamber's refusal to hear his perspective as a neutral witness on the matter undeniably caused injury to the Appellant. Conversely, the Chamber chose to use the statements of civil parties specifically selected to talk about the painful circumstances of their marriage to find on the existence of a generalised forced marriage policy throughout the country.[2229] In addition to the double standard of evaluation of the evidence, which breaches the equity of the proceeding, the Chamber's procedure in its general finding poses a genuine problem regarding the merits of the case.

Partial analysis of the testimonies, in both senses of the word

1196. Several types of evidence on marriage were submitted during the proceeding. The segment dedicated to marriage mainly concentrated on the experience of civil parties who said that they were victims of forced marriage. However, to have an overview of the country as a whole, the Chamber could not reach a general finding based on the existence of specific cases. Furthermore,

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[2226] See above, §1157-1188.

[2227] Decision on Reiterated Request of Khieu Samphan Defence to Hear Stephen Heder (2-TCE-87) and François Ponchaud (2-TCE-99) (E408/6), 03.11.2016, **E408/6/2,** especially §6 where it wrongfully considers that its witness statements "remain part of the evidence available in Case 002/02" even on matters concerning the cooperatives, worksites and forced marriages. See above, §167 and fn. 191.

[2228] See in particular the references to his book: T. 28.01.2015, **E1/294.1**, between 13.33.45 and 13.38.16. Therefore, in our request for his appearance before the Chamber for Case 002/02 to talk about the historical background of the armed conflict, the cooperatives and worksites and the measures against certain specific groups, Request from KHIEU (Annex), 09.05.2014, **E305/5.2**, ERN EN 01429127.

[2229] See also CB 002/02, §2323-2328, 2450-2451.

the Chamber erred in fact and in law by simply ignoring the counter-evidence to the finding that it wished to reach. The failure to take into account the question of the representativeness of these testimonies at national level, which was nonetheless raised by the Defence,[2230] forms part of this incorrect approach. These errors are found both in the examination of the evidence in the marriage segment and also in the other segments, as well as in the written statements. The errors for each type of evidence will be examined in turn as well as the statistical consequences forming part of the incorrect findings of the Chamber.

- **Segment dedicated to marriage**

1197. The Chamber erred by not drawing on all the consequences of the testimony of the witnesses on the marriage segment.[2231] In fact, several of them confirmed the conditions of consent to marriage from the CPK official regulation. The Chamber particularly wrongfully dismissed in its findings the importance of the testimonies which, although mentioning an experience of forced marriage for their own case, also evoked different experiences of marriage. This is the case for NOP Ngim and SENG Soeun, two former high-ranking cadres. [2232] Many other witnesses and civil parties who were lower-ranking cadres or ordinary members of the population, also indicated that their experience of undesired marriage was not shared by others.[2233]

1198. Thus, even for the witnesses and civil parties specifically called to talk about their experience of forced marriage, seven of them, i.e. 50%, spontaneously mentioned the fact that they knew about other marriage practices during DK.[2234] The Chamber erred in fact by deliberately not drawing all the consequences of these witness accounts, which nonetheless confirm the absence of a uniform

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[2230] CB 002/02, §2441-2444.

[2231] 14 witnesses and civil parties, plus two experts altogether. The errors committed in the examination of the testimony of the experts will be discussed below. See expert opinion above, §1209-1210.

[2232] NOP Ngim: T. 05.09.2016, **E1/469.1**, before 11.18.46, at 13.39.16 (non-forced marriages for the people from the unit and those in love); SENG Soeun: T. 29.08.20106, **E1/465.1**, before 15.27.41 (married to a cousin of his superior). See also T. 29.08.2016, **E1/465.1**, after 10.01.07 and T. 30.08.2016, **E1/466.1**, before 11.21.29 (possibility of refusing the arranged marriage for the marriages in Sa-ang).

[2233] HENG Lai Heang: T. 19.09.2016, **E1/476.1**, before 13.46.12, before 13.47.34 (she had managed to refuse several previous marriage proposals from different men without any consequences), around 13.40.14 (the couples had to agree before their marriage was held, "After they were matched and then each of couple was asked (sic)."); YOS Phal: T. 25.08.2016, **E1/464.1**, at 10.39.47, around 11.10.50; PHAN Him: T. 31.08.2016, **E1/467.1**, from 14.22.20 (marriage forced for her but proposed by the husband, not forced for others in her group); OM Yoeurn: T. 03.08.2016, **E1/462.1**, 10.38.51; CHEA Deap: T. 30.08.2016, **E1/466.1**, after 15.10.29.

[2234] See Annexes B1 and B5.

policy. As we will see below, the Chamber also pursued its own error by rejecting the opinion of the experts who made this same finding.[2235]

Segments other than marriage in Case 002/02

1199. The Chamber's approach seems all the more incorrect in that it has not taken into consideration the evidence on the other segments either, which also would not allow it to find that there was a uniform policy of forced marriage.

1200. **TK Cooperatives Segment:** In this segment, 14 people testified about the marriages under DK. The Chamber systematically rejected the testimonies of the cadres confirming the need for consent from the spouses. Only the testimony of PECH Chim found favour in the eyes of the Chamber "since he admitted that those who were reluctant to respond at the wedding ceremony did not consent to the marriage".[2236] However, the Chamber committed a leading error by concealing the parts of the statement from this witness that should have led it to rule otherwise. In fact, PECH Chim stressed several times the principle of consent to marriage, by giving specific details that the Chamber should have taken into account.[2237] The Chamber erred in fact and in law by not highlighting the importance of the explanations given by this witness on the separation of certain offices that had contributed to the incorrect application of the CPK rule in practice.[2238]

1201. In the same way, the Chamber completely ignored in its reasoning the evidence of four other cadres – KHOEM Boeurn, NEANG Ouch, PHNOEU Yav and PHAN Chhen – who also mentioned the rule of prior consent to marriage.[2239] These testimonies did not make it possible to find that it was

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[2235] See expert opinion above, §1209-1210.

[2236] Reasons for Judgement, §3617, 3623. Witnesses discarded: RIEL Son, OR Ho, MEAS Voeun, TEP Poch and YOU Van.

[2237] T. 22.04.2015, **E1/290.1**, at 13.57.06 ("[…] we also had to consult the parents of those involved, and in particular, the couples themselves. We needed to be sure whether they consented to the marriage or not." (emphasis added). See also T. 23.04.2015, **E1/291.1**, around 09.16.46 and at 09.18.41. Furthermore, he stated: T. 22.04.2015, **E1/290.1**, at 13.47.11. "Generally speaking, those who wanted to get married needed to ask for the authorization. The man needed to ask for the authorization and asked the woman for her consent before the marriage could be celebrated. It was impossible for any marriage to be celebrated without the authorization. They also needed the consent of the parents, brothers and sisters or the guardian who was the local chief. That was the principle." (emphasis added). See also: T. 23.04.2015, **E1/491.1**, before 09.08.55

[2238] PECH Chim: T. 23.04.2015, **E1/291.1**, after 09.08.55, after 09.18.41 (case of offices far away in the forest.)

[2239] While NEANG Ouch, *alias* Ta San, the alleged last chief of the Tram Kak District no longer remembered the existence of a marriage policy, he nonetheless talked about a process of consultation for people before their marriage was organised. NEANG Ouch: T. 10.03.2015, **E1/274.1**, before 10.54.08; T. 11.03.2015, **E1/275.1**, 11.27.16, around 09.23.43. He stated that their name was crossed out if they were not in agreement. Above all, he confirmed the existence of different practices at the lower level: T. 10.03.2015, **E1/274.1**, at 10.51.53; T. 11.03.2015, **E1/275.1**, after

the intention of the CPK leaders to flout the consent of individuals to marriage. The Chamber's argument that these testimonies were not credible because they came from former cadres is all the more incorrect since the statements from ordinary witnesses about TK corroborated the existence of this rule regarding consent.[2240] SAO Han and RY Pov talked about arranged marriages without mentioning that they had been forced, while CHOU Koemlan talked about forced marriages for NP but stating that this was deduced from the fact that the couples made it known that they did not spend the night together.[2241] **Statistics.** Thus, of all evidence obtained in this segment, only one civil party mentioned the existence of forced marriages, one talked about different experiences, namely forced and non-forced, three witnesses and civil parties talked about forced marriages, seven mentioned the need for consent before the marriage, one did not indicate the type of marriage

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11.30.15. KHOEM Boeurn corroborated his statement. The former chief of CHEANG Tong commune, she stated that a person who was against being married could oppose it: KHOEM Boeun: T. 04.05.2015, **E1/296.1**, 09.55.37; T. 05.05.2015, **E1/297.1**, before 10.03.00. She also confirmed the existence of the two moral principles related to consent that arose from the revolutionary command that stated that it was unacceptable to behave badly towards women. T. 05.05.2015, **E1/297.1**, at 13.47.58, at 13.51.28.

[2240] Thus, PHNEOU Yav who stated that he had not played any role in the organisation of marriages confirmed his statement in which he said that the marriages had been organised at the proposal of individuals and/or arranged with the possibility of refusing without any problems. PHNEOU Yav: T. 17.02.2015, **E1/264.1**, before 10.48.28. T. 17.02.2015, **E1/264.1**, around 10.46.20 (confirming his statement); Written Record of Interview of Civil Party Applicant, 12.11.2009, **E3/5515**, Q/R 32. See also T. 17.02.2015, **E1/264.1**, before 10.55.29, before 10.59.49. The Chamber was also obliged to acknowledge that although it had talked about cases of forced marriages, EM Phoeung, a former monk, was able to refuse a marriage proposal without any consequences: Reasons for Judgement, §3625. EM Phoeung: T. 16.02.2015, **E1/263.1**, around 13.42.34. CHANG Srey Mom, another witness from TK, stated that she was married reluctantly under the regime, but made it clear that she was not forced, adding that the future spouses had been asked about consent during the ceremony. CHANG Srey Mom: T. 29.01.2015, **E1/254.1**, before 09.54.32 *("Were you forced? My husband said I got married on my own will; no one forced me. After that the unit chief came to ask me the same question. I then replied I got married voluntarily, no one forced me to get married.*"), around 10.01.11 (objection from the Defence admitted by the Presiding Judge stating that CHANG Srey Mom was not forced to get married). See also SAO Han: T. 18.02.2015, **E1/265.1**, around 10.10.09 (during the ceremony "those people were asked whether they would accept his or her partner to be for life. And if they said yes, it means they made the resolution."); Written Record of Interview of Civil Party Applicant SREY Soeum, 16.12.2014, **E3/9826**, Q/R 143 ("During the marriage the Cooperative Committee asked the man Do you love the woman? The man answered I truly love her. Then they asked me"). OUM Sophany married her fiancé. OUM Suphany: T. 23.01.2015, **E1/251.1**, before 15.52.35; T. 26.01.2015, **E1/252.1**, 09.57.51 ("I married happily because I married a man I loved").

[2241] SAO Han: T. 18.02.2015, **E1/265.1**, around 10.10.09. RY Pov: T. 12.02.2015, **E1/262.1**, after 10.14.31. CHOU Koemlan: 27.01.2015, **E1/253.1**, after 10.06.03, before 10.08.32.

and one mentioned marriage out of the time context of the case.[2242] The proportion of forced marriages mentioned falls drastically compared to that of the marriage segment.[2243]

1202. **1JD Worksite Segment**: Ten people testified in this segment about the marriages under the regime. Among them, certain cadres – including OR Ho who was dismissed by the Chamber – talked about the criterion of consent to marriage while others did not talk about it.[2244] Only CHAO Lang stated that she had been forced to marry,[2245] while SEANG Sovida mentioned the case of the marriage of her sister without consent, but the Chamber erred by not taking account of her young age to evaluate her discernment.[2246] It also erred by ignoring the testimonies that were contrary to its findings.[2247] **Statistics.** In this segment, it is interesting to note that two civil parties talked about forced marriage, i.e. 20% compared to three people who talked about consented marriages, i.e. 30%, two people with differences in experience, i.e. 20% and three people who did not indicate the type of marriage, i.e. 30%. The Chamber therefore erred in fact by not drawing on the consequences of these different accounts.[2248]

1203. **TTD Segment:** Nine people testified about the marriages under the regime. One of them was PAN Chhuong whose testimony was wrongfully rejected by the Chamber. In fact, four other former cadres and one ordinary witness confirmed the need for consent to the marriage.[2249] The Chamber

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[2242] 3 arranged (CHANG Srey Mom, RY Pov, and EK Hoeun), 1 forced (CHOU Koemlan for the NP), 7 non-forced (PHNOEU Yav, PHAN Chhen, NEANG Ouch, RIEL Son, PECH Chim, KHOEM Boeun and OUM Souphany), 1 difference in experience namely forced and non-forced (EM Phoeung), 1 out of time context (VORNG Sarun) and 1 N/A (no mention of whether forced or not) (SAO Han). It is important to note that none of these witnesses stated that they were forced to marry under the regime.

[2243] See Annexes B1 and B6.

[2244] Cadres who talked about prior consent being necessary: SOU Soeurn: T. 04.05.2015, **E1/310.1**, 15.12.35 ("The chief of the commune or 'sangkat' would ask the opinion of the men and women, whether they consented to the proposed marriage. And if they agreed, then the ceremony would be organized."); OM Chy: T. 30.07.2015, **E1/326.1**, at 15.51.05. Cadres who did mention consent or forcing: PECH Sokha: T. 20.05.2015, **E1/302.1**; T. 21.05.2015, **E1/303.1**; YEAN Lon: T. 16.06.2015, **E1/317.1**. T. 17.06.2015, **E1/318.1**.

[2245] CHAO Lang: T. 01.09.2015, **E1/339.1**, before 14.38.13 (only one couple at the ceremony).

[2246] SEANG Sovida: T. 02.06.2015, **E1/308.1**, before 09.24.56 (she was 11 years old when her sister was married), after 09.20.09 (her sister was between 15 and 16 years old at the time), at 11.11.46 ("She didn't want to marry him, but she was forced to and she could not refuse. I even asked her to get married to the man so that she would be assigned to work around the village and stay close to our parents."). Her sister's age was far from being in accordance with the DK regulation.

[2247] MEAS Laihour and KONG Uth testified about their respective marriage arranged by their parents: MEAS Laihour: T. 26.05.2015, **E1/305.1**, at 09.28.47, at 09.32.12 ("they asked me to match with so and so men. But, I refused by saying that I'd rather remain celibate my whole life than get married. Angkar then arranged the marriage for me and my husband."); KONG Uth: T. 25.06.2015, **E1/322.1**, at 13.55.25, after 13.31.32.

[2248] See Annexes B1 and B6.

[2249] Thus, KAN Thorl, deputy chief of a mobile unit of 100 people from the Phnom Srok district, talked about consented marriages and stated that he had not heard about any forced marriages: KAN Thorl: T. 10.08.2015, **E1/327.1**, between

erred in fact by not drawing on the consequences of the convergence of these witnesses who operated in different units. Thus, only LING Lrysov stated that she had been married reluctantly under the regime.[2250] **Statistics.** Once again, in all the evidence in this segment,[2251] the Chamber erred by not drawing the consequences of the difference in experiences. In fact, only one person mentioned a forced marriage, i.e. 11%, compared to five people, i.e. 56% consented marriages, two people arranged marriages, i.e. 22%, and one person, i.e. 11%, testified about differences in the circumstances of the marriage.[2252]

1204. **Elsewhere throughout the country:** Of all the witnesses heard outside the segments mentioned above, 47 witnesses and civil parties evoked the question of the marriages.[2253] Seven7 talked about forced marriages, i.e. 15%, compared to 17 consented marriages, i.e. 36%, six arranged marriages, i.e. 13%, eight having indicated the difference in experience without themselves being forced to marry under the regime, i.e. 17%, seven without indicating the type of marriage, i.e. 15%, and two talked about marriages outside the time context of the case, i.e. 4%.[2254] It is important to note that of these 47 witnesses, 21 witnesses and civil parties were married under the regime. Of these 21 people, four stated that they had been forced to marry under the regime. Once again, the Chamber erred in fact by only carrying out a partial analysis of the evidence, in both senses of the word, by not drawing the consequences of the disparity of the accounts.

15.33.07 and 15.36.07. CHUM Seng, chief of a company at the TTD, stated that marriage could only take place with the agreement of the women: CHUM Seng: T. 18.08.2015, **E1/332.1**, before 11.23.49. TAK Boy, chief of a platoon made up of 30 people, stated: "As a general rule, […] those who were to be married chose one another. For example, a man could propose to a woman. And a marriage would be organised": TAK Boy: T. 19.08.2015, **E1/333.1**, before 14.04.14. CHHUY Huy stated: "To my knowledge, at the time, before getting married, the chief of the unit they belonged to had to be informed. For example, the chief of the male youth unit informed the chief of the female unit so that he could ask if she was in agreement.": CHHUY Huy: T. 24.08.2015, **E1/335.1** from 11.09.08, at 11.29.19. The Chamber also erred by not considering the testimony of MAM Soeurn, an ordinary member of the population who nonetheless confirmed the change from the traditional consent of the parents to that invested in individuals under DK, even though he evoked the subsistence of male privilege without, however, talking about forced marriage. "As I said, men and women were married because they fell in love with one another. However, there were certain cases where the boy loved the girl but the girl did not love him.": MAM Soeurn: T. 29.07.2015, **E1/325.1**, at 10.11.43.

[2250] LING Lrysov: T. 20.08.2015, **E1/334.1**, around 14.03.06.

[2251] Of these nine witnesses and civil parties, one forced (LING Lrysov), five non-forced (KAN Thorl, CHHUM Seng, TAK Boy, CHHUY Huy and PAN Chhuong), two arranged (SEN Sophon and MEAN Loeuy) and one difference in experience i.e. forced for some but not forced for others (MAM Soeurn).

[2252] See Annexes B1 and B6.

[2253] See Annexes B1 and B6

[2254] See Annexes B1 and B6

1205. The Chamber particularly erred in fact by rejecting the testimony of YOU Vann, along with that of the other cadres. A former cadre of the SWZ redeployed in Ro'ang commune in the Kampong Siem district, she nonetheless gave specific details on the organisation of marriages: "The men and women formed part of the mobile units. And, if they were in agreement to marry, they made a proposal to the village chief, who in turn reported it to the commune and then to the district. And then a marriage ceremony was organised at the district office". [2255] The necessary collection of consent was confirmed by her superior PRAK Yut, chief of the Kampong Siem district who was even clearer on this point confirming that he had read it in the CPK documentation[2256]: "If I had organised marriages when the individuals did not love one another and if I had had to force them, it would have been an error. I read certain documents too and I did not organise any marriage arbitrarily".[2257] It should be remembered that these two witnesses had essentially been called to state about the Cham and therefore had no reason to be on the defensive about the question of the marriages.

1206. Furthermore, whether or not we want to believe their statements about their own behaviour, the Chamber committed an error by not finding that their statements corroborated those of other cadres from different and far-off localities and, above all, the rule stated in the twelve moral principles of the CPK.[2258] The Chamber's error is even more serious in that these statements were corroborated in court by several witnesses and civil parties.[2259]

1207. Furthermore, apart from SAO Sarun, two other witnesses, Duch and CHUON Thy, stated that they had understood POL Pot's instruction regarding marriage confirming the principle of consent to the marriage.[2260] MOENG Vet talked about his experience with a marriage practice similar to

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[2255] YOU Vann: T. 14.01.2016, **E1/376.1** (in camera), before 14.34.14; T. 14.01.2016, **E1/377.1** (in camera), around 11.31.42.

[2256] In the "Regulation of marriage" section, the Chamber considered that she wished to minimise her responsibility as secretary of the district even though it had been exculpated (Reasons for Judgement, §3579 and 3609), but was credible otherwise (Reasons for Judgement, §3605).

[2257] PRAK Yut: T. 19.01.2016, **E1/378.1** (in camera), around 11.25.35 (emphasis added)

[2258] See above, §1192-1195.

[2259] See above, §1200-1202. YOS Phal: T. 25.08.2016, **E1/464.1**, at 10.39.47, around 11.10.50 ("Regarding the choice, if the man and the woman did not have any of their relatives smashed then they could marry one another."); Written Record of Interview of Civil Party Applicant RUOS Suy, 07.07.2015, **E3/10620**, Q/R 82 ("Because some people agreed to get married as assigned whereas some who understood the plan or had learned Party policy through their friends refused to get married."). It should be highlighted that RUOS Suy indicated that the CPK rule was a reason for opposing a refusal of marriage.

[2260] CHUON Thy: T. 24.04.2013, **E1/183.1**, between 09.58.27 and 10.03.30, at 15.06.36; T. 26.10.2016, **E1/490.1**, around 09.07.08, from 09.13.11, from 09.35.21 (Meeting in 1978 "Pol Pot said it was up to them If they agreed -

traditional arranged marriage: "this was not a forced marriage, but I could say that it was not a – either a voluntary one as well.".[2261] Describing the request procedure by the senior cadres, he stated that instruction had been given orally during meetings on the choice of spouse.[2262] Furthermore, even the witnesses who said that they had not been aware of the specific content of the regulation of marriage spoke about the concept of consent.[2263]

1208. The Chamber therefore erred by not drawing from the fact of the difference in experiences according to the places and people the reasonable finding that was necessary, namely that the rule of clear consent recommended by the CPK had been incorrectly applied. Furthermore, a general examination of all the testimony in Case 002/02 outside the segment dedicated to marriage confirms the disparity of the experiences.

1209. **Opinion of the experts**: The Chamber also erred in fact and in law by distorting the testimony of Kasumi NAKAGAWA and not drawing the findings that were necessary from it.[2264] In fact, the expert stated: "I cannot find any evidence of centralized policy to force the people into the marriage", although she acknowledged that the two conditions applied by the 6th moral principle of the CPK had not been applied to all the marriages under DK.[2265] Although the Chamber had correctly followed the procedure that it had announced in §3534 of the Reasons for Judgement,

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arrange marriage for them, but do not force them."); Written Record of Interview of Civil Party Applicant, 28.02.2017, **E319/71.2.4**, Q/R 33, 34, 104-109, 118, 123, 124, 130-133 from 08.10.2019, admitted as evidence by decision of the Supreme Court of 06.01.2020, **F51/3**; *Duch*: T. 13.06.2016, **E1/436.1**, before 09.49.20; T. 13.06.2016, **E1/443.1**, between 15.42.15 and 15.45.10, at 15.47.21 (post DK meeting with POL Pot, and he never saw a document from the Party stating the policy of forcing people to marry)

[2261] MOENG Vet: T. 27.07.2016, **E1/449.1**, after 09.51.52, at 10.17.14.

[2262] MOENG Vet: T. 27.07.2016, **E1/449.1**, before 10.02.42, before 10.06.04, before 10.15.41, at 10.17.14. This question of choice of spouse according to biography will be examined below.

[2263] For the cadres: PHAN Chhen, SOS Romly, PRUM Sarun, PHAN Van, THUCH Sithan, BEIT Boeurn and SENG Lytheng. For the soldiers: CHIN Kimthong, SUN Vuth, CHIN Saroeun, HUON Choeurm and MAK Chhoeun. For the ordinary people: IT Sen, SOS Ponyamin, SEN Srun, HIM Man, MATH Sor, PRAK Doeun, THANG Phal, IN Yoeung, SIENG Chanthy, KHUOY Muoy, YUN Bin. Statistics: Witnesses who talked about forced marriages: 11 people; Witnesses who talked about marriages consented to: 32 people; Witnesses who talked about arranged marriages: 11 people; Witnesses who talked about difference in experiences: 12 people; Witnesses who do not indicate the type of marriage: 11 people; Witnesses out of the time context: 3 people. See Annex B6.

[2264] Reasons for Judgement, §3533, fn 11882: "She 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" (emphasis added), although she did acknowledge in the same paragraph and the following one, §3534, that her research projects were shaped to document the stories of men and women who experienced sexual violence during the regime and that her opinion was generally "well reasoned and consistent".

[2265] Kasumi NAKAGAWA: T. 14.09.2016, **E1/473.1**, at 14.04.47 (emphasis added); T. 13.09.2016, **E1/472.1**, before 15.06.47, before 15.22.00 (I do not have enough evidence to say whether there was a policy from the top level to organise forced marriage".

namely to evaluate "the research findings of the expert accordingly, in the context of the evidence before it", it found that the analysis of the evidence confirmed the findings of the expert.[2266] In the same way the Chamber wrongfully dismissed the testimony of Peg LEVINE who came to a similar finding, "You're asking me to make a statement yes or no, were weddings forced [...] generally, nationally, that was not the case.".[2267]

1210. In conclusion, it was by partial analysis of the evidence, in both senses of the word, and in contradiction of consistent items of evidence that the Chamber found that the consent of future spouses to marriage did not exist as a clear principle of the CPK. It also erred in law by not making the reasonable finding that it should have: the occurrence of forced marriages was an incorrect application of the regulation of marriage by certain cadres. These errors that contributed to a false characterisation of the CPK policy on marriage led to a miscarriage of justice. They should therefore be reversed.

b. Errors on the objectives of the CPK

1211. The Chamber also erred in fact and in law in its findings on the supposed objectives of the CPK through the regulation of marriage. To arrive at this finding, it first of all erred by concealing the lack of consent of individuals in traditional Khmer marriage to find a difference in marriage arranged under DK, characterised as forced.[2268] To attempt to bypass the drawback in its reasoning constituted by the rule of consent advocated by the Party, it first of all performed a biased analysis of official CPK documents to assert that the regulation of marriage did not apply due to submission to the discipline of *Angkar* (i). Then, by an incorrect assessment and distortion of the evidence, it found that the aim of the CPK was to control sexual relations in order to increase the population in the country (ii).

(i) Biased analysis of the documents and official speeches on the choice of spouse

1212. **"Revolutionary and Non-Revolutionary World Views Regarding the Matter of Family Building" document.** To try to endorse its theory of lack of consent to marriage under the DK as a policy of the CPK, the Chamber operated by deduction and extrapolation using some of the

[2266] See above, 1192-1210.
[2267] Peg LEVINE: T. 11.10.2016, **E1/481.1**, around 10.46.27.
[2268] See above, §1119-1130: 1157-1162.

Party's ideological texts. Often long and obscure due to language specific to proselytism, the texts appearing in the revolutionary publications could be difficult to understand. However, there are some clear passages regarding which no interpretation can be made, such as the consent required for marriage among the twelve moral principles wrongfully dismissed by the Chamber.[2269] In an RY issue published in 1975, "an official reprint" of the RY February 1974 issue on "family building" aimed at young revolutionaries,[2270] the Chamber gave a grossly incorrect interpretation of this, which should simply be invalidated.[2271] According to it, this document demonstrated that *"Angkar*'s assessment or decision was to be respected by each individual as only *Angkar* could make a thorough assessment", including regarding marriages.[2272] However, the Chamber erred in this general finding made out of context. On the one hand, it failed to take into consideration the civil war raging in the country on the date when this document was written (1974). However, it is an essential element when we are aware of outrages against women caused by the military combat. On the other hand, the Chamber completely ignored the new concept of relations between men and women introduced by the revolutionary ideology in relation to the tradition developed in this document. In this specific context, the Chamber erred by not disclosing that there was an intention to give women a different role than the one traditionally allocated to them, in other words, only through marriage.[2273]

1213. In addition, the Chamber should have found that this publication was intended for young cadres and revolutionary soldiers who had joined the movement and were supposed to be in favour of the ideals of the Revolution[2274] including in "their choice of spouse".[2275] However, there is nothing in this document that would lead to the finding that the CPK had a policy or intention of encouraging, and even less so of forcing, people to marry against their will. On the contrary, it was a question of inviting them to think carefully about their choice in the context of their revolutionary

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[2269] See above, §1193.
[2270] RY, June 1975, **E3/775**, p. 3-4, ERN EN 00417941-00417942
[2271] Reasons for Judgement, §3540-3543.
[2272] Reasons for Judgement, §3540-3541, 3543-3544, 3618.
[2273] It should be noted that this traditional concept of women is symbolised by a traditional poem: Chbab Srey by MEUN Mai, undated, **E3/10659**, ERN EN 01327694-7700. [The French version seems to be a summary of the code while the English version seems to be the code itself]. This traditional concept of women is still being fought against today. See 'There is no place for Chbab Srey in Cambodian schools, 09.06.2015 (*The Cambodia Daily*), **E3/10660**, ERN EN 01324426-01324428. This 2015 press article indicates that some Chbab Srey rules have been removed from the curriculum at the request of the Ministry for women's issues.
[2274]RY, June 1975, **E3/775**, p. 2-3, ERN EN 00417941-00417942.
[2275] Reasons for Judgement, §3543 recalling the main principles that should guide the choice of spouse.

commitment.[2276] It was also a question of a reminder in relation to the twelve moral principles, as has been confirmed and explained by the former cadres who were heard in court. [2277] The contents of the above-mentioned RY issue also corroborate the statements of PECH Chim, which were wrongfully dismissed by the Chamber. He had in fact recalled the history of marriages organised before DK, with the consent of the future spouses and the approval of their parents or guardians, as well as that of the local chief.[2278] The Chamber therefore not only erred on the contents of the RY issue but also wrongfully used the recommendations made to the young militants of the CPK to arrive at findings that were general – in addition to being incorrect – for the entire population.

1214. **Other contemporaneous documents**. The Chamber also referred just as incorrectly to other RY and RF publications and a speech by KHIEU Samphan from April 1978 to find that the decisions of *Angkar* prevailed over individual choices or personal feelings on penalty of sanction, including in matters of marriage.[2279] However, none of the revolutionary publications cited mentions marriage or family building. A non-biased reading of these publications would have led the

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[2276] JR, June 1975, **E3/775**, p. 6-8, p. 6-8, ERN EN 00417945-00417947. "As for the matter of family building, the Party has never forbidden it, but we the revolutionary youth must have clear revolutionary world views on this matter. And most importantly, we the revolutionary youth must adhere to our serious revolutionary missions. […] Therefore we the revolutionary 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 organizational discipline and not respecting the collective in building a family, for example. We must understand that in matters of family, we can build one at any time. But we only have our youth one time in our lives. If will allow it to slide by uselessly, it will never return, and we will certainly and without fail have regrets later." (emphasis added)

[2277] Among them, *Duch* thus stated: "In marriage affair, we were not asked -- or we were not prohibited from getting married any -- with any person. However, we were asked to be very careful.". *Duch*: T. 20.03.2012, **E1/51.1**, after 11.08.32. He thus stated that he himself had started the process in accordance with the procedures existing to ask for his wife's hand: *Duch*: T. 20.03.2012, **E1/51.1**, after 10.15.52; T. 13.06.2016, **E1/436.1**, after 09.45.10. See also CHUON Thy: T. 24.04.2013, **E1/183.1**, from 09.58.27

[2278] PECH Chim: T. 22.04.2015, **E1/290.1**, from 13.47.11. "it was as of 1970 That was the way they organized. It was under the same regime. In 1971, the regime organized marriages. Requests for marriages were brought to the attention of unit chiefs or group leaders who then approved them before the wedding took place. Then, more and more people wanted to marry. So, marriages involving hundreds of couples were organized, and for those marriages to be conducted, the unit chiefs made requests to the superior. So, if we did not marry many couples at the same time it would have taken us for ages to process couple by couple marriages. We did not want people to marry because we wanted to build up our army to speed up and conquer the battles. We did not want to prolong the war. We did not want the people to marry when they were still young. We wanted them to wait to be a bit more mature. That was our policy. But, some officials did not give people clear instruction about that policy and only gave them a brief summary. So, conflicts arose. But, since people had deeply loved each other we had to arrange marriages for them." (emphasis added). See also OR Ho: T. 19.05.2015, **E1/301.1**, at 13.56.03 (The war was not over yet and *Angkar* did not allow marriage to happen during that time because *Angkar* needed men and women to go into war); Kasumi NAKAGAWA: T. 13.09.2016, **E1/472.1**, before 13.36.24 (reminder of the restrictions on the organisation of marriages to certain people in the country before a certain period).

[2279] Reasons for Judgement, §3544-3548 (fn 11923-11929), the Chamber made use of the RY, RF CPK Statute and KHIEU Samphan's speech.

Chamber to find that they contained an appeal to young people to be prudent in their attitudes and actions for the reconstruction of the country in accordance with the Party ideology. This appeal to adhesion to a communist ideology and a patriotic ideal would not allow reasonable judges to find that the CPK had the intention of forcing the population to marry.

1215. In the same way, the Chamber erred by misrepresenting and distorting KHIEU Samphan's speech from April 1978.[2280] Omitting that this speech was delivered at the height of the war with Vietnam, it completely obliterated its meaning, which was to draw the population's attention to what would become of the country by calling for calm in the face of the chaotic situation. On the basis of this same speech, the Chamber found that *Angkar* wanted to replace the parents or that it should rank above them in all matters, including marriage.[2281] Only a partial and unreasonable interpretation allowed it to conclude that this speech was about marriage.[2282] Finally, the Chamber failed in its obligation of motivation by not explaining how the communist ideology encouraging personal and family interests to come after collective interests implied that the CPK forced people to marry all over the country. All of these findings should therefore be invalidated.

(ii) Distortion of the evidence about the other alleged objectives

1216. Along the same incorrect lines, the Chamber found that the CPK had a forced marriage policy contrary to the official conditions in order to control sexual relations to increase the population in the context of the country's development and national defence against Vietnam.[2283]

1217. **Objective of controlling relations.** The Chamber erred by finding that "The CPK policy regulating marriage" was aimed at controlling sentimental or sexual interactions between men and women both before and after marriage without finding that this was a regulation of marriage in line with the tradition prohibiting sexual relations outside marriage.[2284]

[2280] Phnom Penh Rally Marks 17 April Anniversary (in SWB/FE/5791/B collection), 16.04.1978, **E3/562**, ERN EN S 00010563-00010564.
[2281] Reasons for Judgement, §3539, 3548 fn 11927. See also §3687-3689, 3691 Legal qualification of the facts.
[2282] *Ibid idem*, ERN EN S 00010563-00010564 (for example "(10) To hold extremely high and keep extremely seething the national spirit of revolutionary vigilance in order to be ready beforehand to deal with all poisonous manoeuvres of the enemy; (11) To desist from thinking or doing anything to harm the people's revolution and Party; (12) To subordinate resolutely all personal and family interests to the nation, class, people and revolution; (13) Always to link closely the rear with the front; (14) All efforts and activities of the rear are to be a vigorous and crystal-clear (thla trachang) support for the front." (emphasis added in the passage partially used by the Chamber)).
[2283] Reasons for Judgement, §3549-3563.
[2284] Reasons for Judgement §3559-3563, 3662-3665, 3669.

1218. ***Control before marriage.*** The Chamber found that for the CPK interactions between men and women outside marriage were considered as "likely to endanger the revolution".[2285] To do this, it referred to the October 1978 issue of RY and a certain number of witness statements produced in Cases 002/02 and 002/01.[2286] It erred in fact by concealing the Khmer cultural tradition of the moral principles decreed by the CPK. Reducing the moral principles of the party to the "defence of the revolution" is a negation of the evidence gathered during the proceeding on the principle of morality and interactions between men and women in Khmer culture and traditions that existed before the regime and have outlived it.[2287] For example, the traditional Chbab Srei text reads as follows: "*Don't behave like a child and don't fool around with and go close to a young man when you see him. Unintentional laughter and smile could make a naughty man take advantage of you. If so you would be called a useless mischievous and dishonest woman. Your illusion and careless speech would make you shameful. You should not act like a tease*".[2288] Relationships between people outside marriage were therefore not encouraged either in the same tradition as under DK. This has been fully confirmed by many witnesses and civil parties.[2289] The Chamber therefore erred in its reasoning by not taking

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[2285] Reasons for Judgement, §3659-3660.

[2286] Reasons for Judgement, §3660-3663.

[2287] RY, October 1978, **E3/765**, p.17-1, ERN EN 00539992-00539994 ("because this issue impacts our honour and our influence as revolutionaries and impacts the clean and pure and dignified traditions of our people. Therefore this impacts our people.").

[2288] Chbab Srei by MEUN Mai, undated, **E3/10659**, ERN EN 01327694 (the French translation is not available in the case file. See therefore the Khmer version ERN KH 013244317-18).

[2289] Thus, CHUON Thy stated: "At that time, it was not forbidden. However, in such a society Cambodian people had to respect the traditions, which means we cannot have sexual contact before the marriage. So, your unit or you yourself could propose if you love someone." CHUON Thy: T. 24.04.2013, **E1/183.1**, after 09.58.27. See also YUN Kim: T. T. 20.06.2012, **E1/89.1**, at 09.34.37 (chief of commune in the Kratie region, on morality, young people had the right to marry but they had to report it to their immediate superior). Talking about the marriages after 1970-1971, PECH Chim stated: "Both the female and the male youth grew older [...] We also tried to follow the tradition that the couples had to get married first before consummating, and the public witnessed their marriages then they became legitimate husband and wife." PECH Chim: T. 23.04.2015, **E1/291.1**, at 09.12.31. See also KHOEM Boeun: T. 04.05.2015, **E1/296.1**, around 15.23.03 see Khmer version p. 67, L. 18-19; T. 05.05.2015, **E1/297.1**, around 14.40.30 where he referred to his Written Record of Interview of Civil Party Applicant on 21.05.2014, **E3/9487**, Q/A 153-155; CHANG Srey Mom: T. 02.02.2015, **E1/255.1**, before 09.29.19 ("We physically stayed together as a husband and wife (sic)"). See also Peg LEVINE: T. 12.10.2016, **E1/482.1**, at 09.52.43 ("[The couples] having the legitimacy then to be recognized in the community as married people-- this is very important-- and then to move forward and have children."), around 10.58.21 ("when I look at the female ones as well, a lot of those run right through some of the revolutionary principles, especially about warning against adultery. So what I can say at this moment is what Pol Pot had said then would align with a potential policy to have people in exclusive relationships first before one thinks about consummation of that relationship"). These testimonies combine with the experience of women who testified during the proceeding: CHUM Samoeurn: T. 24.06.2015, **E1/321.1**, between 14.31.44 and 14.33.31 ("We Cambodian girls would not willingly give ourselves to the men that we just knew and for that reason my body was trembled and I actually begged him to keep a secret that we did not consummate our marriage."); PREAP Sokhoeun: T. 20.10.2016, **E1/487.1**, before 14.35.38 ("I was committed not to allow any man to touch my body as my father used to tell me that as a woman, I should not allow any man to touch my arms or legs."); Written Record of Interview of Civil Party

account of the continuity of this aspect of the revolutionary ideology with the Khmer culture from before the regime and by not drawing on all the consequences of its own finding.[2290]

1219. ***Information reported to the "Party Centre"***: In §3562 of the Reasons for the Judgement under appeal, the Chamber found that sexual misconduct and the measures taken as a result were then reported to the "Party Centre". To endorse this finding, it relied on two reports sent by Office 401 to *Angkar*, and a telegram from Sarun to "Bang". However, its interpretation of these documents is completely incorrect.[2291] On the one hand, the Chamber found that "the Party Centre" was informed but the reports cited then use the term *Angkar* without there being any evidence of the specific recipient. As will be seen below, it constantly used this vague term, "Party Centre" to make an artificial connection between KHIEU Samphan and the facts even though he is not mentioned in person.[2292] On the other hand, the Chamber erred by generalising these isolated reports which, moreover, concentrated on other events mainly concerning the security situation in the armed hostility with Vietnam.[2293]

1220. ***Control after marriage.*** The Chamber erred in fact by finding that it was not possible to be divorced under the regime and that generally relations between couples were controlled by the CPK.[2294] Here again, the Chamber has not taken into account the cultural context of the country by only carrying out a partial examination, in both senses of the word, of the evidence.[2295] Not only has the Chamber erred by ignoring the content of POL Pot's comments, nonetheless endorsed by SAO Sarun and CHUON Thy regarding the prohibition of forced marriages, but it also relied on statements from witnesses and civil parties that talked about sanctions for couples who did not get along well without giving any specific and substantiated example.[2296] By doing this, it erred in fact by

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Applicant SREY Soeum, 16.12.2014, **E3/9826**, Q/A 169-171.

[2290] Reasons for Judgement, §3563 particularly fn 11956 which demonstrates both the respect for discipline with respect to women and the importance of marriage, without which men and women in love were accused of sexual misconduct.

[2291] Reasons for Judgement, §3562, fn 11955 where the Chamber referred to the DK Report, 16.07.1978, **E3/1092**; DK Report, 04.08.1978, **E3/1094**; DK Telegram, 23.04.1978, **E3/156**.

[2292] See below "Party Centre" §1618-1632.

[2293] It is also relevant to note that in the report dated 4 August 1978, although it was reported that in region 32, marriages were organised for 42 couples, nothing is mentioned about what type of marriages they were, DK Report, 04.08.1978, **E3/1094**, ERN EN 00315382-00315383.

[2294] Reasons for Judgement, §3669.

[2295] Reasons for Judgement, §3666-3668.

[2296] SAO Sarun: T. 06.06.2012, **E1/82.1**, before 14.09.57, around 14.11.59. CHUON Thy: T. 24.04.2013, **E1/183.1**, between 09.58.27 and 10.03.30; T. 26.10.2016, **E1/490.1**, from 09.13.11; Written Record of Interview of Civil Party Applicant, 28.02.2017, **E319/71.2.4**, Q/A 19-33. MEAS Voeun: T. 08.10.2012, **E1/131.1**, from 13.46.54. Reasons for

concealing the fact that divorce was frowned upon in Khmer culture long before the DK regime.[2297] As for control of consummation of the marriage, this will be examined below.[2298]

1221. **Objective of population growth.** The Chamber stated that it was convinced that one of the objectives of the regulation of marriage was to encourage population growth. Thus, both men and women did not have any other choice than to marry and then consummate their marriage with their new spouse in order to have children.[2299] To endorse this finding, it committed several errors, first of all by contradicting itself with other findings regarding the regulation of marriage, and also in its assessment of the evidence.

1222. ***Chamber's contradictions.*** In §3665 of the Reasons for the Judgement under appeal, the Chamber found that even after the marriage, the couples "were commonly controlled by the CPK". To endorse this finding, it explained that shortly after the marriage, the couples had to separate and go to work in different places. A visiting system was set up and by default they had to apply for permission to meet one another.[2300] A large number of witnesses and civil parties confirmed this visiting system and husbands and wives working in different places.[2301] However, it must be stated that these separation measures did not in any way foster the chances of pregnancy. This first finding did not allow the Chamber to find, as it did, that the CPK's objective was to produce children for

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Judgement, §3668, fn 12238-12244 where the Chamber used SOU Sotheavy, KHIN Vat, LING Lrysov, PHNOEU Yav, CHEA Deap, YOS Phal and MEAS Laihour. In particular, the Chamber did not base any findings on the lack of credibility of YOS Phal who said that he did not get divorced because he did not "dare" and that he was "afraid": YOS Phal: T. 25.08.2015, **E1/464.1**, after 10.51.06. However, he remained married to his wife after the regime.

[2297] Kasumi NAKAGAWA: T. 13.09.2016, **E1/472.1**, before 11.14.27 ("Technically, it was possible that the married couple seek for divorce, but it was very, very rare, because, at that time, Cambodia was still following the polygamy system, so men could keep several wives. There is no reason that he may divorce a wife; he could just keep several, multiple wives. And for women's side, it's a very shameful conduct if she is divorced, at any cost, so it was extremely rare from both male side and female side the reasons that they had a divorce."). Contrary to the Chamber's finding, NAKAGAWA recalled a case of divorce under DK, T. 14.09.2016, **E1/473.1**, around 15.56.14. SAY Naroeun: T. 25.10.2016, **E1/489.1**, after 11.15.15 (reason not to divorce after the regime: "I am a Cambodian woman, I do not want to see my child having a second father or for me to have a second husband"); Written Record of Interview of Civil Party Applicant KHET Sokhan, 27.11.2013, **E3/9830**, Q/A 86-88 (she did not want to leave her husband after the marriage because she did not want to have more than one husband).

[2298] See below §1341-1398.

[2299] Reasons for Judgement, §3690, 3558, 3690-3691, 3696-3698 Legal qualification of the facts.

[2300] Reasons for Judgement, §3662-3664.

[2301] KHIN Vat: T. 29.07.2015, **E1/325.1**, after 15.04.20, at 15.28.47 (one week after the marriage, she had to separate from her husband to go to work); CHUM Samoeurn: T. 24.06.2015, **E1/321.1**, at 14.27.20 (they were separated three days after the marriage). Written Record of Interview of Civil Party Applicant KEO Theary, 08.12.2014, E3/9662 (they fell in love after the marriage, and her husband had to lie to his chief to be able to go home to see his wife).

Angkar. All the more so since, as will be seen below, the Chamber was incapable of finding on any specific measures to encourage births.[2302]

1223. ***Errors in the assessment of the items of evidence.*** To find on the objective of population growth through the marriages, the Chamber carried out a particularly incorrect and inculpatory examination of several speeches by senior CPK leaders, two speeches by KHIEU Samphan from 1977 and 1978, an extract from KHIEU Samphan's book, two RF issues, three witness statements from former cadres, and seven witness statements from civil parties who appeared in the marriage segment.[2303] The list of items of evidence used was aimed at creating an illusion of motivation, which nonetheless does not stand up to examination in view of the scale of the distortion carried out by the Chamber, which should be sanctioned.

1224. ***Distortion and deformation of CPK documents and speeches regarding the steps to be taken for population growth.*** It has never been contested that the official documents mentioned by the Chamber effectively evoked the CPK objective of population growth of DK.[2304] On the other hand, it erred by conveniently omitting to mention the fact that all these documents indicated the measures to be taken to achieve this objective, which was not related in any way to the implementation of a policy of forced marriage. The CPK wished to achieve this objective by improving the living conditions and the health of the population.[2305] This is a matter related to the country's economic development, which had been addressed on a number of occasions by the CPK leaders, both at national and international level.[2306] Other documents also confirm this tendency of

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[2302] See below, §1228-1230.
[2303] Reasons for Judgement, §3549-3557.
[2304] Reasons for Judgement, §3550-3955.
[2305] See for example, RF, December 1976 - January 1977, **E3/25**, p. 41-42, ERN EN 00491435-00491436 ("For our population to constantly increase the livelihood of the people must rise and they must be in good health").
[2306] RF, October – November 1975, **E3/748**, p. 9, ERN EN 00495808 [English version different from French version] ("3. When our economy is prosperous we will have resources for national defense and it will be politically meaningful for mobilising international support because we create a model society of self reliance, self mastery, independence and enjoy self control over our country's destiny"), p. 20-21, ERN EN 00495819-00495820 ("2. The promotion of people's living standard is relevant to all party's political lines"); Speech by the President of the State Presidium, 16-19.08.1976, **E3/549**, ERN EN 00644939. Speech by IENG Sary before the United Nations, 11.10.1977, **E3/1586**, §56-60 and 63, ERN EN 00079815 ("63. But with regard to the long-term aspirations of our people, the road that we have yet to travel is long indeed. We must redouble our efforts. We are endeavouring as rapidly as possible to improve still further the living conditions of our people, so that everyone may have sufficient strength and health and ardent patriotism, so that our entire people may rapidly and constantly progress and that we may continue in the defence and speedy construction of a prosperous Kampuchea."); RF, September 1977, **E3/11**, p. 37-38, ERN EN 00486248, p. 51-52, ERN FR 00486262-00486263 ("We must continue striving to raise rapidly the people's standard of living and improve their health because we need to increase our Kampuchean population to 15 to 20 million over the next 10 years [...] We

the CPK and the criticism levied at the cadres who neglected their mission to be responsible for and serve the population.[2307] The Chamber ignored them, just as it ignored the statements from witnesses that said the same thing.[2308] An impartial analysis of all these documents would not allow a reasonable judge to find, as this court did, that growth of the population according to the CPK should be achieved by a policy of forced marriages. Its findings in this respect should be reversed.

1225. ***Errors in the assessment of the evidence of former cadres and soldiers.*** In support of its finding, the Chamber used witness statements from SAO Sarun, MEAS Voeun and CHIN Saroeun not only distorting them but also omitting the exculpatory parts of their testimonies. In fact, while they all talked about the objective of increasing the population, none of them mentioned any marriages that were forced or reluctantly consented to in order to achieve this objective. On the contrary, they all confirmed the preliminary condition of consent of the future spouses, a part that was deliberately

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must double our efforts and rapidly raise the standard of living of our people in all fields even further so that each person continues to be strong and healthy and have a resolute sense of patriotism and so the Kampuchean population can increase in number rapidly enough"). The Chamber erred all the more by concealing and distorting the contents of these contemporaneous DK documents about the measures to increase the population that the Defence had reminded it about. Key Documents Hearing: T. 08.09.2016, **E1/471.1**, between 09.16.29 and 10.05.29.

[2307]RF, October – November 1975, **E3/748**, p. 20, ERN EN 00495818-00495819 ("But when the Party is currently in full control over the entire country, all cadres and Party members have to be responsible for people's living standard. We cannot be quiet idle or in ignorance."); RY, April 1976, **E3/732**, p. 14-15, ERN FR 00611518-19 ("But regrettably and most painfully, when we had liberated Phnom Penh and the entire country and our Party had grasped state power throughout the country, some of our cadres and revolutionary combatants veered off track and totally forgot about the support of the popular masses [...] other locations where our comrades were not authoritarians and did not threaten or coerce the people, they were unconcerned and were not distressed at all by the hardships and hunger of the people [...] These mistakes, whether intentional or not, all have serious negative impacts on the living standard of the people and the feelings of the people. Therefore, this also impacts the revolutionary movement and the influence of the entire Party. If we the revolutionary youth do not pay attention to reforming or to absolutely eradicating mistakes like those above, our revolutionary movement truly will not be mighty and strong at all. We will truly be unable at all to mobilize the multitudes of the popular masses to go on strong and constant offensives to restore the economy and defend and build the country"), p. 10, ERN EN 00392436-00392437 ("When we have the correct mass line we do not coerce the popular masses to put up new paddy dikes and dig new feeder canals following plans set by the Party by using our authority and making threats that anyone who does not follow the revolution is a traitor"); RF, February – March 1976, **E3/166**, p. 13-15, ERN EN 00517825-00517827 ("So then, we had great possibilities to implement the mass lines and think of helping sort out the livelihood of the popular masses and gradually make them better off. But to the contrary, regretfully and most painfully, many of our Party members and cadres turned to being playful in victory and forgot their extremely heavy debt of merit to the popular masses"); Statute of The Communist Party of Kampuchea 1971, 03.07.1972, **E3/8380**, ERN EN 00940637-00940639 (criterion of a good leader for the work of building the Party). RF, December 1976- January 1977, **E3/25**, p. 41-42, ERN EN 00491435-00491436.

[2308] For example, when questioned about the CPK's general policy between 1975-1979, CHUON Thy answered: "I heard about it, that is, to build the country so that the economy was better for people, people had enough food to eat, living conditions were better. There were such discussions.": CHUON Thy: T. 26.10.2016, **E1/490.1**, after 09.39.51. See also MAK Chhoeun: T. 12.12.2016, **E1/511.1**, after 15.59.19 ("that only when we had enough force that we can defend our country" while he stated that he had never heard about any forced marriage).

dismissed by the Chamber in its partial examination of the evidence.[2309] In particular, the Chamber concealed the explanation from SAO Sarun, who like others, saw children being born as the logical outcome of marriage and not an end in itself directly related to the overall objective of population growth.[2310] The Chamber erred in fact by considering that this "logical" and natural outcome of having children after marriage was a specific objective of the CPK when it was one that was typical of traditional Khmer society, like many other societies elsewhere. Several testimonies, including those of civil parties, also gave the same analysis as SAO Sarun.[2311]

1226. In addition, CHUON Thy, former military chief of the same WZ as MEAS Voeun, said he heard POL Pot talk about the policy of increasing the population by promoting marriage in a meeting in Kampong Chnang. However, questioned on several occasions on this subject both during Case 002/01 and Case 002/02, CHUON Thy always maintained that there had never been any question of forced marriages: "POL Pot said it was up to them. If they agreed -- if they agreed, arranged marriage for them, but do not force them.".[2312] Contrary to the findings of the Chamber, he found

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[2309] SAO Sarun: T. 06.06.2012, **E1/82.1**, before 14.05.59 ("they had to mutually agree to get married." and around 14.18; T. 12.06.2012, **E1/85.1**, after 09.52.58 ("We did not have any right to force them to get married"); MEAS Voeun: T. 08.10.2012, **E1/131.1**, at 13.46.54, "As for the marriage, there was a meeting in the zone regarding the instructions for the marriage. [...] I observed, the men and the women need to see each other first. And if they liked each other then they would inform me, so is based on their consent when they were married, and there was no forced marriage. That's the practice within the military structure.").

[2310] SAO Sarun: T. 06.06.2012, **E1/82.1**, before 14.16.24 ("Q. Can you recall receiving any instructions from Pol Pot or other leaders about the need to increase the population in the country? A. I didn't hear about it except that I got information about marriage policy, but as for the policy to increase the population, I did not hear. But it was common sense that when people got married, they would produce children and population would increase. Q. Were people who were married by Angkar expected to produce children? R. Naturally, when a couple get married, one or two years later they would bear children") (emphasis added).

[2311] NOP Ngim: T. 05.09.2016, **E1/469.1**, at 11.12.40 ("If you spoke about after the marriage, what else could we do because 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."); PRAK Yut: T. 20.01.2019, **E1/378.1 in camera**, before 13.42.27 ("After the marriage it is common sense that they had to consummate their marriage. Then, if not, what was the purpose of marriage?"), at 13.47.37 ("I did not have any measure to enforce upon them. However, they would be brought to the district to be educated so that they could understand each other and because they were already married."); BEIT Boeurn: T. 28.11.2016, **E1/502.1**, around 11.23.28 (no need for consummation instruction because they were already married). In the Cambodian culture where marriages were arranged, the newlyweds were not asked directly about their night-time activities, but rather about their children and the possibility of pregnancy, Kasumi NAKAGAWA: T. 13.09.2016, **E1/472.1**, at 11.14.27; T. 14.09.2016, **E1/473.1**, after 11.06.23; Written Record of Interview of ROS Suy, 07.07.2015, **E3/10620**, Q/R 95 ("After the wedding they assumed that they would have children If a woman did not have a baby, she was not forced."); Written Record of Witness Interview of SAT Pheap, 18.05.2015, **E3/10761**, Q/R 134 ("*Usually, as a couple, I did not feel we were forced to consummate our marriage. We did it with own consent*"); Written Record of Interview of Civil Party Applicant SREY Soeum, 16.12.2014, **E3/9826**, Q/R 169-171 ("I thought that since we were married I decided to sleep with him.").

[2312] CHUON Thy: T. 24.04.2013, **E1/183.1**, from 09.58.27; T. 26.10.2016, **E1/490.1** from 09.35.21; Written Record of Witness Interview, 28.02.2017, **E319/71.2.4**, Q/A 33, 34, 104-109, 118, 123, 124, 130-133 of 08.10.2019, admitted in evidence according to Supreme Court decision of 06.01.2020, **F51/3**. See also Written Record of Witness RUOS

as follows: "At the time, the arrangements were made based on the agreement from both parties There was no policy."[2313] By taking only part of the witness's testimony, the Chamber was therefore biased.

1227. The Chamber thus erred by giving variable-scope credibility to the statements of CPK cadres on the policy and regulations resulting from the head of the CPK, according to what supported its thesis and not by making an impartial analysis of the evidence. By declaring these statements credible on the objective of population growth through marriage, it could not rule out at the same time their confirmation of the conditions for individuals' prior consent to marriage. Any reasonable judge had to conclude that forced marriage was a breach of CPK regulations and policy. Any findings to the contrary by the Chamber shall be reversed.

1228. ***Errors in the assessment of the testimonies of the civil parties.*** As seen above, the Chamber's bias is reflected in its assessment of all the civil parties' evidence in light of the entire case file. It failed in its duty to look at all the evidence, both incriminating and exculpatory, before making its finding. Thus, the Chamber has essentially used the evidence of civil parties on the marriage segment to make general findings on CPK policy. The Chamber relied on the evidence of the civil parties PEN Sochan, PREAP Sokhoeurn, MOM Vun, KUL Nem, NGET Chat, SOU Sotheavy and CHEA Deap.[2314] However, as with the analysis of evidence in the previous section on consent, the issue of the representativeness of their testimony is central. All of these civil parties, parties to the trial, who had the chance to share their experiences in a group session, appeared specifically on the segment devoted to marriage and all of them, by a strange coincidence, claimed to have been instructed to produce children for the *Angkar*.[2315] The Chamber erred in fact and in law by failing to note the difference in the narratives when it came to witnesses on other segments.[2316]

Suy, 07.07.2015, **E3/10620**, Q/R 82-87, it was according to his reflection that marriages were for the increase of the population, then specifying: "[W]hereas some who understood the plan or had learned Party policy through their friends refused to get married.").

[2313] CHUON Thy: T. 26.10.2016, **E1/490.1**, around 09.07.08, at 09.11.46 ("in my unit and as stated in my previous statements, it was held according to their voluntary feeling.").

[2314] Reasons for Judgement, §3549-3557 and 3635. (fn 12156 and 12160 where the Chamber relied on SOU Sotheavy, CHEA Deap and PEN Sochan).

[2315] They are PEN Sochan, PREAP Sokhoeurn, SAY Naroeun, KUL Nem, MOM Vun, NGET Chat, SOU Sotheavy and CHEA Deap who are eight out of nine civil parties in total who appeared for the marriage segment.

[2316] The Defence refers here to the arguments developed in its CB 002/02 regarding the credibility of these civil parties on the alleged speeches of production of children for the *Angkar*. CB 002/02, §2321-2322, 2450-2451.

1229. More importantly, the Chamber erred by wilfully ignoring all the exculpatory material in the evidence of these civil parties. Indeed, even though they referred to "instruction" from the authorities presiding over the marriage ceremony to have children, these same speeches invited couples to love each other and live happily together as a couple, which was confirmed by several witnesses.[2317] In its biased approach, the Chamber erred in ignoring the evidence that forced marriage to have children was not consistent with the rhetoric of the cadres.[2318] It is also worth noting that PREAP Sokhoeurn, for example, did not perceive the recommendations received as CPK policy contrary to the findings of the Chamber. [2319]

1230. Beyond this partial use and solely on the basis of the evidence of the civil parties, the Chamber erred above all by failing to carry out an overall analysis of the evidence. However, as with the evidence on consent, the analysis of all the testimonies far from confirms that the speeches referring to the need to have children during marriage ceremonies were general. The difference between the evidence of the civil parties and the rest of the testimony in 002/02 is indicative of the error of the

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[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, 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.").

[2318] PREAP Sokhoeurn: T. 24.10.2016, **E1/488.1**, before 09.37.04 ("After they got married, many of them got along well with each other because they thought that they were arranged by *Angkar*, they obeyed the *Angkar*'s instruction, to build a family, so many of them got along. And they lived together well.", emphasis added); PECH Chim: T. 23.04.2015, **E1/291.1**, around 09.31.07 ("The public expressed their satisfaction that the *Angkar* organised the wedding and as the result, the couple would be prosperous."); NOP Ngim: T. 05.09.2016, **E1/469.1**, at 15.49.56. See also fn 12226 (of §3657) where the Chamber quoted the NOP Ngim testimony where he refers to the words of Ta Tith advising couples to live happily together.

[2319] *Ibid idem*, T. 20.10.2016, **E1/487.1**, at 15.59.53 ("[I] do not know whether it was true. I do not know the policy of the Party.").

Chamber's approach in reaching its finding. [2320] Likewise, the witnesses heard in 002/01[2321] and the written statements referred to in the CO[2322] give a different overall view of the accounts of the civil parties called on the marriage segment.[2323] The Chamber could therefore not rely on this evidence to conclude that the CPK's policy of forced marriage to increase the population was national in character. Its findings will be reversed.

1231. Finally, of all the statements filed in case files 003-004 at the Prosecution's request, while some witnesses referred to statements made by the authorities conducting the marriages about the objective of increasing the population, many others never heard such concerns or instruction[2324]. It should be noted that even these submissions in terms of the number of written statements intended to strengthen the Prosecution's case, taken up by the Chamber, do not correspond to the amount of testimony in the marriage segment.[2325]

1232. On the evidence taken as a whole, a reasonable trier of fact would not have found that it had been established that the CPK had developed a policy of forced marriages in order to increase the

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[2320] See Annexes B1, B5 and B6. Marriage segment: Occurrence of speeches on child production, eight people or 57%; absence of mention of speeches, six people or 48%. Transcripts 002/02: Occurrence of speeches on child production, four people or 5%; no mention of speech, 76 people or 95% (it is important to note that none of these four witnesses, namely MEAS Voeun, SAO Sarun, CHUON Thy and MAK Chhoeun, having mentioned the objective of demographic growth, testified about forced marriage, but only about consensual marriages).

[2321] CHUON Thy spoke about the population increase target mentioned by POL Pot, but specified that there was no mention of forced marriages, T. 24.04.2013, **E1/183.1**, from 09.58.27; T. 26.10.2016, **E1/490.1** from 09.35.21. As for SAO Sarun, although he talked about having children after marriage, he mentioned it as a natural continuation of marriage and especially without forcing people to marry, T. 06.06.2012, **E1/82.1**, before **14.09.57**. It is important to note that neither of them testified to the instruction to have children at the marriage ceremony. Transcribed statistics 002/01: Occurrence of speeches on child production 1 person or 6%. No mention of speeches 15 people or 94%. See Annexes B2 and B7.

[2322] Only one witness referred to this goal of production through marriage: SVAY Boramy, Witness Interview, 09.06.2009, **E3/5306**, ERN EN 00345184 (in 1976, Angkar needs the people and young people must get married), while two others testified differently; PHAT Duongchan, PV of hearing, 26.08.2009, **E3/9355**, ERN EN 00375682-00375684 (in 1975 the older people all had to get married) and CHUOP No, Minutes of hearing, 19.11.2008, **E3/9350**, ERN EN 00244169-00244170 (after marriage we were not forbidden to have children.).

[2323] See Annexes B2 and B8. Statistics of the statements contained in the CO: Occurrence of speeches on child production 1 person or about 1%; Absence of mention of speeches 115 persons or 99%.

[2324] Written record of interview of civil party applicant of CHHAO Chat, 18.12.2014, **E3/9562**, Q/A 189 ("Q. After the forced marriages, did they require the couples to have children? A 189: No, it was not like that. They arranged marriages for people so those couples could better serve *Angkar*.", emphasis added); Written record of interview of civil party applicant KEO Theary, 08.12.2014, **E3/9662**, Q/A 77 ("Angkar did not focus on children: they allowed us to have children naturally. Written record of witness interview of KHOEUN Choem, 06.05.201, **E3/9828**, Q/A 6 The cadres did not tell us to bear children. They also did not announce that we were obligated to bear children. Written record of witness interview of KOEM Men, 03.09.2015, **E3/10768**, Q/A 240 (no policy "to produce" children); Written record of witness interview of SOEM Chhean, 22.04.2015, **E3/9765**, Q/ A 99-102.

[2325] See Annexes B2 and B9. Reporting statistics 003/004: Occurrence of speeches on child production: Four people or 5%, No mention of speeches: 82 people or 95%.

population under the DK. The Chamber was even more mistaken in its finding as it was not supported by any specific measures to promote pregnancies or births.[2326] It also failed to note that all civil parties in the marriage segment specifically mentioned the lack of care and medication related to childbirth as a reason for the suffering endured.[2327] These findings shall therefore be reversed.

1233. **Credibility granted incorrectly to the individual testimony of civil party CHEA Deap.** The bias of the Chamber is particularly apparent in the way it assessed and used the testimony of civil party CHEA Deap, which was considered "reliable and consistent throughout".[2328] In fact, the Chamber breached all rules of evidence because CHEA Deap was the only one to directly challenge the Appellant on the facts relating to the marriage.[2329] It thus used it to make a link between the CPK's objective of population growth for the alleged purpose of having soldiers for the war against Vietnam and KHIEU Samphan's alleged personal involvement.[2330] However, the conditions and circumstances of CHEA Deap's testimony would have led any reasonable factual judge to dismiss it.

1234. ***Timely late recollection.*** On the one hand, the Chamber erred by failing to take into account the belated nature of the statements made by this civil party. Indeed, CHEA Deap filed no less than two forms of civil party statements between 14 October 2009 and 29 June 2013 without ever mentioning the name of KHIEU Samphan while he was informed of the proceedings against him.[2331] It was not until 28 May 2014 that it first mentioned the Appellant's name, barely one month before the start of Case 002, and after more than four years of being assisted by counsel.[2332] The Chamber erred in fact and in law by merely stating that the Defence had been given the

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[2326] OM Yoeurn: T. 23.08.2015, **E1/462.1**, around 09.21.53, around 09.59.28; MOM Vun: T. 16.09.2016, **E1/475.1**, before 15.11.46; PREAP Sokhoeurn: T. 20.10.2016, **E1/487.1**, to 15.20.05.

[2327] KUL Nem: T. 24.10.2016, **E1/488.1**, after 14.35.12 (his impact statement at the end of his appearance was about not having children, which happened to other couples as well); SAY Naroeun: T. 25.10.2016, **E1/489.1**, at 10.55.19 his impact statement at the end of his appearance was that he had lost his child due to lack of medication and medical care); NGET Chat: T. 24.10.2016, **E1/488.1**, about 09.28.02.

[2328] Reasons for Judgement, §3569.

[2329] Reasons for Judgement, §3557, fn 11493 where the Chamber relied on CHEA Deap to find that KHIEU Samphan gave instructions on marriage in order to have children and to increase the forces to defend the territory, T. 30.08.2016, **E1/466.1**.

[2330] Reasons for Judgement, §3569, 4247.

[2331] Victim Information Form, 14.10.2009, **E3/5010**. Supplementary Information Form, 29.06.2013, **E3/5010b**.

[2332] One month before the initial hearing of Case 002/02, Initial Hearing: T. 30.07.2014, **E1/240.1**; Victim Information Form, 14.10.2009, E3/5010; Supplementary Information Form, 28.05.2014, **E3/5010a**, ERN EN 01030100-01 where she mentioned KHIEU Samphan for the first time.

opportunity to question the Chamber on this issue without finding that the prosecution was unable to explain this reversal.[2333] However, the circumstances of his isolated incriminating testimony on the alleged training given by KHIEU Samphan at Wat Ounalom, which CHEA Deap claims to have attended, should have led the Chamber not to receive him without specific corroboration on this point. Yet this training has not been confirmed by any official of the same Ministry of Commerce.[2334]

1235. By finding the testimony of CHEA Deap credible in itself, the Chamber breached its obligation to assess testimony carefully and in the light of all the evidence in the case file. Above all, it has applied an unacceptable double standard in its assessment of both exculpatory and inculpatory elements. As noted above, the Chamber has consistently rejected the exculpatory evidence of the former cadres – which was corroborative of each other – on the ground that they sought to minimise their responsibility in the marriage.[2335] Far from applying the same rigour to CHEA Deap, the Chamber was silent on its interest in convicting KHIEU Samphan as a civil party in a trial in which he was not otherwise required to take an oath. The moment when CHEA Deap suddenly "remembered" KHIEU Samphan's alleged speech and his timely statements filling in the gaps in evidence regarding the Appellant's personal involvement were reasons for not accepting his statement.[2336] The examination of his testimony also revealed internal and external contradictions which made its use by the Chamber all the less justified.

1236. ***Internal inconsistencies in the testimony.*** The Chamber erred in failing to draw the consequences from the ambiguous responses obtained by the Defence regarding the identification of KHIEU Samphan by CHEA Deap as the person who provided the alleged training.[2337] In light of the time

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[2333]Reasons for Judgement, §3569. Nor has she been able to explain this reversal, T. 31.08.2016, **E1/467.1**, between 11.20.41 and 11.28.59.

[2334] CHEA Deap: T. 31.08.2016, **E1/467.1**, at 09.06.04 ("There were all combatants from the Ministry of Commerce from Phnom Penh who attended the meeting. However, only a few representatives from each unit from the Ministry of Commerce were sent to attend the meeting. However, only a few representatives from each unit from the Ministry of Commerce were sent to attend the meeting at Wat Ounalom"). This story has not been confirmed by other Commerce cadres: PHAN Him: T. 31.08.2016, **E1/467.1**, at 15.07.21 ("No, I was not aware of the matter that you have just raised.);"); BEIT Boeurn: T. 28.11.2016, **E1/502.1**, after 13.42.15 (she indicated that she attended two training sessions in Borei Keila with POL Pot, KHIEU Samphan and others, and four trade meetings with KHIEU and others, but there is no mention of any training at Wat Ounalom); Written record of witness interview of RUOS Suy, 07.07.2015, **E3/10620**, Q/A 26-40.

[2335]See above, §1193-1195.

[2336] See Case 002/001 Appeal Judgement, 23.11.2016, §480 on the assessment of the reliability and credibility of the witness SAM Sithy.

[2337]The questioning of the two defence teams took place on the second day of his appearance, and in half a day of

elapsed, the time at which these recollections occurred and the contradictory explanations given, the Court erred in considering the identification of the Appellant by the civil party to be established.

1237. ***Contradictions with other evidence***: The Chamber erred in relying on this isolated testimony to establish in §4247 of the Reasons for the Judgement under appeal that KHIEU Samphan had given a training course during which he had talked about marriages. Not only is CHEA Deap's testimony not corroborated by any other evidence, but it reveals many other inconsistencies with the rest of the evidence, conveniently ignored by the Chamber. Thus, CHEA Deap mentioned two meetings with KHIEU Samphan, the one with Wat Ounalom which was uncorroborated and one in Borei Keila or at the Olympic stadium which it places at the time of the trial against HU Nim and HOU Yun towards the end of 1975 or the beginning of 1976.[2338] On this second alleged meeting, the Chamber should at least have noted the implausibility of his story. Indeed, it appears from the evidence that HOU Yun disappeared before 17 April 1975 and that HU Nim was arrested in early 1977.[2339] The Chamber erred in failing to draw the full consequences of CHEA Deap's obvious confusion over the identity of the leaders and the dates of the events it claimed to have attended. His testimony could not reasonably be considered credible.

1238. ***Contradictions on the age of marriage.*** CHEA Deap also supported: "[KHIEU Samphan] asked all ministries to arrange married for all male and female youths. We should not kept them all without marriage", particularly "those with the age above 19 from all ministries needed to be

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hearings, which was not exceptional, contrary to what the Chamber implies in its reasoning, T. 31.08.2016, **E1/467.1**, between 09.18.118 and 11.50. Indeed, in her first response, she said, "I had never met him before (emphasis added) and other people also told me that the person was Khieu Samphan. so I could recognize him. Before the time, I had never met him.". Yet right afterwards, she contradicted herself by arguing: "I understood that I was familiar with his face. In my mind, I thought he was Khieu Samphan. And the announcement. It was said that the person was Khieu Samphan in the announcement.". Moreover, indicating at first that she didn't know his position, she then added: "The person made an announcement that Om Khieu Samphan was an advisor" (emphasis added).

[2338] CHEA Deap: T. 31.08.2016, **E1/467.1**, between 09.06.49 and 09.15.40.

[2339] HOU Nim: It is important to note that in order to give more credibility to CHEA Deap's statement, the Chamber misrepresented her statement in order to use it as corroboration with the arrest of HU Nim confirming the involvement of KHIEU Samphan. Thus, in §4227 of the Reasons for Judgement, "After Hu Nim's arrest in April 1977, Khieu Samphan publicly called for his messengers to be interrogated. [...] The Chamber is satisfied that KHIEU Samphan knew of HU Nim's arrest and death at the time", based solely on CHEA Deap's isolated account, even though the latter had referred to his meeting with KHIEU Samphan concerning HU Nim only in 1975 CHEA Deap: T. 30.08.2016, **E1/466.1**, at 15.03.00; T. 31.08.2016, **E1/467.1**, after 09.03.17 (Judge Lavergne asked for clarification of the date when she replied "as for the year, it is likely that the two occasions happened in late 75 or early 76"). In doing so, the Chamber tacitly ignored the Defence's cross-examinations on inconsistencies on the part of the civil parties regarding the date of arrest of HU Nim, T. 31.08.2016, **E1/467.1**, from 11.43.32. HOU Youn: Philip SHORT: T. 06.05.2013, **E1/189.1**, before 11.20.01.

arranged to get married".[2340] However, these allegations go against the spirit and recommendations contained in the official CPK publication dated the same period urging young people not to marry too early, which were confirmed by several witnesses.[2341]

1239. ***Contradictions with the witnesses of the Ministry of Commerce.*** Finally, the Chamber erred in failing to compare the testimony of CHEA Deap with the rest of the evidence. She is indeed the only one among other witnesses and civil parties who worked at the Ministry of Commerce and other ministries in Phnom Penh to have attended the training supposedly given by KHIEU Samphan where he would have talked about the objective of increasing the population by marrying young people. She was also the only one who claimed to have heard this marriage regulation repeated "during all meetings" she attended.[2342] CHEA Deap's testimony also appears isolated and unsubstantiated in light of all the testimonies about practices within the Ministries around Phnom Penh.[2343] The Chamber erred by failing to draw the consequences of these contradictions. An unbiased analysis of the evidence should have led it to find, moreover, that the deviations from the marriage regulations were essentially taking place in the remote areas of Phnom Penh.[2344]

1240. ***Lack of corroboration of RUOS Suy.*** In an attempt to corroborate CHEA Deap, the Chamber relied on the written record of witness interview of RUOS Suy, an official at the Ministry of

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[2340] CHEA Deap: T. 30.08.2016, **E1/466.1**, between 13.47.07 and 13.51.02.

[2341] See above, § 1212-1213 (Erroneous conclusion on spousal choice, 1975 RY). See also PECH Chim: T. 22.04.2015, **E1/290.1**, from 13.47.11 ("We did not want the people to marry when they were still young. We wanted them to wait to be a bit more mature."); KHOEM Boeun: T. 04.05.2015, **E1/296.1**, at 09.55.37 (arranging marriages for lovers or for those who are getting old); SUN Vuth: T. 30.03.2016, **E1/411.1,** at 14.40.20 ("And usually the marriage was arranged for those who were about 30 years old or older [...]. The same applied to female combatants that they should be within the range of 28 and older.").

[2342] PHAN Him, who worked in the same Ministry of Commerce, never heard such instruction under the regime, on the contrary, testifying to consensual marriages: PHAN Him: T. 31.08.2016, **E1/467.1**, at 15.03. In the same vein, BEIT Boeurn, another Trade department official, gave evidence contradicting CHEA Deap's claims: BEIT Boeurn: T. 28.11.2016, **E1/502.1**, before 11.28.43 (she was not aware of any marriages arranged according to the *Angkar*'s will in her Ministry without the individual's initial proposal, not arrived in her Ministry), before 11.28.43 (she did not receive any instruction to consummate the marriage because "they already got married."), at 11.19.12 (possible to refuse marriage if she is not in love with the husband, she and most wives loved the husbands proposed to them).

[2343] THUCH Sithan: T. 21.11.2016, **E1/500.1**, before 14.51.30 (Ministry of Social Affairs - "Q. Were you ever told that Angkar had the intention of rapidly increasing Cambodia's population? A. No, they did not say so. I never heard such statement."); SENG Lytheng: T. 29.11.2016, **E1/503.1**,(married to a woman from the Ministry of Social Affairs - "At the time, were you advised that the newly married had to live together and to produce children in order to serve the revolution? A. No, we did not receive such advice."); *Duch*: T. 13.06.2016, **E1/436.1**, before 09.49.20, before 09.50.18 (getting married to avoid sexual misconduct). Other witnesses such as NHEM En, HIM Huy (subordinates from *Duch* to S-21), and PHAN Van (driver at the Ministry of Social Affairs) also never mentioned this goal of increasing the population through marriage.

[2344] See above, §1271-1272.

Commerce, referring to a minimum marriage quota.[2345] On the one hand, contrary to the findings made by the Chamber on the statements of CHEA Deap,[2346] RUOS Suy has never spoken of a policy of forced marriages stressing, on the contrary, the principle of consent of individuals with the right to refuse or accept the proposed marriage.[2347] On the other hand, this written statement of a witness who could not be questioned by the Defence on the specific issue of marriage could not be used to establish that this instruction had been "indeed implemented" within the Ministry of Commerce.[2348] Apart from its low probative value, this statement by RUOS Suy on the existence of quota is not supported by any other evidence in the case file. And for good reason, while he indicated that this information came "the ministry chairman" of the State Warehouse unit, named Roeung, he also acknowledged: "I think that [the order] was issued by...".[2349] Above all, the Chamber failed to properly carry out its work of impartial assessment of the evidence by failing to draw the boundaries of a witness who did not appear and acknowledging that it was through "his own reflection and vision" (translation ours) that he had found that the purpose of the marriage was for the growth of the population and to encourage the staff of the State Warehouses in their work.[2350] The Chamber's approach is all the more incorrect in that it used this written testimony selectively since it failed to note that RUOS Suy mentioned "the right to refuse" (translation ours) the marriage proposal in accordance with the principles of the CPK.[2351]

1241. The Chamber also erred in fact and in law by failing to raise evidence contradicting the existence of quotas. Thus, PHAN Him who also worked in Commerce was never aware of any marriage

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[2345]Reasons for Judgement, §3570, fn 11980.

[2346] CHEA Deap: T. 30.08.2016, **E1/466.1**, before 13.51.10 (words of KHIEU Samphan): "[KHIEU Samphan] did not say about whether the marriage was based on love or not, but he just simply said this should be arranged to get – to get married for the female youth with the age above 19 and the male youth with the age of 25 years old. […] [...] We should not kept them all without marriage"(emphasis added), after 15.04.52 ("Yes, I am not mistaken. That's what he said, the age range was between 19 to 25 or the 30 to 35 and that they should all get married and only the younger ones should not be – get married.").

[2347] Written record of witness interview of RUOS Suy, 07.07.2015, **E3/10620**, Q/A 75 ("The marriage age was over 20 years old"), 82, 93 (women have the right to refuse or accept the proposed marriage).

[2348] Reasons for Judgement, §4247, fn 13861.

[2349] Reasons for Judgement, §3570, fn 11980. Written record of witness interview of RUOS Suy, 07.07.2015, **E3/10620**, Q/R 84-85, 90-91.

[2350] Written record of witness interview of RUOS Suy, 07.07.2015, **E3/10620**, Q/A 85. See also PHAN Him: 31.08.2016, **E1/467.1**, at 15.43.03 (there were no discussions or education sessions about women who were married but did not become pregnant after marriage).

[2351] Written record of witness interview of RUOS Suy, 07.07.2015, **E3/10620**, Q/A 84, 93 "[b]ecause some people agreed to get married as assigned, whereas some who understood the plan or had learned Party policy through their friends refused to get married.".

quota.[2352] On the other hand, he confirmed, which the Chamber conveniently ignored, that marriages in his Ministry were arranged with the consent of individuals and at the proposal of men.[2353] Finally, in its biased and incriminatory approach, the Chamber failed to note that neither PHAN Him nor RUOS Suy mentioned the systematic instruction to make children at all meetings of their unit in the Ministry as argued by CHEA Deap.[2354] Likewise, it erred by simply ignoring evidence to the contrary in CHEA Deap's testimony.[2355]

1242. **Conclusion.** It should be found that the Chamber's general approach to the evidence of the existence of a policy of forced marriages with the aim of increasing the population of the DK was made in breach of the essential principles of impartial review. The distorted and twisted argument of population growth was part of this approach, which thus prevented it from reaching the only reasonable finding, namely, that the rule of consent established in principle by the CPK had been misapplied. This erroneous approach therefore also characterises its approach to evidence on the implementation of the marriage regulations.

2. Errors in the implementation of the marriage regulations

1243. The Chamber found that the authorities arranged marriages throughout the regime and throughout the country with practices that were at odds with tradition and in a context of coercion for the bride and groom. Both men and women had no choice but to follow the *Angkar*'s orders to marry and have children.[2356] However, the assessment of the evidence to conclude that the CPK intended to

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[2352] PHAN Him: T. 31.08.2016, **E1/467.1**, at 15.03.26.

[2353] Although she claimed that her marriage was reluctant (and admitted that she had managed to refuse the previous proposals), it was on her husband's proposal, which was not the case for another twenty girls married at the same time as her. PHAN Him: T. 01.09.2016, **E1/468.1**, at 09.42.13 ("They told their respective chiefs that they agreed to get married, and that's why the ceremony was arranged for them."), from 09.24.31 (reminder of her meeting with her husband arranged before her husband's marriage proposal); Written record of witness interview of RUOS Suy, 07.07.2015, **E3/10620**, Q/A 75 (meetings were arranged in the context of work, and if a man loved a woman he asked her whether she agreed to marry or not), Q/A 93.

[2354] CHEA Deap: T. 30.08.2016, **E1/466.1**, at 15.06.26 (the main purpose of child production marriage was repeated at all meetings by the cadres).

[2355] For example, NOP Ngim and SENG Soeun, who were married under the regime and heard during the marriage segment as CHEA Deap, did not mention any formal instruction to have children. NOP Ngim said they never heard such instruction from Ta Mok or anyone else, just joking about it, while SENG Soeun simply said they heard Ta Mok ask the lower echelons to think about organising weddings for those who were getting older; NOP Ngim: T. 05.09.2016, **E1/469.1**, around 11.14.48; SENG Soeurn: T. 29.08.2016, **E1/465.1**, before 09.58.28.

[2356] Reasons for Judgement, §3690-3691.

implement the marriage regulations is totally flawed, both in terms of the supposed supervision and the transmission of the regulations (a) and on the conditions outside the regulations (b).

a. Errors in supervision and transmission of regulations

1244. In the view of the Chamber, it has been established that the instruction to allow the lower echelons to arrange marriages came from the upper echelons and that, conversely, the upper echelons referred to the lower echelons in the reports on those marriages.[2357] However, in finding that an organisation was attempting to support its thesis of a forced marriage policy developed at the highest level, it has once again erred in fact and in law by conducting a biased and piecemeal examination of the evidence.

- **Errors in the transmission of marriage regulations**

1245. **Selective approach to the burden of evidence.** The Chamber found that the lower echelons were organising marriages after obtaining instruction from the upper echelon distributed in the zones, regions, districts, communes and villages during meetings and study sessions.[2358] This first finding was intended to lead to the more general finding that forced marriages were part of an organised CPK policy.[2359] However, that was not the reasonable finding. Indeed, the witnesses and civil parties who referred to instruction from higher authorities on the organisation of marriages that were used to support this finding are the same ones who confirmed the principle advocated by the CPK of consent to marriage.[2360] Yet the Chamber knowingly set aside the part of their testimony confirming a regulation which was contrary to its finding of a policy of forced marriages.

1246. For example, the Chamber accepted that SAO Sarun had attended a meeting at which POL Pot had raised the issue of marriage, but was careful not to include the part of his statement in which he recalled the principle of individual consent and the possibility for parents to attend their child's marriage.[2361] In a similarly biased approach, the Chamber took testimony from PECH Chim and

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[2357] Reasons for Judgement, §3693, 3689-3691.
[2358] Reasons for Judgement, §3564-3566.
[2359] Reasons for Judgement, §3690-3693.
[2360] Reasons for Judgement, §3565-3667.
[2361] SAO Sarun: T. 06.06.2012, **E1/82.1**, before 14.09.35 (("Pol Pot gave that instruction and then it was handed down to us at the sector level and district level. And we had to ask for approval from the couples and then we had to seek approval from their parents, as well. So we had to ask for consent from the family members and parents of the bride and groom, and then, after that, they had to commit themselves to be husband and wife."), emphasis added).

from KHOEM Boeun, both from Tram Kak district, only the part where they indicated that they had received instruction regarding the marriage. However, it did not pay any attention to their testimony establishing the need for the consent of the bride and groom or explaining that the details of the organisation depended on the local authorities in charge.[2362] In the same vein, the Chamber made equally selective use of the testimony of MEAS Voeun (Military WZ), SOU Soeurn (CZ) and SENG Soeun (SWZ), and HENG Lai Heang (Kratie Autonomous Region), all of whom noted the need for prior consent to marriage.[2363] By making this piecemeal and biased analysis, the Chamber erred in fact and in law. This opportunistic interpretation of the evidence must be sanctioned and the resulting findings reversed.

1247. **Errors in interpretation of reports.** The Chamber found that it was established that the information about the marriage was communicated to the higher authorities by means of reports. On the one hand, as seen above, the only two reports referred to on the subject of marriages did not allow the practice to be generalised to the whole country.[2364] On the other hand, and most importantly, the Chamber failed to give any reasons for its finding, merely considering that the *Angkar* formula within these reports was sufficient to establish that "the Party Centre" at the highest level was not only informed of the organisation of the weddings, but also of the precise conditions of this organisation.[2365] However, apart from the fact that it is impossible to deduce from these two isolated reports the evidence of a generalised national organisation, these documents only mention

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[2362] PECH Chim: T. 22.04.2015, **E1/290.1**, at 13.57.22 ("The upper level officials gave their authorization, and it was up to us to organize those marriage, whether they were individual or collective. We consulted the communes and the district in order to celebrate such marriage, that was done at the same time, but we also had to consult the parents of those involved, and in particular, the couples themselves. We needed to be sure whether they consented to the marriage or not."); KHOEM Boeun: T. 05.05.2015, **E1/297.1**, at 15.07.06 (it confirms PECH Chim's statement that it was at the lower level to organise the individual or collective marriage); T. **E1/296.1**, at 09.55.37 and T. 05.05.2015, **E1/297.1**, before 10.03.00, at 13.47.58 (marriage with the consent of individuals and the possibility of refusing the proposal of marriage). See also NEANG Ouch who confirmed this fact: T. 11.03.2015, **E1/275.1**, around 11.25.17 (he confirmed KHOEM Boeun's statement that marriage arrangements varied in the communes), at 11.27.16 (he did not recall hearing any general instruction from above to force couples to marry).

[2363] MEAS Voeun: T. 08.10.2012, **E1/131.1**, at 13.46.54; SENG Soeun: T. 29.08.20106, **E1/465.1**, after 10.01.07, around 10.06.08. T. 30.08.20106 , **E1/466.1**, before 11.21.29; HENG Lai Heang: T. 19.09.2026, **E1/476.1**, around 13.40.14; SOU Soeurn: T. 04.05.2015, **E1/310.1**, after 15.13.11 ("the chef of the commune or 'sangkat' would ask the opinion of the men and women, whether they consented to the proposed marriage. And if they agreed, then the ceremony would be organized") and around 15.20.56 ("the marriage ceremonies were organized at those respective communes. Actually, each commune itself had the authority to organize marriage ceremonies within its own commune").

[2364] See above, "*Information reported to the Party Centre*" §1219.

[2365] Reasons for Judgement, §3693, 3568, fn 11975 and 11976.

the number of married couples.[2366] Therefore, they could not be considered to provide evidence of either an instruction to arrange forced marriages or an endorsement by the CPK leadership of the arranging of marriages under such conditions. The erroneous findings of the Chamber will therefore be reversed.

b. Errors concerning conditions outside the regulations

1248. The Chamber erred both in its findings on the conditions for matching couples by local authorities and in the organisation of the marriage. Finally, it erred by finding that the use of threats to force people to marry was a recommendation of the CPK political system.[2367]

- **Authorities responsible at the local level**

1249. The Chamber found that it was established that all marriages proposed by the persons concerned or arranged by the authorities required the approval of a higher authority.[2368] This finding, which was in line with the second condition of the marriage regulations requiring community approval for the marriage to be legitimate, was not evidence of a willingness to arrange forced marriages. This is a common practice in most countries for both civil and religious marriages. Many witnesses confirmed the need for this formality in accordance with the Khmer tradition of marriage.[2369] Instead, the Chamber erred in its finding that there was a biased analysis of the evidence that the higher authorities (whose precise identity the Chamber was careful not to specify) had given instruction to marry couples with or without the consent of the prospective spouses.[2370]

1250. As demonstrated above, the authority responsible for organising marriages was required by the regulations to ensure that the persons concerned had given their consent to the marriage.[2371] The Chamber used the isolated case referred to by civil party SENG Soeun to rule out the reality of this rule, even though civil party SENG Soeun stated that at the ceremony the bride and groom had

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[2366] See in particular, DK Report, 04.08.1978, **E3/1094**, ERN EN 00315382-00315383.
[2367]Reasons for Judgement, §3693 Legal qualification of the facts.
[2368] Reasons for Judgement, §3602.
[2369] See below, §1257.
[2370] Reasons for Judgement, §3598. Although the consent of the persons concerned was not mentioned in this part of the contested Reasons for Judgement, *14.3.5.1 Marriages proposed to the authorities*, but it was noted elsewhere in the same Reasons, for example in part *14.3.6* to make the finding in §3693. The Defence refers to its arguments below, §1253.

[2371] See above, §1189-1242.

been informed of the possibility to "withdraw" from the marriage "if they disliked one another".[2372] Likewise, the Chamber erred in its interpretation of the evidence of NOP Ngim. Indeed, although she stated that she had been forced with other women to marry disabled persons, the Chamber should have found that they had not expressed a refusal.[2373] Above all, it again ignored an important element of the testimony that did not support its generalisation of the occurrence of forced marriage. Indeed, NOP Ngim made it clear that what had been true for his personal case as a manager under Ta Mok was not true for the people in the cooperatives.[2374] The diversity of experience should have been taken into account by the Chamber.

- **Ceremonies and preliminaries**

1251. The Chamber found that the CPK's policy of forced marriages throughout the country involved the removal of parents from the marriage of their children and the organisation of collective ceremonies.[2375] Again, this finding is based on a biased and partial analysis of the evidence, dismissing for no good cause evidence contrary to its findings.

1252. **Alleged exclusion of parents from the marriage process.** The Chamber found that in the majority of cases, the CPK authorities had excluded the parents from the marriage process in an attempt to stand in for them.[2376] This analysis is erroneous because in reality the regulation of marriage under the DK gave precedence to the consent of the bride and groom over that of the parents, contrary to the tradition with the approval of the local authorities. It is worth reiterating the meaning of the CPK documentation for the Party's youth – without the distortion made by the Chamber – which encouraged them to orient their choice towards a revolutionary ideal and to work for the reconstruction of the country.[2377] Thus, even though the expression "*Angkar*'s children" was used in political literature, the criterion of consent of the future bride and groom took precedence.

1253. Although YOS Phal referred to the lack of permission from the local authorities to marry his fiancée on the grounds that a member of her family had been crushed by the *Angkar*, he himself

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[2372] SENG Soeun: T. 29.08.20106, **E1/465.1**, after 10.01.07, around 10.06.08; T. 30.08.20106, **E1/466.1**, before 11.21.29.
[2373] Reasons for Judgement, §3597. NOP Ngim: T. 05.09.2016, **E1/469.1**, after 11.02.33.
[2374] T. 05.09.2016, **E1/469.1**, at 15.49.56 (she did not refuse the marriage because she considered herself mature enough), before 11.02.33 (LENG remained silent at her wedding), before 11.18.46 and at 13.39.16 (weddings organised for lovers)
[2375] Reasons for Judgement, §3690-3691.
[2376] Reasons for Judgement, §3691, 3693.
[2377] Reasons for Judgement, §3539, fn 11911 and 3610, fn 12052.

acknowledged that this situation did not arise for the majority of candidates for marriage.[2378] CHANG Srey Mom, who also noted the expression "*Angkar*'s children", however, pointed out that the authorities did verify his consent to the marriage during the ceremony.[2379] As noted above, this verification was corroborated by several testimonies on the stand.[2380] The Chamber therefore erred in talking about substituting parental authority for that of local officials without realising that the real revolution lay in the consent of the persons concerned to their marriage.

1254. ***Testimony to the contrary.*** Moreover, the Chamber could not withour erring conclude from the evidence in the case file that the consent given to the persons concerned and the authorities implied the exclusion of the parents from the process. Here again, it erred in fact and in law by systematically rejecting the testimonies of former cadres contrary to its finding. It again used the argument of their willingness to "minimise their own responsibility" even though it had no qualms about using other parts of their testimony when it suited its thesis.[2381] The Chamber actually erred in dismissing that testimony because it came from cadres when in fact it was corroborated by many witnesses. Indeed, contrary to its findings, parental involvement was not reserved for certain privileged persons. Several witnesses and civil parties, including ordinary people, confirmed the involvement or at least the presence of their parents at their marriage.[2382] The Chamber's finding

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[2378] YOS Phal: T. 25.08.2016, **E1/464.1**, at 10.39.47, around 11.10.50 ("About other couples, although they were New People, but if none of their relatives or family members had been smashed and that if they were fiancés then they could marry one another.").

[2379] CHANG Srey Mom: T. 29.01.2015, **E1/254.1**, before 09.54.32 ("'Were you forced?' My husband said I got married of my own will; no one forced me. After that the unit chief came to ask me the same question. I then replied I got married voluntarily, no one forced me to get married."). His mother and his grandmother were present at his wedding even though they had been informed about it beforehand, **E1/254.1**, at 10.09.49, after 15.29.39.

[2380] See above, §1194-1195.

[2381] Reasons for Judgement, §3612-3613, 3639-3640. For example, the Chamber selectively used the testimony of SAO Sarun who had heard POL Pot talk about marriage regulations at a meeting in Phnom Penh. His statement was cited at least nine times in the Reasons for Judgement on the Regulation of Marriage: deemed credible seven times to confirm the arrangements for organising the marriage or the origin of the instruction, but dismissed twice when he affirmed the principle of consent to marriage and the possibility of parental participation. However, SAO Sarun's statements were confirmed by other executives such as PECH Chim or KHOEM Boeurn who also mentioned the participation of parents in the marriage of their children. See Reasons for Judgement, §3556, 3565-3567, 3592, 3617, 3623, 3632-3633. SAO Sarun: T. 06.06.2012, **E1/82.1**, before 14.09.57. PECH Chim: T. 22.04.2015, **E1/290.1**, from 13.47.11, at 13.57.06, to 09.24.36 (it was possible to visit and greet families and relatives if they lived next door after the marriage. See also KHOEM Boeun: T. 05.05.2015, **E1/297.1**, at 15.07.06.

[2382] Reasons for Judgement, §3616, 3640. **Ordinary people:** OUM Suphany: T. 23.01.2015, **E1/251.1**, at 15.50.47. T. 26.01.2015, **E1/252.1**, before 09.57.10; CHANG Srey Mom: T. 29.01.2015, **E1/254.1**, at 10.09.49; MEAS Laihour: T. 26.05.2015, **E1/305.1**, at 09.28.47; KONG Uth: T. 25.06.2015, **E1/322.1**, after 10.55.41, before 11.00.32; SEN Srun: 14.09.2015, **E1/346.1**, at 11.51.47; MATH Sor: 13.01.2016, **E1/375.1**, around 14.38.50, around 15.49.35; THANG Phal: 06.01.2016, **E1/371.1**, at 14.06.23. HIM Man: 28.09.2015, **E1/350.1**, after 09.43.03 (married to his fiancée with parental involvement); MEY Savoeun: T. 17.08.2016, **E1/459.1**, between 15.47.50 and 15.50.01; SIENG

that parents were excluded from marriages in the majority of cases is erroneous and must be reversed.

1255. ***Aim of group weddings.*** The Chamber erred by finding that the widespread practice in the country of marrying many couples at the same time was intended "to speed up weddings on a large scale for a large number of people".[2383] To conclude this, it relied upon the testimonies of EK Hoeun and SOU Sotheavy, who spoke about ceremonies at work sites involving group marriages of 400 and 117 couples. As noted by the Defence in its CB, however, these were extreme cases, so the Chamber should not have drawn generalities from the evidence.[2384] Nor did it take into account exculpatory explanations given by other witnesses who gave explanations on the reasons for organising group marriages. Thus, in its biased approach, the Chamber only used the evidence of PECH Chim when he referred to the increase in the number of marriages, omitting his explanation in the same response regarding the reason for the increase: In 1971, the regime organized marriages. [...] more and more people wanted to marry [...] So, if we did not marry many couples at the same time it would have taken us for ages to process couple by couple marriages.".[2385] Similarly, the Chamber did not take into account the evidence of SAO Sarun, in which he explains that while POL Pot mentioned the possibility of marrying several couples at the same time, local officials – some of whom confirmed this at the hearing – had complete discretion as to the practical details of the ceremonies in different situations.[2386] It was therefore unreasonable in the light of the evidence on the record to conclude as the Chamber did that group marriages were systematic.

1256. ***Undertakings and instruction at the marriage ceremony*** In §3648 of the Reasons for the Judgement under appeal, the Chamber found that the undertakings of the future spouses at the marriage reflected absolute compliance with the directives of the *Angkar*, which took precedence

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Chanthy: T. 01.03.2016, **E1/394.1**, after 09.54.20, at 10.50.08. **Former cadres**: PAN Chhuong: T. 01.12.2015, **E1/360.1**, after 11.11.05; OR Ho: T. 19.05.2015, **E1/301.1**, after 14.41.19; HENG Lai Heang: T. 19.09.2016, **E1/476.1**, before 09.48.04, after 13.40.14, at 14.01.24 (parents informed and invited to participate in the ceremony).

[2383] Reasons for Judgement, §3691 (Legal qualification of the facts), 3631-3632.

[2384] Reasons for Judgement, §3632. See also CB 002/02, §2450.

[2385] PECH Chim: T. 22.04.2015, **E1/290.1**, from 13.47.11.

[2386] SAO Sarun: T. 06.06.2012, **E1/82.1**, before 14.09.57; KHOEM Boeun: T. 04.05.2015, **E1/296.1**, before 09.54.14 ("The marriage could be arranged for one couple or multicouples, depends on the situation. And from my experience, I had arranged the marriage for three or four couples at a time"); CHUON Thy: T. 26.10.2016, **E1/490.1**, after 09.43.20 (possibility of organising a wedding for one couple only), at 09.20.33 (the collective wedding was organised to save time) CHANG Srey Mom: T. 29.01.2015, **E1/254.1**, at 15.30.36 (ordinary people of TK marriage of a single couple in 1977).

over personal and family interests.[2387] No reasonable trier of fact would have made such a finding with an impartial examination of the evidence. First of all, the Chamber gave an overview of the communist ideology and the willingness to take the common interest into consideration in its political and personal commitments. Just as in some countries one pledges allegiance to a country's flag or motto, the CPK advocated patriotism that was further exacerbated by the recent history of civil war and victory over a decried former regime. This revolutionary positioning on the creation of a new society and the call to sign up to this vision of new couples may have had an impact on the discourse of some local cadres at wedding ceremonies. However, the Chamber erred by failing to draw the consequences of its observation of the different practices that have been used in marriage ceremonies. For instance, the evidence shows that the commitment of future brides and grooms mentioning the *Angkar* during the celebration of marriages was not systematic; sometimes no commitment was made[2388]

1257. Thus, in §3635, the Chamber noted that various instructions were given to the couples by the authorities presiding over the ceremonies, such as those to love each other, to live together, to respect discipline and sometimes to make children for the *Angkar*.[2389] The diversity of speeches noted and the lack of uniformity of ceremonies should have caused it to note that there were no specific instructions from the CPK leadership on how to perform marriages. The Chamber should have found from the case file that the celebration of ceremonies by the authorities made it possible to formalise or legalise unions,[2390] to give official recognition to the creation of couples within the framework of a marriage recognised by the regime. As elsewhere, obtaining consent was an important aspect of the validity of the marriage.[2391]

[2387] Reasons for Judgement, fn 11928 (from §3548) which refers to §3633-3634.
[2388] Reasons for Judgement, §3633-3634.
[2389] Reasons for Judgement, §3635.
[2390] PRUM Sarun: T. 08.12.2015, **E1/364.1**, at 15.11.51; OR Ho: T. 19.05.2015, **E1/301.1**, after 14.39.15; TEP Poch: T. 22.08.2016, **E1/461.1**, at 15.07.48; CHAO Lang: T. 01.09.2015, **E1/339.1**, at 15.13.25; KHIN Vat: T. 29.07.2015, **E1/325.1**, at 15.40.44; MEY Savoeun: T. 17.08.2016, **E1/459.1**, after 14.08.35; CHANG Srey Mom: T. 02.02.2015, **E1/255.1**, before 09.29.19.
[2391] PECH Chim: T. 22.04.2015, **E1/290.1**, at 13.57.06; T. 23.04.2015, **E1/291.1**, around 09.16.46, at 09.18.41, around 09.22.43; CHANG Srey Mom: T. 29.01.2015, **E1/254.1**, before 09.54.32 and before 09.56.12; SAO Han: T. 18.02.2015, **E1/265.1**, around 10.10.05 (during the ceremony "those people were asked whether they would accept his or her partner to be for life. And if they said yes, it means they made the resolution."); PAN Chhuong: T. 01.12.2015, **E1/360.1**, before 11.11.05; MATH Sor: T. 13.01.2016, **E1/375.1**, before 15.52.52 ("The marriage was simply organized and we were all asked to hold our hands to symbolize our agreement to get marriage"); Written record of interview of civil party applicant SREY Soeum, 16.12.2014, **E3/9826**, Q/A 143.

1258. The Chamber further erred in making general findings about the particular experience of the civil parties on the marriage segment without confronting them with the entirety of the evidence.[2392] It should have noted that the commitment required of spouses was above all a fairly classic commitment between two people with the duty to love and live together as husband and wife.[2393] The intervention of the authorities in the marriage ceremony and the commitments of the future spouses made before them could not be considered part of the CPK's intention to carry out forced marriages. The findings of the Chamber on this point are erroneous and should be invalidated.

- **Use of threat and context of coercion in the country**

1259. The errors of the Chamber were not limited to a distortion of the evidence on the rule of consent or the conduct of ceremonies. According to it, the authorities had used threats to force people to marry, whether directly in the context of respect for *Angkar* discipline or indirectly through the general context of fear that prevailed throughout the country. This is the essential argument of the Chamber in finding that the CPK's rule of consent was ineffective and that it could not challenge its existence. Thus, it found that people had no choice but to marry, and even when consent was given, it was not genuine.[2394] These erroneous findings result from a biased analysis of the evidence.

1260. **Lack of real consent** According to the Chamber, contrary to the official texts and the testimonies of former CPK cadres, the consent of the future spouses to the marriage was not a reality, as many witnesses and civil parties stated that they had not had the right to refuse the marriage because they thought they had to comply with the *Angkar*'s orders.[2395] It found that "the overwhelming majority of the evidence shows that people could not refuse to marry without suffering consequences".[2396] In so doing, it erred by making a misjudgement and selective use of evidence.

1261. The Chamber first relied primarily on the statements of the civil parties called to appear on the marriage segment to make general findings. In so doing, it rejected the arguments put forward by the Defence on the essential question of the representativeness of these statements at the national

[2392] See below §1199- 1210.
[2393] See below, §1225.
[2394] Reasons for Judgement, §3625, 3690-3691 (Legal qualification of the facts).
[2395] Reasons for Judgement, §3619.
[2396] Reasons for Judgement fn 12106, 12108 admitting the cases of EM Phoeung and SUN Vuth as exceptions, fn 12106-12107.

level.[2397] It erred by failing to compare these testimonies with the totality of the evidence. However, the evidence in the case file for the entire trial did not support such a finding, as will be seen below.

1262. The Chamber also erred in misrepresenting the evidence to conclude that the marriages were forced, or that consent was given for fear of reprisals even when the persons concerned said otherwise.[2398] Its erroneous and biased approach climaxed by finding that the rape outside marriage alleged by civil party MOM Vun was the penalty following her refusal to marry.[2399] The use of this isolated rape committed by local cadres as a *actus reus* of the CPK's intentional behaviour to find the crime of forced marriage is a scandalous finding in more ways than one. On the one hand, it had been accepted since the investigation that rape was a practice condemned by the KR and severely punished.[2400] This was confirmed by the Chamber itself in a decision during the trial.[2401] However, it did not hesitate to use this rape as an example of coercion underpinning the alleged CPK policy of forced marriages, even though it was the best demonstration that local officials had disobeyed CPK instruction at the highest level. Instead of drawing the necessary consequences, namely that there had been a deviation from the policy on the ground, the Chamber used these facts to conclude the existence of a policy of forced marriages!

1263. on the other hand, this use of OC evidence is quite indicative of the bias of the Chamber, which is reflected in the fact that it knowingly ignored not only the way in which the Prosecution put the words into the mouth of the prosecution, but also the fact that the prosecution itself indicated that it had not heard of any other case similar to its own.[2402] Moreover, the Chamber should have noted that it was

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[2397] CB, 002/002, §2321-2328, 2440-2444, 2450-2451.

[2398] Reasons for Judgement, §3619-3620. For example, the Chamber found that SEN Srun was "forced" to marry, although this witness stated that his marriage was arranged by the two families of the bride and groom: SEN Srun: T. 14.09.2015, **E1/346.1**, at 11.51.47. In the same vein, IN Yoeung, when questioned by the defence, confirmed her written statement that she had volunteered to marry, like other young people: IN Yoeung: T. 03.02.2016, **E1/387.1**, around 14.18.10, from 15.39.49. The Chamber completely ignored that part of his questioning. The Chamber also erred in fact by finding that SIENG Chanthy was forced to marry under the regime, when she had referred only to the case of her sister's marriage: SIENG Chanthy: T. 01.03.2016, **E1/394.1**, before 09.54.20, before 10.48.48 and around 10.50.08 ("I did not know clearly that because I was young at that time. I only heard what people said, that the proposal were made to *Angkar* for the wedding to take place [...] I just heard from my parents that a proposal had been made to my sister wedded. They could have approached my mother as well.").

[2399] Reasons for Judgement, §3621 (fn 12094), 3658, 3690.

[2400] CO, §1426-1429 in particular §1429 "it cannot be considered that rape was one of the crimes used by the CPK leaders to implement the common purpose".

[2401] Trial Chamber memorandum entitled "Further Information Regarding Remaining Preliminary Objections", of 25.04.2014, **E306**, §3. See also CB, 002/02, §171, 198-200; Reasons for Judgement, §186-188.

[2402] MOM Vun: T. 16.09.2016, **E1/475.1**, at 15.01.22, at 15.15.30 ("Q. [from the Prosecutor] So let me get back to your personal experience. You said that you were raped, maybe because you refused to get married and then they forced you to get married. So did this happen to other young women or girls? Were they also raped before they were

clear from this statement that MOM Vun had been threatened with death if she disclosed the rape, which confirms that this was behaviour prohibited by the regime. As Kasumi NAKAGAWA recalled, "[a]ny sexual violence is an abuse of power" by the authorities subject to punishment.[2403] The Chamber has therefore totally erred in fact and in law by using the experience of MOM Vun as an illustration of CPK policy. Such a skewed use of the evidence perfectly symbolises the Chamber's biased approach to the analysis of the evidence as a whole. Its findings on this point will be reversed.

1264. ***Errors concerning the case of favoured persons.*** Because the Chamber could not entirely ignore the testimony of witnesses who indicated that they had freely chosen to marry, the Chamber found that disabled soldiers and certain cadres had been privileged to be able to propose their choice of spouse or to be consulted before the marriage was arranged for them. This did not prevent the Chamber from coming to the contradictory finding that it was not real consent either.[2404]

1265. ***Disabled soldiers.*** The Chamber found that the CPK's forced marriage policy supported by the highest CPK leadership provided for soldiers considered war heroes to be married to young women chosen from among the "Base People" as part of the implementation of the policy.[2405] To make the link with the "highest levels of the CPK", it relied upon a speech by KHIEU Samphan, without however specifying which one, as well as a number of RYs presented as "consistent" with the testimonies of the civil parties who had spoken of the duty to serve the nation and unconditional respect for the discipline of the *Angkar*.[2406] However, as set out above, the Chamber failed in its obligation to give reasons for its decision by confining itself to generalities in order to conclude that there was a lack of consent on this basis.[2407]

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forced to get married? A. Before my marriage, I was raped. I knew only about my case.", emphasis added).

[2403] Kasumi NAKAGAWA: T. 14.09.2016, **E1/473.1**, at 14.15.32 ("Q. [W]ould it be possible that the rape of the two women that you spoke to for refusing to marry were something which was done through the abuse of power by local cadres in violation of the official policy and the sixth principle that we have discussed concerning rape? A. Yes, that is correct. All sexual violence is an abuse of power"). Reasons for Judgement, §3562 (fn 11954).

[2404] Reasons for Judgement, §3690 (fn 12306), 3623, and part *14.3.4.4 Favoured Persons.*

[2405] Reasons for Judgement, §3590.

[2406] Reasons for Judgement, §3590. The Chamber's sources are the testimonies of SENG Soeurn, NOP Ngim, CHEA Deap, PREAP Sokhoeurn and SOU Sotheavy.

[2407] See, for example: *Duch* who evoked this condition, but never recognised her marriage as forced, *Duch*: T. 20.03.2012, **E1/51.1**, after 10.15.52, after 11.08.32; T. 13.06.2016, **E1/436.1**, after 09.45.10. SEN Srun married his fiancée, but by this respect he was not allowed to marry whenever, as he wanted, SEN Srun: T. 14.09.2015, **E1/346.1**, at 11.51.47. See also Kasumi NAKAGAWA: T. 13.09.2016, **E1/472.1**, before 13.36.24 (reminder of the restrictions on the organisation of marriages to some people in the country before a certain period, in particular in Kampong Cham,

1266. The Chamber relied on SIHANOUK's book as corroborating evidence. In this book, SIHANOUK reports that KHIEU Samphan is said to have talked about the marriages of young girls to disabled soldiers, praising their high patriotic spirit as they "accepted" to take care of these heroes sacrificed for national salvation.[2408] The Chamber erred in failing to take into account the low evidentiary value of this account of the Appellant's actions and conduct established outside the judicial framework. Moreover, in light of SIHANOUK's varied and particularly changing prior statements, the Chamber should have assessed this evidence more carefully.[2409] Most importantly, it erred in its selective and directed use of the testimonies used to support its finding. In particular, it set aside, without giving reasons, the elements contrary to its findings. Thus, no mention was made of SOU Sotheavy who stated that these marriages with disabled people were not forced marriages, nor of SENG Soeurn who learned by hearsay of arranged marriages for disabled people on the grounds that they were "getting older", nor of NOP Ngim married to PREAP Kab, a former disabled soldier, who did not refuse because she considered herself "quite senior or mature".[2410] If the Chamber had made a proper assessment of the testimony of the witnesses and civil parties as a whole, it would have seen that there were four other witnesses on the marriage of disabled soldiers.[2411] Of these four witnesses, only MES Am claimed to have heard about a soldier forced to marry, but he later found that the newlyweds "seemed to go along well together. They did not have any disagreement when they were together".[2412] MAK Chhoeun, a disabled soldier, stated that his consensual marriage was arranged with a woman he had known for a long time.[2413] He also stated that he was not aware of any forced

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the same area where SEN Srun was).

[2408] Reasons for Judgement, §3586.

[2409] In its own citation, the Chamber should have noted the excessiveness of SIHANOUK's statements, in particular the use of the expression "forcibly coupled", and asking itself what the sources of these statements were who were aware of these details. Moreover, she should have noticed that SIHANOUK was accustomed to changing statements and evolving according to its alliances of the moment. Closing arguments: T. 25.10.2013, E1/234.1, between 10.58.52 and 11.01.47 ("we agree on most of the points today both at home and abroad [...] with Khieu Samphan. We visited some cooperatives [...] These people were not unhappy, they didn't look terrorized").

[2410] SOU Sotheavy: T. 23.08.2016, **E1/462.1**, around 15.47.39; NOP Ngim: T. 05.09.2016, **E1/469.1**, at 15.49.56.

[2411] These are MAK Chhoeun, SEM Am, OR Ho and CHUON Thy whose written records were admitted into evidence (Supreme Court Decision on Khieu Samphan's Request for Admission of Additional Evidence of 06.01.2020, **F51/3)** in which CHUON Thy explains about the marriage of the disabled that women who did not consent could refuse without any consequences, Written Record of Witness Interview, **E319/71.2.4**, Q/A 191-198.

[2412] SEM Am: T. 21.09.2016, **E1/478.1**, after 10.05.48.

[2413] MAK Chhoeun: T. 12.12.2016, **E1/511.1**, around 15.54.56, before 15.56.45 ("We simply asked each other whether we agreed to marry each other, but we had no love relationship."); Written Record of Interview of Witness SENG Ol, 02.12.2009, **E3/5833**, ERN EN 00413906-00413907 (as the Chamber noted, she was in charge of sending the girls to marry the soldiers, although she was not sure whether these girls volunteered, but what is certain is that no girl refused).

marriages.[2414] All these elements have conveniently been ignored. It was not possible after an examination of all the evidence to conclude that there was a CPK policy of forcing women to marry disabled soldiers. The Chamber erred in fact and in law by relying solely on the civil parties' accounts of the marriage segment and ignoring the rest of the evidence. Its findings can only be reversed.

1268. ***Male cadres:*** The Chamber erred by finding that while some male cadres were allowed to choose their spouses, women were forced to marry without being asked for their opinion under a CPK policy.[2415] In so doing, it relied on a distortion of the statements of PRAK Yut and CHEAM Kim, finding that women were not consenting or were systematically coerced into marriage.[2416] The Chamber also withheld some of the evidence contrary to its findings.[2417] Therefore, all of these elements did not allow the Chamber to conclude that only male cadres had the right to marry as they chose. Its findings will therefore be reversed.

[2414] MAK Chhoeun: T. 12.12.2016, **E1/511.1**, at 11.17.13.

[2415] Reasons for Judgement, §3591.

[2416] Reasons for Judgement, §3591 fn 12023 citing the statements of PRAK Yut and CHEAM Kin. The Chamber's first error was to use out-of-context evidence since the marriage of PRAK Yut took place in 1974, i.e. outside the time period dealt with in the trial. The Chamber erred once more in ignoring the witness's statement according to which she indicated that she married voluntarily because she loved her husband and that if she had not agreed, she would have refused to marry: PRAK Yut: T. 19.01.2016 **E1/378.1**, before 11.12.11 ("I had to make that decision because sooner or later, as a woman, I had to marry a man. […] I did not say that I was forced to marry him, but because I loved him, too, so then I followed the Angkar's instructions and if I were not to like my husband, I would refuse it. And he said that since I also loved him, then he would organize that marriage for us"), around 11.19.18. CHEAM Kim's written statement also did not allow the Chamber to find that there was a forced marriage in his case. Indeed, in spite of the investigator's precise or even directive question, she simply answered: "When I married my husband, *Angkar* organized our marriage". Written record of witness interview of CHEAM Kin, 13.03.2014, **E3/9524**, Q/R13. The Chamber erred in inferring from this simple sentence that the decision to marry was imposed against her will.

[2417] Therefore, if BEIT Boeurn, married on her husband's proposal, explained that it was possible for her to refuse the proposed marriage, she indicated that she had feelings for her husband and therefore freely gave her consent as the other women in her unit gave their consent for their own spouses: BEIT Boeurn: T. 28.11.2016, **E1/502.1**, around 11.19.12, before 11.28.21. PHAN Him, who worked in the Ministry of Commerce as BEIT Boeurn, said she married reluctantly but on her husband's proposal, even though she had managed to refuse several previous proposals since 1975: PHAN Him: T. 31.08.2016, **E1/467.1**, before 10.46.58 and at 15.46.31 and at 14.28.26. She added, however, that her case was different from 20 other women who had consensual marriages: PHAN Him: T. 31.08.2016, **E1/467.1**, at 15.46.31; T. 01.09.2016, **E1/468.1**, around 09.42.21. These testimonies are corroborated by the written statement of RUOS Suy which stated that as a matter of principle, both women and men could choose their spouse. He explained, however, that as women were reserved and timid, they are not used to talking about their feelings for the opposite sex, which prevented the full implementation of gender equality. He said that subsequently, opportunities were created for men and women to meet each other: Written record of witness interview of RUOS Suy, 07.07.2015, **E3/10620**, Q/A 75. This corresponds to the Khmer culture regarding restrictions on women's behaviour. See also Written record of interview of civil party applicant of KEO Theary, 08.12.2014, **E3/9662**, Q/A 80-82 (if a man wanted to marry a woman he could ask and "No, if a woman did so, they would say that the woman craved a husband")

1269. ***Refusals without prejudicial consequences presented as exceptions.*** The Chamber erred by finding that cases of refusal without prejudicial consequences were an exception by using the testimony of EM Phoeung and SUN Vuth.[2418] According to the Chamber, their experiences could only be explained by particular circumstances. In so doing, the Chamber distorted their evidence and discarded exculpatory material that did not lead to that finding. Indeed, EM Phoeung testified that his friend, a former monk like him, had been forcibly married because he "was cheated"[2419], suggesting that the responsible authorities had not applied the rule. An unbiased reading of SUN Vuth's statement that he "protested" the marriage proposal "maybe" because he was young was also not sufficient to conclude that his refusal was in exceptional circumstances. This witness was also unable to say what "the others" had done or whether or not they could "protest" it.[2420] Therefore, the Chamber has again erred by making deductions using shortcuts. Furthermore, it should have noted that the witnesses who indicated they had had to comply with the instruction of the authorities, believing that they had no other choice, had nevertheless refused several previous proposals with different persons without any prejudicial consequences.[2421] The plurality of their refusals and the circumstances evoked in the different narratives were more indicative of social pressure emanating from the negative view of long-term celibacy in Khmer society than evidence of a policy of forced marriages.

1270. Finally, the fact that there were marriages arranged without the actual consent of both persons, either with the proposal of one person or arranged by their leader, should have led the Chamber to find that these were breaches of the rules of marriage. Here again, the question of the

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[2418] Reasons for Judgement, §3625.

[2419] EM Phoeung: T. 16.02.2015, **E1/263.1**, after 13.43.08.

[2420] SUN Vuth: T. 30.03.2016, **E1/411.1**, at 14.40.12: "I actually protested that proposal and I was successful in my protest, but the others could not protest against *Angkar*. […] But I was successful in my protest so I was not forced to get married. Maybe, because at that time I was rather young. And usually the marriage was arranged for those who were about 30 years old or older, and those who were 25 or 26 years old were not arranged to get married at that time. The same applied to female combatants that they should be within the range of 28 and older." (emphasis added).

[2421] HENG Lai Heang: T. 19.09.2016, **E1/476.1**, before 13.46.12, before 13.47.34 (possibility to refuse previous proposals without any problem), around 13.40.14 (at a basic level, it was different, people were consulted in advance); CHEA Deap: T. 30.08.2016, **E1/466.1**, after 13.51.02 (possibility to refuse previous proposals), at 15.25.53 (officials did not threaten him regarding the last proposal). T. 31.08.2016, **E1/467.1**, before 09.44.10 and before 09.47.55; PHAN Him: T. 31.08.2016, **E1/467.1**, around 14.29.03 ("Since 1975, I kept refusing but by 1978, I could no longer do that. I wanted to be by myself and I did not want to get married. But on that day, despite my refusal, I was wanted"); THUCH Sithan: T. 21.11.2016, **E1/500.1**, after 14.59.07 (she made her choice to avoid eventually marrying an illiterate man, "[s]o when I could not get married to the person whom I loved, I had no choice of love, I agreed to get married to him because he was an intellectual").

representativeness of the accounts selected and the exculpatory evidence withheld poses a real problem in the Chamber's analysis of the evidence. Challenging the existence of the rule because it was breached was not a reasonable finding.

- **Concealment of discrepancies in the application of regulations**

1271. The Chamber erred in fact by ignoring the CPK policy documentation that reminded cadres of the necessity to consider the needs of the people in their charge in order to follow the Party line on building.[2422] Criticisms of executives who did not follow these recommendations show, however, that contrary to the findings of the Chamber, the CPK party line was not applied correctly.

1272. This enforcement problem has been clearly mentioned by ex-KR executives. PECH Chim acknowledged: "[s]ome officials did not give people clear instructions about that policy and only gave them a brief summary. So, conflicts arose."[2423] MOENG Vet has highlighted one of the fundamental problems of the regime: "the implementation or the interpretation of the principles were based on individuals' understanding. Although everyone attended at the same meeting where the principles were announced, then individual understanding was different."[2424] This is a point that the Defence has consistently raised throughout the trial, as it did in its closing arguments during the 002/01 trial.[2425] The Chamber erred in fact and in law by not addressing this crucial point of a different application regarding the facts of the policy advocated. This is precisely the case with the regulation of marriage. The Chamber erred in its reasoning by not confronting the accounts of forced marriages with all of the evidence before making general findings about state policy.

- **Marriage statistics throughout the case file**

1273. In addition to the errors detailed above in the consideration of the evidence relied upon by the Chamber, its general approach to the evidence is flawed and tarnishes its findings. Indeed, no reasonable trier of fact would have found the existence of a policy of forced marriages based

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[2422] RY, April 1976, **E3/732**, ERN FR 00611518-00611514. Draft Statute of The Communist Party of Kampuchea, 1971, 03.07.1972, **E3/8380**, ERN EN 00940637-00940639 (criterion of a good leader for the work of building the Party).
[2423] PECH Chim: T. 22.04.2015, **E1/290.1**, from 13.47.11. See also OR Ho: T. 19.05.2015, **E1/301.1**, at 13.56.03 (The war was not over yet and *Angkar* did not allow marriage to happen during that time because Angkar needed men and women to go into war); Kasumi NAKAGAWA: T. 13.09.2016, **E1/472.1**, before 13.36.24 (reminder of the restrictions on the organisation of marriages to certain people in the country before a certain period).
[2424] MOENG Vet: T. 27.07.2016, **E1/449.1**, around 11.05.20, before 11.02.05.
[2425] Closing arguments: T. 25.10.2013, **E1/234.1**, around 14.00.20.

primarily on the civil parties' accounts specifically selected to evoke traumatic experiences in the context of their marriage. An unbiased approach should have led the Chamber to consider the evidence as a whole, as the occurrence of forced marriages was not sufficient to demonstrate the existence of a CPK policy to that effect. A statistical approach was needed.

1274. **Segment dedicated to marriage:** Significantly, all those called to testify for the marriage segment spoke of their experience of forced marriage. Of 14 witnesses and civil parties, all stated that they were reluctantly and/or forcibly married under the regime, although seven of them referred to marriages consented to by others. In the forced marriage segment, therefore, 100% of witnesses and civil parties underwent forced marriages and, of them, 50% mentioned marriages consented to by others.[2426]

1275. **Testimonies in 002/02 outside the marriage segment**: Out of 80 witnesses and civil parties who testified outside of the marriage segment, 31 testified that they were married under the regime. Of these 31 people, only six reported being forced into marriage. That makes 19% of forced marriages compared to 55% of consensual marriages, 13% of arranged marriages and 13% of marriages whose nature has not been specified.[2427] Thus, of a sample of witnesses called to testify on a variety of topics, we have a different view of the application of marriage regulation than that given in the marriage segment.

1276. **All testimonies in 002/02**: If it is recalculated by taking all the witnesses who appeared before the Chamber in the entire 002/02 trial, including those in the segment on marriage, the new figure is obviously different. Of all the witnesses who appeared in 002/02, 94 referred to marriage under DK.[2428] Of these 94 people, 45 people married under the DK regime, i.e. 48% of the witnesses and civil parties who mentioned marriage. Of these 45 persons married under the regime, 20 reported having been forcibly married (including 14 in the marriage segment alone). Of the 20 people who spoke of their own experience of forced marriage, however, seven admitted to witnessing consensual marriages or the possibility of refusal for others.[2429] These figures show that there was

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[2426] See Annexes B3 and B5.
[2427] Some of those who indicated that they had married consensually or without specifying the nature of their marriage also evoked different experiences for other people. See Annexes B3 and B6.
[2428] See Annexes B3, B5 and B6.
[2429] Cases of witnesses and civil parties in the marriage segment who referred to marriages agreed to for others: OM Yoeurn: T. 03.08.2016, **E1/462.1**, around 10.38.51; YOS Phal: T. 25.08.2016, **E1/464.1**, at 09.59.50, at 10.39.47, around 11.10.50; SENG Soeun: T. 29.08.2016, **E1/465.1**, after 10.01.07, after 15.01.17; CHEA Deap: T. 30.08.20106,

therefore no consistent application of the regulation of marriage. They did not point to the existence of a widespread policy of forced marriages established and advocated by the CPK leadership.

1277. **Written statements**: Written statements have less probative value due to the lack of opportunity to question witnesses. However, insofar as they were used by the Chamber as corroborating evidence, it should also have examined them as a whole. Each category of documents will be reviewed, i.e. transcripts from Case 002/01 that have the value of written statements in Case 002/02, written statements in support of the Closing Order and those entered into evidence in case files 003-004 at the request of the Prosecution. ***Transcripts 002/01:*** Of 16 witnesses and civil parties who referred to marriage in Case 002/01, seven got married under the DK regime. Of these seven, only two stated to have been forcibly married. That makes 29% of forced marriages compared to 71% of consensual marriages.[2430] ***Written statements supporting the Closing Order:*** Of 115 witnesses and civil parties who referred to marriage, 56 were married under the DK regime. Of these 56 people, 20 reported having been forcibly married. This equates to 34% of forced marriages against 29% consented, or 16 persons, 30% arranged, or 17 persons, 5% whose nature has not been specified, or three persons, 2% or one person outside of the time scope.[2431] ***Written statements of case files 003-004:*** Of the 86 witnesses who raised the issue of marriage, 45 were married under the regime and 29 of them indicated that they had been subjected to forced marriages, i.e. 65% of forced marriages as opposed to 33% consented and 2% arranged.[2432] The percentage difference with the other reporting categories is striking. Here again, the issue of the guided selection of these statements is a parameter that should have been taken into account. Indeed, it should be recalled that these statements were introduced into evidence at the request of the Prosecution to support the thesis of a policy of forced marriages. In addition, the leading questions of the investigators and the lack of opportunity to question the witnesses means little probative value can be attached to these written statements.[2433] In any event, the Chamber could not rely on these specifically chosen

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E1/466.1, after 15.10.29; PHAN Him: T. 01.09.2016, **E1/468.1**, from 09.41.06; NOP Ngim: T. 05.09.2016, **E1/469.1**, before 11.18.46, at 13.39.16; HENG Lai Heang: T. 19.09.2016, **E1/476.1**, around 13.40.14, after 13.42.04.

[2430] See Annexes B3 and B7.

[2431] Annexes B3 and B8. Some of those who stated that they had married consensually or without specifying the nature of their marriage evoked different experiences for other people.

[2432] Annexes B3 and B9. Some of those who stated that they had married consensually or without specifying the nature of their marriage evoked different experiences for other people.

[2433] See, for example: Written record of witness interview of CHHUOM Savoeun, 15.10.2014, **E3/9578**, Q/A 26 ("What did you know about forced marriages in the Sector where you lived?") Written record of witness interview of HANG Horn, **E3/9518**, Q/A 4. Written record of witness interview of HAOM Tun, 14.10.2014, **E3/9486**, Q/A 89-91.

accounts to support the Prosecution's case and make general findings about CPK policy without confronting all of the evidence.

1278. A comparison of all the statistics and the percentage of forced marriages evoked by witnesses and civil parties according to whether they were called in the marriage segment or whether they testified about other facts reveals a drastic difference.[2434] The Chamber therefore erred in its approach to the evidence, which distorted its findings. It could not rely on this testimony from the marriage segment alone to conclude on a general policy in the country, even though many witnesses explained the actual content of the regulations as advocated by the CPK. Through its directed and biased approach, the Chamber erred in fact and in law by finding that what was a regulatory drift was a policy intended by the DK regime. This has caused all the distortion and obscuring of counter-evidence.

- **Experts**

1279. The bias of the Chamber is all the more apparent in its reasons rejecting the findings of the two experts. The expert Peg LEVINE, who explained how she proceeded with an approach free of all prejudice and preconceived ideas about the nature of marriage in her scientific approach, made it clear to the audience: "however, as a trend, as a finding, were the weddings forced across time and place under DK, my answer is no."[2435] Kasumi NAKAGAWA, however, having focused her research on sexual violence, had also come to a similar finding by stating that that there was insufficient evidence that there was a top-down policy of organising forced marriages, although forced marriages had been organised in most of the provinces.[2436] These experts, having conducted

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Written record of interview of civil party applicant of HENG My, 25.05.2015, **E3/9800**, Q/A 185-186 ("Some people were forced to get married. Did you know why they were forced to do so?"); Written record of witness interview of KHOEM Sorn, 01.09.2014, **E3/9747**, Q/A 96; Written record of witness interview of NGET Yi, 09.07.2014, **E3/9832**, Q/A 282-285 (guided questions from the investigator on forced marriages only); Written record of witness interview of OEM Pum, 04.02.2014, **E3/9510**, Q/A 17, 22-23, 56-60. Written record of witness interview of PEN Thol, 10.08.2015, **E3/9775**, Q/A 23; Written record of witness interview of SEK Sam At, 10.11.2016, **E3/10783**, Q/A 81, 84; Written record of interview of civil party applicant of SORM Vanna, 17.10.2014, **E3/9825**, Q/A 81-82, 91-92.

[2434] Annexes B3 and B5 to B9.

[2435] Peg LEVINE: T. 11.10.2016, **E1/481.1**, around 10.43.26.

[2436] Kasumi NAKAGAWA: T. 11.10.2016, **E1/472.1**, before 13.56.29 (its research did not take into account the policy documents or any other available documents), after 15.05.21. The Chamber acknowledged that NAKAGAWA had followed a strict methodology in its research and had specialised knowledge throughout its testimony, Reasons for Judgement, §3533.

their studies in a scientific manner, thus adopted the objective approach that the Chamber failed to adopt when, given its role as a judge, it should have been even more rigorous.

1280. The confrontation of all the evidence in the whole case file did not allow the Chamber to conclude beyond reasonable doubt that the cases of forced marriages it considered established were the result of an intentional policy of the CPK leadership. It erred in fact and in law by adopting a selective and biased approach to the burden of proof in making its findings, which will therefore be reversed as a whole, including the conviction for the OAI crimes through forced marriage and rape within marriage.[2437]

Section II. RAPES COMMITTED IN THE CONTEXT OF FORCED MARRIAGES

I. ERRORS ON THE LEGALITY OF RAPES COMMITTED IN THE CONTEXT OF MARRIAGE AS OIAS BETWEEN 1975 AND 1979

A. Lack of analysis of the condition of formal unlawfulness

1281. The Chamber did not apply the requirement of formal unlawfulness. In order to characterise the facts of the case as a CAH OIA, it merely used the definition of rape as set out in the Penal Code of the Kingdom of Cambodia of 1956 to characterise the crime.[2438] As already indicated above, according to the Case 002/01 Appeal Judgement, while it is not necessary for the behaviour in question to have been expressly established as an offence under international criminal law, it is necessary to identify a real coordination of the rights and prohibitions set out in the human rights instruments applicable at the time of the events giving rise to the charge of OIA.[2439] By evoking the definition of rape in the Penal Code of the Kingdom of Cambodia of 1956, the Chamber believed it was not necessary to analyse this condition.[2440]

1282. However, KHIEU Samphan has not been charged with rape, but for OIAs having taken the form of rape **in the context of forced marriages.** The aforesaid context has been completely ignored by the Chamber in its examination and no in-depth search has been carried out. This context was, however, to be taken into account in the characterisation of the crime since it has a direct impact on the constitutive elements. Once again, the characterisation of an OIA demands a rigorous legal

[2437] Reasons for Judgement, §3690-3691, 3693, 4293-4294, 4307, 4370, 4400, 4402)
[2438] Reasons for Judgement, §731; *Duch* Judgement, 26/07/2010, §362.
[2439] Case 002/001 Appeal Judgement, 23.11.2016, §584- See above, §666-671.
[2440] Reasons for Judgement §731; referring to fn 2236: Judgement *Duch*, 26.07.2010, §362.

analysis, and a search of the rights and prohibitions contained in the international instruments at the time was inescapable. Such a prudent analysis is there to avoid an attack on the principle of legality.[2441] It is surprising to see that neither for the OIAs through forced marriages, nor for the OIAs through rape in the context of forced marriages, did the Chamber undertake such an analysis whereas it did so in the initial trial in the Judgement 002/01.

1283. In effect, to determine the constitutive elements for enforced disappearances, the Chamber relied on the definitions of behaviour provided in the case of the trial by the Nuremberg Judges, the Rome Statute and the decisions of the ICTY.[2442] Therefore, the Defence cannot help thinking that if the Chamber, in the case in point, omitted to carry out an analysis of this condition, it was because it knew that it would find itself in difficulty and that it would be impossible to justify the principle of legality. In conclusion, by not proceeding with this analysis, the Chamber committed an error in law in breach of the principle of legality.

B. No reference to conjugal rape in the international instruments at the time

1284. Rape within marriage, that is between spouses, was not constitutive of an offence in the Cambodian Penal Code of 1956,[2443] which was still formally in force between 1975 and 1979.[2444] No provision relative to conjugal rape or rape within marriage can be found in the instruments relative to the rights of war. Although the Lieber Code, the GC and the Additional Protocols refer to rape and to the protection of women in the specific case of armed hostility, there is no mention of conjugal rape. No reference either may be found in the various Statutes of special or international Tribunals. Rape in the context of forced marriage has never been evoked as a distinct OIA and has never before been the subject of any verdict in international criminal law. The Chamber confuses two distinct offences which require distinct reasoning: rape and rape in forced marriage situations. Rape in a forced marriage situation leads to a particular context which is that of a marital bond. But this is completely excluded by the Chamber which deliberately omits a part of the context such that the definition of the crime given by the Chamber is false, as is its application.

1285. In any case, this absence of analysis of the condition of formal unlawfulness and coordination of the rights and prohibitions contained in the instruments at the time is constitutive of an error in law.

[2441] See above, §659-665.
[2442] Case 002/01 Trial Judgement, 07.08.2014, §448.
[2443] Cambodian penal code of 1956.
[2444] Judgement *Duch*, 26.07.2010, §29.

In these conditions, the Chamber could not say that the crime has been established and, *a fortiori*, it could not sentence KHIEU Samphan for these facts.

C. Impossibility to sentence KHIEU Samphan

1286. As already argued by the Defence, the supplementary category of the OIA forms part of an effort to build international criminal law and this construction must be carried out respecting the principle of *nullum crimen sine lege*.[2445] In needing to rule on a supplementary category, the Chamber was required to carry out a meticulous legal examination, which calls inescapably for an analysis of the condition of formal unlawfulness and the coordination of the rights and prohibitions contained in the international instruments at the time of the events. The Chamber erred in the definition of the crime as well as its legality at the time of the events.

1287. Given the absence of standards within the international instruments or in domestic law, it is clear that the Judges cannot conclude for establishing the crime as charged. By sentencing KHIEU Samphan for acts of OIA through rape in the context of forced marriage, the Chamber has breached the principles of accessibility and foreseeability.

II. ERRORS IN THE EXAMINATION OF THE CONSTITUTIVE ELEMENTS FOR THE OIA THROUGH RAPE IN THE CONTEXT OF FORCED MARRIAGE

A. Errors in the examination of the criterion of a similar nature and gravity

1. Rape in the context of forced marriage did not constitute a criminal offence either before or after the events

1288. Rape in the context of forced marriage did not exist at the time of the events.[2446] Neither did it exist before the events and it still does not expressly exist in Cambodian law. This absence of criminal charges at national and international level shows that if this OIA has not been elevated to the status of a distinct CAH, if it has not been the subject of any previous verdict, this is because it has never been considered as having a nature and a level of severity similar to the other CAHs.

[2445] See above, §659-671.
[2446] See above, §659-665.

1289. In refusing to apply the condition of unlawfulness for sentencing KHIEU Samphan, the Chamber was not able to determine the said behaviour and whether it was of a nature and a level of severity similar to those of other listed acts by comparing with international standards.

1290. Neither did the Chamber believe it useful to apply the rule of *esjudem generis* to appreciate the *actus reus*. In the characterisation of the crime as an OIA, the *esjudem generis* rule could have served for determining whether the alleged act or its omission was of a level of severity as serious as the acts constitutive of the CAHs listed in article 5 of ECCC law. In order to determine which types of acts may have a similar character, (in terms of both their nature and gravity,) the Chamber should have examined the case law and evaluated the types of act or omission defined as OIA.[2447] In not using these objective criteria for saying that the *actus reus* of the crime is constituted, the Chamber committed an error in law such that it could not beyond reasonable doubt establish that the alleged behaviour was of a similar nature and severity.[2448]

2. Error concerning the definition of rape in the context of forced marriage

1291. The Chamber erred in law concerning the definition applicable to the alleged facts by recalling its reasoning in the *Duch* Case and its definition of rape as understood in 1975:

> "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".[2449]

1292. However, this definition concerns rape and not rape committed in the context of marriage, whether forced or not. Marriage implies a conjugal bond between the two spouses, and this bond having a direct impact on the appreciation of consent. It is therefore a constitutive element which changes the definition invoked by the Chamber and therefore the law applicable at the time of the events. *De facto*, it has given an erroneous definition of the alleged crime.[2450] And neither has it properly defined what is "rape committed in the context of forced marriage". The Chamber contented itself by giving a definition of rape which removed a part of its element, of its context.

1293. Rape committed in the context of a marriage, that is in a conjugal context, constitutes a separate offence according to several countries. A separate offence which therefore distinguishes it from the

[2447] Case 002/001 Appeal Judgement, 23.11.2016, §581-585. Supreme Court application of the *esjudem generis* rule.
[2448] Reasons for Judgement §3697-3698.
[2449] Reasons for Judgement, §731, referring to fn 2236 in *Duch* Judgement, 26.07.2010, §362.
[2450] See above, Section I. Marriage §1098-1280, notably §1098-1116.

"classic" offence of rape. This acknowledgement has appeared recently, because all traditional jurisdictions refused to criminalise rape in such a context because there existed (or still exists, depending on the countries) a presumption of consent between the spouses. In the same way that forced marriage constitutes a complex offence halfway between the civil and criminal law, rape committed in the context of marriage also sits in the two camps. Numerous nation states would consider that there existed an inviolable presumption of consent between spouses.

a. Cambodian law

1294. In Cambodia, although article 443 of the Penal Code of 1956 treated rape as a criminal offence, there is no reference to conjugal rape, that is rape in the context of marriage.[2451] The above-mentioned Code provides for the offence of rape in the following terms:

> "Whosoever by force or by using threats introduces or attempts to introduce his sexual organ into the sexual organ of a person who refuses, is committing rape".[2452] (translation ours).

1295. This absence of criminalisation finds its origins in civil law, according to which in marriage there exists a "conjugal duty" from which ensues the presumption of consent between spouses that the marriage should be consummated. Under the authority of the above-mentioned Code, abandoning the marital home by a spouse was even constitutive of a criminal offence punishable by imprisonment.[2453]

1296. In Cambodia and in numerous States, this inviolable presumption granted criminal immunity to the spouses in any case of rape committed in the context of marriage. This presumption has only recently been called into question. The 2009 law on the prevention of domestic violence has introduced criminalisation of sexual aggressions in the context of marriage.[2454] Article 7 of the said law states: "*Sexual aggression includes: - Violent sex; - Sexual harassment; - Indecent exposures*".[2455]

1297. It is noticeable that although this recent law criminalises sexual aggression committed in a marriage, there is no express mention of rape but just to "violent sex" which casts the net very wide

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[2451] Cambodian penal code of 1956, article 443.
[2452] Cambodian penal code of 1956, article 443.
[2453] Cambodian penal code of 1956, article 452.
[2454] Kram royal, *Law on the prevention of domestic violence and the protection of victims,* 2009. Available at the following url: https://www.wcwonline.org/pdf/lawcompilation/Cambodia_dv_victims2005.pdf.
[2455] Kram royal, *Law on the prevention of domestic violence and the protection of victims, 2009,* article 7.

and is difficult to define. One still cannot say that conjugal rape, in other words in the context of a marriage, has been expressly addressed and established in Cambodian law. Because of this absence, rapes committed between spouses are very rarely brought before the Cambodian legal chambers.[2456] The result is that, before 2009, rape between spouses that is rape in the context of a marriage did not exist as a criminal offence. A spouse could not be charged using the classic characterisation of rape. As such, it was impossible for the Chamber to sentence KHIEU Samphan for these facts.

b. Domestic laws

1298. The legal arsenals relative to rape in the context of marriage have taken a long time to be built and remain incomplete or completely absent in several nation States. In France, for example, recognition of rape in the context of marriage has encountered numerous difficulties. One of the difficulties arises notably from the fact of the existence of the civilised presumption of consent to sexual relations within the couple concerning the cohabitation and conjugal duties which ensue from the marriage contract.[2457] Doctrine and case law have been unanimously opposed to any criminalisation:

> "*Violence carried out by the husband on his legal wife, when seeking legitimate ends afforded by marriage, may never constitute the crime of rape*".[2458]

1299. Whereas the Criminal Code remains silent, the French Appeals Court recognised conjugal rape for the first time in a decision in 1990.[2459] It had recognised it a few years earlier but only on condition that the couple had already entered into divorce proceedings[2460] Legal recognition of conjugal rape only finally arrived in terms of a legislative modification in 2006.[2461] This law did not propose a

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[2456] Report by the NGO LICADHO, *Violence against Women: how Cambodian Laws discriminate against Women*, 2007, p. 10 (https://www.licadho-cambodia.org/reports/files/112CAMBOWViolenceWomenReport2007_ENG.pdf); Article by Dorine VAN DER KEUR, *Legal and Gender Issues of Marriage and Divorce in Cambodia*, *2.5 Domestic Violence and Marital Rape*. Available at the following url: http://cambodialpj.org/article/legal-and-gender-issues-of-marriage-and-divorce-in-cambodia/.

[2457] Article by Audrey DARSONVILLE, *Repository of criminal law and procedure Dalloz, Rape §3-Existence of earlier relations and lack of consent,*, 2011 (updated: November 2018). ().

[2458] Article/Extract by GARÇON, Annotated criminal code, 2nd ed, by *ROUSSELET, PATIN and ANCEL*, Sirey, 1952-1959, No. 23. ().

[2459] Crim. Cass. 05.09.1990, no. 90-83786.

[2460] Crim. Cass., 17.07.1984, No. 84-91288.

[2461] Law dated 04.04.2006, article 11, introducing paragraph 2 of article 222-22 of the French Criminal Code: *"Rape and other sexual aggressions are constituted when they are imposed on the victim in circumstances provided for in the present section, regardless of the relations existing between the aggressor and the victim, including when they are*

separate offence but enabled extending the scope of application to aggravating factors for spouses, common-law partners, cohabitants or civil partners. Similarly, in Germany, conjugal rape does not constitute a separate offence but an aggravating factor.[2462] In Switzerland, conjugal rape was officially an offence enshrined by a 1992 law and, as opposed to other offences, proceedings are entered into only if the victim files a complaint.[2463] Since the reform of the Penal Code in 1999, Spanish courts admit that the existence of a conjugal bond prevents characterisation of rape.[2464] This same "conjugal immunity" exists in countries with a common law legal tradition. In the United Kingdom, this immunity of praetorian origin has existed for a long time, justifying itself on the presumption of consent between the spouses. In 1990, the Law Commission drafted a report on "rape in marriage" and for the first time proposed to abolish conjugal immunity.[2465]. In the absence of any legislative reform, the first sentencing for rape in the context of marriage was pronounced in England by the House of Lords on 23 October 1991.[2466] In terms of this case, the ECtHR also for the first time validated the notion of rape between spouses.[2467] The United Kingdom added conjugal rape as an aggravating factor without creating a separate offence *via* a law in 2003. Nation States such as Barbados and Belize only recognise rape between spouses if one or other has already commenced divorce proceedings to break the conjugal bond.[2468] Finally, many nation States have still not legislated on this question and still use the concept of conjugal immunity such that rape between spouses is not a crime.[2469]

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united by the bonds of marriage. In this case, the presumption of consent between spouses to the sexual act is only valid until evidence of the contrary". ().

[2462] Report from a French Senate Study, *Campaign against conjugal violence*, March 200 (sic). (). Available at the following url: https://www.senat.fr/lc/lc86/lc86_mono.html.

[2463] Article by Geraldine BROWN, Thierry DELESSERT and Marta ROCA I ESCODA, *From marital duty to conjugal rape. Study of the trends in Swiss criminal law*, Lextenso Droit et société, 2017/3 No. 97, p. 595-614.

[2464] Article by Geraldine BROWN, Thierry DELESSERT and Marta ROCA I ESCODA, *From marital duty to conjugal rape. Study of the trends in Swiss criminal law*, Lextenso Droit et société, 2017/3 no. 97, p. 595-614.

[2465] Article by Renée KOERING-JOULIN, *Rape between spouses and conjugal immunity in Common Law*, RSC, 1996, p. 473.

[2466] Article by Renée KOERING-JOULIN, *Rape between spouses and conjugal immunity in Common Law*, RSC, 1996, p. 473.

[2467] Judgement *CR and SW .v United Kingdom, Judgement (ECtHR)*, 22.11.1995.

[2468] Note from the World Bank Group, *Women, work and the law,* World Bank Group, p. 5. Available at the following url: http://pubdocs.worldbank.org/en/379891519938659824/Topic-Note-Protecting-Women-from-Violence-FR.pdf.

[2469] Note from the World Bank Group, *Women, work and the law,* World Bank Group, p. 5. Available at the following url: http://pubdocs.worldbank.org/en/379891519938659824/Topic-Note-Protecting-Women-from-Violence-FR.pdf. Country examples: India, Bruneï Darussalam, Myanmar, Bangladesh, Sri Lanka, Ethiopia, Kenya, South Sudan, Tanzania.

1300. In conclusion, by applying the "classic" definition of rape to the alleged facts, the Chamber committed an error in law. The legal proceedings being that of rape in the context of forced marriage, it should have proceeded with a legal examination looking at the characterisation of rape between spouses and found that the said offence did not exist at the time of the events. It was simply impossible for the Chamber to sentence KHIEU Samphan for these facts.

B. Errors concerning the examination of the suffering endured in the context of sexual relations within marriage

1301. Mainly, it is to be recalled that the existence of a CAH of OIA through forced marriage and that such CAH had been constituted has been contested.[2470] In the alternative, in view of the developments above concerning the applicable law and the fact that rape between spouses did not exist at the time of the events, the Chamber could not sentence the Appellant in accordance with the principle of legality.[2471] The Chamber committed several errors in law and in fact by finding that generally sexual intercourse within forced marriages was of the same level of severity as other CAHs of OIA.[2472] In the infinitely alternative, the Chamber did not have sufficient pieces of evidence for finding that the *actus reus* for rape had been established and by definition neither the characterisation of the CAH of OIA through rape in the context of the Khmer culture (1), but the totality of the pieces of evidence provided to the Chamber also do not enable such a finding to be made (2).

1. Errors concerning the level of severity of suffering and lack of consideration for the Khmer culture

1302. The Chamber committed several errors by finding that the *actus reus* of rape in the context of forced marriage was established, and that the physical and mental suffering of raped women was the result of the obligation of consummating the marriage.[2473]

a. Errors concerning the case of "established" rape

[2470] See above, Section I. Marriage §1098-1280
[2471] See below/above §1288-1398.
[2472] Reasons for Judgement, §3698. It should be recalled that according to the Reasons for the Judgement under appeal only women could be victims of conjugal rape whereas this is not the case for men victims either of rape or of sexual violence (see Reasons for Judgement, §3701).
[2473] Reasons for Judgement, §3698.

1303. The Chamber erred in fact and in law by finding that one instance of rape was established in Tram Kak. In effect, according to the Chamber there was committed "at least one instance of rape in the context of forced marriage at the Tram Kak Cooperatives". Its formulation is deceptive because it suggests that evidence existed for other instances of rape in Tram Kak, which is not the case. In reality, a single case was found to support this finding: the alleged rape of CHANG Srey Mom.[2474] This is the sole occasion where the Chamber considered "rape" established. However, even for these facts, the Chamber was not in a position to conclude for the impact of the alleged crime.

***Actus reus* non-constituted and insufficient level of severity.**

1304. CHANG Srey Mom did not complain of suffering endured in her testimony. Only the partial approach of the Chamber enabled it to conclude as it did by ignoring the elements which ran counter to its findings. However, in her testimony CHANG Srey Mom indicated that she still lived as a couple with her husband, the perpetrator of the alleged rape, and with their children. In addition, although having stated that the marriage was not desired from her side, CHANG Srey Mom clearly indicated that her husband never forced her to have sexual relations. To use her own words, she said: "On the issue of consummation, he didn't force me. However, he told me and advised me of the role of a husband and a wife and that whatever we do, we would become husband and wife in the future, and for that reason he just made me feel comfortable. But he did not force me.".[2475]

1305. The Chamber erred in not remarking that both for CHANG Srey Mom and for her husband, the fact of being officially married normalised and legitimised their sexual relations. In addition, the Chamber also failed in its duty to examine for and against by not taking into account the statements by the civil party concerning the evolution over time in the sentiments of the couple.[2476] Above all, given these statements, it could not reasonably rely on the testimony of CHANG Srey Mom for considering rape established and even less for finding the existence of suffering to the level of severity that would characterise the CAH of OIA for rape.

b. Instances raised in part *14.3.8.3 Forced sexual relations between spouses*

[2474] Reasons for Judgement, §3674, fn 12260 without giving concrete findings.
[2475] CHANG Srey Mom: T. 29.01.2015, **E1/254.1**, at 15.43.48 (emphasis added).
[2476] CHANG Srey Mom: T. 29.01.2015, **E1/254.1**, before 10.45.55 ("From time to time we could live along with each other, and I started to love him"), à 10.46.18 ("My husband tried to console me, and he said that we were husband and wife, so we had nothing to hide each other. I listened to my husband").

1306. The Chamber has in addition erred in fact and in law by finding in general that insofar as the consent to marriage was not "real", the consummation of the marriage was *ipso facto* also forced. It based its findings on the fact that the newly-weds would have been required to have sexual relations, because of the surveillance to ensure the marriage was consummated and even, in case of resistance, to have the consummation forced.[2477] To make such a finding, the Chamber used the testimonies from PREAP Sokhoeurn, OM Yoeurn, MOM Vun, PEN Sochan, SOU Sotheavy, NOP Ngim and CHEA Deap.[2478]

1307. As we shall see, the testimony of PREAP Sokhoeurn did not allow such a finding to be made.[2479] OM Yoeurn did state that she had been annoyed and angry at having been forced to marry, but she also stated that during the time spent with her husband, he had comforted her. The Chamber did not take account for assessing her suffering of the fact that she added that they found each other after three years of separation after the fall of the regime and "lived together and felt normal".[2480] Above all, OM Yoeurn did not mention suffering as a result of sexual intercourse with her husband in her statement of injury at the end of the hearing.

1308. The Chamber in addition erred in fact and in law by making general findings from the remarks by MOM Vun and PEN Sochan. These two civil parties would have been required to have forced sexual intercourse with their husbands under the eyes of militiamen. The exceptional circumstances surrounding these experiences being strictly contrary to the moral principles advocated by the CPK, the Chamber should have found with much more circumspection.

1309. The problems of credibility with MOM Vun have already been treated above.[2481] The statements of PEN Sochan exhibit others. In effect, she claims to have been married at the age of 15, and have been raped by her husband on the orders of the militia, two conditions contrary to the regulations on marriage.[2482] Apart from the fact that the account by PEN Sochan had been publicised because her age meant it was something out of the ordinary[2483], the Chamber should have noted with regard

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[2477] Reasons for Judgement, §3659, 3661.
[2478] Reasons for Judgement, §3648-3661.
[2479] See *below,* Cases identified in part *14.3.12.2 Impact of forced sexual intercourse on the victims,* §1313- 1323.
[2480] OM Yoeurn: T. 23.08.2016, **E1/462.1**, around 13.34.47 and after 13.41.15 ("After three years we started to feel normal towards each other […] we simply lived together and felt normal.").
[2481] See above, §1173.
[2482] PEN Sochan: T. 12.10.2016, **E1/482.1**, around 13.44.12; T. 13.10.2016, **E1/483.1**, at 09.06.20.
[2483] Case 002/001 Appeal Judgement, 23.11.2016, §480 regarding the appreciation of the reliability and credibility of SAM Sithy. PEN Sochan: T. 13.10.2016, **E1/483.1**, after 09.26.32 (the directors of the film were interested in her case

to the rest of the evidence that it was clearly an isolated case and could not be considered as a representative example of the suffering resulting from marriage under a generalised policy emanating from the CPK.

1310. It also relied erroneously on the atypical case of SOU Sotheavy in considering that his wife was the victim of enforced sexual intercourse by him.[2484] This finding is all the more astonishing that, as mentioned by the Defence, civil party SOU Sotheavy, having the particularity of being a transgender, at no moment in his testimony did he raise the subject of feelings or sentiments of his wife.[2485] The Chamber therefore had very few elements for finding for the impact of the events concerning the wife of SOU Sotheavy and even less for being able to characterise the level of severity.

1311. Finally, the Chamber erred in fact and in law by not taking account of NOP Ngim's own statements which explained: "Personally, I was not forced and as I said my husband was not forced either, we both abided by the organizational disciplines. [...] We did not force one another.".[2486] Whatever the legal arguments employed by the Chamber concerning the automatically forced characteristic of sexual intercourse in the case of forced or arranged marriages, it could not ignore the remarks from the people concerned relative to their feelings. In the case of NOP Ngim, she did not consider that she had been raped and therefore expressed no suffering in that regard. In any case, the Chamber could not use her testimony for finding for suffering with a level of severity to characterise the CAH of OIA of rape.

1312. In the same way, even if CHEA Deap stated that consummation of the marriage was her husband's decision at their second post-wedding meeting, she did not speak of suffering as a result of this act

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because she was young for getting married under the DK. "Q. And in that conversation or in subsequent conversations, they said, "We are interested in your story because you were young at the time"? A. Yes, that is correct. Q. And did they explain why they thought that was an interesting component for their film? A. It was important because I was under age. I had to lodge my form with the Khmer Rouge Tribunal and to take part in the film so that the younger generation know what happened in the dictatorial regime. And I, myself, wanted to do that."), after 11.47.35 (she was the youngest person married at the ceremony).

[2484] Reasons for Judgement, §3657, 3659.

[2485] KHIEU Samphan Defence Response to the Prosecution's Appeal in Case 002/02 23.09.2019, **F50/1**, §46. SOU Sotheavy: T. 24.08.2016, **E1/463.1**, around 14.03.51. See also above, §1170.

[2486] NOP Ngim: T. 05.09.2016, **E1/469.1**, 14.19.56 and at 11.12.40 where she specifies ("If you spoke about after the marriage, what else we could do because *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.").

of sexual intercourse.[2487] In addition, she indicated that it was precisely because they had the impression of being watched by the militiamen that nothing happened between them on their wedding night.[2488] It is only through a biased appreciation of the evidence that the Chamber considered that all the remarks from civil parties enabled it to conclude that there was suffering resulting from forced sexual intercourse reaching a level of severity similar to that for other listed CAHs.

c. Instances raised in section *14.3.12.2 Impact of forced sexual intercourse on victims*

1313. The Chamber made its findings relative to forced sexual intercourse from the remarks of civil parties PREAP Sokhoeurn and SAY Naroeun, and from the expertise of Kasumi NAKAGAWA, concerning for the most part the loss of virginity for a large number of victims, exacerbated in certain cases by unwanted pregnancy.[2489] To make findings unfavourable to the Appellant, the Chamber systematically ignored the exculpatory elements as well as those casting doubt on the credibility of the civil parties.

1314. **Contradictory testimony from PREAP Sokhoeurn.** Thus, the Chamber did not take account of the convoluted explications from civil party PREAP Sokhoeurn, notably in response to questioning from the Defence. For example, she stated very late that she was raped by her husband but indicated having been encouraged to talk about the rape in detail because if not "there would be nothing as evidence".[2490] The Chamber did not even ask itself what could have been in the interest of this civil party to lie or at least to exaggerate the facts in order to have the Appellant sentenced. This is, however, part of the procedure. In addition, her first response to explain the late change in her version was that "after the news reached my father, he advised him and that's the end of it. And later on, I did not specify that I was forced.".[2491] Later, she gave a new version saying that she was " still shy and I did not want to speak...". The Chamber should have understood the consequences

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[2487] CHEA Deap: T. 30.08.2016, **E1/466.1**, around 14.07.26 and before 15.34.22; T. 31.08.2016, **E1/467.1**, after 13.33.13.
[2488] CHEA Deap: T. 30.08.2016, **E1/466.1**, at 14.05.55.
[2489] Reasons for Judgement, §3683-3685.
[2490] PREAP Sokhoeurn: T. 24.10.2016, **E1/488.1**, at 11.31.01. In paragraph §3649, the Chamber reproached the Defence for having distorted this statement in order to find that such statements were reliable and credible.
[2491] PREAP Sokhoeurn: T. 24.10.2016, **E1/488.1**, at 11.28.32 and at 11.31.01. See also T. 20.10.2016, **E1/487.1,** around 15.18.04 (he helped her look for her husband after his disappearance and helped look after her after she gave birth).

of these elements in the appreciation of the reliability of her late statement. In not doing so, the Chamber erred in its findings which should be annulled.

1315. In addition, the Chamber systematically ignored the other elements of her story casting doubt on the level of suffering which she is supposed to have endured as a result of the alleged rape. Thus, she stated that she decided to live with her husband after a discussion, as a sentimental relationship developed between them before he disappeared definitively.[2492] This was, however, an indication of the way in which sexual relations were seen as an obligation within marriage, the conjugal duty as a consequence of the traditional view of marriage. This equally explains why in her impact statement, she had raised the absence of her husband during her pregnancy. [2493] The Chamber made no reference to any of these elements.

d. Absence of conjugal rape in Khmer culture at the time

1316. The Chamber completely ignored the cultural and legal context raised by the Defence in which the concept of conjugal rape was unknown until very recently.[2494] This had, however, a concrete effect on the conception of sexual relations for a couple before and during and even after the DK, as the expert NAGAKAWA recalled: "The situation before 1975 is very different from that of now,")[2495] (…) " based on the studies on violence against women, in Cambodia or in any other countries, it was reported that marital rape happening within the marriage was a reality and this would be true regardless of the time period." [2496] (…) "but even now the Criminal Code of Cambodia does not explicitly say that marital rape was a crime".[2497]

[2492] PREAP Sokhoeurn: T. 20.10.2016, **E1/487.1**, at 14.40.27 ("since we already slept with each other, I was convinced and I went to live with him"), at 15.14.49; T. 24.10.2016, **E1/488.1**, before 13.54.28 (" I talked with my husband about our living condition. He told me because we had lived together and I had lost my virginity, so both of us should live together as husband and wife so that we could survive. No one forced us to live with each other; that was our own decision after we had consulted with each other.").

[2493] PREAP Sokhoeurn: T. 24.10.2016, **E1/488.1**, after 14.03.34: "I was arranged to get married I was forced to have intercourse with a person that I did not like […] that hurt me physically and mentally. In addition, when I became pregnant, they did not allow my husband to stay with me or to look after me or to give me supplementary food during my pregnancy or during my delivery. My husband was taken away and killed."

[2494] CB 002/02, §2350-2355.

[2495] Kasumi NAKAGAWA: T. 14.09.2016, **E1/473.1**, at 10.48.48.

[2496] Kasumi NAKAGAWA: T. 14.09.2016, **E1/473.1** before 11.08.27.

[2497] Kasumi NAKAGAWA: T. 14.09.2016, **E1/473.1** around 15.21.33. See also PREAP Sokhoeurn: T. 20.10.2016, **E1/487.1**, after 15.32.44.

1317. As Kasumi NAKAGAWA has also said, for the Khmers, the question of sexuality is a taboo subject even between mother and daughter.[2498] Amorous feelings were not considered as a prerequisite in traditional marriage. It was within marriage that the women were required to do their duty:

> "Before the DK time, women were oppressed to even think about sexuality or love. They didn't have any idea about love. And many women were oppressed to show such direct affections to the man."[2499]

> "The term 'love' is very difficult term to speak or to identify under the Cambodian culture. Women took it for granted that they have husband and they have to respect their husband and they have to love their husband, but love could mean very complex issues.".[2500]

1318. This concept of the oppression of women in marriage, including sexually, applies to couples according to the textual doctrine of Chbab srey, some of which have only recently been abolished:

> "(…) up until 2006 or 2007. […]The United Nations CEDAW Committee, Convention on the Elimination of all Forms against Discrimination against Women, CEDAW Committee, recommended the Cambodian government to delete or to stop teaching 'Chbab Srey' in school curriculum because it's a symbol of oppression of women in Cambodia. So in responding to this recommendation from UN CEDAW Committee, Cambodian Government, Ministry of Education abolished it. So officially, it is not taught in school anymore. However, the concept, itself, to oppress women, to deprive women of freedom of expression or freedom in many issues, still remains.".[2501]

1319. The Chamber therefore erred in not taking account of the cultural context and of the traditional conception of a couple in which the consummation of the marriage was enshrined. Because virginity was very important for women, the measures for governing the man-woman relationship were important too. According to the other expert Peg LEVINE, virginity was not only considered from the clinical point of view. The majority of Khmer women avoided any contact with men for fear of being considered a loose girl who associated with the boys.[2502] On the other hand, within a normally married couple, sexual intercourse was a right for the man and a duty for the woman.

1320. Consequently, the Chamber should have appreciated the severity of the suffering of women resulting from sexual intercourse with their husband in the Khmer cultural context at the time of the events in which they had little freedom in their contact with men and were required to submit

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[2498] Kasumi NAKAGAWA: T. 13.09.2016, **E1/472.1**, at 11.14.27, before 11.24.18 relative to the absence of sexual education even between women; T. 14.09.2016, **E1/473.1**, around 11.14.27 many couples formed with marriages arranged by the parents met for the first time on their wedding day and took some months before consummating the marriage.
[2499] Kasumi NAKAGAWA: T. 14.09.2016, **E1/473.1**, after 15.41.57.
[2500] Kasumi NAKAGAWA: T. 14.09.2016, **E1/473.1**, at 10.39.56 and before 10.44.57.
[2501] Kasumi NAKAGAWA: T. 14.09.2016, **E1/473.1,** at 13.32.15.
[2502] Peg LEVINE: T. 13.09.2016, **E1/472.1**, around 15.40.10.

to their husband in everyday activities and in sexual intercourse. By ignoring this aspect, the Chamber erred in fact and lacked an element of explication in the late testimony of PREAP Sokhoeurn who only conceived of the idea of rape and suffering during the trial.

1321. In addition, in general, the Chamber should have remarked that the manner in which the first acts of sexual intercourse the women had with men they hardly knew or knew not at all were no different depending on whether they took place within a marriage arranged by the parents or in a marriage arranged by the local authorities under the DK. The absence of sexual education and the weight of social pressure meant that certain men never took the trouble to obtain the consent of the woman or to prepare her for sexual intercourse. However regrettable and unjust this situation might appear for women, it was nevertheless a social reality in Cambodia which the Chamber ought to have taken into account in making its findings, all the more so that this was confirmed by testimony in court from witnesses and civil parties.[2503]

1322. However, with its biased and directed approach, the Chamber preferred to conclude for the political will of the CPK to insist on forced consummation of marriage and therefore made a completely erroneous analysis of the evidence. In its analysis of the level of suffering endured, it should, however, have noted that the differences between the suffering in marriages under the DK and traditional marriages were not different in the manner in which sexual intercourse was practised within marriage. In addition, as seen above relative to the regulation of marriage seen by the CPK, the Chamber also erred in what the Party had tried to introduce as modernising the relations between men and women.[2504]

[2503] CHANG Srey Mom: T. 29.01.2015, **E1/254.1**, at 10.46.18, at 15.43.48 ("On the issue of consummation, he didn't force me. However, he told me and advised me of the role of a husband and a wife that whatever we do, we would become husband and wife in the future, and for that reason he just made me feel comfortable."); PREAP Sokhoeurn: T. 20.10.2016, **E1/487.1**, after 14.38.09; PEN Sochan: T. 13.10.2016, **E1/483.1**, at 09.57.02; NOP Ngim: T. 05.09.2016, **E1/469.1**, before 10.43.35 ("[W]e loved one another after the marriage."), at 11.12.40, and at 14.19.56; BEIT Boeurn: T. 28.11.2016, **E1/502.1**, around 11.24.06 (After they got married, they would go with their spouse. There was no need for such instruction because they already got married."); SAY Naroeun: T. 25.10.2016, **E1/489.1**, at 10.48.15 and at 11.10.23, at 10.51.58 (she had to submit to her husband as he wished and to accept to live as husband and wife); CHUM Samoeurn: T. 24.06.2015, **E1/321.1**, between 14.31.44 and 14.33.31 (she evoked her lack of experience on her wedding night and her husband accepted to wait to consummate their marriage). See also Written record of interview of civil party applicant KEO Theary, 08.12.2014, **E3/9662**, Q/A 46-49 (definition of cohabiting - having sexual relations, but she is too shy to speak about it because of the Khmer culture), Q/A 40, 66-67 (unpleasant experience on the wedding night: absence of relations with men prior to marriage and of sexual knowledge), Q/A 42-43 (she dares not remain face to face with her husband for fear that he'll rape her, and this until her mother comes to speak to her), Q/A 74-75 (shyness about speaking of sexual questions before others), Q/A 55-59 (to love one's husband after having had sexual intercourse with him).

[2504] See above, §1151.

1323. This error is all the more serious in that it did not compare the stories selected from the totality of the evidence to see what the level of representativeness was of the sufferings such as had been defined and identified.

2. Errors concerning the analysis of all the pieces of evidence and representativeness

1324. The Chamber erred in fact and in law by using a selective and biased analysis to the detriment of all the pieces of evidence presented to it to conclude that sexual intercourse as endured by women in the case of forced marriage caused suffering to a level of severity enabling a characterisation of CAH of OIA. Its findings do not hold up, however, in face of an impartial analysis of all the evidence.

a. Testimonies in the segment devoted to marriage

1325. As has been seen above, in the segment devoted to marriage, the Chamber heard from two experts, two witnesses, nine civil parties, and three civil parties for the impact of the crimes.[2505]

1326. **Three civil parties for the impact of the crimes:** NGET Chat, SAY Naroeun and KUL Nem (male). As has been noted above, neither NGET Chat nor SAY Naroeun mentioned in their end of hearing statement any suffering resulting from sexual intercourse during marriage.[2506] NGET Chat did not mention it at all, even when broaching the subject[2507], whereas SAY Naroeun raised the suffering she experienced at losing her virginity, an important point for a Khmer woman.[2508] Finally, KUL Nem as a man was never a victim of rape in the context of forced marriage. He never made any mention either of incidents of sexual intercourse with his wife and stated that the suffering he experienced "with her" was caused by the fact of not having had a child.[2509] In addition, he specified that his wife had been previously informed of the organisation of arranged marriages

[2505] See above, §1175-1187. See Annex B5.
[2506] See above, §1156-1188.
[2507] She raised the subject of nightly surveillance and possible discussions among the young militiamen. NGET Chat: T. 24.10.2016, **E1/488.1**, at 16.05.27 ("we should kept quiet because there were young militiamen walking nearby listening to us."); T. 25.10.2016, **E1/489.1**, before 09.09.43 "I was afraid that they would eavesdrop and hear me saying something.").
[2508] SAY Naroeun: T. 25.10.2016, **E1/489.1**, before 10.48.15 and at 10.55.19.
[2509] KUL Nem: T. 24.10.2016, **E1/488.1**, after 14.35.14 ("upon me and my wife. And such incident of having no children did not happen to only me, but also to other people. The people who got marriage on the same day as me also experienced miscarriages.").

and that it was a subject of teasing among the girls in her group.[2510] Consequently, his testimony did not allow for the finding that his wife greatly suffered as a consequence of their marriage.

1327. **2 witnesses**, namely PHAN Him and NOP Ngim: Neither considering having been subjected to rape, the Chamber could not use their testimonies to support findings about the severity of suffering endured for this crime.[2511] In effect, PHAN Him not only did not mention suffering as a result of sexual intercourse with her husband, but on the contrary spoke about the changes in their feelings over time before consummating the marriage.[2512] As for NOP Ngim, the Defence refers to its arguments developed above, relative to the fact that she specifically indicated not having been forced to have sexual intercourse with her husband.[2513]

1328. **Nine civil parties concerning facts in marriage** among whom six women, two men and one transgender woman.[2514] The Chamber retained only the testimony PREAP Sokhoeurn in its findings. As developed above, her story did not allow for the finding that she had endured suffering of a severity similar to that for the other listed CAHs.[2515] As with CHEA Deap, although stating that she had married against her will', HENG Lai Heang did not speak of any particular impact resulting from sexual intercourse within marriage.[2516]

1329. Nothing in the accounts from these men allow for the indication of any possible impact suffered by the women with whom they were married. YOS Phal did not speak about any suffering for his wife, whom he married under the regime. He stated that he did not touch her at the beginning of their marriage, allowing time to get to know and appreciate each other before living like man and wife and having children.[2517] As for SENG Soeun, he mentioned nothing about consummating the marriage when relating the facts or in his statement at the end of the hearing.[2518]

[2510] KUL Nem: T. 24.10.2016, **E1/488.1**, at 15.11.00.
[2511] Reasons for Judgement, §3649, 3661, *section 14.3.8.3 Forced sexual intercourse between spouses.*
[2512] PHAN Him: T. 31.08.2016, **E1/467.1**, around 15.41.31.
[2513] NOP Ngim: T. 05.09.2016, **E1/469.1**, 14.19.56 and at 11.12.40.
[2514] OM Yoeurn, CHEA Deap, PREAP Sokhoeurn, MOM Vun, HENG Lai Heang, PEN Sochan, SOU Sotheavy (transgender woman), SENG Soeurn (male), and YOS Phal (male).
[2515] See *above,* Cases identified in part *14.3.12.2 Impact of forced sexual intercourse on the victims,* §1313- 1323.
[2516] HENG Lai Heang: T. 19.09.2016, **E1/476.1**, at 16.12.09. She recalled not having been watched and not having consummated the marriage on the wedding night but a month later because "at that time, [they] did not like one another". T. 19.09.2016, **E1/476.1**, around 09.54.02, after 10.01.15, at 11.23.06.
[2517] YOS Phal: T. 25.08.2016, **E1/464.1**, around 10.03.14, at 10.44.39, at 10.53.07.
[2518] SENG Soeun: T. 29.08.2016, **E1/465.1**, à 10.07.42.

1330. In conclusion, even the pieces of evidence produced specifically in the segment on marriage did not enable the Chamber to conclude that the suffering endured by the women resulting from forced sexual intercourse in marriage presented the same level of severity as for the other listed CAHs. Moreover, it could not rely on this to conclude the existence of a national CPK policy of organising forced marriages.[2519]

b. Statements in Case File 002/02 not included in the trial segment relating to marriage

1331. **TK Segment**: Of the 14 witnesses and Civil Parties who spoke about marriages during the DK period, only witness CHANG Srey Mom stated that she married under the DK regime. As was shown above, although she felt compelled to have sexual intercourse with her husband on their wedding night, she repeatedly stated that he did not force her to do so, further stating that they were still living together.[2520] In her case, there can be no finding of any suffering of a particularly serious kind.

1332. **1JD Worksite Segment**: Of the 10 witnesses and Civil Parties who spoke about marriages during the DK period, only witness CHAO Lang stated that she had been forced to marry.[2521] However, she did not mention being pressured or having suffered as a result of sexual relations with her husband, and attributed her divorce in the post-DK period to an outside cause.[2522]

1333. **TTD Segment**: Of the nine witnesses and Civil Parties who spoke about marriages during the DK period, one woman stated that she had married against her will, and one married man stated that his marriage had been arranged.[2523] LING Lrysov did not mention any suffering as a result of sexual relations with her husband, but said that at their second meeting he had taken the initiative to have intercourse, although she did not provide any further details.[2524] As to MEAN Loeuy, he stated that

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[2519] See *above,* §1243-1280.
[2520] See above, §1180, 1304-1305.
[2521] Of the 10 witnesses and Civil Parties, three stated that their marriages under the DK regime were not the result of force.
[2522] CHAO Lang: T. 01.09.2015, **E1/339.1**, before 14.40.37, after 15.32.23. Divorce in 1988-1989 ("The divorce was not because of our relationship, it was because the in-law family was not satisfied with me.").
[2523] LING Lrysov: T. 20.08.2015, **E1/334.**1, around 14.03.06; MEAN Loeuy: T. 02.09.2015, **E1/340.1**, between 14.10.07 and 14.15.38.
[2524] LING Lrysov: T. 20.08.2015, **E1/334.**1, around 14.20.23.

the couple had wanted to consummate the marriage,[2525] and showed his attachment to his wife, whom he had married during the regime, by saying that her death was the cause of his suffering.[2526]

1334. **Other segments in Case 002/02:** Of the 21 witnesses and Civil Parties who stated that they were married under the regime, six are women, of whom one stated that her marriage was arranged by Angkar, two stated that they were forced to marry, and three stated that they had consented to marry.[2527] None of the women, however, mentioned any suffering as a result of sexual relations with their husbands. Not only did THUCH Sithan not mention any suffering in that regard, but when asked whether she had received an instruction of any kind, replied in the negative, saying that it was a "morality issue".[2528] KHIN Wat said she had consummated her marriage after "feeling sorry for" her husband.[2529] CHUM Samoeurn, who spoke of her fear on her wedding night as an inexperienced young Khmer woman, said that her husband had agreed to wait before consummating the marriage, and further said that three days after the wedding they never saw each other again, and thus had not had sexual relations.[2530] Furthermore, even those who stated that they had been forced to marry did not report experiencing any harm as a result of sexual relations.[2531] As regards the men's statements during the trial segments in question, of the 15 men, only 2, CHEAL Choeun and MEY Savoeun, stated that they had married against their will. None of the men, however, mentioned any harm resulting from sexual relations with their wives. CHEAL Choeun said did not say anything concerning the consummation of his marriage. MEY Savoeun stated that he had waited for a few days until he began to have feelings for his wife before he

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[2525] MEAN Loeuy: T. 02.09.2015, **E1/340.1**, before 14.20.31, between 14.10.07 and 14.15.38, at 14.17.56 ("I have learnt a lot about the virtues, good deeds, and whatever that I had to do the good things. So, after the marriage, I had to love my wife.").

[2526] MEAN Loeuy: T. 02.09.2015, **E1/340.1**, around 14.27.34, at 14.54.38.

[2527] They are MATH Sor (consent), IN Yoeung (consent), BEIT Boeurn (consent), KHIN Vat (forced marriage), CHUM Samoeurn (forced marriage) and THUCH Sithan (marriage arranged by *Angkar*).

[2528] THUCH Sithan: T. 21.11.2016, **E1/500.1**, after 15.03.46.

[2529] KHIN Vat: T. 29.07.2015, **E1/325.1**, before 15.40.44, before 15.32.40, her feeling after the marriage was consummated: "After I got married to my husband and after I spent a week there, I was asked to return. […]. So I got separated from my newlywed husband and returned to Pochentong. I could not refuse since I had to adhere to that instruction.").

[2530] CHUM Samoeurn: T. 24.06.2015, **E1/321.1**, at 14.27.20, between 14.31.44 and 14.33.31.

[2531] Although she stated that she had to consummate the marriage because if she failed to do so, she would be taken to the commune office, IN Yoeurng did not mention any suffering in the context of her intimate relationship with her husband. T. 03.02.2016, **E1/387.1**, after 15.39.49, around 14.18.10.

engaged in sexual relations with her.[2532] Hence, there is no evidence to indicate that their wives experienced a serious degree of suffering.

c. Written statements

1335. **Records from Case File 002/01:** Of the people who married under the DK regime, no woman stated that she had married against her will.[2533] In particular, neither NOEM Sem nor SA Siek, who married under the regime, mentioned any suffering as a result of sexual relations.[2534] As noted above, with regard to the men, EM Oeun and YOS Phal's statements do not support a finding by that Chamber that their wives had suffered as a result of sexual relations.[2535]

1336. **Written statements supporting the Closing Order:** Of 116 Written Records of Interview, 21 individuals stated that they had married against their will during the DK regime, five of whom testified in court during the proceedings in Case 002/02. In the remaining 16 Written Records of Interview, no one stated that they had experienced any suffering as a result of sexual relations in the context of marriage. However, some of the evidence contradicting the Chamber's findings has been deliberately disregarded.[2536]

1337. **Written statements on record from Case Files 003-004**: Of 85 Written Records of Interview of witnesses and Civil Parties from Case Files 003-004, 30 individuals stated that they had married against their will during the DK era, 17 of whom were women and 13 were men. Of the 17 women,

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[2532] MEY Savoeun: T. 17.08.2016, **E1/459.1**, after 14.10.57 and after 14.20.24.

[2533] Two of the women, SA Siek and NOEM Sem, stated that they had married under the DK regime but had given their consent.

[2534] SA Siek: T. 20.08.2012, **E1/110.1**; T. 21.08.2012, **E1/111.1**; NOEM Sem: T. 25.09.2012, **E1/126.1**.

[2535] See above, §1177-1178.

[2536] Written Record of Interview of Civil Party of KHIEV Horn, 09.09.2009, **E3/5559,** ERN EN 00377369-00377370 (They lived together like brother and sister under the regime and then had a second wedding after the regime fell, at her mother-in-law's request). Others talked about the consummation of the marriage but not about any harm that occurred as a result of sexual relations: Women: Written Record of Interview of Civil Party HORNG Orn, 09.09.2009, **E3/5558**, ERN EN 00381009-00381011 (My husband didn't have to use violence because I gave myself up to him, I had no choice; afterwards she fell in love with him and wanted to have more children with him); Written Record of Interview of Civil Party of MAO Kroeun (wife of TES Ding), 10.09.2009, **E3/5561**, ERN EN 00384790 ("I did not get pregnant during the Khmer Rouge regime because we did not have time to stay together, and my husband and I were separated."). Men: Written record of interview of civil party of TES Ding, 10.09.2009, E3/5560, ERN EN 00377171 ("My wife and I discussed what had to be done and decided that we had to accept this to stay alive."); Written record of witness interview of OUK Savuth (man), 09.06.2008, **E3/5177**, ERN EN 00242135 (after the wedding, couples would be together for three days before going back to their respective work places); Written record of witness interview of DUK Suo, 10.11.2009, **E3/408**, Q/A 94 (the Khmer Rouge do not monitor sexual relations after the wedding).

10 did not mention harm resulting from sexual relations,[2537] two stated that they did not consummate their marriage immediately, without indicating any specific harm,[2538] and one stated that they did not consummate their marriage at all.[2539] Four others stated that they had developed feelings for their spouses and had not experienced any physical or psychological issues as a result of sexual relations.[2540]Such statements stand in contradiction to the Chamber's overall findings as set out in paragraphs 3659 and 3661 of the Reasons for the Judgement under appeal, according to which, as the marriages were not entered into by consent at the time, all sexual relations between the women and their new spouses were forced and constituted rape *ipso facto*.

1338. As has just been shown and on a close examination of the evidence as a whole, it is clear that the statements of the different witnesses and Civil Parties describing their experiences and feelings do not by any means corroborate the Chamber's findings. The Chamber erred in fact and in law by taking shortcuts in its reasoning and generalising on the basis of carefully chosen individual cases which are not representative of the experiences of the majority of the individuals who married under the DK regime.

1339. In conclusion, the Chamber has demonstrated a lack of objectivity that has led it to reach erroneous overall findings with regard to any suffering resulting from sexual relations in the context of

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[2537] CHEAM Nhor, MAK Met, HUL Poeu, POV Sinoun, POV Sarom, THANG Thoeuy, TUM Nga, UK Him, MAK Met and MOM Sroeung.

[2538] Written record of witness interview of KHET Sakhan, 27.11.2013, **E3/9830**, Q/A 81-82 (her husband asked her to have sexual intercourse but did not force her to do so, two or three nights after the wedding). Written record of interview of civil party applicant of KHOEUN Choeum, 06.05.2015, **E3/9828**, Q/A 11 (she did not sleep with her husband on their wedding night but rather four or five days later.

[2539] Written record of interview of civil party applicant of CHECH Sopha, 13.10.2014, **E3/9831**, Q/A 120-121 (she did not consummate the marriage and lived with her husband for 29 days before he was killed).

[2540] Written record of interview of civil party applicant of KEO Theary, 08.12.2014, **E3/9662**, Q/A 40-43, 46-49, 55, 59, 86 They were in love with each other after having had sexual relations and now, after spending years together, they have the same feelings as other couples who married by consent; Written record of interview of civil party applicant of SREY Soeum, 16.12.2014, **E3/9826**, Q/A 169-171 ("My husband attempted to sleep with me a few times, but I refused. Having thought again and again that we had already married, I let him have his way. Q At that time, did you feel threatened? What did your husband do at first? A170: I did not feel scared because we had lived together for a while."). Written record of witness interview of SUON Yim, 24.11.2014, **E3/9829**, Q/A 29-30 ("Q: Did you have any physical or mental problems caused by having sexual intercourse with your husband out of fear? A. 29: No, I did not have any problems. Q. Did you know any other couples who had physical or mental problems caused by having sexual intercourse with people whom they did not love? A. 30: No."); Written record of interview of civil party applicant of VA Limhum, 15.09.2014, **E3/9756**, Q/A 45, 48, 50 (She loved her husband and never thought about leaving him because he was kind. After spending time together, they ended up feeling pity for each other.); Written record of interview of civil party applicant of MEAS Saran, 29.12.2014, **E3/9736**, Q/A 112 ("Q. Because you were forced to have sexual intercourse the first time, was there any impact on sexual intercourse with your second husband? A 112: No, there were no problems.").

marriage under the DK regime. The biased, selective approach taken by the Chamber in its evaluation of the evidence before it has effectively prevented it from making the appropriate finding with respect to the evidence, namely that it has neither the factual basis for a finding of rape, nor the evidence upon which to base a finding that suffering was endured to a level of severity not comparable to the other crimes against humanity that have been charged. Its erroneous findings must therefore be reversed.[2541]

1340. It will be shown that it is that same approach, selective and biased against the accused, which has led the Chamber to misrepresent and distort the evidence so as to make equally erroneous findings with regard to the alleged CPK policy of organising forced marriages. It similarly invalidates the Chamber's findings concerning the Appellant's intent to commit the CAH of OIA through forced marriage and rape.

C. Errors relating to the monitoring of the consummation of marriage

1341. Following the same one-sided, biased approach, the Chamber has also found that newly married couples were compelled to have sexual relations for the purpose of "producing" children to increase the population.[2542] The Defence refers to its discussion above regarding the non-existence of the crime of marital rape at the material time,[2543] and therefore recalls, first and foremost, that the Chamber could not convict KHIEU Samphan for a crime that did not exist between 1975 and 1979. In the alternative, the Chamber likewise could not enter a conviction for CAH/OIA of rape in the context of forced marriage based on the evidence on record in the case file. The evidence on record is not sufficient to show that the instances of rape which the Chamber considers to be established were indeed the result of a deliberate CPK policy formulated at the highest levels. It is only through the application of an erroneous approach to the evidence that the Chamber was able to find that consummation of marriage took place under coercion as a result of the measures imposed (1) that led to the rape of at least one individual (2).

1. Alleged measures to ensure that marriages were consummated

[2541] Reasons for Judgement, §3686-3694, 4303-4306, 4361-4376, 4400, 4402.
[2542] Reasons for Judgement, §3696-3700.
[2543] See above, §1281-1287.

1342. A number of measures were allegedly put in place by the authorities in order to force couples to consummate their marriages, including monitoring (a) in a coercive environment (b). The Chamber has, however, committed errors in order to make those findings.

a. Monitoring the consummation of marriage

1343. The Chamber has stated that it was "satisfied" that following the wedding ceremonies, couples were "commonly" monitored to ensure that the marriage had been consummated.[2544] To make that finding, however, the Chamber incorrectly analysed the evidence. A comprehensive examination of the evidence would not have enabled the Chamber to make such a finding beyond reasonable doubt.

- **Selective, one-sided analysis of the evidence**

1344. The Chamber erred by once again basing its findings essentially on the experience of Civil Parties who had been called upon to testify specifically during the trial segment concerning marriage, without considering whether their accounts were in fact representative of the evidence as a whole.[2545] It has thus committed an error by reaching overall findings regarding CPK policy without considering any evidence showing that the practices of some local cadre were in fact contrary to the general guidelines as set out in the official regulations relating to marriage.

1345. **Varying accounts concerning monitoring** First, the Chamber has committed a factual error by using testimony relating to the surveillance of cooperatives and work sites in general in order to reach the finding that newlyweds were subject to specific monitoring. Whilst Civil Parties OM Yoeurn, PREAP Sokhoeurn and CHUM Samoeurn do talk about militia patrols of the places where they spent the night with their respective spouses, it cannot be found that the purpose of such patrols was indeed to monitor their wedding nights.[2546] MEAS Laihour's explanation that the purpose of

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[2544] Reasons for Judgement, §3644, 3659.
[2545] Reasons for Judgement, Section *14.3.8.1 Monitoring*.
[2546] OM Yoeurn: T. 23.08.2016, **E1/462.1**, before 09.19.35 (this was at a work office where the militia came to stand guard) before 11.27.03 ("they did not think of it as important. They were staying under the house and not far from the house"), at 11.31.41 (one month later, she agreed to have sexual relations with her husband); PREAP Sokhoeurn: T. 20.10.2016, **E1/487.1**, at 14.31.27; T. 24.10.2016, **E1/488.1**, at 09.23.08 ("during the regime, […] we were under constant surveillance"); CHUM Samoeurn: T. 24.06.2015, **E1/321.1**, before 14.27.20 ("There were militias who came to eavesdrop on us, but they did nothing. I did not know whether these militias were armed because I did not see them, I only heard their footsteps.), around 14.31.44 ("I did not know what would happen if they would found out").

monitoring was to determine whether the bride and groom were performing religious rituals[2547] likewise precludes the finding that sexual relations between the newlyweds were in fact being monitored.[2548] The Chamber has committed factual and legal errors by making general findings regarding the systematic presence of militiamen for purposes of monitoring whereas the accounts on which it has based its findings are themselves quite diverse. Whilst some accounts do describe systematic monitoring, others indicate that it was only carried out in cases of marital discord, or indeed that it was general surveillance. Such is the case for HENG Lai Heang and CHANG Srey Mom, the latter having stated that she did not know the reason the militiamen were there.[2549]

1346. The effect that such monitoring had on newlywed couples also varied from case to case. Whilst some individuals stated that they had forced themselves to have sexual relations with their spouses[2550], others said that the militia's presence had prompted them not to make any noise.[2551] However, quite apart from those differing experiences, the Chamber's fundamental error lies in its failure to recognise that the militiamen's behaviour was in fact abuse rather than the result of a policy determined at the highest levels. The Chamber has committed factual and legal errors by failing to assess the consequences of the information provided concerning the militiamen who carried out the monitoring. Several Civil Parties indeed describe the militiamen as young people. This was stated by SOU Sotheavy, NGET Chat, PEN Sochan and MOM Vun, some of whom were aware of the abusive nature of the militiamen's behaviour.[2552]

[2547] Reasons for Judgement, fn 12175 (in §3641).

[2548] MEAS Laihour: T. 26.05.2015, **E1/305.1**, around 09.47.16.

[2549] HENG Lai Heang: T. 19.09.2016, **E1/476.1**, before 09.54.02 ("For those who agreed with each other, they were not monitored. But for those who did not get along with each other, whey were monitored and investigated"); CHANG Srey Mom: T. 29.01.2015, **E1/254.1**, before 10.47.53. CHANG Srey Mom stated that she was not sure whether it was being done to see if the couple was getting along or to check if they were saying bad things about *Angkar* T. 29.01.2015, **E1/254.1**, before 15.46.57.

[2550] KUL Nem: T. 24.10.2016, **E1/488.1**, after 15.08.22; CHANG Srey Mom: T. 29.01.2015, **E1/254.1**, at 10.41.56

[2551] NGET Chat: T. 25.10.2016, **E1/489.1**, before 09.09.43 (the militiamen's presence pressured them to keep silent "I was afraid that they would eavesdrop and hear me saying something"); CHAO Lang: T. 01.09.2015, **E1/339.1**, before 14.40.37 (they were being monitored by a militiaman "So my husband and I decided to keep silent and we did not dare to move our bodies").

[2552] For example, PEN Sochan stated that militiamen had been deployed during the night "to keep monitoring on the newlywed couples, whether they consummated the marriage or not. It was a game to them.": PEN Sochan: T. 12.10.2016, **E1/482.1**, after 14.40.47. MOM Vun said that she had been ordered to have sexual relations with her husband by 16- or 17-year-old militiamen who were allegedly acting on the orders of the head of the unit, a man named Sea, whom she described as someone important who behaved in an arbitrary way: MOM Vun: T. 16.09.2016, **E1/475.1**, after 13.43.34 (young militamen aged 16-17), at 14.39.02 (the instruction came from Rom and Sea), before 11.27.24 (recalling the abuses of power committed by the head of the unit, a man named Sea). NGET Chat and SOU Sotheavy testified in a similar vein: NGET Chat: T. 24.10.2016, **E1/488.1**, at 16.05.27; T. 25.10.2016, **E1/489.1**, before

1347. The testimony of CHEA Deap has been retained by the Chamber despite its lack of precision. As she did not actually see anyone, she simply said that she heard footsteps[2553], which she claimed were made by the bodyguards of the head of her workplace, without being able to substantiate that claim.[2554] Aside from the lack of detail in her testimony, due to which it cannot be ascertained whether monitoring was in fact taking place and if so, by whom, she is the only witness to mention that such monitoring occurred within her Ministry. No other witness from the Ministry of Commerce has mentioned any similar events.[2555] The Chamber thus could not reach general findings on the basis of her testimony and should at the very least have noted that hers was an isolated account.

1348. Similarly, the Chamber has misrepresented the testimony of civil party CHOU Koemlan when it accepted that she was referring to the monitoring of the newlyweds' consummation of their marriages, whereas in fact she had simply stated that she believed it was a means of listening in on their "conversations".[2556] Nor could the Chamber retain NOP Ngim's account as a basis for its finding that the monitoring of the consummation of marriage was carried out on orders from the authorities. Although the civil party stated that she was afraid of being monitored, she did not in fact see anyone and acknowledged too that she had never heard the district chief give instruction to his militiamen to go and monitor the newly-wed couples.[2557] It should also be noted that her husband, PREAP Kab, did not mention any monitoring of the consummation of marriage either, and stated that he had not received any instruction regarding what should happen after the wedding.[2558] Therefore, the Chamber erred by not taking all of the evidence into account. Its findings will be reversed.

09.09.43 (She was afraid that the young militiamen were eavesdropping at the door and that they would hear her say something, so she and her husband didn't dare speak to each other.); SOU Sotheavy: T. 23.08.2015, **E1/462.1**, after 14.39.15.

[2553] Reasons for Judgement, fn 12176 (to §3641).

[2554] CHEA Deap: T. 30.08.2016, **E1/466.1**, before 14.05.55; T. 31.08.2016, **E1/467.1**, before 10.09.38.

[2555] BEIT Boeurn: T. 28.11.2016, **E1/502.1**, around 11.24.06; PHAN Him: T. 31.08.2016, **E1/467.1**, at 15.08.51 ("No, I did not hear anything about that"); Written record of witness interview of RUOS Suy, 07.07.2015, **E3/10620**, Q/A 95.

[2556] CHOU Koemlan: T. 26.01.2015, **E1/252.1**, around 14.36.37. It should be noted that there have also been issues with the French translation.

[2557] NOP Ngim: T. 05.09.2016, **E1/469.1**, after 14.18.13.

[2558] Written record of witness interview of PREAP Kap, 03.11.2014, **E3/9818**, Q/A 53.

1349. **Monitoring reports** The Chamber has relied on the testimony of RY Pov, CHANG Srey Mom, SUN Vuth and HENG Lai Heang as well as the written statement of KOL Set to reach its finding that the militia was reporting on their monitoring to the "authorities".[2559]

1350. The Chamber erred by holding that the testimony of RY Pov was credible when he claimed that his unit had been instructed to monitor the activities of the newlyweds from units other than his own and to report back to their respective unit heads.[2560] The large number of personnel movements that such an alleged mission would entail should have led the Chamber to treat his account with greater caution. In any event, even if the Chamber considered the account credible, it should have noted that it referred solely to reports transmitted to the heads of units, that is, to the newlyweds' immediate supervisory "authorities". No evidence suggests that senior officials at the upper echelons were made aware of such practices, much less the CPK leadership.[2561]

1351. Furthermore, the Chamber has committed errors by misrepresenting the testimony given by HENG Lai Heang. She did not in fact ever say that "senior officials" received the information obtained during monitoring. She simply referred to unit "supervisors", adding that they were the ones who would summon the couple to be educated or reprimanded.[2562] An impartial examination of the evidence should have led the Chamber to take into account the testimony of those cadre who were particularly well placed to know whether or not instruction had been given and if so, by whom. The Chamber did not do so, although the evidence on the case file supported a finding that senior officials did not give instruction to carry out any such monitoring.[2563]

1352. **Role of the militia in the commune** The Chamber has also committed an error by ignoring part of the evidence on the case file. Thus, for instance, it disregarded the testimony of NEANG Ouch, the last chief of TK district. He stated that he had no knowledge of the militia engaging in the

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[2559] Reasons for Judgement, fn 12183-12185 (referring to §3643).
[2560] RY Pov: T. 12.02.2015, **E1/262.1**, before 13.54.11 (his unit head).
[2561] RY Pov: T. 12.02.2015, **E1/262.1**, before 13.54.11 (his unit head); SUN Vuth: T. 31.03.2016, **E1/412.1**, after 09.11.48 (the individuals assigned to carry out the monitoring were among those closest to the commanders).
[2562] HENG Lai Heang: T. 19.09.2016, **E1/476.1**, before 13.54.51 ("the ones who monitored them were the people from within their own units. They were assigned to monitor them. They wanted to know such information as what were their reactions, what happened between them"), and around 13.55.19.
[2563] CHUON Thy: T. 26.10.2016, **E1/490.1**, from 09.14.29. PECH Chim: T. 23.04.2015, **E1/291.1**, before 09.27.04. See also PHNOEU Yav, who claimed to have heard about it and said that the unit chiefs were the ones who sent militiamen to eavesdrop at night., T. 17.02.2015, **E1/264.1**, after 10.55.29; KHOEM Boeurn: T. 04.05.2015, **E1/296.1**, at 16.07.05.

monitoring of newlywed couples.[2564] Moreover, he explained that it was not their role: It was not the role of the commune militia to monitor the newlywed couples, "[M]ilitias were to provide security to respective communes and districts. That's all.". His statement has been corroborated by YEAN Lon, a militiaman from the CZ: "Militiamen also worked with us. But they had additional tasks to watch over people in the villages. Because people might not get along with each other or have problems with each other.".[2565]

- **Monitoring in breach of CPK principles**

1353. The Chamber has also erred in its analysis of a number of witness statements, setting aside or misrepresenting any that were inconsistent with its findings. In particular, the Chamber erred by selectively retaining parts of Duch's testimony concerning a cadre named Pang who had instructed his subordinate to spy on married couples.[2566] Although it made extensive use of his testimony in its Reasons for Judgement, the Chamber has failed to take into account Duch's statement with regard to the CPK position on such behaviour:

> "To my knowledge there were no measures to organize surveillance, but some immoral cadre spied on the married people to find out whether they were sleeping together (this was independent of the problem of forced marriages). [...] He was punished for this: he was first made to apologize to the married couples in question and then, as there were other allegations against him, he was arrested, transferred to S-21 and executed.".[2567]

1354. From his testimony, it is quite apparent that a cadre of Duch's rank would know that monitoring the marital intimacy of married couples was contrary to CPK policy and was thus a punishable offence. Several other witnesses have confirmed that this type of monitoring was an affront to the standards of morality advocated during the DK regime. THUCH Sithan, for instance, who married during the regime, explained that the issue of consummating marriage was not raised because it was perceived as a question of "morality".[2568] YEAN Lon likewise categorically denied that there was instruction regarding monitoring, stating further that it was shameful in terms of both culture and tradition.[2569] That key evidence, contradicting as it does the Chamber's thesis that the highest

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[2564] NEANG Ouch: T. 10.03.2015, **E1/274.1**, between 10.41.16 and 10.48.56.
[2565] YEAN Lon: T. 16.06.2015, **E1/317.1**, at 14.32.22. See also SOU Sotheavy: T. 24.08.2016, **E1/463.1**, between 11.02.26 and 11.06.26 ("it was a duty of the militiamen to monitor us"), at 13.35.43 ("The militiamen went under my house to conduct surveillance so it is for sure that they were assigned by the unit chiefs").
[2566] Reasons for Judgement, §3641, fn 12177.
[2567] *Duch*: Written Record of Interview, 02.12.2009, **E3/5789**, ERN EN 00414335-00414336 (emphasis added).
[2568] THUCH Sithan: T. 21.11.2016, **E1/500.1**, after 15.03.46.
[2569] YEAN Lon: T. 16.06.2015, **E1/317.1**, at 14.43.21.

echelons of the Party deliberately forced couples to consummate their marriages, should have been taken into account.

1355. There is insufficient evidence to show that monitoring was in fact advocated by the CPK as a means to ensure that newly-married couples had sexual relations and thus would produce children for *Angkar*, and does not allow the Chamber to make such a finding beyond reasonable doubt. Moreover, the testimony retained attesting to monitoring at the local level cannot be generalised as proof of a policy at the national level.

- **Statistics relating to monitoring in the case file as a whole**

1356. As was the case with other issues, it is essential to ascertain whether the accounts relating to monitoring the consummation of marriage are in fact representative. This question will be addressed through an examination of each category of evidence.

1357. **Statements obtained during the trial segment relating to marriage**: Of the 14 witnesses and Civil Parties who appeared in court during this segment of the trial, 11 stated that they had been monitored after their wedding. Seven of them specifically mentioned that they were monitored to verify whether they had consummated their marriage. Three stated that they had been monitored as part of the broader surveillance of the population, and one referred to couples being monitored only in the event that they did not get along with each other.[2570] Finally, two stated that they had not been monitored and one did not mention the issue at all. Once again, it can be seen that a majority of the individuals that testified during this trial segment said they had been monitored. In the trial segment relating to marriage, therefore, a high percentage of individuals stated that they had been monitored: 79% said they had been monitored (11 individuals), 14% said they had not been monitored (two individuals), and 7% did not say anything on the subject (one individual).[2571]

1358. **Statements obtained in Case 002/02 not included in the trial segment relating to marriage**: A review of the remaining statements in Case 002/02 offers a very different view. In fact, of 80 individuals questioned on the topic of marriage, 13 individuals or 16% stated that they had been monitored, 10 individuals or 12% were never monitored, 54 individuals or 68% did not provide

[2570] See Annexes B4 and B5.
[2571] See Annexes B4 and B5.

any relevant information on the topic, and three individuals or 4% testified concerning marriages that took place outside the temporal scope of the Case, without raising the issue.[2572]

1359. **Written statements: Case 002/01(i)**: Of the 16 witnesses and Civil Parties who mentioned marriage in their testimony, only civil party EM Oeun spoke about the monitoring of the consummation of her marriage.[2573] Hence, the percentage of individuals who were monitored may be calculated as follows: One individual or 6% was monitored, compared with 14 individuals or 88% who did not indicate that they were monitored, and one individual or 6% whose testimony was outside the temporal scope of the Case and who did not raise the issue.[2574] **Written statements supporting the Closing Order (ii)**: Of the 115 witnesses and Civil Parties who mentioned marriage under the DK regime, only nine of them or 8%, stated that they had been monitored on their wedding nights, as opposed to five individuals or 4%, who said they were not monitored, 100 individuals or 87% who did not discuss the matter, and one individual or 1%, whose mention of marriage was outside the temporal scope of the Case.[2575] **Written statements on record from Case Files 003-004 (iii)**: Of 86 Written Records of Interview of witnesses and Civil Parties on the case file in Case 002 that mentioned marriage under the DK regime, 27 individuals or 32% stated that they had been monitored, seven individuals or 8% were never monitored, 50 individuals or 58% did not provide any relevant information on the topic, and two individuals or 2% testified concerning marriages that took place outside the temporal scope of the Case.[2576]

1360. A comprehensive analysis of the evidence shows that according to witness accounts, the monitoring of the consummation of marriage was not a common practice. The focus on those accounts during the trial segment relating to marriage was the result of the selective approach taken by the Chamber, but could not lead to finding beyond reasonable doubt that the monitoring of newlyweds was

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[2572] See Annexes B4 and B6.

[2573] EM Oeun: T. 23.08.2012, **E1/113.1**, around 16.01.07. YOS Phal spoke about the topic only during his testimony before the Chamber during the trial segment relating to marriage in 002/02 and had not spoken of it in 002/01: T. 27.05.2013, **E1/197.1**.

[2574] See Annexes B4 and B7.

[2575] See Annexes B4 and B8.

[2576] More specifically, two witnesses testified concerning their own marriages in 1974, outside the temporal scope of the Case Their testimony did not enable the Chamber to reach incriminatory findings with regard to the consummation of marriage or to monitoring: PRAK Yut: Written record of witness interview, 30.09.2014, **E3/9499**, Q/A 96-97: (R 96: "No, they did not put any pressure or force us to consummate our marriage. After that, we went to work at different places."). Written Record of Witness Interview of RIEL Neang, 21.11.2014, **E3/9652**, Q/A 28 (she does not know whether she was spied on). See Annexes B4 and B9.

carried out on a nationwide scale, much less that it was a practice encouraged by the CPK. The Chamber's findings in this regard will therefore be reversed.

b. A coercive environment and forced sexual relations

1361. By generalising that couples felt they were forced to have sexual relations with their new spouses and were re-educated, threatened with death or punished when they did not do so, the Chamber has improperly made a finding that is not substantiated by the evidence on the case file.[2577]

Post-wedding arrangements

1362. In order to come to its finding of rape in the context of forced marriage, the Chamber has taken the broad view that all the arrangements made for the newlyweds is incriminatory. As recalled above, however, under the law applicable at the material time, marital rape not only did not exist, but sexual relations between spouses were perceived as a logical outcome of marriage. The Chamber has thus committed factual errors by finding that cadre arranged accommodation for the new couples and granted them leave with the deliberate intent to force them to have sexual relations. Yet, as Peg LEVINE has observed, cohabitation is an obligation for spouses in all cultures and constitutes the very meaning of marriage.[2578] A large number of witnesses and Civil Parties have confirmed that view: once the marriage had been officially celebrated, cohabitation and marital intimacy were its logical continuation.[2579]

1363. Moreover, the Chamber erred by failing to take into account the traditional Khmer context, to which the population was still firmly attached at that time. Traditional marriages were arranged by parents so that their children could start a family, and gender relations were viewed only in that context.

[2577] Reasons for Judgement, §3696.

[2578] Peg LEVINE: T. 10.10.2016, **E1/480.1**, around 15.50.16 ("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.").

[2579] PECH Chim: T. 23.04.2015, **E1/291.1**, at 09.24.36; BEIT Boeurn: T. 28.11.2016, **E1/502.1**, around 11.23.28; BEIT Boeurn: T. 28.11.2016, **E1/502.1**, around 11.23.28 "After they got married, they would go with their spouse. There was no need for such instruction because they already got married."); NOP Ngim: T. 05.09.2016, **E1/469.1**, at 11.12.40 ("If you spoke about after the marriage, what else we could do because *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."); PRAK Yut: T. 19.01.2016, **E1/378.1**, before 13.42.27 ("After the marriage, it is common sense that they had to consummate their marriage. Then, if not, what was the purpose of marriage?"); CHANG Srey Mom: T. 29.01.2015, **E1/254.1**, before 10.45.45; T. 02.02.2015, **E1/255.1**, *avant 09.29.19* "*Nous étions mari et femme. Il nous fallait nous accepter mutuellement*" [In French only, : "We were husband and wife. We had to accept each other"]; Written Record of Interview of Civil Party Appliquant KEO Theary, 08.12.2014, **E3/9662**, Q/A 40, 43.

Traditionally, the newlyweds' cohabitation and/or sexuality was alluded to only obliquely during the wedding ceremony. The notion of starting a family and having children was self-evident, as both experts noted during the trial segment relating to marriage.[2580]

Recourse to threats by the authorities/rape is beyond the scope of the Case

1364. The Chamber has misconstrued and misrepresented the evidence, unreasonably interpreting it as incriminatory, so as to reach the finding that there were threats and/or instruction to make the couples feel that they were compelled to have sexual relations with their new spouses.[2581]

1365. **Statements obtained outside the trial segment relating to marriage**: The Chamber has erroneously interpreted the testimony of PRAK Yut at the hearing as incriminatory when she responded as follows: "[The newlyweds] had to consummate their marriage. Then, if not, what was the purpose of marriage?" Her response could not reasonably be interpreted as confirming that couples were subjected to threats. Using the plain words of a country woman, she simply expressed that consummating the marriage was the next step in the marriage process.[2582] Moreover, the Chamber erred by ignoring an important section of her explanation:

> "For couples who did not consummate their marriage, I did not have any measure to enforce upon them. However, they would be brought to the district to be educated so that they could understand each other and because they were already married. In my capacity as the district chief, I did not take those couples who did not consummate their marriage away for any mistreatment or punishment at all."[2583]

1366. The Chamber has further erred by failing to take into account the witnesses' and Civil Parties' own concept of marriage. Thus, although CHANG Srey Mom stated that she was afraid she would be

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[2580] Kasumi NAKAGAWA: T. 13.09.2016, **E1/472.1**, at 11.14.27 (some women were told "to be obedient to the husband in the night of the wedding [...] one of the common or casual conversations that people before the Khmer Rouge or even now have in Cambodian society is people tended to ask about a child: "Do you have a child? How many children do you have?" It's a very common conversation, so it could be assumed that after the marriage, parents were inquiring about their daughters or son that: "Are you expecting a child? Do you have child?" etc., but I think that's the maximum of their inquiry level in regard to the reproductive health issues."). T. 14.09.2016, **E1/473.1**, before 11.06.23, (information about newly married couples' nocturnal activities could be obtained by means of questions about the possibility that the bride might be pregnant). See also Peg LEVINE: T. 10.10.2016, **E1/480.1**, before 15.53.22 ("most people said that it was just expected. I married this person and it was expected that we would have children for our family. And oftentimes there was an unexpected -- I mean, or sort of an expected, unexpressed assumption that the woman would be pregnant within the first year after marriage."

[2581] Reasons for Judgement, §3645-3646.

[2582] Reasons for Judgement, §3645, fn 12186. PRAK Yut: **E1/378.1**, before 13.42.27.

[2583] PRAK Yut: T. 19.01.2016, **E1/378.1**, at 13.47.37 (emphasis added).

killed and felt that she had had no choice but to consummate her marriage, she also stated that her fear was related to her father's death and that in any case, she and her husband were "officially" married.[2584] The Chamber has also committed an error by relying on the testimony of MAM Soeurn. Whilst he did state that those who refused to consummate their marriages could be risking their lives, the Chamber should have recognised that the witness could not have been aware of the details of post-marital monitoring, as he himself was not married at the time.[2585]

1367. **Civil party statements from the trial segment relating to marriage used by the Chamber**: The Chamber has committed several errors in its evaluation of the testimony of SAY Naroeun, OM Yoeurn, CHEA Deap, KUL Nem and PEN Sochan.

1368. For example, the Chamber has not fully appreciated the implications of the statement made by PEN Sochan. The particularly violent rape she alleges she was subjected to by her husband on the instruction of the militia make hers a special case, especially in light of the young militiamen's behaviour.[2586] According to PEN Sochan, the militiamen had a very archaic view of marriage: "...we were considered husband and wife, and that my husband had to successfully rape me." The next day, she further stated: "my husband and I became husband and wife so my husband could do whatever he wanted".[2587] Thus, a reasonable trier of fact should have noted that the violent militiamen were guided by the concept of an all-powerful husband who had the right to force his wife to carry out her conjugal duty. It is not reasonable to regard this extreme case as consistent with CPK policy.

1369. Similarly, the Chamber has relied on an incident of rape, outside the scope of the Chamber's referral, which OM Yoeurn said she was subjected to by her husband's superior, whom she described as a cruel man. That rape was allegedly the victim's punishment for failing to consummate her marriage.[2588] As noted above,[2589] rape was condemned by the CPK. It was the

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[2584] Reasons for Judgement, fn 12187 and 12196 (in §3645, 3646). CHANG Srey Mom: T. 29.01.2015, **E1/254.1**, before 10.45.45. T. 02.02.2015, **E1/255.1**, before 09.29.19. The same applies to IN Yoeung. The Chamber has ignored the fact that she and her husband got married willingly, which was also the case for other people she mentioned in her statement, T. 03.02.2016, **E1/387.1**, around 14.18.10, from 15.39.49.
[2585] MAM Soeurn: T. 28.07.2015, **E1/324.1**, at 15.56.26.
[2586] PEN Sochan: T. 12.10.2016, **E1/482.1**, at 14.35.37, at 14.40.47.
[2587] PEN Sochan: T. 12.10.2016, **E1/482.1**, before 15.44.46. T. 13.10.2016, **E1/483.1**, at 09.57.02.

[2588] Reasons for Judgement, §3658. OM Yoeurn: T. 23.08.2016, **E1/462.1**, at 13.54.30.
[2589] See above, §1173.

very antithesis of the ban on extramarital relations and of the moral behaviour advocated by the Party's revolutionary ideology and its new conception of women. OM Yoeurn's experience was thus in no way representative of CPK policy.

1370. Kasumi NAKAGAWA discussed the abuse of power by local authorities, which she analysed as being the failure of the senior leadership to enforce "the policy to protect women".[2590] The Chamber should also have recognised that this type of behaviour was in flagrant disregard of CPK policy. Instead, in a biased and improper attempt to condemn the Appellant at all costs, the Chamber has used the rape in question – which it knew was outside its scope – on the spurious pretext of "understanding the general context" in which marriages took place. Indeed, while committing both factual and legal errors, the Chamber has used the rape in question to make the finding that the elements constituting the crime of rape were indeed present together and established the threats made by the authorities (their intentional behaviour) for the purpose of forcing couples to have sexual relations.[2591] Its findings must be reversed.

1371. **Statements from Case 002/02 that were not used by the Chamber** As discussed above, several witnesses stated that traditionally, the duty to live together and have sexual relations after marriage (without duress) was self-evident.[2592]

1372. The Chamber erred by failing to note that even the Civil Parties who stated that they were married against their will (NOP Ngim, PHAN Him and SENG Soeun) did not mention consummating their marriages under duress.[2593] Although PREAP Sokhoeurn testified that her husband raped her, she analysed it as having been a voluntary act on her husband's part. She did not testify to any outside

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[2590] Kasumi NAKAGAWA: T. 14.09.2016, **E1/473.1**, at 14.15.32 ("Any sexual violence is an abuse of power."), at 14.13.24 ("there was a strict policy against rape during the DK but that perpetrators were not necessarily punished because higher authorities didn't always know about the crime being committed? A. Yes, that's correct that there was a very strict policy and everybody knew about it. I think that the higher authority failed to implement that policy. So the policy to protect women, was used to attack women.") See also Reasons for Judgement, §3562.

[2591] Reasons for Judgement, §3652 and 3535. The Chamber has likewise erred by finding that the rape in question, outside the scope of the proceedings, was the source of the Civil Party's acceptance of sexual relations with her husband, whilst she in fact stated that she had not received any instruction to do so: OM Yoeurn: T. 23.08.2016, **E1/462.1**, around 09.10.28, but on the other hand, and more importantly, she stated that those relations took place "one or two months later", T. 23.08.2016, **E1/462.1**, at 13.31.20.

[2592] See above, §1362.

[2593] PHAN Him: T. 31.08.2016, **E1/467.1**, around 15.41.31 (after getting to know him and talking to him, she began to feel pity for him and they began to live as husband and wife.); NOP Ngim: T. 05.09.2016, **E1/469.1**, around 14.19.56 and at 11.12.40.

threats or instruction to do so.[2594] The Chamber has also disregarded a number of statements by witnesses and Civil Parties that contradict its findings. For example, although PRAK Doeun spoke of monitoring by the militia, he stated that the new couples were not punished, and that *Angkar* had advised them to consummate their marriages and live together.[2595] Similarly, the Chamber has been very careful not to recognise that, like CHANG Srey Mom, NOP Ngim and PHAN Him, SREY Soeum explained that she had accepted sexual relations with her husband because they were already husband and wife. She added that she did not "feel scared" since they had been living together for some time.[2596]

1373. The Chamber has also committed a factual error by ignoring the findings reached by expert witness Peg LEVINE, which attest that an objective and unbiased selection would lead to a different finding than that made by the Chamber.[2597]

Concealment of non-consummation to avoid harmful consequences

1374. The Chamber has committed factual and legal errors by finding that the non-consummation of marriage had to be hidden in order to avoid harmful consequences. Not only is it relying on only two civil party statements, those of CHUM Samoeurn and YOS Phal, but it has extrapolated from them without taking the Khmer context into account.[2598] CHUM Samoeurn wanted to hide the fact that she had refused to have sexual relations after her wedding, even though she did not know what the consequences would be.[2599] YOS Phal stated that he pretended to love his wife during the regime, but then continued to live with her due to family pressure.[2600] The Chamber erred by failing to recognise that in Khmer culture, romantic love is not paramount, and that other factors play a

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[2594] PREAP Sokhoeurn: 20.10.2016, **E1/487.1**, around 14.38.09; T. 24.10.2016, **E1/488.1**, before 11.23.27, after 13.51.22 (no one ordered her to sleep with her husband, but he raped her and then consoled her, saying that they were already husband and wife).
[2595] PRAK Doeun: T. 02.12.2015, **E1/361.1**, after 15.58.14.
[2596] Written Record of Interview of Civil Party Applicant SREY Soeum, 16.12.2014, **E3/9826,** Q/A 169-171.
[2597] Peg LEVINE: T. 10.10.2016, **E1/480.1**, before 15.51.24 ("Nobody in my sample said that the next day someone asked them did they have sex or not. No-one in my sample were threatened with death if they did not comply to the request. So I can only speak from my sample.").
[2598] Reasons for Judgement, §3647.
[2599] Reasons for Judgement, §3657, fn 12200.
[2600] YOS Phal: T. 25.08.2016, **E1/464.1**, at 10.53.07 (family pressure to live together after the regime), at 11.05.33 (pressure from the regime). See also OM Yoeurn: T. 23.08.2015, **E1/462.1**, after 09.31.31 ("My parents, parents-in-law and the elders in the village tried to convince me to accept him. We reunited. However, he passed away three years later.").

decisive role in the couple's life together. Moreover, that is what was explained by expert witness NAKAGAWA.[2601]

Procedures for monitoring couples who failed to consummate their marriages

1375. The Chamber erred by finding that "in general", a monitoring procedure was implemented whereby the authorities would summon any couples who did not consummate their marriages to talk to them, either individually or together.[2602] To reach that finding, it has relied on statements made by YOU Vann, PRAK Yut and SUN Vuth. However, as noted above, the Chamber should have considered that not one of those three witnesses mentioned any measures being taken against newlyweds who had not consummated their marriages.[2603] Several statements obtained on the witness stand confirm this point.[2604]

1376. Moreover, as discussed above, although some cadre mentioned that it was the individuals' direct superiors who monitored any couples that did not get along, they further stated that the superiors acted as counsellors to the newlyweds, due to their age and positions. Their task was to ensure that the arranged couples got along well.[2605] Accordingly, the Chamber erred by failing to take into account the testimony of those witnesses who talked about advice regarding the commitments of marriage rather than punishment.[2606] That testimony, however, was consistent with the comments and recommendations some cadre were reported to have made during the celebration of the wedding ceremonies.

[2601] Kasumi NAKAGAWA: T. 14.09.2016, **E1/473.1**, at 10.39.56, after 15.41.57.
[2602] Reasons for Judgement, §3656.
[2603] SUN Vuth: T. 31.03.2016, **E1/412.1**, after 09.14.02, before 09.39.56 (he gave the example of a couple who separated because they did not get along, without experiencing any ill-treatment); YOU Vann: T. 14.01.2016, **E1/376.1**, before 15.40.24; PRAK Yut: T. 19.01.2016, **E1/378.1**, before 13.42.27, at 13.47.37.
[2604] See for example PRAK Doeun: T. 02.12.2015, **E1/361.1**, after 15.58.14 (the new couples weren't punished, *Angkar* advised them to consummate their marriages and to live together). Witnesses from TK: KHOEM Boeun: T. 04.05.2015, **E1/296.1**, at 09.59.35; PHNOEU Yav: T. 17.02.2015, **E1/264.1**, after 14.12.43 (the newlyweds were advised to consummate their marriages, but no one was sent to prison because they did not get along); NEANG Ouch: T. 11.03.2015, **E1/275.1**, before 11.35.01 (the witness spoke about the case of a couple that did not get along, and to his knowledge, the measures taken against them consisted simply of advice from their respective unit chiefs so that they would live together again).
[2605] See above, "Monitoring reports" ,§1349-1351. HENG Lai Heang: T. 19.09.2016, **E1/476.1**, after 13.55.19; PECH Chim: T. 23.04.2015, **E1/291.1**, before 09.27.04.
[2606] HENG Lai Heang: T. 19.09.2016, **E1/476.1**, after 13.55.19; PECH Chim: T. 23.04.2015, **E1/291.1**, before 09.27.04.

1377. In light of all of the foregoing reasons, the Chamber could not find beyond reasonable doubt that the CPK had adopted measures intended to force newly married couples to have sexual relations. Its finding must therefore be sanctioned.

2. Errors concerning the findings relating to instances of rape established in the Case File

1378. The Chamber has committed a series of errors regarding the instances of rape that it considers as established in the context of marriage.[2607] Not only is its reasoning unclear with respect to the instances of rape established (a), but an assessment of the evidence as a whole did not allow the Chamber to find that the CPK intended in fact to adopt the behaviour charged (b). As a result, the accumulation of errors has entirely distorted the findings of the Chamber (c).

a. Errors regarding the established instances of "rape" and representativity

1379. The Chamber has committed factual and legal errors by failing to be clear as to which instances of rape it considers to be established in the Reasons for the Judgement under appeal. As a result, the Defence has had to search through the section relating to factual findings on the regulation of marriage. The present review will thus first focus on the instance considered to have been established as well as the others set out in section "*14.3.8.3. Forced sexual intercourse between spouses*".

- **Instance of rape "established" at TK**

1380. The Chamber has found that the evidence before it demonstrates "at least one instance of rape in the context of forced marriage at the Tram Kak Cooperatives".[2608] That is the only instance of the Chamber finding that "rape" had been established. However, through its broad and misleading observations, it appears to indicate that there were several such instances. In fact, the Chamber was only able to identify one instance to support its findings, that of CHANG Srey Mom.[2609] As noted above, she was the only individual in the TK trial segment to have stated that she married against her will. Her statement, however, did not support the finding that her rape had been established. Indeed, despite the surveillance of the militiamen, CHANG Srey Mom explained: "My husband, he did not force upon me, but we decided to get along, to be together. […]We had to decide to

[2607] Reasons for Judgement, §3696-3698.
[2608] Reasons for Judgement, §3674 (emphasis added).
[2609] Reasons for Judgement, fn 12260 (to §3674) referring to §3673, fn 12256.

follow and to agree and to be together regardless whether there was love in between the couple. Although we physically stayed together as a husband and wife, but inside, our feeling was different [(sic)]".[2610] In her case, the Chamber could not find that she had been raped because she subsequently stated that she had never been forced into marriage and that she was still living in harmony with her husband, whom she had married during the regime, and their children.[2611] The Chamber has therefore erred by misrepresenting the content of her testimony and its findings will be invalidated.

- **Other instances set out in *section "14.3.8.3. Forced sexual intercourse between spouses"***

1381. In this section of the Reasons for Judgement, the Chamber has used several pieces of evidence to make the finding that forced sexual intercourse did indeed take place in the context of forced marriage. The Chamber has stated that it is thus "satisfied" that the women cited in the section in question, namely OM Yoeurn, MOM Vun, PREAP Sokhoeurn, PEN Sochan, SOU Sotheavy, CHEA Deap and NOP Ngim, with the exception of PHAN Him, had been forced to consummate their marriages. In the Chamber's view, establishing the absence of consent to the marriage at the outset was sufficient to find *ipso facto* that there had been forced sexual intercourse when the marriage was consummated.[2612] The evidence, however, does not enable it to reach such a determination beyond reasonable doubt. Not only has the Chamber erred in its assessment of the leading Civil Parties' credibility, which the Defence has challenged, but also in its approach to the remainder of the relevant evidence.

1382. **Civil Parties who testified during the trial segment relating to marriage and mentioned rape.** The Defence raised its concerns as to the credibility and representativity of the three Civil Parties OM Yoeurn, MOM Vun and PREAP Sokhoeurn from the outset in its CB 002/02. The Chamber has wrongly dismissed all of the Defence's concerns, without stating its grounds.[2613] However, the Chamber has failed to justify its view that the accounts given by the Civil Parties are representative of CPK policy, whilst a comparison with the other evidence shows the extent to which their

[2610] CHANG Srey Mom: T. 29.01.2015, **E1/254.1**, around 10.49.52. T. 02.02.2015, **E1/255.1**, before 09.29.19.
[2611] CHANG Srey Mom: T. 29.01.2015, **E1/254.1**, around 10.49.52. T. 02.02.2015, **E1/255.1**, before 09.29.19. See above, §1179-1188, see CHANG Srey Mom.
[2612] Reasons for Judgement, §3648-3661.
[2613] Reasons for Judgement, §3648-3649.

experiences are in fact far from the norm.[2614] The Chamber erred by validating that selection of Civil Parties by the Prosecution and/or the lawyers for the Civil Parties and has thus failed to act in accordance with its duty of impartiality.

1383. **Double standard in the assessment of evidence**: The Defence recalls that reasonable triers of fact are bound by their obligation to respect the fundamental principles of fairness and justice, an obligation that requires them to apply the same standards when assessing evidence, whether incriminatory or exculpatory. That is not what the Chamber has done, as it has systematically rejected all the statements given by cadre except where they mention evidence that it considers as incriminatory. The argument used to discard them, that the cadre allegedly tend to minimise their own responsibility with respect to marriages, is not tenable in light of the abundant corroborative evidence on the Case File. In contrast, the Chamber has systematically accepted the credibility of all of the statements made by Civil Parties, without genuinely comparing those statements with the rest of the evidence and without ever noting that as Civil Parties to the proceedings, they have a vested interest in the Appellant's conviction. The inconsistencies in their statements have never been noted, nor has the isolated or uncorroborated nature of the events to which they refer.

1384. The Chamber erred in its contention that the Defence had had the opportunity to question the Civil Parties, without noting that the Civil Parties were assisted by counsel, had access to the case file and had been prepared in advance by their counsel prior to their appearances before the court. The two Defence teams, although defending two separate Accused, were required to share the time allocated to them for their questioning, irrespective of any interruptions caused by the different parties or the Judges.[2615]

1385. In its approach, the Chamber has not complied with the principles that it stated in §3825 of the Reasons for Judgement would be adopted in its evaluation of civil party statements. It should have carefully considered those statements on a case-by-case basis, verifying inconsistencies as regards essential facts, ascertaining whether the statements of the cited person might have been influenced by any potential hidden agenda, and noting the existence of evidence that corroborates the content of their statements, together with all the relevant circumstances. Such has not been the case.

[2614] CB 002/02, §2327.

[2615] See for example, PEN Sochan: T. 13.10.2016, **E1/483.1**, between 09.15.16 and 11.56.52 (questioning for both defence teams).

1386. Similarly, it is significant to also recognise the extent to which the Chamber has been inclined to ignore the omissions and belated, last-minute corrections to their statements on such vital points as alleged rape or the death of their loved ones.[2616] Thus the Chamber has committed a factual and legal error by overlooking the flimsiness of the explanation given by OM Yoeurn, who stated that she "forgot" to mention the rape committed by her husband's chief, while at the same time maintaining, on the day of her appearance in court, that it is an unforgettable event in a woman's life.[2617] In addition to her belated testimony concerning her rape, her account was unclear on a number of points, particularly as regards when she had first had sexual intercourse with her husband. The Chamber has nevertheless considered that those were minor discrepancies that did not affect her overall credibility.[2618] The very fact that the Chamber was able to find that the circumstances and details of the rapes on which the conviction was based were immaterial is in and of itself the clearest demonstration of the bias that has characterised its examination of the evidence. Its findings must therefore be reversed.

1387. Following the same biased approach, the Chamber has reproached the Defence for misrepresenting evidence and has dismissed its arguments challenging the credibility and reliability of PREAP Sokhoeurn's testimony as having no basis.[2619] The Defence, however, was simply underlining the fact that the civil party had been encouraged to speak bluntly about the rape in question, a rape that had only been mentioned at a late stage in the proceedings: "I was told to speak it out and not to feel shy about the rape. I was told that if I still feel shy then there would be nothing as evidence. And for that reason, I speak everything from the beginning."[2620] The Chamber has also committed factual and legal errors by misrepresenting and then distorting the same Civil Party's statements in its findings as regards the measures taken against PREAP Sokhoeurn so that she would have sexual

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[2616] OM Yoeurn: T. 23.08.2015, **E1/462.1**, à 13.56.43 [in French]. MOM Vun: T. 20.09.2016, **E1/477.1**, before 09.41.44 ("I forgot what I told them"), before 09.44.00 ("I didn't include the loss of my husband and my children because I didn't remember at the time").

[2617] In spite of the intervention of her national lawyer, this was clear in the Khmer version of her Civil Party Application. Civil Party Application of OM Yoeurn, 04.08.2009, **E3/6011**, ERN EN 00891277 ("Military Chairman Than then summoned me for instruction and he threatened me with the threat of being killed because they said that I had associated with traitorous elements I accepted the marriage coerced by my husband and others. emphasis added.) OM Yoeurn: T. 23.08.2015, **E1/462.1**, at 13.56.43, due to issues with the French translation, please see the original version in Khmer, p. 53, L. 8-10.

[2618] Reasons for Judgement, §3649.

[2619] Reasons for Judgement, §3649.

[2620] PREAP Sokhoeurn: T. 24.10.2016, **E1/488.1**, at 11.31.01.

intercourse with her husband.[2621] In fact, she never said that she had been "threatened by the elderly cadres". She simply talked about a discussion with an elderly couple, stating that she herself asked the woman not to go away and "chit-chatted" with her because she could not sleep alone.[2622] Furthermore, the Chamber has been silent regarding the fact that she repeatedly acknowledged that she was not aware of any instruction to have sexual intercourse that her husband might have received, adding that he had acted in his own interests and that she herself had not been ordered to have sexual intercourse with him.[2623] As for the other couples, many of those who had been forced to marry got along well and lived together in harmony after the wedding.[2624]

1388. The Chamber has also erred by disregarding the many contradictions in MOM Vun's statement, which it once more considers as being minor discrepancies. Even if her account is accepted as credible, however, the singular nature of her experience did not allow the Chamber to reach general findings as regards CPK policy. The conduct of the cadre who victimised her as she stated clearly breached all the rules of morality advocated by the CPK and should have led the Chamber to find that local cadre had acted abusively.[2625] As noted above, it is clear that such conduct was an abuse of power on the part of the cadre in question, and undermined CPK policy regarding the protection of women.[2626]

1389. In any event, quite apart from the contradictions and belated new evidence, the Chamber could not base its general findings on those narratives, which were chosen because of their exceptional nature. Therefore, it could not find beyond reasonable doubt that acts of rape were committed in the context of forced marriage throughout the country as the result of an intent on the part of the CPK and its members at the highest echelons.

b. Other evidence used by the Chamber

[2621] Reasons for Judgement, §3653.
[2622] PREAP Sokhoeurn: T. 20.10.2016, **E1/487.1**, après 14.35.38 [French].
[2623] PREAP Sokhoeurn: T. 20.10.2016, **E1/487.1**, at 15.30.51. T. 24.10.2016, **E1/488.1**, after 09.14.50, before 11.23.27, after 13.51.22.
[2624] PREAP Sokhoeurn: T. 24.10.2016, **E1/488.1**, before 09.37.04.
[2625] MOM Vun: T. 16.09.2016, **E1/475.1**, before 11.23.13. Not only was she allegedly forced to have sexual intercourse in front of young militiamen aged sixteen or seventeen, but before her marriage, she had also allegedly been raped by five unknown men who threatened to kill her if she ever disclosed that rape.
[2626] See above, §1262-1263.

1390. **Other evidence:** As noted above, the Chamber has failed to take into account the media coverage of PEN Sochan's story, which attests to its singular, extreme character and which should have led the Chamber to exercise greater caution when assessing its credibility.[2627] No reasonable trier of fact would have admitted such evidence nor would they have used it as the basis for any general findings with respect to marriage under the DK regime. The Chamber has similarly committed factual and legal errors by using civil party SOU Sotheavy's individual story as the basis for its findings with respect to forced sexual relations in the context of marriage.[2628] Indeed, she herself has stated that the fact that she was a transgender woman exacerbated the local cadre's abusive conduct. Furthermore, her statements regarding the circumstances surrounding sexual relations with her spouse, with the assistance of a village chief with whom she was close, were particularly atypical.[2629] Her account thus cannot be considered as representative at the national level.

1391. With respect to CHEA Deap, simply the fact that she did not consent to her marriage satisfied the Chamber that the consummation of her marriage was forced.[2630] However, that assessment is incorrect in view of the Civil Party's own statements that it was her husband's "choice" that they have sexual relations, which occurred only during their second meeting and without any mention of a context of fear or monitoring.[2631] On the basis of her statements, the Chamber could not reach the finding that her sexual relations with her husband had been forced.

1392. The Defence infers from the Chamber's phrasing of its finding that all the women mentioned in this section had been forced to consummate their marriages, that this also includes NOP Ngim.[2632] However, contrary to the Chamber's findings and as noted above, NOP Ngim clearly stated that her sexual relations had been consensual: "Personally, I was not forced. We did not force one another.".[2633]

[2627] See above, §1309.
[2628] Reasons for Judgement, §3657, fn 12225.
[2629] SOU Sotheavy: **E1/462.1**, around 15.26.40, before 14.35.29.
[2630] Reasons for Judgement, §3659, 3661, 3655 (fn 12220).
[2631] CHEA Deap: T. 30.08.2016, **E1/466.1**, around 14.07.26; T. 31.08.2016, **E1/467.1**, at 10.06.20. The Civil Party further stated, with regard to the first night when nothing happened: "I did not consummate with my husband since I was afraid of both the militiamen and my husband. I did not dare to make any sound", T. 30.08.2016, **E1/466.1**, at 14.05.55.
[2632] Reasons for Judgement, §3659, 3661, 3657 (fn 12226).
[2633] NOP Ngim: T. 05.09.2016, **E1/469.1**, 14.19.56. As the Chamber has acknowledged, the instruction from the upper echelons were to advise new couples "to live together happily", Reasons for Judgement, §3657, fn 12226.

1393. **Expert testimony presented during the trial segment relating to marriage:** The Chamber has drawn on the expert testimony of Kasumi NAKAGAWA, who held that in so far as the individuals concerned had not consented to the marriage, its consummation had not been freely consented to either.[2634] The Chamber has committed a factual and legal error by adopting that finding unchanged, because it failed in its obligation to legally characterise the facts in respect of the law as it existed at the time of the facts charged. Furthermore, the Chamber recalled in §3533 of the Reasons for Judgement that the expert witness had confirmed that her first two research projects were "biased" in that they had been designed to document the accounts of men and women who had been victims of sexual violence under the Democratic Kampuchea regime. Finally, and most importantly, as discussed above, several witnesses and Civil Parties who initially married against their will stated that they had not been coerced into consummating their marriages.[2635]

1394. In light of the totality of the foregoing evidence, the Chamber could not conclude beyond reasonable doubt that all the women had been forced to consummate their marriages with their new spouses in the context of marriage.[2636] Its findings will therefore be reversed.

c. Subsequent errors relating to the existence of a criminal policy

1395. The errors that the Chamber has accumulated in its analysis of the evidence relating to marriage have flawed the totality of its findings. No reasonable trier of fact could conclude that the accounts retained by the Chamber were indeed reliable and representative. The fact that there were forced marriages and even rapes in DK during that period is not sufficient to prove that a CPK policy existed that was designed to force members of the population to marry against their will and to coerce couples into having sexual relations so as to produce children and thereby increase the

[2634] Reasons for Judgement, §3654.
[2635] For example: BEIT Boeurn: T. 28.11.2016, **E1/502.1**, around 11.23.28 ("After they got married, they would go with their spouse. There was no need for such instruction because they already got married."); PHAN Him: T. 31.08.2016, **E1/467.1**, around 15.41.31 (after getting to know him and talking to him, she began to feel pity for him and they began to live as husband and wife.); NOP Ngim: T. 05.09.2016, E1/469.1, around 14.19.56 and at 11.12.40. T. 05.09.2016, **E1/469.1**, around 14.19.56 and at 11.12.40; MEAN Loeuy: T. 02.09.2015, **E1/340.1**, before 14.20.31 (he and his wife had consented to consummate their marriage); LING Lrysov: T. 20.08.2015, **E1/334.1**, around 14.20.23 (the first time she had sexual intercourse with her husband was at the latter's request during their second meeting, without mentioning whether she had done it unwillingly). See also Peg LEVINE: T. 10.10.2016, **E1/480.1**, before 15.51.24 (no one in her sample was threatened with death if they did not obey the instructions to consummate the marriage).
[2636] Reasons for Judgement, §3696-3698.

population, in the unlikely and even absurd aim of providing the country with soldiers to fight against Vietnam.

1396. Likewise, an impartial, comprehensive assessment of the totality of the evidence could not support the finding that instruction was issued by CPK leadership to monitor couples, so as to force them to have sexual relations. Finally, and most importantly, an objective analysis of the evidence as a whole could not support the finding that there was behaviour with the intent to force people to marry and force them to consummate their marriages so as to produce children for *Angkar*.

1397. The Chamber has committed grave errors in its assessment of evidence in order to substantiate its unreasonable findings. It incorrectly set aside the official CPK documentation that sets out the principle of consent in marriage. In an equally biased and arbitrary manner, it rejected all the statements of former cadre that corroborated those principles and ignored the testimony of witnesses whose experiences diverged from the Chamber's findings. The Chamber has also taken an incorrect approach to evidence in that it has failed to conduct the kind of comprehensive confrontation of the evidence that is needed when analysing national policy.

1398. Finally, the Chamber has systematically misrepresented the exculpatory evidence that prevented it from reaching the only reasonable finding possible: under the DK regime, the regulations relating to marriage stipulated that the future couple give their consent. Any marriage that was conducted locally that breached that provision was in fact contrary to CPK policy. All of the Chamber's findings, whether with respect to forced marriage or to rape as the CAH of OIA will therefore be reversed by the Supreme Court.[2637]

Part IV. ERRORS CONCERNING THE COMMON PURPOSE

Title I. ERRORS CONCERNING THE CPK's SOCIALIST REVOLUTION PROJECT

1399. The 1970s were marked by the cold war, a period where countries carried on a ferocious ideological battle opposing the American and Soviet blocks. The geopolitical context may only be analysed by reference to these two opposing camps. In Asia and in Africa, in States newly-independent and desirous of turning the page in their history, there was the need to write a new page with non-aligned nations. In these countries, socialism was a strong line of thinking which had often been in the foundation of the struggle for independence such as in Cambodia. The damage caused by the

[2637] Reasons for Judgment, §3686-3694, 4303-4306, 4361-4376, 4400, 4402.

American bombing of Cambodia in their war with Vietnam and their support for the regime of LON Nol had produced a very strong rejection of everything that could be considered as foreign interference by the new KR regime. This desire to install a new system within a socialist revolution was conditioned by this distinctive context which the Chamber unfortunately failed to take into account.

1400. Right from the start of the investigation, the CIJ conceded that the CPK's leaders' project "was not entirely criminal in nature".[2638] In the same way as for its findings in Case 002/01 where it indicted that the project "was not in itself necessarily or entirely criminal",[2639] the Chamber equally observed that the "common purpose does not have as its primary objective the commission of crimes, as such, and cannot therefore "amount to" such under the applicable law".[2640] Nevertheless, by a series of errors in law in its approach to the evidence in the case file (chapter I) and errors of fact in its interpretation of the common project (chapter II), the Chamber concluded that implementing the CPK's political project inevitably passed by criminal policies.

Chapter I. ERRORS IN LAW

1401. The Chamber erred in law in its approach to the CPK's common purpose. First, although it recalled in paragraph § 3728 of the Reasons for Judgement the extent of the *saisine* in line with the CO and its own severance decision,[2641] in reality it made findings in breach of its *saisine*, findings which should be dismissed. These errors developed in the part relative to the *saisine* obviously have an effect on the way in which the Chamber defined the common purpose.[2642] Although it noted that it should only examine the implementation of the population movement limiting itself "to the treatment of the Cham during the movement of the population out of the Central (old North), Southwest, West and East Zones "from the latter part of 1975 until some time in 1977" (MOP Phase Two),[2643] the Chamber went beyond this and what is more judged a second time facts for which KHIEU Samphan has already been sentenced in Case 002/01.[2644] This same overstepping is

[2638] CO, §1524.
[2639] 002/01 Judgement, 07.08.2014, §778.
[2640] Reasons for Judgement, §3743.
[2641] Annex to Decision **E301/9/1**, pertaining to new severance of proceedings in Case File No. 002, §2 i) and 3 i).
[2642] See above, §380-549.
[2643] Reasons for Judgement, §3728.
[2644] See above, §544-546.

to be regretted in its examination of "The targeting of specific groups, including the Cham and Vietnamese".[2645]

1402. Moreover, besides the geographic and temporal *saisine*, the Chamber also erred in using OC facts for judging crimes established in Case 002/02. This was the situation for a case of rape outside marriage which was used to conclude for a context of coercion in direct contradiction of the CO and the Chamber's own decision on the question of rape.[2646] In the same way, the Chamber recalled that its examination of the creation and use of the cooperatives and worksites should be limited to the cooperatives in TK, at the TTD, at the 1JD Worksite and at the KCA,[2647] but it made findings concerning crimes beyond those related to these sites.[2648] As a result, all the findings reached outside the *saisine* should be dismissed.[2649]

1403. As has been recalled above, a court's respect for the scope of the *saisine* is of the utmost importance for a fair trial.[2650] This violation by the Chamber constitutes an error in law which entailed an undeniable prejudice for the Appellant. He was not, in effect, in a position to mount an effective defence and was finally condemned on grounds to which he should not have been asked to respond.

1404. To reach its findings pertaining to the common purpose, the Chamber presented its methodology: check whether the "common purpose as charged by the Closing Order existed, before examining the 'policies' pursuant to which the common purpose is charged to have been implemented" and then see "whether the crimes established at the crime base (as defined by the Closing Order) are attributable to the relevant policy and were therefore perpetrated in furtherance or implementation of the common purpose".[2651]

1405. In addition, the Chamber was supposed to submit to adversarial debate the arguments of the two parties relative to the CPK's political project. Therefore, it was required to carry out an impartial examination of the pieces of evidence put forward by the parties at the time of their final findings and during the trial, in particular using questioning and hearings relative to key documents. The

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[2645] Reasons for Judgement, §3728. See above, §435-438, 517-521, 538-549.
[2646] See above, §1262-1263.
[2647] Reasons for Judgement, §3728.
[2648] Reasons for Judgement, §3728.
[2649] See above, §469-470, §474, §480-481, §483, §486, §489, §492-494, §499, §504, §510, §513, §516.
[2650] See above, §351-366, §440-444, §459-464.
[2651] Reasons for Judgement, §3732.

Reasons for Judgement show that the Chamber failed in its duty to examine objectively and without prejudice the facts, testimonies and documents from the CPK. Its findings concerning what it qualified as the CPK's socialist revolution project do not correspond to what emerges from an impartial examination of the evidence. We shall see below that the Chamber committed the same errors when it proceeded with its analysis of the policies.[2652]

1406. The errors in law committed relative to the facts in Case 002/02 tarnished its examination of the common purpose and the findings it made from its implementation. In effect, it is not insignificant to note that before reaching a decision on the question of knowing whether the common purpose implied the perpetration of crimes, the Chamber concludes that although it "does not have as its primary objective the commission of crimes [...] the successful implementation of the common purpose – and therefore the transformation of the country into a pure, revolutionary society – 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".[2653] This demonstrates that the Chamber did not carry out an impartial examination of the pieces of evidence relative to the CPK's policy, but rather in the light of the crimes for which it had been seised. According to the Chamber's analysis, the existence of crimes is the proof of the existence of a criminal policy, which amounts to analysing the evidence by seeking the confirmation of an initial postulate. The subsequently announced examination of the policies to know whether they implied the commission of crimes no longer needed to be carried out.

1407. It follows that the errors in law relative to the *saisine* and an incorrect approach to the evidence had an impact on the manner in which the Chamber defined the common purpose. Its erroneous findings should be annulled.[2654]

Chapter II. ERRORS IN FACT

1408. The Chamber's erroneous procedure is the result of a hypothesis. It thus created the basis for criminal policies using a distorted presentation of the political relations with Vietnam (Section I) and the content of the CPK's socialist revolution project (Section II). These are two erroneous

[2652] See below, §1438-1447.
[2653] Reasons for Judgement, §3743.
[2654] Reasons for Judgement, §3733-3743.

foundations on which the Chamber then built its hypothesis of a common purpose which implied the commission of crimes.

Section I. POLITICAL RELATIONS WITH VIETNAM BEFORE 17.04.1975

1409. The Chamber used its analysis of the political relations with Vietnam prior to April 1975 to create the basis of a CPK policy relative to the Vietnamese.[2655] Although their analysis enables understanding of the areas of friction between the two revolutionary movements and the reasons for an escalation in tensions leading to armed hostility, the Chamber did not show how this could be described as a policy directed against the Vietnamese.

1410. It evoked the "long-standing animosity between the Khmers and Vietnamese" referring to an extract from the Black Paper.[2656] However, this extract simply relates historical facts dating from the 2nd century when the Vietnamese annexed the Champa. These facts were used as propaganda whereas Vietnam had, a little earlier in December 1977, attacked Cambodia militarily. The Chamber should have been able to take things properly into consideration and distinguish between propaganda in times of armed hostility and a policy targeting the Vietnamese living in Cambodia.

1411. It committed an error in considering that "the CPK leaders resolved that Vietnam was the long-term "acute enemy" [unofficial translation] of Kampuchea as early as September 1971 at the Third CPK Congress".[2657] To support this observation, the Chamber cited the book by KHIEU Samphan and the one by Stephen MORRIS.[2658] It did not, however, explain why it had retained the term of "acute enemy" used only in the book by Stephen MORRIS which itself is based on a book by Stephen HEDER.[2659] On the other hand, KHIEU Samphan, who was present at the aforementioned Congress, gave a very different position from the CPK at the time:

> "The 1971 Congress (I attended) determined that: 'Vietnam is a friend with whom there is a contradiction'. The determination was the determination of a clear political line toward Vietnam, meaning they were not comrades in arms, but neither were they enemies. It was imperative to implement the principle of struggle in solidarity struggle for solidarity. When Vietnam had been a

[2655] Reasons for Judgement, §3382 -3385.
[2656] Reasons for Judgement, §3382.
[2657] Reasons for Judgement, §3382.
[2658] Reasons for Judgement, §3382 referring to §226, fn 531.
[2659] Book by Stephen MORRIS, *Why Vietnam Invaded Cambodia*, **E3/7338**, ERN EN 01001723. Reference 31 points to the book by Stephen HEDER, *Kampuchea: From Pol Pot to Pen Sovan*, p. 19.

friend those who followed or supported Vietnam were still friends".[2660]

1412. This is a long way from the term "acute enemy" used by Stephen MORRIS. The Chamber has not explained why it chose the version by the author of this book rather than that by KHIEU Samphan, if it was not because it preferred the use of the term 'enemy' to support its theory. In addition, this observation contradicts another of its findings, according to which "The initial focus in this regard was on the previous regime of LON Nol and generic enemies of the Marxist-Leninist revolution: feudalists, capitalists, imperialists, revisionists".[2661] The Chamber then added: "Thailand was initially the primary enemy, but this attention started to shift to Vietnam in early to mid-1976". Thus, no reasonable judge of facts could conclude that, in 1971, Vietnam was the "acute enemy" of the CPK.

1413. The Chamber should not have used the grounds of "this background of animosity" to explain "in part the CPK's identification of ethnic Vietnamese living in Cambodia as a group deserving distinct attention".[2662] In fact, it has not explained in what way the historical events between Cambodia and Vietnam which it retained had a relationship with the ethnic Vietnamese living in Cambodia. It has equally been seen above that the references used for the Chamber's finding on targeting ethnic Vietnamese make no reference to this group.[2663] They directly target Vietnam, which is more logical with the above-mentioned historical references.

1414. Contrary to the Chamber's assertion, the Vietnamese ambition "to impose its Indo-Chinese Federation model" was not alone in the minds of the CPK's leadership. During the hearing, Stephen MORRIS evoked the Soviet federation model which Vietnam longed to be able to reproduce: "The history of Vietnam is of a long march to the south of what is now North Vietnam, the objective of which was to conquer the territories formerly occupied by other ethnic groups, including the Cham and the Cambodians".[2664] David CHANDLER also explained that Vietnam was accustomed to

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[2660] Book by KHIEU Samphan, *Considerations on the History of Cambodia from the Early Stage to the Period of Democratic Kampuchea*, **E3/16**, ERN EN 00498295-00498296

[2661] Reasons for Judgement, §3840.

[2662] Reasons for Judgement, §3382.

[2663] See above, §1029-1032, §1059-1067, §1097.

[2664] T. 18.10.2016, **E1/485.1**, around 15.12.36: "Well, the history of Vietnam is the history of a long march south from what is now northern Vietnam to conquer territories which were once occupied by other ethnic groups, including the Cham and the Cambodians. Large parts of what is now southern Vietnam used to be part of Cambodia, and the French assisted in the official dismemberment of that part of southern Vietnam from Cambodia during their colonial rule. And I also think that the whole concept of the Indochinese Federation which was initiated in the Communist International in the 1930s was a guiding impulse and motivating factor in the behaviour of the Vietnamese communists towards

violating Cambodian territory and that the precedent in Laos, where Vietnam "controlled the Lao revolution and has taken Lao land", was in the back of everyone's mind.[2665] Although it is right to say that these tensions and important disagreements existed between the two revolutionary movements prior to April 1975, the Chamber could not, without error, conclude that Vietnam was the CPK's long-standing "acute enemy" to then use this as the grounds for establishing a policy targeting the Vietnamese, without any distinction.[2666] Its findings in this sense will therefore be invalidated.

Section II. ERRORS REGARDING THE CONTENT OF THE "SOCIALIST REVOLUTION"

1415. The Chamber also erred in presenting the CPK's desire for independence as an inculpatory element without ever taking into account the context in which the KR had just seized power (I). It also erred in insisting on the notion of the "great leap forward" without expounding in what way it was urgent for the CPK to redress the country's economy (II).

I. DESIRE FOR INDEPENDENCE EXPLAINED BY THE CONTEXT OF 1975

1416. The Chamber erred in its approach to independence as advocated by the KR. Citing a speech by KHIEU Samphan emphasising independence, sovereignty and the capacity to rely on its own means, the Chamber concluded that the promotion of this line was "the basis of the Party's socialist revolution ultimately waged throughout the entire DK period".[2667] Although it was never discussed that independence was central for the CPK, the Chamber erred in not taking into account the context of 1975. Thus, it considered the CPK's reactions to the hostility with Vietnam as a form of Party paranoia without seeing the link with this desire for independence from a neighbour with which border skirmishes had crystallised years of political dominance.[2668]

Cambodia in subsequent decades. I think that the idea of the Indochinese Federation was modelled on the Soviet Union itself, that is, that there would be one major political ethnic entity which provided the "leadership" for the other ethnic groups which were federated with it. So in the case of the Soviet Union, the Russian ethnic group was dominant over the other non-Russian peoples of the Soviet Union. So the Vietnamese conceived Indochina as a place where the Vietnamese would be dominant over the Lao and Cambodian in terms of leadership, and they were -- considered themselves more advanced than the people of Laos and Cambodia." (emphasis added).

[2665] Book by David CHANDLER, *POL Pot, Frère numéro un,* 1992, **E3/17**, p. 183, ERN EN 00393023

[2666] Reasons for Judgement, §3417.

[2667] Reasons for Judgement, §3734.

[2668] See CB 002/02, §674-691.

1417. Far from taking account of the context, the Chamber showed *a minima* partiality by characterising as "falsification campaign" and "revisionist policy" the desire of the CPK to dissociate itself from the Vietnamese communist party by reminding people of the origins of the creation of the Cambodian Party.[2669] The force of the terms used relative to this historical element denotes the bias with which it examined all the pieces of evidence. In its desire to implicate KHIEU Samphan at all levels, the Chamber erred in making findings on the supposed content of national congress meetings, the very existence of which the Chamber itself declared to be unsure.[2670] In any case, the document on which it based the establishment of the content of party policy is an interview which POL Pot accorded to Yugoslav journalists in which there is absolutely no mention of KHIEU Samphan.[2671] The Chamber's finding that KHIEU Samphan chaired these congresses should be annulled.

1418. The Chamber had no need to refer to some putative congress to conclude that the CPK desired independence for the country. In an edition of the RF in 1976, the principle of independence, including economic independence, was clear.[2672] The Chamber erred in not seeking in the CPK's official documentation the reasons which led to the attempt to institute a self-sufficient economy. Although it recalled in paragraph § 3766 of the Reasons for Judgement the reasons justifying the evacuation of the towns, it omitted to indicate that agriculture was the country's only real natural resource and thus the only one capable of raising the capital required for the reconstruction of the country by trading with the DK's allies. These fully independent trading relationships were to deal with its political allies or with non-aligned countries such as China, North Korea and Yugoslavia. The Chamber failed to identify the importance given to the trading arrangements with these countries as well as the aid received in terms of food and medicines which featured clearly in the minutes of the SC meetings. [2673]

[2669] Reasons for Judgement, §3741.
[2670] Reasons for Judgement, §3735. See also below, §1517, 1690.
[2671] Reasons for Judgement, §3734, fn 3735.
[2672] Revolutionary Flag No. 7, July 1976, E3/4, ERN EN 00268944: "Our Party's line in constructing economics and finance is self support. Therefore, the economy of our Party originates from actual production originating fundamentally from agriculture. Therefore, we continue to strive to make capital capital for food supplies, capital for national defense, capital for rapidly building the country.".
[2673] See for example, Minutes Meeting of the Standing Committee, Evening of 22 February 1976, **E3/230**, ERN EN 00182546-00182547; Minutes of the Meeting of the Standing Committee 28.02.1976, **E3/238**, ERN EN 00424112-00424113.

1419. The Chamber also erred by extrapolating on the notion of enemies in the education sessions without ever putting this into the context of the cold war. Indeed, the very use of the term "cold war" reminded everyone how the ideological war was rife at the time. There were political "friends" and ideological "enemies". The Chamber erred in its findings relative to the education sessions by not including this context and by placing the ideological and political combat on the same level as the military combat.[2674]

II. "GREAT LEAP FORWARD" AND THE GRAVITY OF THE COUNTRY'S POST-CONFLICT SITUATION

1420. The independence of the DK implied that the country was capable of feeding the population after the period of war and bombardment during which agricultural production had been devastated. The LON Nol regime had survived under the perfusion of American military aid as part of their political and military alliance. As the arrival in power of the KR brought this to an end, survival demanded finding alternative means. It is in this light that the "great leap forward" slogan appeared.

1421. The Chamber erred again in its desire to implicate KHIEU Samphan[2675] in attributing to him without any grounds a speech on 11 April 1976 concerning the opening session of the KPRA.[2676] This inaugural speech was not given by KHIEU Samphan but by the "President of the Delegates" to the Representative Assembly of the people of Kampuchea, as the Defence had pointed out during the hearing.[2677] The Appellant never occupied this position. Moreover, the only point at which the name of KHIEU Samphan appeared in this document was where his appointment as President of the Presidium was mentioned.[2678] Other documents confirm, moreover, that KHIEU Samphan and the "President of the Delegates" are two distinct persons. KHIEU Samphan is not named in this position in the press release issued at the end of the meeting of the Assembly.[2679] Above all, a

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[2674] Reasons for Judgement, §3736. See also below, §1448-1452.
[2675] This tendency of the Chamber to extend the roles of KHIEU Samphan is found in the date it retained for the 4th CPK Congress which it fixed as January 1976 in paragraph §3738 of the Reasons for Judgement. See below, §1723-1728.
[2676] Reasons for Judgement, §3739.
[2677] Document on Conference I of Legislature I of the People's Representative Assembly of Kampuchea 11-13.04.1976, **E3/165**, ERN EN 00184051-00184056. T. 05.02.2013, **E1/169.1**, from 10.17.32 to 11.32.20.
[2678] Document on Conference I of Legislature I of the People's Representative Assembly of Kampuchea, 11-13.04.1976, **E3/165,** ERN EN 00184067-00184068.
[2679] First Plenary Session of the First Legislature of the People's Representative Assembly of Kampuchea, 14 April 1976, **E3/262.** This press release published following this Assembly does not mention KHIEU Samphan as "Chairman of the Delegates" either.

document used by the Chamber in Case 002/01[2680] refers to a speech by the Appellant before the KPRA in which he opens his speech by presenting his respects to "esteemed and beloved comrade chairman to beloved comrade representatives of the Cambodian revolutionary army".[2681] In concluding that KHIEU Samphan gave the speech on 11 April 1976, the Chamber committed an error even more incomprehensible in that the Defence had called out the confusion caused by a translation problem at the time of the hearing concerning the documents.[2682] And above all, it should not have persisted in this finding when the Supreme Court Chamber had sanctioned this error in Case 002/01.[2683] The finding of the Chamber, which is symptomatic of the lack of impartiality regarding KHIEU Samphan, should once again be annulled.

1422. The Chamber erred moreover in failing to point out the extent to which the "great leap forward" corresponded to a speech designed to galvanise the populations in the critical situation in which the country found itself.[2684] Faced with the impoverished state of the countryside aggravated by years of civil war, modernisation of a backward agriculture appeared as an absolute necessity in a period of exceptional restrictions. In the moribund post-war Cambodian economy, choices were more than limited.

1423. The Chamber erred in not pointing out in the CPK's documents and during the testimony of witnesses the project of working with all the components of society to address the critical situation which pre-dated the arrival of the KR. Thus, although it cited the minutes dated 30 March 1976,[2685] it ignored passages which highlighted the necessity of "knowing how to be united" or of "reinforcing and widening the solidarity between workers and peasants".[2686]

[2680] Judgement 002/01, 07.08.2014, §233, fn 726.
[2681] "Minutes from KHIEU Samphan", FBIS, 05.1976, **E3/273**, ERN EN 00167810 (emphasis added).
[2682] T. 05.02.2013, **E1/169.1** around 10.22.43 where the Defence raises a problem of translation and gives the references in Khmer drawing the distinction between the President of the KPRA Delegates and the President of the Presidium. See also the original in Khmer from **E3/165** ERN 00053610.
[2683] Case 002/01 23.11.2016, §1023: "In contrast, in relation to the inaugural speech of 11 April 1976, KHIEU Samphan is correct when he avers that the Trial Chamber erred when it attributed this speech to him. […] There is no indication in the meeting minutes that KHIEU Samphan had also assumed the role of "President of the Delegates" and delivered the inaugural speech."
[2684] Reasons for Judgement, §3739.
[2685] Reasons for Judgement, 3739, fn 12468.
[2686] Decision of the Central Committee Regarding a Number of Matters, 30.03.1976, **E3/12**, ERN EN 00182809-00182810.

1424. However, at this critical juncture when nothing was available, the notion of common goods and collective production in the framework of a communist ideology appeared as the effort required from all components of society for the survival of the country.[2687] It was no longer a question of working for the benefit of a small minority but rather of rebuilding on the basis of a new society where everybody could benefit from the fruit of collective working. The Chamber thus erred in ignoring all these aspects, preferring to make biased findings from the contradictory and unreliable testimonies from witnesses such as EM Oeun and EK Hen.[2688]

1425. Reconstruction implied also new infrastructure projects, always with the same idea of modernising the country, notably using the technical cooperation with the Chinese from whom the KR borrowed the "great leap forward" slogan.[2689] It is important at this stage to underline that there was no hint of other-worldliness relative to the CPK's policies. It was rather to indicate how the party's political project fitted with a socialist ideology where the collective prevailed over the individual and in which there was nothing criminal.

1426. The fact that KHIEU Samphan signed up for a political project where the priorities were "agriculture, the economy and defence" in no way enabled concluding *ipso facto* for his intent that crimes be committed, but simply in his belief in a political project which had its models in many countries at that period.[2690] The Chamber thus noted that the "common purpose having consisted of carrying out the rapid socialist revolution in Cambodia with the "great leap forward" with the aim of rebuilding the country, of defending it against its enemies and of transforming the population into a homogeneous Khmer society of worker-peasants [...] did not have as its primary objective

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[2687] Pol Pot's Interview with Yugoslav Journalists, 03.1978, **E3/5713**, ERN EN 00750097-00750098, ERN EN 00750099-00750100; KHIEU Samphan's Speech at Anniversary Meeting 15.04.1977, **E3/201**, ERN EN 00419512-00419514. See also PRAK Yut: T. 21.01.2016, **E1/380.1 (in camera)**, p. 58-60, after 13.55.40; YOU Vann: T. 18.01.2016, **E1/377.1 (in camera)**, p. 44-46, around 11.14.03, p. 53-55, around 13.37.47.

[2688] Reasons for Judgement, 3739, fn 12473. See also below, §1755-1759.

[2689] See for example concerning the proposal for a factory in the forest or the KCA construction site placed under the authority of SON Sen: Minutes of Meeting of The Standing Committee, 15.05.1976, **E3/222**, ERN EN 00182665-00182666; Summary of the Decisions of the Standing Committee in the Meeting of 19-20-21 April 1976, **E3/235**, ERN EN 00183418-00183419; Meeting of Standing Committee Evening of 22 February 1976, **E3/229**, ERN EN 00182625-00182626.

[2690] Reasons for Judgement, §3742. The Chamber moreover cited as evidence of KHIEU Samphan's support for the policy several speeches before meetings of non-aligned countries, fn 12489.

the committing of crimes. ".[2691] However, the nuance afforded by the choice of "primary objective" laid the foundation for its subsequent biased interpretation of the CPK's policies.

1427. In addition, by presenting the project as a desire to establish a "pure and revolutionary society",[2692] the Chamber introduced the beginnings of a racial vision which the CPK never had. The only notion of "purity' ever advanced in the policy was that opposing what was considered as the corruption of the former regime. As we shall see on examining the five policies, the Chamber committed serious errors in its interpretation of speeches and documents from the CPK for reaching the finding of the regime's structural racism. In fact, it is only by a subjective and distorted assessment of the evidence that the Chamber concluded that implementing the CPK's policy would necessarily involve the committing of crimes. However, an alternative and reasonable finding would be that the project was deformed by an inappropriate application of a policy poorly understood at the base and poorly communicated, contrary to the finding from the Chamber.[2693]

Section III. COMMUNICATING THE "SOCIALIST REVOLUTION" POLITICAL PROJECT

I. ERRORS RELATIVE TO THE COMMUNICATION CHANNELS FOR THE POLICY

1428. The Chamber made findings relative to the CPK's policy based on telegrams, official correspondence and documents, articles and speeches featuring in the revolutionary magazines, transcriptions of FBIS reports and SWB summaries from the BBC, most of which were collected by the CD-Cam. Despite the few reserves noted in its presentation of the pieces of evidence,[2694] the Chamber erred in according all of them a significant probative value in order to arrive at its findings (A) but then using a variable-scope assessment for analysing their content (B).

A. Errors concerning the probative value of the documents used

1429. The original error of the Chamber was to have refused the Defence access to all the original pieces of evidence in the case file and above all to the possibility of obtaining all the information relative to the chain of custody and traceability.[2695] In Case 002/02, the Chamber maintained its position of

[2691] Reasons for Judgement, §3743.
[2692] Reasons for Judgement, §3743 (emphasis added).
[2693] See below, §1434-1437.
[2694] Reasons for Judgement, §469-472.
[2695] See for example in Case 002/01: Decision on Objections to Documents Proposed to be put before the Chamber on the Co-Prosecutors Annexes A1-A5 and to Documents cited in Paragraphs of the Closing Order Relevant to the First

"presumption of reliability" for all documents although provided only as copies by the CD-Cam.[2696] The Chamber erred in justifying this presumption based on the declarations of witness CHHANG Youk, director of the CD-Cam. Not only the witness used relatively unscientific methods for authenticating the documents,[2697] but even more importantly he refused to reveal the whereabouts of the original documents with the full agreement of the Chamber.[2698] In this context, the Chamber committed an error in law by attaching a significant probative value to documents collected by non-judicial organisations in mostly unknown conditions and to which itself had not had access. Given the age of the documents and the chaos reigning in Cambodia after 1979, the Chamber ought to have adopted a higher standard of evidence. Above all, when taken into consideration the weight it attributed to the copies in order to make findings about the CPK's policy.

1430. With regard to the specific case of the telegrams, the Chamber erred in the relationship between the policy of the CPK and the information in the telegrams. In effect, it very often assimilated local exchanges of telegrams as evidence of a policy at the national level, even when there was no evidence that the information in such telegrams reached as far as Phnom Penh.[2699] Above all, the Chamber erred in fact and in law by using these documents only for making negative findings relative to the policy of the CPK.

B. Partiality in the variable-scope value accorded the documents.

1431. The Chamber erred particularly in its partial approach to the content of CPK documents and revues. Its selective use of both the RFs and RYs is symptomatic of its analysis used only for attacking the evidence. Thus, it considered that these magazines had a very high probative value so as to be able to give a negative interpretation of the policies. Concerning speeches involving the Vietnamese, the Chamber extrapolated on what had not objectively been said.[2700] On the other hand, for examining the clear terms relative to marriage, the Chamber then considered the articles as nothing

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two Trial Segments of Case 002/01, 09.04.2012, **E185**.

[2696] Reasons for Judgement, §455 relative to telegrams. It is appropriate to note that before this international tribunal of the ECCC, there is almost no original in the section reserved for exhibits. See Brief dated 31.07.2013, **E297**, in the 002/01 case file (it is an issue of the magazine *Revolutionary Youth* and an issue of the magazine *Revolutionary Flag* provided by Steve HEDER).

[2697] CHHANG Youk: T. 1.02.2012, **E1/37.1**, p. 53-55; T. 2.02.2012, **E1/38.1**, p. 9-12.

[2698] CHHANG Youk: T. 02.02.2012, **E1/38.1**, around 09.28.13. See above, §326-328.

[2699] See above, §1090-1091, §1430 and before, §1542, §1614, §1624-1626, 1629, 1634, 1639, 1646, 1649, 1711.

[2700] See for example above, §1083-1085, §1469-1471. See also CB 002/02, §734-740.

better than propaganda.[2701] This partial analysis of the evidence, in both sense of the word, was systematic.

1432. The Chamber notably erred in its selective use of the minutes of the SC meeting in March 1976 to vaunt the propaganda character of the KR regime's radio broadcasts.[2702] On the other hand, it was wrong to ignore the part of the minutes which shows that the DK Constitution was supposed to be known by the population.[2703] This extract is interesting because although propaganda is evoked, the meeting of the SC concerns only the members of the CPK and its minutes were not supposed to be communicated outside. The contents of the minutes of the SC meeting may not therefore be analysed as part of a communications campaign. The minutes prove that there was a desire that the Constitution be understood and applied by the population and that it give a much more nuanced image of the CPK's political project. The Chamber ought to have drawn lessons from this instead of dismissing the Defence's reasoning which rejected the existence of a policy targeting the Cham on racial or religious grounds faced with the ideal advocated by the DK Constitution for "harmony" and "the great national union" for rebuilding the country.[2704]

1433. Meeting minutes, FBIS, SWB documents and other telegrams should have been examined both for and against, but here is an example among many others where this was not the case. The Chamber breached the legal principles which should govern the impartial examination of evidence thereby giving it a distorted and incomplete vision of the policies of the CPK. We shall see that the impact has been particularly harmful in the examination of the five alleged policies, causing undeniable prejudice to the Appellant.

II. ERRORS CONCERNING THE EXTENT OF INFORMATION DISSEMINATION

[2701] See above, §1193.

[2702] Reasons for Judgement, §466.

[2703] Minutes of the 8 March 1976 meeting on propaganda, 08.03.1976, **E3/231**, ERN EN 00528385-00528387: "Our wishes: To have our men people and army understand the constitution. Our entire population must know its own constitution; not just the representatives. The population must know it in order to follow up and rectify its implementation in accordance with the will of the people and national interests. If we act thus, we will derive many benefits: - Firstly, this will be beneficial to radio programming; - Secondly, this will offer an opportunity for political education; Thirdly, if we act thus, we will be completely different from others in the world. Not even China and Vietnam have made their constitutions public. […]. We do not wish to brag about not having any problems. However, our constitution is in fact the result of our struggles. On the basis of this constitution, we are doing our utmost to build our nation. Our constitution is a symbol and a victory in our struggles. It is a foundation and a heritage for our children." (emphasis added).

[2704] DK Constitution, 05.01.1976, **E3/259**, ERN EN 00184834. See also CB 002/02, §1845.

1434. The Chamber erred in fact in its findings relative to the dissemination of the politics by radio and through the CPK's publications. In fact, it did not assume the consequences of its own findings relative to the poor radio coverage of the population during the DK.[2705] In the absence of a personal radio, only those on "certain worksites" equipped with loud-speakers would have been able to hear the political message by this means.[2706] Consequently, "the recording of confessions from Vietnamese soldiers captured in Cambodia" could not be presented as demonstrating having benefited from a wide dissemination concerning the whole population.[2707]

1435. In the same way, the Chamber erred in fact in the logic of its interpretation and analysis of the revolutionary magazines. Apart from its biased analysis of the content, it did not take account of the testimonies relative to the distribution of the RF and RY. Thus, although it retained that witness KIM Vun "who worked in the Ministry of Propaganda and Information, was unable to give a precise estimate of the number of copies printed",[2708] it was still able to conclude that "copies were delivered to [...] officials at the zone, sector, district and sub-district levels".[2709]

1436. It completely ignored an important aspect which emerged from a study of the profiles of local leaders who testified as witnesses before the Chamber, namely that very few people were capable of reading them and of understanding the message. It had, however, heard the testimonies concerning the disparities that existed between the districts and the problems of literacy in the countryside, including among the KR hierarchy like PRAK Yut.[2710] It should also have recalled the communication difficulties mentioned in the minutes of the SC meeting in 1976.[2711] This should have prevented it from concluding beyond reasonable doubt that these magazines enabled widespread influencing and indoctrination of the population and party hierarchy.

[2705] Reasons for Judgement, §468.
[2706] Reasons for Judgement, §466. Moreover, the testimony of SA Siek who worked at the radio "stating that these broadcasts did not happen on a daily basis", fn 1472.
[2707] Reasons for Judgement, §466.
[2708] Reasons for Judgement, §474
[2709] Reasons for Judgement, §475
[2710] François PONCHAUD: T. 09.04.2013, **E1/178.1**, around 16.08.58, T. 11.04.2013, **E1/180.1**, around [11.00.46]. PRAK Yut: T. 26.01.2012, **E1/34.1,** around 11.16.02: "As a member of the CPK, I rarely provided -- or delivered these magazines, because I could not read or write very well, and for that reason I did not keep good records of any publications by the regime."
[2711] Minutes of Meeting of Standing Committee 8 March 1976, **E3/232**, p. 6-7, ERN EN 00182633-00182634.

1437. It is a fundamental point for understanding the discrepancy that there could be between the instructions given in the magazines on the treatment of the population in the cooperatives or on the rule concerning marriage and the reality in the field. The Chamber erred in ignoring this argument in its findings relative to the CPK's political project. It was, however, a point which was raised many times by the Defence and to which it will return below.[2712] In any case, the Chamber has not approached the evidence relative to the common purpose of the CPK in an impartial way and that has cast a shadow over its subsequent findings relative to the five alleged policies.

Title II. ERRORS CONCERNING THE FIVE ALLEGED POLICIES OF THE COMMON PURPOSE AND THEIR CRIMINAL CHARACTER

Introduction. ERRONEOUS APPROACH FOR EXAMINING THE POLICIES

1438. The Chamber erred in concluding that implementing the CPK's political project was effected using five policies which implied committing crimes. To arrive at this finding, we shall see that it accumulated errors in fact and in law which follow from the method adopted to arrive at its findings in paragraphs § 3864 and 3865 in the Reasons for Judgement.

1439. Starting with the CO which mentioned that the CPK's leaders had the common purpose of implementing a rapid socialist revolution in Cambodia "by whatever means necessary", including the five "policies", the Chamber announced that, to arrive at its findings, it would examine "whether these policies existed, whether they encompassed the commission of crimes and whether they were intrinsically linked to the common purpose, thereby rendering it criminal in character".[2713]

1440. To verify the existence of these policies, the Chamber indicated that it would first "review contemporaneous CPK statements and documents" which it had ruled "to be particularly probative".[2714] However, it erred from the very start, either by using documents of poor probative value or simply and purely by distorting the content of the documents.

1441. The most symbolic example of this distortion is surely the manner in which the speeches from the CPK leaders were taken systematically out of context to be given a biased interpretation to make

[2712] See below, §1490-1502.
[2713] Reasons for Judgement, §3864.
[2714] Reasons for Judgement, §3865.

them say exactly what the Chamber needed to conclude for the criminal character of the CPK's policies.[2715]

1442. Besides the examination of the contemporaneous CPK statements and documents, the Chamber also indicated that it would "look to consistent patterns of conduct beyond the crime base which corroborate the existence of a centrally-devised policy".[2716] Here again the examination of "consistent patterns of conduct" led the Chamber to commit errors of fact and of law, especially in the use of out-of-context evidence. It in effect based numerous findings on evidence out of the temporal and geographic context of the *saisine* to establish the existence of a policy or evoke its character prior to the DK regime. This has been particularly the case concerning the alleged policies with regard to specific groups.[2717] Finally, the Chamber indicated that it would "then assess whether crimes established at the crime base in the preceding sections of this Judgement were perpetrated in furtherance of the policy as charged, and therefore whether they were encompassed by the common purpose".[2718]

1443. As for the other steps in its approach, the Chamber erred in fact and in law in its analysis, first because it used its erroneous findings on the crime sites and then because it proceeded with an illogical demonstration. In effect, contrary to the method announced, the Chamber did not seek explanations of the incriminated facts other than the existence of a policy. As we shall see concerning the criticism of its examination of each of the policies, its demonstration resided principally in the fact of concluding that there was a policy because crimes were committed. It is this biased reasoning which will be examined in the subsequent parts.

1444. The occurrence of crimes is not a proof of a criminal policy as such. The existence of the five policies concluded by the Chamber after a biased examination of the evidence was not the reasonable finding which was clear at the end of the hearings in Case 002/02.

1445. The subjective approach by the Chamber has tainted all the examinations of the evidence for each of the policies examined. Thus, it effected a shift in the content of the policies as defined in the CO and then in 002/01 so that it aligned with its construction of a criminal policy from the CPK. The

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[2715] See above, §1080-1085.
[2716] Reasons for Judgement, §3865.
[2717] See above, §469-470, §474, §480-481, §483, §486, §489, §492-494, §499, §504, §510, §513, §516.
[2718] Reasons for Judgement, §3865.

term "construction" is intentional because to establish the criminal character of the various policies, the Chamber committed an original error in having recourse to the notion of "real or perceived enemies", for which it required no less than 67 pages to develop.[2719] Under the guise of presenting a chronology of the vision of "enemies of the CPK", the Chamber erred in using this catch-all notion for subsequently presenting each aspect of the CPK's policy as a different form of attack on its enemies. All the evidence has been interpreted in terms of this initial error.

1446. Knowingly, to allow the confusion to reign between military enemies and enemies as political adversaries, the Chamber notably ignored the armed hostility context as well as the Marxist rhetoric of the time. It is on this erroneous foundation that it spawned all the errors of assessment of the evidence for the alleged policies, excluding the testimonies which did not agree with this position and, in general, operating a selective approach for its initial postulate: everything that did not lead to the finding of a criminal policy was excluded.

1447. The errors of the Chamber relative to the five policies shall only be examined after having demonstrated the partial assessment biased against the Appellant of the pieces of evidence used for supporting its distorted presentation of the political foundations of the CPK as seen solely in the light of the notion of an enemy (Chapter I). Subsequently, the errors related to the alleged population movements and the creation of cooperatives and worksites which it grouped under the headings "Control" and "Capture the people"[2720] (Chapter II) shall be examined, as well as the alleged policy of security centres and execution sites (Chapter III), and the alleged policy regarding specific groups and relative to the regulation of marriage to the extent of that which has not already been treated in the part related to the crimes (Chapters IV and V).

Chapter I. ERRORS CONCERNING THE CONCEPT OF ENEMIES OF THE CPK

1448. The part of the Reasons for Judgement related to the alleged five policies opens with a presentation of what has underpinned all the Chamber's reasoning on its visions of the CPK's policy.[2721] Under cover of giving a "chronological overview of the notion of enemies", it provided an erroneous postulate at the start according to which the political project of the CPK essentially turned on this

[2719] Reasons for Judgement, §3744-3863, p. 2259 to 2319.
[2720] Reasons for Judgement, 16.4.1.
[2721] Reasons for Judgement, 16.3. Real or perceived enemies.

notion. For this, it has placed pieces of evidence with no relation to each other all on the same level.[2722]

1449. The Chamber announced that it would demonstrate "throughout the DK era so-called enemies were discussed continuously and at length during meetings at various levels: in telegrams, at study sessions, in speeches, in CPK publications and in other contemporaneous documents such as notebooks and policy directives".[2723]

1450. From this standpoint, the Chamber developed its vision of the conception of enemies by the CPK in a kind of "catch-all", policy taking no account of the probative value of the documents on which this was based. Although it had announced the contrary,[2724] the Chamber took even less account of the context of armed hostility, be that the war with the regime of LON Nol for the pre-April 1975 period or for the armed hostility with Vietnam (Section I). This approach to the evidence led to confusing the military war and the ideological war without counting the errors concerning the Cambodian social and cultural context (Section II). This confusion served as the bedrock of its findings relative to the criminal character of the CPK's political project. In effect, each of the five policies examined was attached in one way or another to this global conception of enemies attributed to the CPK.

Section I. ERRORS CONCERNING THE CHRONOLOGICAL OVERVIEW OF THE CPK'S NOTION OF ENEMIES

1451. The Chamber has taken insufficient account of the differences in the sources it used for making its findings. In its examination of the documents from this period, it used documents which it qualified as "internal, contemporaneous documents".[2725] However, many of the documents on which findings concerning the policy of the CPK were founded have a very poor probative value. For example, it accorded the same importance to certain notes from an unknown person "containing a CPK analysis of social classes in Cambodian society"[2726] and the minutes of military meetings.[2727] Apart from the reliability of the documents, the Chamber amalgamated the word "enemy" used in the military context and the same word used in the ideological context. Consequently, it erred in

[2722] Reasons for Judgement, §3744-3750.
[2723] Reasons for Judgement, §3744.
[2724] Reasons for Judgement, §3936.
[2725] Reasons for Judgement, §3745.
[2726] Reasons for Judgement, §3750.
[2727] Reasons for Judgement, §3750, fn 12516.

focusing on a chronological evolution of the definition of the word "enemy", whereas in reality it should have been analysing in accordance with the context of the document and not just the period.

1452. This erroneous approach gave rise to a vision equally erroneous of the policy described. The errors of the Chamber relative to the armed hostility are to be found particularly in its analysis of the evidence, be that for the pre-1975 and 1975 period (I) or for the 1977-1978 period (II) in which it presented the notion of "enemy" in a manner disconnected from the context of the documents used.

I. ERRORS RELATIVE TO THE ARMED HOSTILITY FOR THE PERIOD PRE-1975 AND 1975

1453. The Chamber made findings from an undated notebook, by an unknown author, taken in an unknown context with no indication of the chain of custody nor any confirmation of its authenticity.[2728] The content of this document is in no way official and can only commit its author. The Chamber thus erred in interpreting from these notes general considerations concerning the CPK's policies. In the same way, the Chamber used an undated proposal for a CPK statute by an unnamed author and for which there is no evidence that it was adopted by any organ of the Party.[2729] No finding should have been taken from this document.

1454. The Chamber has used several documents dealing with the positions of the KRA vis-à-vis the ex-KR. In particular, it evokes an execution order dated June 1975 from "Comrade Pin" of the Special Zone without establishing the circumstances surrounding this decision, given that he is the sole signatory of the document and no-one appears to be copied.[2730] The Chamber erred in fact by using internal KRA documents concerning decisions in the field at the end of a long conflict for making general findings about the CPK's policies when it goes on to reveal that there were pockets of resistance in the North-West Zone for example.[2731] The Chamber also erred in fact in not underlining for this period of 1975 the differences appearing in the RF magazines between the ideological enemies and the military enemy being fought on the front, when witnesses such as PHY Phuon gave testimony in Court that the distinction had been made within the Party.[2732] The

[2728] Reasons for Judgement, §3750 fn 12508 and §3751 where the Chamber indicates only that the author "**seems** to be LONG Ya" with no further details (emphasis added).
[2729] Reasons for Judgement, §3749 fn 12508
[2730] Reasons for Judgement, §3752, fn 12517.
[2731] Reasons for Judgement, §3754.
[2732] Reasons for Judgement, §3746, fn 12495. See ROCHOEM Ton *alias* PHY Phuon: T. 26.07.2012, **E1/97.1** after 09.24.17. ("A. In the war time, all zones, sectors, and district levels were told the enemies were those whom we fought against on the battlefield. Off the battlefield, enemies were those who opposed the revolution. But I, myself, did not

Chamber was therefore wrong not to make the difference between these two "notions" of enemy who were not placed on the same level. Moreover, it was obliged to recognise that there was a different position concerning NP and the monks for whom it could not conclude that they were considered as enemies.[2733]

1455. Finally, it is to be noted that the Chamber gave a different interpretation of the Constitution depending on whether it supported its findings or not. Thus, it concluded in paragraph § 3763 that the Constitution "includes a general provision" for the highest level of punitive sanction for hostile acts, a provision it then used for saying that it formed the basis for executions. On the other hand, when it came to mention provisions concerning freedom of religion – admittedly with restrictions – or the mention of "great national solidarity",[2734] the Chamber considered that the Constitution had no value. This totally biased assessment is to be sanctioned.

1456. The Chamber erred in fact by presenting the expression "chief of the traitors LON Nol" as coming from the CPK whereas in reality is was from the FUNK directed by SIHANOUK following the coup d'état of which he was the victim. In a declaration on 1 April 1975, he talked about a list of "traitors" much longer than the one given by the KR.[2735] That the regime of American ally LON Nol be considered by the CPK as capitalist changes nothing of the fact that the "treachery" came from the coup d'état against SIHANOUK.[2736] In addition, the struggle against the enemies using the cooperatives in a document dated 20 May 1976, published on the occasion of the 3rd anniversary of the 'organisation of peasant cooperatives'", made direct reference to the manner in which the KR managed to ensure fresh supplies for their troops after the 1970 coup d'etat. It was thus fundamental that this context should have been advanced and it clearly had no connection with an evolution of the notion of enemy in 1976.[2737]

II. ERRORS CONCERNING THE PERIOD 1976 TO 1978

1457. The erroneous approach of the Chamber is even more apparent in the manner in which it completely distorted the sense of documents for the years 1976 to 1978. It particularly committed errors in its

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witness any measures taken against those who opposed the revolution at the time. I only knew that we fought the enemies on the battlefield.")

[2733] Reasons for Judgement, §3757.

[2734] DK Constitution, 05.01.1976, **E3/259**, ERN EN 00184834. See above, §1432.

[2735] Kampuchea News Reports, Kampuchea News Agency, **E3/1287**, ERN EN S 00771786-S 00771789;"*Sihanouk announces 21 more 'Supertraitors' to be tried*", **E3/120**, p. 100, ERN EN 00166878.

[2736] Reasons for Judgement, §3755.

[2737] Reasons for Judgement, §3776.

assessment of the probative value of documents or in not positioning them correctly in the context of the armed hostility.

A. For the year 1976

1458. The Chamber used a "summary of a study session" appearing in a work by Ben KIERNAN.[2738] However, this academic refused to come to testify before the Chamber despite repeated attempts.[2739] As there was no opportunity to question him concerning the origin of his sources nor on the exact nature of the summary nor more generally concerning his research areas, the Chamber wrongly used this document to support its findings. A similar criticism applies to the use by the Chamber of certain notebooks apparently belonging to IENG Sary but which are neither signed not dated and which could not be authenticated by the author.[2740] Here again, we are dealing with a document found in uncertain conditions "in a house in which IENG Sary would seem to have occupied", then apparently entrusted to Ben KIERNAN in 1986 in circumstances which it is impossible to ascertain given the absence from hearings of the latter.[2741]

1459. No matter that the Chamber recalled in the CPK's statutes the rules designed to fight against "nepotism",[2742] this did not stop it from making findings stating that the principles were contrary to the backsliding noted in the cooperatives.[2743] Above all, it appeared to understand that it was advocated that "All Party organizations and every Party member must always be good and clean and be pure politically, ideologically, and organizationally".[2744] The "purity" referred to here concerns the human qualities required of the leaders and had nothing to do with race and could not serve as grounds for concluding that this created the basis for racism or for discrimination concerning the Cham or the Vietnamese. It is an element of which the Chamber did not take account later.

[2738] Reasons for Judgement, §3791, fn 12642.
[2739] See Brief dated 13.06.2012, **E166/1/4**.
[2740] Reasons for Judgement, §3746, fn 12495, §3778.
[2741] Reasons for Judgement, §3746 (emphasis added).
[2742] Reasons for Judgement, §3765.
[2743] See above, §1490-1510.
[2744] Reasons for Judgement, §3765 citing Communist Party of Kampuchea Statute, undated, **E3/130**, ERN EN 00184025-00184026 (emphasis added).

1460. The Chamber committed an error in fact by not placing in its context the testimony of Duch in his role as the manager of S-21.[2745] It appeared that the activities in his security centre, under direct military responsibility, were secret.[2746] The Chamber should have taken this into account to arrive at findings concerning the type of training that was provided there. It erred notably in not appreciating the extent of SON Sen's extensive autonomy for decision-making in his role of member of the Standing Committee and, above all, his particular power as head of the general staff.[2747] His decisions in the military arena and the intelligence work specific to the period were equally quite extraordinary.[2748] In the same way, the vocabulary used at S-21, such as the term "smash", was specific to the Security Centre, which demonstrates that the explanations of Duch, taken up literally by the Chamber[2749] had however a different meaning outside S-21.

1461. The Chamber did not - wrongly - take account of the explanations by PECH Chim which it however raised, saying that the term "smash" meant eliminating from individuals "the sense of class, the repression and exploitation of other people, to get rid of that mindset".[2750] According to the context, there could be different meanings.

1462. The Chamber should not have therefore reaching general findings from military-specific decisions. This has its importance insofar as it says it is "satisfied" that "KHIEU Samphan did not have operational military authority during the DK period".[2751]

B. For the years 1977 and 1978

1. Use of evidence with low probative value

1463. The Chamber erred in fact by using minutes from M. GOSCHA to establish the contents of remarks made by POL Pot at a conference in Beijing in September 1977.[2752] The few reservations expressed

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[2745] Reasons for Judgement, §3767.
[2746] See below, §1905.
[2747] Minutes of the Meeting of the Standing Committee, 09.10.1975, **E3/182**, ERN EN 00183393. Comrade KHIEU [SON Sen]: head of the general staff and of security. (On the prerogatives of the Command) ERN EN 00183402-00183403.
[2748] Reasons for Judgement, §3768.
[2749] Reasons for Judgement, §3858.
[2750] Reasons for Judgement, §3858; see also §3801, fn 12690. It is interesting to note that in this fn, the Chamber raises the supposed inconsistency of PECH Chim concerning the dates whereas it did not deem appropriate to raise and take account of the much more problematic inconsistencies from EK Hen and EM Oeun relative to the education sessions they say they participated in. See below, §1754-1759.
[2751] Reasons for Judgement, §595.
[2752] Reasons for Judgement, §3814.

concerning its use limited to "the general tone" didn't add anything to the reliability of the document, being "information from minutes copied by Professor GOSCHA from the Vietnamese translation he found at the People's Army Library in Hanoi".[2753] The use of notes from Mr. GOSCHA on the subject of military divisions and regiments deserve the same comments.[2754] In the absence of information concerning the author of the minutes on the conditions in which the notes were taken, what's more in Vietnamese, the Chamber was wrong in using their content. Its findings drawn from the content of this document should be excluded.

1464. The Chamber also made findings from the content of the "Combined S-21 notebook" by an unknown author taken in an equally unknown context.[2755] There is no element concerning the chain of custody of this document or concerning confirmation of its authenticity. The Chamber thus erred in interpreting from these notes general considerations concerning the CPK's policies. The Chamber has again used the notebook attributed to IENG Sary but without any authentication.[2756] The same criticisms formulated above apply to such use.[2757] In any case, these notes are a reflection of the ideological camps as expressed during the cold war.

2. <u>Ignoring the armed hostility in the DK's speeches and official declarations</u>

1465. The presentation by the Chamber of the speeches and official documents for the years 1977 and 1978 reveals how the armed hostility was ignored, despite it being raised in a general overview of the facts.[2758] In fact, it's not a question of recalling the border quarrels[2759] or simply mentioning the armed hostility, but rather assessing the impact they have on the various official reactions and in the country. The Defence took great care to establish in its closing brief the chronology of the armed confrontations underlining the escalation of the conflict in 1977-1978 presaging the DK's defeat in January 1979.[2760] Consequently, the various pieces of evidence could not be presented and analysed without placing them amid the unfolding events.

[2753] Reasons for Judgement, §3814, fn 12747-12749.
[2754] Reasons for Judgement, §3805.
[2755] Reasons for Judgement, §3822.
[2756] Reasons for Judgement, §3803.
[2757] See above, §1464.
[2758] Reasons for Judgement, §281-293.
[2759] Reasons for Judgement, §3775.
[2760] CB 002/02, §801-811 for 1977-1978 and §812-832 for the defeat of 1979.

a. Speeches and documents from 1977

1466. ***Minutes from military meetings.*** The Chamber devoted plenty of space to the minutes of military meetings where the positions of SON Sen are presented.[2761] As indicated above, the role and particular position of SON Sen only enabled findings to be drawn concerning his management in the military and intelligence domains.[2762]

1467. ***Commemoration of the victory of 17 April.*** The Chamber should have taken account of the escalation of the armed hostility to put into context the celebratory speeches of the earlier victory and the encouragement for the troops in the ongoing conflict with Vietnam.[2763]

1468. ***Declaration by KHIEU Samphan on severing diplomatic ties with Vietnam.*** The Chamber discreetly indicated that the declaration of 30 December 1977 by KHIEU Samphan arrived at a moment when hostilities "had reached a new high" without specifying exactly which events had provoked qualification of Vietnam as "aggressive, expansionist and annexationist".[2764] But it was necessary to recall the context of the events at the end of 1977.[2765] The Chamber erred in not indicating that this peak in the hostilities had been caused by the entry of Vietnamese forces into Cambodian territory. A document from the DK's armed forces had been drafted in the wake of this to describe the various attacks and incidents that had occurred on the frontier with the Vietnamese forces.[2766] This erroneous approach contributed to presenting the remarks attacking the State of Vietnam as remarks aimed at the Vietnamese in general and those who lived in Cambodia in particular. As can be seen above, this representation does not correlate with the evidence.[2767]

b. Speeches and documents from 1978

[2761] Reasons for Judgement, §3804-3805, 3789-3790, 3797, 3799.
[2762] See above, §1460.
[2763] Reasons for Judgement, §3806-3807.
[2764] Reasons for Judgement, §3816.
[2765] CB 002/02, §809-810: "809. During the examination of witness LONG Sat, President NIL Nonn made reference to several telegrams from Phuong about Vietnamese incursions into Cambodian territory and the attack on the rubber factory and the plantation he managed. Those attacks, which took place between 23 and 27 December, notably sent the troops into disarray and forced the people in the area and the workers to flee. They were a prelude to the entry en masse of Vietnamese troops in late December 1977. 810. Therefore, with the negotiations at a stalemate and the conflict escalating, those telegrams were describing the end of the military resistance of the Eastern troops and the entry of the Vietnamese troops into a large part of Cambodian territory. It was against that background that Democratic Kampuchea caused quite a sensation by announcing the severing of diplomatic relations [with Vietnam] and made the conflict official, much to the chagrin of Vietnam, as Expert Philip Short explains in his book.".
[2766] Revolutionary Army adopts Resolutions on SRV Dispute, 04.01.1978, **E3/1285**, ERN EN 00169538.
[2767] See above, §1065-1097.

1469. Just as for the declaration of December 1977, it is inexplicable that, in its presentation of the speeches by the DK officials at the start of 1978, the Chamber did not recall the Vietnamese incursion into Cambodian territory and the impact that had after months of escalation of the conflict. The contents of speeches and the various official documents from the DK cited by the Chamber could not be understood without giving the extent of this incursion by the Vietnamese army into the country.[2768] All the positions taken up by the DK both nationally and internationally can only be explained by the intensity of the armed hostility during 1978.

1470. In recalling the speeches by POL Pot on 17 January 1978[2769] and in April 1978,[2770] the one by KHIEU Samphan of 15 April 1978[2771] and all the official declarations from that period, the Chamber could not relegate to the background the remarks against Vietnam and the Vietnamese army. In so doing, however, it erred in fact and in law.

1471. The partiality with which the Chamber analysed the famous "one against thirty" speech by POL Pot in this context is disquieting. It is clearly a speech designed to encourage the DK troops in the upcoming battles with Vietnam, just after the deep incursion by enemy troops into DK territory.[2772] The Chamber erred in rejecting the Defence's argument which was supported by detailed and consistent testimonies from military witnesses who had suffered the full force of the disparity in military might on the battlefield.[2773]

1472. As can be seen above, its ignoring of the context of the various speeches at this crucial period of the armed hostility invalidates all its findings seeking to find an incitement to racial hatred and to genocide.[2774]

Section II. SUBSEQUENT ERRORS IN ANALYSING THE FACTS

I. DISTORTION OF THE MARXIST CONCEPT OF "CLASS ENEMIES"

A. Importance of Marxist ideology in CPK communication

[2768] Reasons for Judgement, §3817-3829.
[2769] Reasons for Judgement, §3818, fn 12760.
[2770] Reasons for Judgement, §3824.
[2771] Reasons for Judgement, §3823.
[2772] Revolutionary flag, "The presentation of the comrade secretary of the communist party of Kampuchea on the occasion of the 3rd anniversary of the great victory of 17 April (…)", 17.04.1978, **E3/4604**, ERN EN 00519832-00519833.
[2773] CB 002/02, §7 34-751.
[2774] See above, §1065-1097.

1473. The Chamber failed to situate all documents analysed in the Marxist lexicon used at the time. The expressions: "class struggle" or "class anger"[2775] were current expressions related to an ideological confrontation between political enemies. In the context of the Cold War and after a war in which the adversary was supported by the Americans, suspicion towards that country and its allies remained palpable. The various speeches, meeting minutes and guidance cited by the Chamber must be understood in this sense.[2776] Contrary to its arguments, the term "enemy" was not "used in general terms [here], referring to any outsider" but to characterise those considered as belonging to the opposite ideological camp.[2777] Third country relations were based on ideology.[2778]

1474. The Marxist language specifically used by the CPK was so much more complex as the KR had adapted it to their social and cultural reality, for example their use of the concept of "New People". For example, KHIEU Samphan's speech of 15 April 1976 fell within this Marxist lexical field. Indeed his reference to "the traitorous LON Nol clique" as "a lackey of US imperialists" was in strict keeping with communist idioms of that time, which moreover was the anniversary of the April 1975 victory.[2779] While it has noted the propagandistic aspect of some communications,[2780] the Chamber nevertheless erred in only considering this in its Reasons for Judgement to dismiss anything that jarred with its findings. This is flagrant, notably concerning the cooperatives and marriage.

1475. Yet it is logical that a speech to highlight patriotic efforts or to commemorate a military victory, an article targeting CPK cadres or an international broadcast, all require different analyses.

B. <u>Distinction between ideological and real conflict</u>

1476. Contrary to the Chamber's arguments, while imperialist, capitalist and feudal ideas were attacked, no document would allow us to conclude that the CPK opposed any who "subscribed to or supported pacifism or revisionism".[2781] Similarly, under the CPK's Marxist ideology, the notion of

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[2775] Reasons for Judgement, §3762, §3766, 3856

[2776] Reasons for Judgement, §3764 (recalling that the cross-border hostilities fed defiance towards Thailand), §3752, §3769-3771, 3374, 3802, 3806, 3808, 3810-3813.

[2777] Reasons for Judgement, §3768.

[2778] Revolutionary Flag, December 1976 - January 1977, **E3/25**, ERN EN 00491424: "It is imperative to have international friends helping and supporting morally politically and diplomatically to prevent the enemy from being able to isolate us. How do they support? They support our struggle."

[2779] Reasons for Judgement, §3773.

[2780] Reasons for Judgement, §3747.

[2781] Reasons for Judgement, §3845.

social class and the theory of class war could not be analysed as a literal fight against the groups identified by the Chamber, the list of whom is much longer than the groups mentioned in the CO as having been subject to persecution on political grounds.[2782]

1477. The Chamber therefore made a mistake in defining categories by extrapolation and incriminating interpretations of the evidence, i.e.: ex-KR,[2783] NP,[2784] and also "[p]eople returning to Cambodia from abroad",[2785] monks,[2786] "CIA, KGB and 'Yuon' agents".[2787] Ex-KR were only enemies in the context of the armed hostility with LON Nol. Moreover, neither NP nor monks were ever considered enemies.

1478. The Chamber therefore erred in its analysis by confusing documents that mention ideological conflicts with others that clearly reference armed hostility. This has undermined its presentation of the notion of "enemy" and led to a confusion over political and military enemies.[2788] The Chamber's errors were motivated by its need to define the groups (even in breach of the CO scope,) to try and secure the legal basis allowing it to establish the crimes of persecution on political and religious and racial grounds as well as genocide.[2789] However, we have seen that its findings do not stand up to examination.[2790] It evoked "methods" in order to make completely different situations equivalent, and to unite ideological considerations (such as the opposite view of the family to traditional opinions,) under the prism of the fight against enemies.[2791]

1479. The way in which the Chamber established the foundations for creating the confusion between the Vietnamese civilian population and the military enemy is extremely revealing of its misleading process.

[2782] CO, §500.
[2783] Reasons for Judgement, §3847.
[2784] Reasons for Judgement, §3848.
[2785] Reasons for Judgement, §3849.
[2786] Reasons for Judgement, §3850.
[2787] Reasons for Judgement, §3851.
[2788] Reasons for Judgement, §3839-3846.
[2789] Reasons for Judgement, §3851.
[2790] See above, §656-657, 719-757, 763-767, 787-813, 825-835, 848-861, 884-886, 926-963, 1028-1097.
[2791] Reasons for Judgement, §3856-3863.

II. CONFUSION BETWEEN POLITICAL AND MILITARY ENEMIES

A. Errors over the use of the term *Yuon*

1480. The Chamber made a mistake of fact and law in concluding that the word "*Yuon*" "was used in a derogatory fashion in aggressive rhetoric and associated with both combatants and civilians".[2792] This statement reflects its posture when it affirmed having to analyse "any derogatory intent associated with the use of the term '*Yuon*' or Vietnamese 'enemy' on a case-by-case basis and by taking into account the totality of the evidence and the circumstances in which the term was used".[2793] In fact, the Chamber dispensed of this case-by-case analysis.

1481. This analysis was nevertheless essential as "Yuon" does not have the same connotation when it applies to soldiers, Khmer civilians, the spouses or family members of Vietnamese people, CPK leaders and above all each context.[2794] The Chamber admitted that this term could equally cover soldiers and civilians.[2795]

1482. If the term "Yuon" could be used both to mean Vietnamese people and Vietnam, then it was not possible for the Chamber to decide that in CPK publications it was used to target Vietnamese civilians.[2796] We saw above that in the "one against thirty" speech, POL Pot clearly targeted Vietnam and its armed forces.[2797] The Chamber should also not have founded its arguments on the fact that Vietnam was described "as "the hereditary enemy" of the Cambodian people and the Party" to conclude that the word "Yuon" was used as a derogatory term for Vietnamese civilians.[2798] In this context, the word Vietnam or "Yuon" signified the neighbouring country, not civilians. Moreover, the Chamber should have found that Vietnam was seen as "the hereditary enemy" long before the CPK came to power. Indeed, witnesses explained that Vietnam had been

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[2792] Reasons for Judgement, §3853.
[2793] Reasons for Judgement, §3377, 3381.
[2794] T. 22.08.2012, **E1/112.1**, at 09.36.41: ("'Yuon' was not [(sic)] the contemptible word for the Vietnamese, but some people construed this word as something contemptible for the Vietnamese, but actually it was the traditional word that describes the Vietnamese. For example, we call Thai people as the Siam; Vietnamese people as 'Yuon', and Laos people as Lao. So, when I used 'Yuon' in this context before this Chamber in my testimony, it does not mean that I am expressing my contempt against the Vietnamese people. It was not a derogatory remark against the Vietnamese. So I apologize to the Chamber if I fail to use the full name of the country, for example 'the Socialist Republic of Vietnam'. For example, in our context as well, I normally referred this country to 'Khmer' instead of 'Cambodia'. Actually, people would use 'Cambodia' in general.").
[2795] Reasons for Judgement, §3379.
[2796] Reasons for Judgement, §3379 and 3853.
[2797] See above, §1083-1085, 1469-1471. See also CB 002/02, §734-740.
[2798] Reasons for Judgement, §3381.

described in these terms for several generations.[2799] This is also true of the consideration of Vietnam as "the most dangerous enemy".[2800] The Chamber notably relied on the Black Paper published in September 1978, i.e. after a Vietnamese military aggression in Cambodian territory. In this context, it seems logical that Vietnam was perceived as the most dangerous enemy. But the Chamber could not use this to deem that Vietnamese civilians were targeted by this propaganda document.

1483. The Chamber did not justify its decision considering the arguments raised by the Defence and confirmed by witness interviews in court.[2801] Indeed for Khmer speakers, the notion of inherent racism in the term "*Yuon*" does not fit the various ways in which it has been used throughout history in Cambodia.

1484. The Chamber specifically failed to explain how the former spouses or family members of Vietnamese people would have used this derogatory or aggressive term to mention members of their family. It is worth remembering that indeed witness SAO Sak, whose mother was Vietnamese from Prey Veng, used the word "*Yuon*" on numerous occasions to refer to families sent back to Vietnam as well as to other villagers.[2802] DOUNG Oeurn's husband was Vietnamese and also used the word "*Yuon*" to mean Vietnamese people in general.[2803]

1485. Accordingly, the Chamber erroneously concluded that the use of the word "Yuon" in DK representatives' speeches implied a call to violence. In reality, the only possible reasonable finding was that they had used the word which all rural Cambodians used on a daily basis. The context of armed hostility was the only element explaining "the aggressive nature" of the suggestions to denounce what the DK considered as attacks on its sovereignty. The Chamber's finding on this point must therefore be annulled.

[2799] See, for example: MEAS Voeun: T. 03.02.2016, **E1/387.1**, around 10.07.07; PRUM Sarat: T. 27.01.2016, **E1/383.1**, before 09.30.57.
[2800] Reasons for Judgement, §3381.
[2801] CB 002/02, §2218-2225.
[2802] SAO Sak: T.03.12.2015, **E1/362.1**, p. 90-91 *avant* 15.20.15 ("[…] those who were from the mixed families, they actually were gathered up continuously and they were sent by boats"., KH p. 70-71); T.03.12.2015, **E1/362.1**, p. 107 *après* 15.55.46 ("[...] the person was mixed race, Chinese and Vietnamese.", KH p. 83-84), T. 07.12.2015, **E1/363.1**, p. 11-12, around 09.35.07 (KH p. 9), p.13-14, at 09.37.24 (KH p. 10).
[2803] DOUNG Oeurn: T. 25.01.2016, **E1/381.1**, p. 38-39, at 11.04.34 (KH p. 30).

B. Errors resulting from masking the armed hostility

1486. The Chamber deliberately maintained confusion over those targeted by CPK rhetoric in never clearly defining what lay behind the expression "Vietnamese" or Vietnamese "agents". It notably erred in failing to define who was clearly hidden behind the term Vietnamese "agent".[2804] This is what made the semantic slip between Vietnamese "agent" and "Vietnamese people" possible.

1487. This is flagrant in §3853 of the Reasons for Judgement. While the Chamber analysed the category "CIA, KGB and '*Yuon*' (Vietnamese) agents", it then considered that "[t]he Vietnamese or '*Yuon*' (agents) were increasingly discussed throughout the DK era". We therefore moved from Vietnamese "agents" to "the Vietnamese (and their agents)". The Chamber makes particular references to the purges of former CPK cadres or members,[2805] or "expansionist territory-swallowing Yuon".[2806]. While it is clear that this category does not involve "literal references to these intelligence agencies,"[2807] the CPK seems to use the word "agent" to target people accused of having links to Vietnam, particularly former members of the CPK. On the other hand, nothing allowed us to conclude that all Vietnamese people, without distinction, were targeted. Without justification, the generalisation of the category Vietnamese "agent" to cover all Vietnamese people, is unreasonable. This semantic fuzziness must be dismissed as it has been used to conclude that there was a criminal policy against all Vietnamese people to establish the basis of the intent to commit genocide.[2808]

1488. **Conclusion.** All of the Chamber's errors annul its findings about how the CPK conceived enemies. These erroneous findings were used to determine the content of alleged policies through the prism of the fight against enemies. The Chamber then deduced from SKIEU Samphan's adhesion to the CPK's political project that he *ipso facto* adopted this erroneous idea of the fight against the enemies, in order to find that he had culpable intent under JCE. This erroneous reasoning annuls all of the Chamber's findings in the context of a criminal policy.[2809] The Chamber used the same false premise to conclude that five policies we will now examine existed and were criminal.

[2804] Reasons for Judgement, §3851-3855.
[2805] Reasons for Judgement, §3853, §3853, fn 12871 referring to §3793 which notably mentions the arrests of CHAN Chakrei, Chhouk, Ya and KEO Meas; §3811 mentions cleansing within the Ministry of Foreign Affairs, in §in §3820, 3828 and 3829.
[2806] Reasons for Judgement, §3853, fn 12871 referring to §3819.
[2807] Reasons for Judgement, §3854.
[2808] Reasons for Judgement, §3417 and 3517-3518.
[2809] Reasons for Judgement, §4279-4299, §4306-4307, §4316-4318, §4326-4328.

Chapter II. MOP, COOPERATIVES AND WORKSITES "POLICIES"

Section I. EXISTENCE OF THE POLICY OF MOP

1489. The Chamber erred in law and in fact in exceeding the limits of scope and pronouncing on the motives for MOP and on the existence of a recurrent MOP operational method after the fall of Phnom Penh. Firstly, it erred in law by including out-of-scope evidence and time periods for the motives for MOP, in order to conclude that there was a plan to "'control' and 'capture the people'".[2810] Then the Chamber erred in law and in fact by including RMO of MOP developments after the fall of Phnom Penh.[2811] But MOP were not included in the scope of Case 002/02 in their entirety. The Chamber breached the limits of its scope. So its findings cannot be used to establish the criminal nature of the policy to create cooperatives and worksites.[2812]

Section II. THE OBJECTIVE OF THE COOPERATIVES

1490. The creation and operation of the cooperatives is the only aspect of CPK policy that KHIEU Samphan does not contest was included in the common purpose as a means of running the rural economy in Cambodia at the time of the events.

1491. Firstly, the Chamber considered that it was "relevant to examine all the MOP as well as the creation and operation of the cooperatives and labour camps, in view of the fact that their political and ideological objectives overlap",[2813] although it had specified that, given the level of disjunction, it would limit itself to examining the implementation of the MOP policy "only insofar as it concerns the Cham".[2814] In this combined examination, the Chamber has invented a new policy that it named "Control" and "Capture the people" which is not that of the CO, or that of Case 002/01.[2815] This construction reveals a willingly distorted presentation of the objective of the cooperatives in order to conclude that they were criminal.

1492. Moreover, this approach contradicts the fact that the Chamber considered "that this is indicative of the Cham being dispersed in order for their communities to be broken up rather than to simply

[2810] Reasons for Judgement, §3877-3883.
[2811] Reasons for Judgement, §3883.
[2812] Reasons for Judgement, §3916, §3918-3929.
[2813] Reasons for Judgement, §3867.
[2814] Reasons for Judgement, §3867.
[2815] Reasons for Judgement, 16.4.1.

displace the labour force",[2816] which rejects the arguments made by the Defence.[2817] Indeed, it concluded that the decisions to displace Cham people were taken in the framework of specific measures, while it had no reason to analyse both policies together.

1493. n fact, the Chamber erred in its findings as, in the same way that the Supreme Court noticed that there was no discrimination against NP in MOP2,[2818] there was no discrimination against Cham people who followed the movements of a large section of the population to distribute people around DK into the different cooperatives for economic reasons. The Chamber notably committed errors on CPK policy (I) and on KHIEU Samphan's role (II) concerning the cooperatives.

I. ERRONEOUS FINDINGS ABOUT CPK POLICY

1494. The Chamber established the discussion of plans "concerning the final assault and evacuation of Phnom Penh and other urban centres at a meeting in June 1974" and "the plan to liberate and evacuate Phnom Penh [...] at the very beginning of April" (translation ours). In addressing KHIEU Samphan's role, we will see the Chamber's errors on the subject of his participation in the alleged meeting of April 1975 in B-5.[2819] The Chamber considered that this date marked the start of the implementation of agricultural cooperatives, in mis-characterising the CPK's political orientation and in ignoring all the evidence demonstrating that there was constant concern for the population.

A. Badly characterised political orientation

1495. In the Reasons for Judgement, official CPK documents concerning the cooperatives were systematically presented through an angle of "enmity" to support the alleged policy of discrimination against NP. And yet the content cited allowed the Chamber to reach a very different finding, without considering the documents that it completely ignored.

[2816] Reasons for Judgement, §3268.
[2817] CB 002/02, §1611-1616.
[2818] Case 002/01 Appeal Judgement, 23.11.2016, §702: "The Supreme Court Chamber recalls in this regard that it has found that the Trial Chamber was unreasonable in finding that the 'overwhelming majority' of people transferred during Population Movement Phase Two were 'New People', given the limited evidence that supported this conclusion. Further, it appears from the Trial Chamber's findings and the evidence upon which they are based that population transfers for economic reasons and away from the Vietnamese border concerned both 'Old' and 'New People' – a fact acknowledged by the Trial Chamber in its legal conclusions. Thus, since these transfers did not affect only 'New People', it cannot be said that they were discriminatory in fact or expressions of discriminatory intent" (emphasis added).
[2819] See below, §1676-1680.

1496. Accordingly, the Chamber has not considered the motives highlighted in the revolutionary magazines. While an RY of October 1975 describes the catastrophic situation in the country in April 1975, the Chamber only underlined the section stating that "99.9% of the Kampuchean people have been obliged to live in the countryside", while the fundamental evidence was the statement of "[...] all kinds of shortages, everything from, shelter, housings, food supplies, the various means and tools from production, etc.".[2820] This truncated original citation shows the Chamber's bias as the RY continues underlining the exceptional situation which justifies why everyone needs to work to get the country back on its feet for a while.[2821] The Chamber has deliberately ignored this passage.

1497. The Chamber also confused the various use of the word "enemies" in CPK documents mentioning the cooperatives prior to 1975 and those after April 1975. [2822] The RF cited by the Chamber in fn 12933 dated 1976-1977 is dedicated to the 1970-1975 period. The expression "control the population" is used here to explain what had been a military strategy during the war against LON Nol and against troops that had to be weakened through the use of military force.[2823] This same issue also addresses the role played by the cooperatives in supplying the front during this time.

1498. Moreover, the Chamber erred in fact and in law in its use of the evidence. It used the work by Ben KIERNAN, which is of no probative value, as this academic refused to appear and could therefore not be questioned about his sources.[2824] It also essentially relied on written statements with low probative value in order to make findings on MOP, which is also outside the MOP of the Cham people.[2825] It finally erred in making findings about a group of cooperatives beyond those in TK and about OC worksites.[2826]

[2820] Reasons for Judgement, §3885, fn 1297.
[2821] Revolutionary Youth, October 1975, **E3/729**, ERN EN 00357902: "Our production cooperatives are responsible for this heavy burden and have the potential and the capacity to successfully sort out all these problems" (emphasis added).
[2822] Reasons for Judgement, §3877-3878.
[2823] Revolutionary Flag, December 1976-January 1977, **E3/25**, ERN EN 00491425. "When the enemy has no people the enemy has no military and no economic strength".
[2824] Reasons for Judgement, §3898, fn 12995. Also see §1458 above regarding Ben KIERNAN.
[2825] Reasons for Judgement, §3915.
[2826] Reasons for Judgement, §3917.

1499. Moreover, in addition to wrongly mentioning KHIEU Samphan's thesis to evoke constraint in the cooperatives,[2827] the Chamber completely underestimated CPK objectives in founding them. It therefore used an analysis that only favoured the prosecution, although numerous elements demonstrated the desire to take care of the population.

1500. The Chamber erred in fact by considering that the distinction between BP and NP meant that NP were designed to be less well treated than BP. While the desire to abolish old social classes cannot be contested in CPK guidance document No. 6,[2828] it is mentioned before the Chamber's original citation: "The new peasants include former officials, petty bourgeoisies, traders, national capitalists, compradors, aristocrats. [...] We will continue to strengthen the alliance of the base and new workers and peasants in the future.".[2829]

1501. To conclude that there was "an intensified campaign to control people inside cooperatives", the Chamber made selective use of the RF cited.[2830] It focused on highlighting "the imperative to advance agricultural production and rapidly increase rice production," "to address all shortages in the country"[2831] and "the rapid and ongoing fulfilment of economic targets"[2832] without contrasting this with the instructions issued to cooperative leaders.

1502. While the Defence recognises that the language of these RF can sometimes be obscure, there are clear passages that the Chamber should have highlighted in an impartial analysis of the evidence.[2833] Failure to apply these instructions is one thing, but hiding the fact that they were issued is an error that stains the Chamber's findings on CPK policy.

B. <u>Hiding instructions to cooperatives</u>

[2827] Reasons for Judgement, §3884. See below on the thesis, §1653.
[2828] Reasons for Judgement, §3894.
[2829] Document No. 6: Concerning the grasp and implementation of the political line in mobilizing the National Democratic Front Forces of the Party, 22.09.1975, **E3/99**, ERN EN 00244274-00244275.
[2830] Reasons for Judgement, §3998.
[2831] Reasons for Judgement, §3889-3891.
[2832] Reasons for Judgement, §3893.
[2833] For example, Reasons for Judgement, §3898, fn 12995. Revolutionary Flag, February – March 1976, **E3/166**, ERN EN 00517833 ("Since modern medicine is currently not very plentiful, in their positions as leaders, our cadres must think about making large sufficient quantities of traditional medicines of every type to treat and maintain the health of our people.")

1503. The first of the 12 CPK commandments was: "Thou shall love, honor, and serve the people of the laborers and peasants".[2834] The cooperative leaders were therefore responsible for respecting the "promotion of people's living standard".[2835] The cooperatives were therefore primarily seen as a resource to improve means of production and to allow "vegetables and fishes/meats [to be] available for improving the people's living standard".[2836] These daily improvements were presented as a revolutionary obligation.[2837] The CPK considered them to be an integral part of defending the country, notably as the objective was to rally the people to the Revolution and the national effort during this critical period.[2838]

1504. The Chamber made a mistake of fact and law in only examining the incriminating evidence concerning CPK instructions. Accordingly, it considered that the Party leaders did not care about the poor conditions reported to them,[2839] but when specific measures such as working hours were encouraged, the Chamber concluded that "[they knew that] workers were forced to work irregular hours and without rest and envisaged work outside of regular hours".[2840]

1505. But the RF specified the specific measures to be implemented for the people. The objective had to be to find solutions to improve agricultural, livestock, clothing and housing issues.[2841] While rationing was necessary due to the shortages, the orders were to do everything to improve the

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[2834] François PONCHAUD, *Cambodia Year Zero*, 2005 (3rd edition), **E243.1,** p. 117-118, ERN EN 00862085-00862686.

[2835] Record of the Standing [Committee's] visit to the Northwest Zone 20-24 August 1975, **E3/216**, ERN EN 00850976-00850977. This obligation was communicated through the revolutionary magazines: RY, 11.11.1975 **E3/750**, ERN EN 00522453-00522454 ("So, nowadays, the livelihood of our people is seriously insufficient. They are in shortage of food, clothing, means, production equipment. […] Our revolutionary male-female youths must see this obvious truth as the painful experience for us so that we will feel stronger to react as we are the servants and the flesh and blood of the people. We must have a practical measure and personally use our best ability to help the people to solve their livelihood problem", emphasis added).

[2836] Revolutionary Flag, August 1975, **E3/5**, EN 00401509-00401510.

[2837] Revolutionary Flag, October – November 1975, **E3/748**, EN 00495818-00495820: "The promotion of people's living standard should be perceived as fundamental and continuous duties.".

[2838] Revolutionary Flag, October – November 1975, **E3/748**, ERN EN 00495818-00495820; Revolutionary Flag, November 1976, **E3/139**, ERN EN 00455284 ("Why did the Party designate 13 bushels? Because of the economic and political meaning. The objective was to let the people have enough to eat. For centuries the labouring people have not had enough to eat. During war, the people had to withstand many pitiful hardships, not being able to make ends meet. After liberation, during 1975 and 1976, during this one and a half year period, the people still have shortages. Therefore, this is why we have gone all out to increase production during 1976 to supply the people so they will have enough. When the people have enough to eat, the people are warm and push the movements of socialist revolution and building the country to even greater leaps.").

[2839] Reasons for Judgement, §3900.

[2840] Reasons for Judgement, §3910-3911.

[2841] Revolutionary Flag, February – March 1976, **E3/166**, ERN EN 00517832-00517833.

situation.[2842] The use of the population as a work force was therefore not intended as enslavement, but as a stage that would allow the country to survive during this critical period. Moreover, this is why even soldiers were sent to work in the fields and on construction projects.[2843]

C. Errors about rice exports

1506. The Chamber erroneously concluded that rice exports and the quota of "three tonnes of rice per hectare" had been set under a policy that did not care for the population and was the cause of hardship in the cooperatives.[2844] It ignored the evidence demonstrating that the objective of agricultural exports was to make up for the lack of industry, currency and to buy the products that the population needed, including medicine.[2845] This is why trade with allied countries was crucial to sending materials to the zones.[2846]

[2842] Revolutionary Youth, 11.11.1975 **E3/750**, ERN EN 00522457 ("2. As for the revolutionary male-female youths working at the village-commune, bases and cooperatives, they have to go down to work directly with the cooperative members and live and eat with them. They should not have a separate center and a separate food ration from the people."), ERN EN 00522458 ("So, our revolutionary male-female youths must consider the task of solving the people livelihood as their daily task, and weld and connect their daily living to that of the people in any circumstances, either in the easy or difficult one." (emphasis added); RF, July 1976, **E3/738**, ERN FR 00349976-77 [different from EN version] (Achieving the task of 3 tonnes per hectare - improve the people's living conditions: – 1. Find fertile ground – 2. Water – 3. Two rice harvests each year: to promote the construction of socialism, national defence and the rapid increase of our people's living conditions – 4. Diverse crops: promote plantations in order to improve people's living conditions and export abroad – Workforce, production and agricultural tools: We must continuously and successfully take care of our people's health and lives.", emphasis added). See also RF, February – March 1976, **E3/166,** ERN EN 00517827-00517828 and 00517845-00517846 (on criticism of local cadres who did not take care of the people); RF, September 1978, **E3/215**, ERN FR 00521093 [wrong ERN] (on the need to improve living conditions and care for the people's health); RF, March 1978, **E3/725**, ERN FR 00491842-843 [wrong ERN] (on the measures to implement for the food shortage) RF, August 1976, **E3/762**, ERN EN 00486762-00486763 (importance of a plan to build the country: "the third reason is that we must build the country to have economic and industrial foundations quickly and to have lots of capital to quickly build the country and sort out the living standards of the people").

[2843] RF, February – March 1976, **E3/166**, ERN EN 00517834. Note that the soldiers should have the same concerns: Minutes of military meetings, 15.12.1976, **E3/804**, ERN FR 00382609 [wrong ERN]. See also Nhim report, 11.05.1978, **E3/950**, ERN EN 00185216-00185217; Nhim report, 16.05.1978, **E3/863**, ERN EN 00321961.

[2844] Reasons for Judgement, §3901-3908.

[2845] Record of the Standing [Committee's] visit to the Northwest Zone 20-24 August 1975, **E3/216**, ERN EN 00850977-00850978; Minutes of Meeting of the Standing Committee on "The Party's Four-Year Plan to Build Socialism in All Fields, 1977-1980", 21.07-02.08.1976, **E3/213**, ERN FR 00301205-06 [different from EN]; Article entitled "Liberated Cambodia" by François PONCHAUD, January 1976, **E3/4589**, ERN EN 00323686. Regarding medicine: KHO Vanny Interview, 22.09.2005, **E3/5659**, ERN EN 00442652-00442653; Written Record of Interview of Witness KE Pich Vannak, 04.06.2009, **E3/35**, ERN EN 00346150-00346151.

[2846] Revolutionary Flag, August 1976, **E3/762**, EN 00486765: ("We face shortages of some materials and must purchase them from outside."); Revolutionary Flag, March 1978, **E3/745**, ERN EN 00504069-00504070 (exports after subtracting the population's means of subsistence to be able to import various materials for industry and living conditions). See below, §1778, for examples of exchanges.

1507. Moreover, the Chamber willingly ignored DK documents demonstrating that rice for export was supposed to be the production surplus.[2847] These documents were corroborated by testimony concerning the false reports from the base on the surplus and dissimulation of the problems of shortages in the cooperatives from CPK leaders, which prevented them from having an accurate view of the situation on the ground.[2848]

1508. Which is why in its extensive reading of the minutes of CPK Central Committee meeting of 30 March 1976, the Chamber also made the mistake of concluding that the mention of "weekly reporting to Office 870" and the existence of telegrams mean that CPK leaders were informed of everything that happened in the cooperatives.[2849] This was not the case and the myth of "Central Party control" over everything in the country does not match the chaos and disorganisation that happened during the DK regime.

[2847] Revolutionary Flag, April 1976, **E3/759**, ERN EN 00517865-00517866; RF, October-November 1977, **E3/737**, ERN EN 00182592-00182593. Minutes of meeting on base work, 08.03.1976, **E3/232**, ERN EN 00182633 ("Propose the genuine/true amount of rice. Upper echelon need to know the amount so it can easily make arrangements, for one thing for solving the livelihood of the people, but for another to think about sale and exchange as well. (…) As for 103, previously, *Angkar* decided to take 1,000 tons. Now, only 500 tons will be taken. This amount is to be kept in at that location first, as a reserve in case there are shortages.")

[2848] NHIP Horl: T. 25.08.2015, **E1/336.1**, before 10.51.13; MAM Soeurm *alias* HENG Samuoth: T. 28.07.2015, **E1/324.1**, after 15.37.03; T. 29.07.2015, **E3/325.1**, after 10.42.27. NORNG Sophang T. 06.12.2012, **E1/123.1**, around 09.47.57 ("because I look at certain reports; they said that the rice production yield was up to 3 tons per hectare; at other places, there were 5 tons per hectare. In other reports, they also mentioned that 10 tons – 10 metric tons of rice production yield per hectare. And if that was the case, why people were starving at the time? That was my personal judgement of the situation. And upon hearing your question, in my own analysis, I think that there could have been certain people who wanted to claim their credits. That's why they had to – and the report of the situation, and they make mention in their telegrams that people were enjoying their lives, there were progress made at their location, but in reality that was not the case. Even the food – enough food to eat – was difficult for the people, and they did not even have proper clothes to wear.") and around09.49.59(he adds: "I noticed that sometimes Angkar distributed rice and lots of clothes to them. Mr. Khieu Samphan was the one who ordered the distribution of materials and equipment each month. But, unfortunately, people did not receive those materials and clothes. For example, when sewing machines were sent, they threw away weaver's shuttles and rendered the machines useless. And that's why it reflected the living condition of the people, and it also reflected the attitude of the local authority"). See also: Interviews with Kampuchean Refugees at the Thai-Cambodia border, by Masato MATSUSHITA and Steve HEDER, February-March 1980, **E3/1714**, ERN EN 00170702 ("We understood from this that one of the problems was the each co-op was supposed to be a little self-reliance society and that co-ops were supposed to provide statistics on rice production, population and the needs of the people to the higher levels. The amount of rice to be sent to the State was the sole responsibility of the co-op chairman but many co-op chairmen inflated the production figures in order to make themselves look good in the eyes of the Party, and sent rice to the State at the expense of popular consumption. Extracts of the book by R.A. BURGLER, *The eyes of the pineapple*, 1990, **E3/7260**, ERN EN 00995821-00995822. See also SIHANOUK's statements in an interview broadcast during the closing arguments of Case 002/01: T. 25.10.2013, **E1/234.1**, p. 45-48, between 11.00.33 and 11.06.27. He testified that this happened during official visits (most accompanied by KHIEU Samphan), the people he saw "weren't unhappy, they didn't look scared. They were not undernourished."

[2849] Reasons for Judgement, §3899.

1509. Another reasonable finding was therefore that the PCK SC was far from knowing and even further from controlling everything that happened in the country. Sending MEAS Voeun to Preah Vihear in 1978 is a perfect example highlighting Phnom Penh's actual control over the rest of the country.[2850] His testimony has been wrongly used to establish KHIEU Samphan's alleged knowledge of the actual conditions in the cooperatives or to raise the purges.[2851]

1510. The cumulative mistakes made by the Chamber in analysing the evidence has resulted in injury against the Appellant. This bias has stained all of the Chamber's findings on the alleged policy of cooperatives and worksites.

II. ERRORS ABOUT KHIEU SAMPHAN'S ROLE REGARDING THE COOPERATIVES

A. Errors about his statements

1511. The Chamber wittingly embellished the Reasons for Judgement with references to the Appellant's statements in its findings about the cooperatives. However, most of his statements were made after the DK regime.[2852]

1512. To corroborate its findings on CPK policy prior to 1975 regarding population control, the Chamber accordingly cited an extract of a work by the Appellant,[2853] but refrained from mentioning that he repeatedly noted having made several attempts at research to understand the things he knew nothing about during DK.[2854] The same remark can be made for its analysis of his comments on the evacuations in another work dated 2004.[2855] Similarly, in its use of undated interviews after the facts concerning the coercive nature of the cooperatives,[2856] the Chamber once again wittingly

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[2850] MEAS Voeun: T. 04.10.2012, **E1/130.1**, between 14.02.20 and 14.08.42. MEAS Voeun was sent to the region of Preah Vihear towards the end of 1978 following new NZ leader KANG Chap's actions with regard to the population. At his meeting with POL Pot, the latter is said to have asked him to find out what was going on, which reveals his lack of control of the situation.
[2851] See below, §1834-1835.
[2852] See also below, §1829-1840.
[2853] Reasons for Judgement, §3877, fn 12935.
[2854] KHIEU Samphan, *Considérations sur l'histoire du Cambodge dès les premiers stades à la période du Kampuchéa Démocratique [Reflections on the History of Cambodia from its initial stages to Democratic Kampuchea] []*, **E3/3855**, p. 52, ERN EN 00498271: "I can only partially answer this, but I understand that my findings, though incomplete, may be of use in the sense that they might mark the trial for further lengthy research. Much has already been found, but there needs to be additional objective, unbiased research done without anger or hatred."
[2855] Reasons for Judgement, §3879, fn 12939 citing Khieu Samphan's work, *Cambodia's Recent History and the Reasons behind the Decisions I Made*, May 2004, **E3/18**.
[2856] Reasons for Judgement, §3884-3885, fn 12962.

failed to mention that KHIEU Samphan noted having dedicated himself to reflection after the regime.[2857]

1513. The Chamber also made an error of fact by using KHIEU Samphan's speech to commemorate 17 April in which he "praised the development of the country's agricultural production, industry, handicraft and social sectors", as well as the objective to produce a rice surplus as if that were enough to characterise an intent to commit crimes in the cooperatives.[2858] The Chamber has not placed the speech in the context of the symbolic Head of State celebrating the Revolution. The Marxist position of "resolutely placing all personal interests [...] after the collective interests of the nation, class, the people and the revolution" (translation ours) did not allow for the finding that there was a criminal policy.[2859] Moreover, it omitted to recall that this glorification of national progress came a few weeks after open warfare with Vietnam commenced.[2860]

B. Errors about his contribution

1514. Beyond its inappropriate use of declarations made after the facts and taken out of context to conclude that the Appellant was aware of the crimes, the Chamber erred in fact by concluding that KHIEU Samphan was a DK leader, while his role as Chairman of the State Presidium of Democratic Kampuchea was purely ceremonial.[2861] We will see below that his other positions were in limited fields. His presence at certain SC meetings would not give him SC member status.[2862]

1515. Moreover, the Chamber was unafraid to speculate about what the Appellant would have known about a meeting that he nevertheless did not attend:

> "While there is insufficient evidence to establish to the requisite standard that either NUON Chea or KHIEU Samphan participated in the August 1975 visit to the Northwest Zone, the Chamber is satisfied that, by virtue of their positions of seniority within the Party, they were both aware of the report and participated in the development of plans and policies reflected therein."[2863]

[2857] See below about these interviews, §1817-1828.
[2858] Reasons for Judgement, §3909.
[2859] Reasons for Judgement, §3909.
[2860] See above, §1465-1472.
[2861] Reasons for Judgement, §3884.
[2862] Reasons for Judgement, §3884, 3891.
[2863] Reasons for Judgement, §3888 (emphasis added).

1516. As no evidence allows it to reach this finding, it must be annulled. It employed the same erroneous approach to a document dating from 1975.[2864] The Chamber also erred in affirming that KHIEU Samphan would have known of the living conditions on the ground due to "the systematic vertical reporting regime within the hierarchy of the CPK".[2865] Beyond the errors made concerning the methods of communication and the points highlighted regarding the question of the honesty of these reports,[2866] the Chamber should have highlighted that knowledge of the difficult conditions in the country and experienced by the population was something that pre-existed the creation of the cooperatives, which were designed precisely to find solutions to these issues. This process of hammering out convictions without them being founded on solid proof has guided a good number of the findings about KHIEU Samphan's knowledge of the alleged crimes.[2867] Speculation, supposition and convictions based on extrapolation are not the reasoning of an impartial court and do not reasonably allow us to start the process of condemning an accused.

1517. The Chamber also erred in wrongly making KHIEU Samphan President of a national congress on 14 December 1975 in order to conclude that he contributed to a criminal cooperatives policy. It mistook the identity of the session president, but nothing in the contents of the alleged congress or the DK Constitution allows us to conclude that a criminal policy was drafted.[2868] Similarly, the Chamber founded its reasoning on confused, contradictory and un-believable testimony to conclude that KHIEU Samphan contributed to spreading discourses against the enemy at training sessions.[2869] The Chamber has in no case established how the CPK economic plan to operate cooperatives was intrinsically linked to this alleged policy.

III. ERRORS CONCERNING THE CRIMINAL NATURE OF THE POLICY

1518. As we saw above, the Chamber was not ordinarily seised of events concerning: the persecution on political grounds of NP outside the eight TK communes,[2870] "discriminatory treatment" of NP in

[2864] Reasons for Judgement, §3891. The Chamber found that "[A]lthough the September 1975 policy document does not name its authors or those responsible for the plans and policies it sets out, it is clear that its purpose was to examine the implementation of the Party line to build the country following liberation" (emphasis added).
[2865] Reasons for Judgement, §3913.
[2866] See above, supra, §1506-1508, and below §1625-1626.
[2867] See below §1808-1937.
[2868] See above, §1417 and below §1699-1690.
[2869] Reasons for Judgement, §3916. Regarding the training sessions, see below, §1754-1762.
[2870] See above, §367-369, 374-377.

TK,[2871] the surveillance and disappearances of ex-KR in TK,[2872] events that took place against Buddhists in TK,[2873] executions at Baray Choan Dek pagoda,[2874] discrimination for political grounds against NP at the 1JD Worksite,[2875] "discrimination" on religious grounds at the 1JD Worksite,[2876] disappearances at the 1JD Worksite,[2877] forced displacement and persecution on political grounds at the TTD[2878] site and persecution on political grounds at the KCA site.[2879]

1519. It should be recalled that in the section of this brief concerning the gathering of the constituent evidence, the Defence contested some of the crimes committed in the cooperatives and worksites. The Chamber should also have noted that the constituent evidence for the crime of persecution on political grounds at TK, TTD and 1JD Worksite, and on religious grounds at TK and the 1JD Worksite were not established.[2880] Finally, the Defence has shown that the crime of persecution for racial motives was not established at TK.[2881]

1520. As for all the policies addressed, the Chamber erred in considering that the existence of crimes at cooperative level was evidence of a criminal policy. While they were related to a common plan, the project to create and operate cooperatives did not imply criminal acts. The fact that they adhered to a common plan that aimed to establish a policy based on the principles of socialism and shared ownership was not itself criminal. The objective of achieving food self-sufficiency through a collective approach was also not criminal.

1521. This policy does not imply murder, enslavement, enforced disappearance or persecution on religious or political grounds nor attacks on basic human dignity as the Chamber has erroneously concluded.[2882] It has therefore wrongly rejected the arguments of the Defence.[2883] The cumulation of errors in the Chamber's examination of the evidence taints its decision. The poor behaviour of cooperative leaders allow us to understand these slippages. The Chamber erred in failing to

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[2871] See above, §448-450.
[2872] See above, §451-457.
[2873] See above, §426-434.
[2874] See above, §388-390.
[2875] See above, §393-394.
[2876] See above, §490-492.
[2877] See above, §395.
[2878] See above, §396.
[2879] See above, §386-387, 482-483, 493-494.
[2880] See above, §719-747, 763-767, 787-813. See also above, §642-657.
[2881] See above, §748-755.
[2882] Reasons for Judgement, §3919-3920, 3922-3923, 3927-2929.
[2883] Reasons for Judgement, §3929.

consider the evidence that demonstrates that population mistreatment was not part of the common purpose, that the aim was rather to improve their conditions, if only to ensure they adhered to the revolutionary project.

1522. The fact that this policy failed, due to a lack of means, top-flight incompetence, bad management and the authoritarian spirals of cooperative and worksite cadres and leaders, did not make the common purpose criminal. The evidence regarding the principles and reasons that led to the implementation of the cooperatives does not reasonably lead to this finding. The Chamber therefore erred in concluding that the policy of creating and operating cooperatives and worksites implied crimes relevant to the common purpose and therefore crimes established at the various sites covered by Case 002/02. [2884] KHIEU Samphan could therefore not be held responsible. All of the findings in this sense will therefore be annulled.[2885]

Chapter III. SECURITY CENTRES AND EXECUTION SITE "POLICY"

Section I. ERRORS REGARDING THE SECURITY CENTRES

I. ERRORS REGARDING HOW THESE SITES AND CENTRES CAME INTO BEING

A. Intrinsic violence of the CPK revolutionary movement

1523. The Chamber erred in relying on an unreliable FBIS document to affirm that "NUON Chea acknowledged that, after 1960, Angkar "clearly decided that political action and armed violence must be used to overthrow and crush the enemy" who was 'using arms and totalitarian tools to repress and kill our people'".[2886] Moreover, NUON Chea did not mention a policy of armed hostility in court; he described a will to overthrow Vietnamese domination.[2887] The Chamber

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[2884] Reasons for Judgement, §3919-3920, §922-3923, §3927-3929.

[2885] Reasons for Judgement, §4255-4278, §4280-4282, §4299, §4306, §4313-4315, §4326-4328.

[2886] Reasons for Judgement, §3934. On the unreliable nature of the FBIS, see below, §1898-1899.

[2887] Reasons for Judgement, §3934, fn 13124 referring to §3741, fn 12485; Reasons for Judgement, §3934 fn 13124 referring to §205 which is actually §206. NUON Chea: T. 31.01.2012, **E1/16.1**, at 09.31.23: "In 1962, the first Party Congress was held... Or actually it was the second Party Congress. The decision was taken to carry out the political and armed struggle. But the armed struggle was secondary to the political struggle. When we spoke of 'arms' we only meant sticks and knives used for the purposes of self-defence"; T. 11.01.2012, **E1/25.1**, at 11.09.53 "As far as I remember, the Party continued to do political struggle as the principle. And as for the armed struggle, it was only the supplement measure and it was implemented to protect the cadres. This is the same thing I said before. And the struggle that we did was a political struggle"; T. 22.11.2011, **E1/14.1**, at 14.06.18 "we shall implement the end political form as we use the policy as the best, but we would use arms if necessary in order to protect our forces". The Chamber should also have considered an RF from January 1977 which dates the drafting of a policy consistent with preparing for the armed struggle to 1966. See Revolutionary Flag, December 1976-January 1977, **E3/25**, ERN EN 00491412-00491413.

should also have considered the violent repression of the Samlaut peasant uprisings, supported by the KR, in the historical contest.[2888] The armed struggle was envisaged as a reaction to land seizures.[2889] These contextual elements explain the change in strategy between 1966 and the start of hostilities in 1967. Therefore, another reasonable finding was possible, not just that of the revolutionary movement's intrinsic violence.

1524. The Chamber also erred in relying on Duch's testimony to affirm that, after 1960, the Party had "resolved to purge bad elements who could not be re-educated in 1960 and affirmed that three categories of enemies had been delineated at this time".[2890] But Duch was commenting on the minutes of a military meeting citing three enemy categories held on 9 October 1976.[2891] We do not know what allows Duch to affirm that the Party fixed these three enemy categories in 1960 given that in terms of CPK policy he draws his knowledge from his reading of the Case file. This is therefore a striking example of the Chamber's breach of its principle, according to which it should base itself on his testimony "only to the extent that [Duch] had contemporaneous knowledge of the facts about which he testified".[2892] It is evident that he was not aware of the policies adopted by the Party in 1960. This statement of fact must therefore be dismissed.

B. Creation of security centres

1525. The Chamber erred in using historic events that took place prior to April 1975 to establish that there was a policy against enemies during DK.[2893] Indeed, these events took place in the context of the armed hostility with the LON Nol regime and when Vietnam wished to control the Cambodian revolution. These elements could therefore not demonstrate the annunciation of a policy against enemies. The Chamber also erred in concluding that there were at least 200 security centres.[2894] Indeed, it should not have considered the research led by DC-Cam valid as very little information

[2888] Reasons for Judgement, §212.
[2889] Revolutionary Flag, December 1976-January 1977, **E3/25**, ERN EN 00491414: "if I remember correctly in early 1967. This gunfire broke out without any circular instruction from the Party Center. […] At the time it was exploding in Battambang in Samlaut".
[2890] Reasons for Judgement, §3934.
[2891] T. 21.06.2016, **E1/441.1**, between 13.46.02 and 13.51.14; Minutes of the meeting of secretaries and deputy secretaries of divisions and independent regiments, 09.10.1976, **E3/13**, ERN EN 00940355-00940356. See also above, §1463.
[2892] Reasons for Judgement, §2080.
[2893] Reasons for Judgement, §3934-3941.
[2894] Reasons for Judgement, §3954.

was provided about the methodology they used.[2895] Craig ETCHESON worked for both DC-Cam and the Prosecution.[2896] It is obvious that he supported the work led by DC-Cam which the Prosecution then used widely.[2897] Given Henri LOCARD's lack of credibility, the Chamber failed to take the required precautions by relying solely on the work of CD-Cam to judge that at least 200 security centres existed during DK. Its finding should therefore be annulled.

II. DISTORTION OF DOCUMENTS AND OFFICIAL SPEECHES

A. Texts and speeches

1526. To characterise the existence of the generic term "enemy" and deduce that there was a criminal policy, the Chamber distorted official CPK documents and its leaders' speeches.

1. Distortion of texts

a. Errors in understanding the DK constitution

1527. The Chamber considered that "the framework and modalities by which enemies were condemned to detention in security centres – and frequently death – were constitutionally legitimised and implemented pursuant to Party decree".[2898] In order to do so, it has distorted the terms of the DK Constitution. It recalled article 10 of the Constitution under which "[D]angerous activities in opposition to the people's State must be condemned to the highest degree".[2899]

1528. On the one hand, adopting a severe sentence for any attack on the nation is not a tactic used only by DK; all sovereign states adopt similar mechanisms. It is enough to glance at (even contemporary) national criminal codes to see this. On the other hand, the Chamber has used deduction in its association of the idea of severe penalty with death. The article cited above makes no mention of corporal punishment.

1529. Given this poor evaluation of the evidence, this finding[2900] must doubly be annulled as the Chamber also applied a double standard in analysing the Constitution. It considered that it was credible when

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[2895] *Genocide Sites in Cambodia, 1975-1979*, undated, **E3/2366**, ERN EN 00188710-11.
[2896] In 1994, Craig ETCHESON was one of the founding members of DC-Cam, which he led for two years before working as a consultant for three years. He worked for the *Cambodian Genocide Program* from 1995 to 1997 before spending six years working for the Co-Prosecutors from 2006 to 2012.
[2897] Reasons for Judgement, §3949.
[2898] Reasons for Judgement, §3955.
[2899] DK Constitution, 05.01.1976, **E3/259**, article 10.
[2900] Reasons for Judgement, §3955.

it came to elements that support the prosecution, as here to conclude that it contained the seed of ill-treatment of enemies, but considered that it was a façade when it contained elements that supported the Accused.[2901]

b. Errors in the analysis of the CC decision of 30.03.1976 and the power to order executions

1530. The Chamber distorted the CC decision dated 30 March 1976 to allow it to make findings about the power to order executions in the context of the purges.[2902] Throughout the Reasons for the Judgement under appeal, this document has been highlighted as the foundation of the purges policy and of crimes committed in the security centres. Its biased and systematic use is an admission of the lack of evidence at the Chamber's disposal. In any case, there is no connection between KHIEU Samphan and this document.[2903] Findings reached on the basis of this document must be annulled.[2904]

c. Distortion of the CC directive published in June 1978

1531. In June 1978, the CPK Central Committee published a directive pardoning "enemies" who had engaged in anti-revolutionary activities prior to 1975.[2905] The Chamber cited Duch's declarations in answer to CIJ questions in which he characterises this document as a "ruse" to appease the population.[2906] However, this remark was not based on any objective evidence and relies only on Duch's subjective evaluation. He admitted to the court that he did not attend any Central Committee or Standing Committee meetings during the DK period.[2907] His statement is not corroborated by any other element and he relies exclusively on his personal opinion, while he recognises not having had any outside perspective, beyond S-21.[2908] Accordingly, the above-mentioned document should have been examined objectively, notably concerning the context of mid-1978. At the height of the

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[2901] See for example freedom of religion and the notion of "great national solidarity". DK Constitution, 05.01.1976, **E3/259**, ERN EN 00184834.
[2902] Reasons for Judgement, §3955-3956.
[2903] See below, §1718-1722.
[2904] Reasons for Judgement, §3955-3956.
[2905] Guidance of the Central Committee, May-June 1978, **E3/764**.
[2906] Reasons for Judgement, §3971; Written record of interview of charged person *Duch* of 21.10.2008, **E3/15**.
[2907] *Duch*: T. 22.06.2016, **E1/442.1**, between 09.04.35 and 09.06.05: "Q. During the DK period, were you a member of the Central Committee? A. **No,** I had not become a member of the Central Committee yet. Q. And during the DK period, were you ever invited to a meeting of the Central Committee? A. **No**, I was not" (emphasis added).
[2908] *Duch*: T. 22.06.2016, **E1/442.1**, around 09.06.05:

armed hostility with Vietnam, the desire to have a common front and appease internal conflict made sense.[2909] The Chamber should have considered this.

2. Distortion of speeches and evidence with low probative value

1532. The Chamber distorted the Appellant's speeches on numerous occasions. It interpreted KHIEU Samphan's use of the term "enemy" as damning in removing it from its context in order to characterise it as criminal. But, in the context of a communist revolution, the enemy was primarily ideological.

a. Speech of 17 April 1977

1533. The Chamber retained and misinterpreted a speech given on the second anniversary of the liberation, in which KHIEU Samphan put forward the following: "We must wipe out the enemy in our capacity as masters of the situation, following the lines of domestic policy, foreign policy and military policy of our revolutionary organization".[2910] The enemy he was describing in this speech was a political enemy. He was speaking in the context of celebrating the victory of 17 April, of the communist revolution and the break with the old regime. Taken in this context of an ideological opposition in a propagandistic speech focused on the 17 April victory, this speech invited listeners to continue the class struggle to achieve political triumph in the context of the great ideological stand-offs of that period. The reference to foreign policy moreover refers precisely to the context of the Cold War. The Chamber therefore erred in distorting this speech to characterise it as criminal.

b. Civil party statement by PREAP Chhon

1534. The Chamber also wrongly used the statement by civil party PREAP Chhon, who spoke about a speech KHIEU Samphan is said to have given in 1977 at the Chbar Ampov market. He is said to have made virulent statements to a group of people evacuated from the EZ.[2911] These MOP3 events are not only out of context and should therefore never have been considered by the Chamber,[2912] the credibility of the civil party is above all questionable, given her sudden, comfortable, memory

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[2909] Guidance of the Central Committee, May-June 1978, **E3/764:** "The Party is appealing to all those who have been misled to come back and to unify their hearts and minds with our nations and people to defense and rebuild the country and to improve the living standards of the people for a speedy progress and for stepping up towards the prosperity in all fields", ERN EN 00275219.

[2910] Reasons for Judgement, §3960; KHIEU Samphan's speech, 15.04.1975, **E3/200**.

[2911] Reasons for Judgement, §3961; PREAP Chhon, T. of 30.11.2016, **E1/504.1**, around 15.30.25.

[2912] Ms GUISSÉ's objections to PREAP Chhon's testimony, T. 30.11.2016, **E1/504.1**, around 15.42.44 and 15.45.58.

of KHIEU Samphan right after Case 002/01, even though she was questioned during the first case. Her civil party statements made no mention of this alleged encounter with KHIEU Samphan.[2913]

1535. As the request to summon PREAP Chhon came very late,[2914] greater prudence should have been used in examining her testimony, notably as she had an interest in the procedure. The Chamber should have found corroboration, which in the present case does not exist. No other evidence corroborates this civil party's statement and none of the speeches given by KHIEU Samphan in the Case File express similar ideas. The civil party accused the Appellant of having threatened DK traitors with death. But there is nothing to corroborate a speech having been made at that location on that date. The Chamber erred in making incriminating findings on the basis of a speech with such low probative value. They must be declared null and void.[2915]

c. KHIEU Samphan's testimony on criticism and self-criticism

1536. The Chamber relied on KHIEU Samphan's testimony during Case 002/01 regarding the practice of criticism and self-criticism to conclude that it was designed to develop "class anger".[2916] It then used these notions to conclude that the practice of self-criticism would have involved intent to discriminate against NP, which would also reveal criminal intention. This is a perfect distortion and extrapolation of the Appellant's remarks, as he answered a civil party and explained the aim of self-criticism sessions in the following terms:

> ("As for the self-criticism system, it fulfilled the principle of... of class struggle and... especially for Party members. [...] Unlike other leaders, who were intellectuals... Or a bit less and spent criticism and self-criticism sessions... and they have... They managed to forge themselves and to eliminate their capitalist consciousness and to not concentrate their efforts on... living entirely in the resistance movement with every effort they made. But I didn't manage to do this. That's what I wanted to tell you, Madame civil party" (translation ours).[2917]

1537. On the one hand it wasn't solely a DK approach; it was common among Marxist and revolutionary parties at that time. And on the other hand, as the Appellant indicated, it was essentially designed

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[2913] PREAP Chhon: T. 01.12.2016, **E1/505.1**, between 09.17.44 and 09.34.35. The civil party confirms never having mentioned a meeting with KHIEU Samphan in his statements.
[2914] Decision on the International Co-Prosecutor's request to summon one additional civil party and also to admit related documents 17.10.2016, **E436/1**; also see the Defence's opposition to this late request, T. 08.09.2016, **E1/471.1** around 10.52.58.
[2915] Reasons for Judgement, §3961.
[2916] Reasons for Judgement, §3967: "In court, Khieu Samphan acknowledged that the Party's regime of re-education through criticism and self-criticism meetings was ideologically fundamental to the class struggle."
[2917] KHIEU Samphan, T. 13.05.2013, **E1/103.1**, between 10.09.21 and 10.14.14.

for CPK members to help them concentrate on the revolutionary objectives. In mentioning that "[he] didn't manage to do this," KHIEU Samphan not only showed that this practice also applied to him, it also concerned the efforts to be carried out in the context of a political choice.

1538. Every individual, including the Appellant, has the right to shape their own thoughts, so long as they are not criminal. In this case, self-criticism as an instrument of the class struggle does not support any criminal policy; it was seen as a tool for training political consciousness. The Chamber has therefore distorted the Appellant's speech and used extrapolation to define a criminal policy towards NP by taking it completely out of context.

1539. The use of the term "enemy" belongs to political rhetoric. KHIEU Samphan has not been the only person to use it in an ideological context. Numerous authors have written about this question and explained how the notion of "enemy" or "enemy inside" belonged to a political and historical construct:

> "This construction of an enemy inside results from the games of positioning, cooperation and distancing, as well as conflicts of interest inside a particular area at a given time. The consolidation of the soviet regime in the 1920s, the cold war, colonial wars, the end of the bi-polarity with its uncertainties and questions, transnationalism, etc. are just some of many historical examples of social tensions. Each led to the creation of specific political games and express specific bureaucratic processes in which there is room for 'the enemy inside'."[2918]

1540. This enemy rhetoric was part of the way in which a policy was modelled in a context of the stand-off between communist and capitalist systems. The self-criticism practised in communist regimes was part of this same approach. The Chamber erred in ignoring the political rhetoric of KHIEU Samphan's speeches on the class struggle to wrongly give them a negative connotation relating to a criminal policy.[2919] It has completely distorted his remarks. These findings must be annulled.[2920]

B. Knowledge of the elimination of enemies

1. Revolutionary magazines

[2918] Article by Ayse CEYHAN and Gabriel PÉRIÈS, *L'ennemi intérieur: une construction discursive et politique* [*The enemy inside: a political and discursive construction*], Culture et conflits automne 2001, p. 3. []
[2919] See also Reasons for Judgement, §3970.
[2920] Reasons for Judgement, §3955, 3956, 3960-3963, 3967-3971.

1541. The Chamber has used numerous issues of RF and RY to conclude that "the smashing of enemies was widely reported within Party ranks".[2921] However, it could not only rely on its incriminating interpretation of these documents. Having itself recognised that "statements made for propagandistic purposes may diminish their reliability",[2922] it should indeed have considered the fact that these revolutionary magazines relied on a specific rhetoric. As indicated above in the section of this Brief dedicated to the evidence, propaganda is designed to convince people and unite them around a specific socio-political context, and often deliberately strays from reality,[2923] using exaggeration to arouse enthusiasm and political loyalty. In this case, the RF/RY were used to unite people around the idea of class struggle. So the Chamber erred in placing articles evoking ideological combat on a level with articles evoking military combat - as for example when it refers to the war against LON Nol's regime. It also made an error of fact by literally interpreting these extracts to conclude that these magazines preached that enemies should be eliminated through security centres, and that this elimination would therefore have been general knowledge throughout the country and Party ranks.[2924]

2. Telegrams and reports

1542. The Chamber then used telegrams of reports sent by the Zone secretaries to *Angkar* to state that it was "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".[2925] While these telegrams may mention "enemies", this is done in a very hidden way as we do not know exactly *to whom or to what* the authors are referring. Moreover, the Chamber has completely omitted the context of armed hostility and has in no way verified or challenged the information contained in these telegrams in terms of the development of this hostility in the country. Moreover, it has not justified its finding and has not said *why* it is convinced that these telegrams demonstrate the implementation of Party policies. For all of these reasons, its findings must be declared null and void.[2926]

[2921] Reasons for Judgement, §3958-3959.
[2922] Reasons for Judgement, §65; see also §472, 479.
[2923] See above, §291-292.
[2924] Reasons for Judgement, §3958-3959.
[2925] Reasons for Judgement, §3964.
[2926] Reasons for Judgement, §3964.

Section II. ERRORS REGARDING THE POLICY

1543. As has been seen above, the material competence of the Chamber did not include the deaths due to the conditions of detention, nor the facts of enslavement, torture and ill treatment inflicted by the guards and interrogators and the disappearances at KTC.[2927] Furthermore, the Chamber was irproperly seised of facts of "discrimination" against NP, the ex-KR and the "group" of real or supposed enemies at KTC.[2928]

1544. It has been seen above that the Chamber exceeded its remit by examining and legally characteriseing facts concerning the "real or supposed opponents" at AuKg.[2929] Thus, its finding on the CAH of persecution on political grounds must be dismissed[2930] The Chamber also went beyond what it was seised of by finding on persecution on racial grounds of the Vietnamese people at AuKg.[2931] It also erred in law by considering itself seised of facts regarding the lack of medical supervision and the ill treatment inflicted by the guards and the interrogators.[2932] The finding on the CAH of persecution on racial grounds and OIA that took the form of attacks against human dignity regarding these facts should therefore be dismissed.[2933]

1545. Finally, the Chamber went beyond what it was seised of by characterising facts of enslavement at the K-17 and PK sites, by characterising facts of torture as OIA through attacks against human dignity and by characterising facts as OIA through enforced disappearances at K-11 and PK.[2934] Its findings should logically be dismissed.

1546. It has been seen above that the Chamber's errors did not make it possible to conclude the CAH of persecution on political grounds and on racial grounds at S-21.[2935] Nor was it possible to conclude CAH of OIA through enforced disappearances at KTC regarding the same people who disappeared from the TK cooperatives.[2936] The CAH of murder and extermination regarding the Vietnamese people could not be established at AuKg, nor could the CAH of persecution on political grounds

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[2927] See above, §404-415.
[2928] See above, §495-510.
[2929] See above, §511-513.
[2930] Reasons for Judgement, §2993.
[2931] See above, §416-417.
[2932] See above, §418-419.
[2933] Reasons for Judgement, §2994-2999 and 3004, 3006, 3008-3010.
[2934] See above, §397-403.
[2935] See above, §828-835.
[2936] See above, §836-840.

and on racial grounds.[2937] Finally, it has been seen that the Chamber's findings on the CAH of murder regarding Heus, of enslavement at K-11, of persecution on political grounds and OIA through enforced disappearances at PK should also be reversed.[2938]

1547. The Chamber declared KHIEU Samphan responsible and guilty of crimes committed in the security centres at S-21, KTC, Au Kg and PK. It justified this conviction based on the existence of a "CPK policy of identifying, arresting, isolating and smashing the most serious category of enemy".[2939] However, it erred by characterising the existence of crimes in the security centres as a policy, when they were a manifestation of a deviation of the secure operation of the regime and were not in themselves related to the political purpose of establishing a socialist revolution shared by KHIEU Samphan.[2940]

1548. The need for the existence of a general policy against the enemies as defined by the Chamber, i.e. polymorphous and changing, involved artificially attaching the crimes committed in the security centres to the Appellant even though numerous items of evidence demonstrate that the security centres were under military command, an area in which he did not have any power.[2941] The Chamber thus wrongfully rejected the Defence arguments which it only partially recalled.[2942]

1549. Its general reasoning shows that it concluded the implementation by the entire administrative network of the Party[2943] based on an incorrect interpretation of the messages sent to 870 or to *Angkar* to include KHIEU Samphan in this.[2944] It also erred by placing on the same level the concepts of self-criticism in relation to a commitment to revolution and re-education in the sense of sanction in the event of fault.[2945] The Chamber also erred in fact and in law by including in this policy facts and crimes of which it had not been properly seised and/or that had not been established beyond reasonable doubt.[2946]

[2937] See above, §841-861.
[2938] See above, §862-869, 880-891.
[2939] Reasons for Judgement, §3965.
[2940] See CB 002/02, §1469-1479.
[2941] See CB 002/02, §1480-1484.
[2942] Reasons for Judgement, §3932.
[2943] Reasons for Judgement, §3965
[2944] See below, §1616-1639. The Chamber particularly erred by not reaching consequences from the fact that the KTC security centre was under the responsibility of the district. See CB 002/02, §1485-1486.
[2945] Reasons for Judgement, §3968, 3972.
[2946] Reasons for Judgement, §3974-3976. See above, *saisine*: §397-403, §514-516 (PK), §404-415 (KTC), §416-419, §511-513 (AuKg), §495-5010 (KTC); §420- 425 (Purges); constitutive elements: §825-835 (S-21), §836-840 (KTC),

1550. Above all, the Chamber erred in fact and in law by not drawing on the consequences of the secret and closed operation of the security centres in general and that of S-21 in particular and finding that a criminal policy was applied as part of the common purpose.[2947] However, as will be seen below,[2948] the items of evidence from the case file on the security centres and the lack of evidence in the case file about KHIEU Samphan's knowledge of the crimes that took place there prevented the finding that the common purpose led to these crimes being committed. All of the findings in this respect and the convictions in relation to it should therefore be reversed.[2949]

Chapter IV. "POLICY" REGARDING SPECIFIC GROUPS

Section I. ALLEGED POLICY REGARDING THE VIETNAMESE PEOPLE

1551. It has been seen above that the Chamber went beyond what it was seised of by examining and legally characteriseing the facts of deportation of Vietnamese people.[2950] Its finding on the CAH of deportation of Vietnamese people at TK and at Prey Veng should be dismissed,[2951] as well as the one regarding the CAH of persecution on racial grounds regarding the expulsion of Vietnamese people from the TK district.[2952] The Chamber also went beyond what it was seised of by examining facts of enforced disappearances of Vietnamese people at TK.[2953] The findings regarding this crime should therefore be reversed.[2954] Finally, the Chamber went beyond what it was seised of by analysing and legally characteriseing facts regarding the Vietnamese people outside the provinces of Prey Veng and Svay Rieng.[2955] The findings on the CAH of murder and extermination and on the genocide outside these two provinces should therefore be reversed.[2956]

1552. Apart from the errors regarding the matters of which the Chamber was seised, it has also been seen above that the Chamber's errors did not make it possible to find on the CAH of deportation of Vietnamese people at TK and at Prey Veng,[2957] or on the CAH of OIA through enforced

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§841-861 (AuKg), §862-891 (PK).
[2947] Reasons for Judgement, §3987.
[2948] See below, §1849-1878.
[2949] Reasons for Judgement, §3978-3981, 3983, 3985-3987.
[2950] See above, §380-385.
[2951] Reasons for Judgement, §1159 and 3507.
[2952] Reasons for Judgement, §1189-1192.
[2953] See above, §547-549.
[2954] Reasons for Judgement, §1201.
[2955] See above, §520-521, 435-438 and 380-385.
[2956] Reasons for Judgement, §3493-33501 and 3519.
[2957] See above, §966-986, 1028, 1033-1036.

disappearances of Vietnamese people at TK.[2958] Nor was it possible to find on the CAH of murder and extermination of Vietnamese people at Svay Rieng, in territorial waters on 19 March 1978, in the province of Kampong Chhnang, in the province of Kratie and at the Ksach Pagoda regarding Chantha's grandparents and Chum's family.[2959] Nor was it possible to find on the CAH of persecution on racial grounds of Vietnamese people at TK, Prey Veng and Svay Rieng,[2960] or on the crime of genocide against the Vietnamese people.[2961]

1553. The Chamber erred in fact and in law by finding on the existence of a policy that consisted of taking hostile measures against the Vietnamese people.[2962] It also erred by considering that the establishment of a socialist revolution in Cambodia involved attacking the Vietnamese people. Apart from its general assertion that the CPK was fighting its enemies, in addition, the Chamber did not explain how this treatment of Vietnamese people served in the application of the common political purpose.

1554. Allies during the war against the US, Vietnam and Cambodia have a long history of tensions marked by border conflicts and struggles for influence in the two communist parties. The DK period was marked by armed hostility with the SRV that intensified over the years to reach its height with the entry of Vietnamese troops into Phnom Penh in January 1979. These are the only reasons for the actions and speeches of the CPK on Vietnam during the period and it is only in this context that they were considered enemies.[2963] Impartial and reasonable judges would have reached this finding.

1555. However, concluding on the existence of a policy was necessary for the Chamber because this was the only way to establish intent for the crimes charged. It was in these conditions that the Chamber was able to conclude on the subject of persecution:

> "With respect to the *mens rea*, the Chamber notes the systematic targeting of Vietnamese individuals due to their perceived race, as evidenced by the preparation of lists, the matrilineal policy applied to mixed families, and contemporaneous publications in the Revolutionary Flag and speeches of leading CPK figures targeting the Vietnamese. The Chamber is satisfied on this basis that the Vietnamese

[2958] See above, §756.
[2959] See above, §987-1017.
[2960] See above, §748-755, 859-861, 828-835, 1028-1050.
[2961] See above, §1051-1097.
[2962] Reasons for Judgement, §4000-4015.
[2963] See above, §1448-1488.

were intentionally targeted in Prey Veng and Svay Rieng on the basis of their race and finds that the specific intent to discriminate on racial grounds is established.".[2964]

1556. The reasoning is almost the same as for the *mens rea* of genocide:

> "Turning to the *mens rea*, the Chamber has found that the CPK specifically targeted Vietnamese as a group, including civilians, throughout the DK period. In particular, it has found that POL Pot's 'One against 30 policy' specifically targeted Vietnamese armed forces as well as civilians. The Accused were found to have lectured at or attended political training sessions at which the Vietnamese or Vietnamese 'agents' were labelled as enemies. KHIEU Samphan repeatedly and publicly referred to Vietnam in inflammatory terms, and NUON Chea publicly stated that the Cambodian people and KRA had 'crushed the Vietnamese strategy of "Indochina Federation" aiming at swallowing the Kampuchea's territory and exterminating the [sic] Kampuchea's race'. The Chamber was further satisfied that the Vietnamese were identified by the CPK through the creation of lists and that mixed families were targeted on the basis of matrilineal ethnicity.".[2965]

1557. The Chamber thus relied on the speeches of the CPK from 1977 and 1978, distorting them to find an incitement to racial hatred in them, even though this is not a reasonable finding when we carry out an objective analysis of the things that were said or of the Party publications. As we have seen above, it is clear that all of the leaders who spoke during the armed hostility always referred to Vietnam, the enemy of the state and to the Vietnamese army.[2966]

1558. It is obviously the case that KHIEU Samphan's speeches can only be interpreted as encouragement for the efforts of the DK forces to defend the national territory against a military enemy in a war that would only be openly acknowledged by the CPK from December 1977. This armed hostility was nonetheless at the heart of all concerns long before this date and the Chamber erred by concealing this aspect to justify a conviction. By placing Vietnamese civilians on the same level as Vietnam as a country and its army, the Chamber has not only distorted the evidence but also shown its partiality.

1559. The Chamber also stated that it was satisfied that Vietnamese civilians were targeted at Prey Veng and Svay Rieng and that this was an integral part of this policy against the Vietnamese. However, it has also been seen that the evidence was insufficient to find on certain murders in these

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[2964] Reasons for Judgement, §3513.
[2965] Reasons for Judgement, §3517.
[2966] See above, §1058-1097.

provinces,[2967] that the theory of matrilineal affiliation that would have proved the CPK's policy of destruction does not stand up to an examination of the facts,[2968] and that the entire population was affected by the compilation of lists, mainly due to the operation of the cooperatives that needed to calculate the rations for everyone.[2969] Furthermore, the Chamber did not make any connection between the speeches, the RF/RY publications and the perpetrators of the crimes in these places, which anyway did not affect people of Vietnamese descent living in Cambodia.

1560. The Chamber has therefore not established the existence of a general policy aimed at taking hostile measures against people of Vietnamese descent or one aimed at their partial or total destruction as a racial group.[2970] Due to the errors of fact and of law examined above, it also failed to establish all the crimes that it considered to be part of this policy.[2971] In these conditions, all of its findings on the existence of this policy and the fact that it would have served the common purpose should be reversed,[2972] including the conviction of KHIEU Samphan.[2973]

Section II. ALLEGED POLICY REGARDING THE CHAM

1561. It should be recalled that KHIEU Samphan was acquitted of the crime of genocide by murder of the Cham.[2974] The criticism of the alleged policy against this group will be therefore limited to the extent to which it served to convict him of the CAH of murder, extermination, imprisonment, torture, persecution on political and religious grounds and OIA that took the form of facts qualified as forcible transfer regarding the Cham.

1562. As has been seen above, the Chamber committed errors by judging facts of which it had not been properly seised. Its material competence did not in fact include the facts of "discrimination" on religious grounds against the Cham occurring at the 1JD Worksite , and it therefore erred in law in judging those facts.[2975] In addition, it was never seised of facts constitutive of murder as a CAH regarding Trea village and therefore could not find on the constitution of the CAH of murder at the

[2967] See above, §987-1017.
[2968] See above, §1043-1048.
[2969] See above, §1096.
[2970] Reasons for Judgement, §4000, 4003-4004
[2971] See above, §966-1097.
[2972] Reasons for Judgement, §4000-4012.
[2973] Reasons for Judgement, §4291 -4295.
[2974] Reasons for Judgement, §4308.
[2975] See above, §395.

Trea security centre in 1978.[2976] All of its findings in this respect should be reversed. The Chamber also erred in law by declaring itself competent to judge facts of persecution on political grounds committed during MOP2.[2977]It erred in law by judging facts of forcible transfers committed during MOP2 under the legal characterisation of the facts of the CAH of OIA of forcible transfers when it should have noted that they had already been judged definitively.[2978] All of its findings in this respect should be reversed.

1563. In addition to the questions of the matters of which the court was seised, as has been seen above, the Chamber erred in fact and in law invalidating its findings regarding the crimes of murder and extermination, torture, persecution on political grounds and on religious grounds, as well as the crime of OIA through forcible transfers. These facts that have not been proved beyond reasonable doubt could not be integrated in a "policy" qualified as criminal by the Chamber. All of its findings in this respect should be reversed. As has been seen above, the Chamber erred by considering established at the required level of evidence the *actus reus* of the crime of murder in the case of the victims of the Wat Au Trakuon and in the case of a large number of Cham from the Kroch Chhmar district in 1977.[2979] The material and *mens rea*s of the crime of extermination in the case of the executions at the Wat Au Trakuon in 1977 and in Trea village in 1978 could not be judged as constituted either. All of its findings in this respect should be reversed.

1564. As also seen above, the Chamber erred in fact by considering the *actus reus* of the crime of torture as constituted in the case of the bodies taken to IT Sen and the Cham men at the security centre in Trea village on the day of IT Sen's arrest in 1978.[2980] It erred in the same respect by considering as constituted the actus reus and *mens rea* of the crime of persecution on political grounds against the Chams in the case of the mass transfer of the population from the East Zone to the Central Zone.[2981] All of its findings in this respect should be reversed. As seen above, the Chamber finally erred in fact and in law by considering the actus reus and *mens rea* of the crime of persecution on religious grounds against the Cham to be constituted, at the level of evidence required, at the 1JD

[2976] Reasons for Judgement, §3306-3308. See above, §517-518.
[2977] Reasons for Judgement, §3184, 3320. See above, §538-542.
[2978] Reasons for Judgement, §3184, 3335. See above, §538-542, 544-546.
[2979] See above, §894-924.
[2980] See above, §925.
[2981] See above, §926-936.

Worksite, in the Kroch Chhmar district, in the Central Zone and in several places in Cambodia.[2982] All of its findings in this respect should be reversed. Finally, as has been seen above, the Chamber erred in law by considering the CAH of OIA established regarding the facts qualified as forcible transfers during MOP2.[2983] These findings must be annulled.

1565. The Chamber erred in fact and in law by concluding that there was "a CPK policy throughout the DK period targeting the Cham as a result of their group identity".[2984] According to it, these measures were implemented "as part of the Party's overarching goal to establish an atheistic and homogeneous Khmer society".[2985] This goal supposed by the Chamber was merely the result of its incorrect interpretation of the evidence. No official CPK document makes it possible to establish that there was a policy against the Cham (I), which has also been confirmed by a large number of witnesses (II) and which explains why the evidence does not demonstrate that the Cham were targeted (III).

I. ABSENCE OF ANY OFFICIAL DOCUMENT REGARDING A NATIONAL POLICY AGAINST THE CHAM

1566. More than an atheist society, the political purpose of the KR on their rise to power was to create a secular society in which religion effectively took second place in relation to the revolutionary goals of rebuilding the country. [2986] Contrary to what was stated by the Chamber, the specific identity of the Cham as members of a group was never a problem for the CPK which, quite the opposite, presented them as forming an integral part of the Cambodian nation and whose participation in the revolution was praised in a report in October 1975.[2987] This document refers to the "*fraternal Cambodian Moslem*", which is far from demonstrating any hostility towards them.

1567. This is a fundamental element, which also explains why the Chamber had difficulty in finding any political document from the Party presenting the Cham as enemies. Thus, in an issue of RF from

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[2982] See above, §804-813, 933-963. See also §642-655, 657.
[2983] See above, §964-965.
[2984] Reasons for Judgement, §3990.
[2985] Reasons for Judgement, §3990
[2986] See, for example the Document "Concerning the grasp and implementation of the political line in mobilizing the National Democratic Front Forces of the Party", 22.09.1975, **E3/99,** ERN EN 00244276: "Previously, we mobilized the national and democratic forces to fight the enemy and liberate the country. Now, we are mobilizing the forces to defend and rebuild the country." (emphasis added).
[2987] *Moslem guaranteed full Democratic liberties*, 14.10.1975 (FBIS), **E3/272**, ERN EN 00167520. ("*After liberation, [Cambodian Moslem] quickly achieved political awakening. Correctly educated and guided by the revolutionary organization, they have formed a new revolutionary concept regarding problems of production and the nation. Closely united with the Cambodian brothers, they have organized themselves into solidarity groups for production [...]".)*

1976, reference is made to the nation of DK "which is made up of both Khmers and other races who are in the different bases".[2988] In 1977, a DK publication talks about the population made up of Khmers and "numerous national minorities living all together in the same and great family, closely linked to defend and build the country".[2989] In the same manner, the DK Constitution, as symbolic as it could have been, highlighted "harmony" and "great national solidarity" to build the country.[2990] Here again, it was never a question of considering the Cham as enemies.

1568. Even if we consider that all these documents were propaganda, it should be noted that the message was positive and called for national solidarity. However, when the CPK wished to denounce political opponents or enemies whether they were considered imperialists, capitalists or reactionaries, it did so. This was never the case for the Cham.

1569. Instead of reaching the only reasonable finding there could be in view of the documentary evidence, i.e. that there was no policy of specific measures against the Cham, the Chamber erred in fact and in law by using the occurrence of crimes to attempt to justify its theory and by distorting the evidence.[2991] The convoluted manner in which it has attempted to prove that such a policy existed is particularly indicative of the intellectual construction necessary to arrive at this finding, which, if it had existed, would quite simply have been established by the facts.

1570. Thus, the Chamber erred in fact and in law by stating that it was "satisfied that the treatment of the Cham demonstrates the CPK's objective of establishing an atheistic and homogeneous society without class divisions and, in so doing, the Party's intent to abolish all national, religious, class and cultural differences".[2992] It also considered that "this objective was implemented through the CPK's policy to identify, arrest, isolate and 'smash' enemies".[2993]

1571. To reach this finding, the Chamber mobilised the class struggle, the supposed introduction of atheism and therefore the fight against religion, and the fight against the enemies. This approach completely contradicts the attempt to establish a specific kind of treatment due to belonging to the

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[2988] Revolutionary Flag, April 1976, **E3/759**, ERN EN 00517854.
[2989] Democratic Kampuchea is moving forward, 08.1977, **E3/1388,** ERN EN S 00050248 (emphasis added).
[2990] DK Constitution, 05.01.1976, **E3/259**, ERN EN 00184834.
[2991] See in particular the distortion of KHIEU Samphan's comments which had absolutely no relation to the Cham, Reasons for Judgement, §3207, 3211, 3216.
[2992] Reasons for Judgement, §3993.
[2993] Reasons for Judgement, §3993.

Cham group. It is not only incorrect in the absence of evidence of a policy defined at national level by the CPK against the Cham, but it collides above all with the reality of the facts.

II. LACK OF NATIONAL POLICY CONFIRMED BY THE WITNESSES

A. Senior cadres

1572. The Chamber wrongfully concealed the testimony of several witnesses who jeopardised its theory of the existence of a policy against the Cham. However, Duch, whom it had considered credible on many occasions despite his tendency to speculate, told the court that neither SON Sen nor NUON Chea had "never instructed him about Cham people".[2994] Nor had he "ever heard of the arrest of members of the Cham people" and, above all, he said that "there was no policy aimed at exterminating the Cham people", and that he had seen "no document at the time stating such a Party line".[2995] The Chamber erred by neglecting this aspect of the testimony of the leader of S-21, the largest security centre in the country, who in addition had Cham people on his staff.[2996] At a high level, the Chamber should also have taken account of the statements from MAT Ly, a Cham who was close to the senior CPK leaders and who refuted the idea of a specific policy regarding the Cham.[2997] In fact, he stated that POL Pot "did not hate" the Cham people and that the reason for the arrests of which his family was a victim came from accusations of belonging to the CIA, the KGB or an alliance with the Vietnamese.[2998] He also spoke about repression with respect to "all the Khmers".[2999]

B. Experts

1573. The Chamber did not take into account the consistent testimony from several experts or particularly well-informed witnesses. It is also advisable to remember that it erred by refusing to recall Stephen HEDER and François PONCHAUD whose appearance had been requested by the Defence.[3000] In

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[2994] *Duch*: T. 15.06.2016, **E1/438.1**, p. 31, around 10.35.01 and regarding his subsequent hypotheses, p. 30 around 10.39.11.
[2995] *Duch*: T. 23.06.2016, **E1/443.1**, p. 105-106, after 15.36.37, p. 109, at 15.46.40.
[2996] *Duch*: T. 22.06.2016, **E1/442.1**, p. 49-50, at 11.26.57. *Duch* stated that SIM Mel, a Cham member of S-21 was punished because he had committed several wrongdoings and not because he was a Cham.
[2997] Book by Ben KIERNAN, *The Pol Pot regime: Race, power, and genocide in Cambodia under the Khmer Rouge, 1975-79*, 1996, **E3/1593**, p. 323, ERN EN 01150140. MAT Ly was on the CPK committee in Tbaung Khmum; Interview with MAT Ly by Steve HEDER, undated, **E3/390**, ERN EN 00436867-00436869 and 00436874-00436875.
[2998] Statement from Mat Ly to the DC-Cam, 27.03.2000, **E3/7821**, ERN EN 00441579-00441580.
[2999] Statement from Mat Ly to the DC-Cam, 27.03.2000, **E3/7821**, ERN EN 00441579-00441580.
[3000] See above, §165-173.

any case, during Case 002/01, these experts and witnesses were unanimous in stating that there was no specific policy regarding the Cham people. This is the case with Philip SHORT who, while he talked about the "savage repression of their rebellion" in 1975, considered that there was no "conscious attempt to exterminate any particular ethnic group" in respect of the Cham people.[3001] PONCHAUD, who had lived for several decades in the heart of Cambodian society, agreed wholeheartedly, while mentioning "due to the conflict with Vietnam", a rise in tensions in 1978.[3002] HEDER also emphasised to the court that the introduction of the initial policies described as anti-Cham "were actually carried out by cadres who were themselves Cham".[3003] Even Henri LOCARD, with all his partiality regarding KHIEU Samphan and his animosity towards the Defence, acknowledged at the hearing that in his work of collecting DK slogans, he had found "no slogan against the Cham", adding that they were not "hated by the regime for being an ethnic minority".[3004]

1574. As extensively discussed above, the question was therefore not that of a policy of specific measures but that of the application of equal measures to the entire population.[3005] The diversity of the testimonies from former cadres and local leaders confirmed by the experts therefore tend to prove that there was no policy issued by the CPK but local management of the population, whether Khmer or Cham.[3006] The Chamber therefore could not deduce from all these elements that there was a standard practice and even less so instructions coming from the leaders of the CPK specifically targeting the Cham, and this is what explains that an impartial and objective examination of facts would not make it possible to find that the Cham people were targeted.

[3001] Philip SHORT: T. 09.05.2013, **E1/192.1**, p. 19, around 09.40.54.
[3002] François PONCHAUD: T. 10.04.2013, **E1/179.1**, around 13.44.15; T. 11.04.2013, **E1/180.1**, around 10.23.30.
[3003] Stephen HEDER: T. 15.07.2013, **E1/223.1**, around 15.15.25.
[3004] Henri LOCARD: T. 28.07.2016, **E1/450.1**, after 15.22.40; T. 02.07.2016, **E1/453.1**, after 09.34.01.
[3005] See above, §939-961.
[3006] It is noted that this disparity was found *de facto* by the investigating Judges even though they did not reach the logical findings from it. In fact, in §320 of the CO, the Judges were obliged to state that some witnesses remembered that "Cham people in Tram Kok district were treated like everyone else". Similarly, in §500, they noted that regarding the Kraing Ta Chan security centre: "However, 'base people', former Khmer Republic soldiers, CPK cadres, Chinese, Vietnamese and Cham also contributed to the population. With regard to the Chams, witnesses who lived in Tram Kok District said that Chams were treated like everyone else.". This is what was also found in the testimony in court regarding TK.

III. TARGETING OF THE CHAM NOT ESTABLISHED

1575. As we have seen above, in addition to the errors of law in relation to the Chamber being seised and the principle of legality,[3007] the Chamber has not established beyond reasonable doubt that the Cham were targeted as part of the crime of persecution on political or religious grounds.[3008] They worked in the same conditions as the rest of the population in the cooperatives and on the worksites, they were moved at the same time as the rest of the population, and they received the same treatment as the rest of the population in terms of arrests. Their fate was no different from that meted out to non-Muslim Khmers. Many witnesses also concentrated on the description of this equal treatment, which therefore opposes the finding on the existence of discrimination and the intention to exercise any with respect to the Cham.[3009]

1576. Regarding the crime of OIA/forcible transfers, it is further recalled that the Chamber erred in law by not limiting itself to what it was seised of.[3010] From the time when it failed to establish that the movement of the Cham in MP2 was discriminatory, it should have found that they were included in the MOP2 already examined by the same judges in Case 002/01. However, KHIEU Samphan had already been judged and definitively sentenced for these crimes.[3011] The Chamber therefore ruled in breach of the principle of res judicata and could not in any case make use of these facts to establish the existence of a policy.

1577. It therefore wrongfully found on the existence of a policy that involved taking hostile measures against the Cham, particularly the CAH of murder, extermination, imprisonment, torture, persecution on religious and political grounds and OIA/forcible transfers as a means to achieve the common purpose having the effect of giving it a criminal nature.[3012] It is obvious that the Chamber committed all these errors because it needed the existence of such a policy to be able to find the culpable intent of KHIEU Samphan to commit the crimes in relation to the treatment of the Cham. All of its findings concerning his guilt in this respect should therefore be reversed.[3013]

[3007] See above, parts II and III.
[3008] See above, §939-961.
[3009] See above, §926-932.
[3010] See above, § §538-546.
[3011] See above, §926-932,964-965.
[3012] Reasons for Judgement, §3392-3998.
[3013] Reasons for Judgement, §4289, 4326-4327.

Section III. ALLEGED POLICY REGARDING EX-KR

1578. As has been seen, the scope of the material competence of the Chamber did not include the facts of "discrimination" that occurred at TK against former Khmer Republic officials. It therefore could not find that the crime of persecution on political grounds was constituted with respect to ex-KR at TK.[3014] Similarly, the Chamber was improperly seised of facts constitutive of "discrimination" targeting ex-KR at the 1JD Worksite and it was not able to find that the crime of persecution was constituted.[3015] As has been seen, the Chamber was irproperly seised of facts of "discrimination" against ex-KR at KTC and it was not able to find that the crime of persecution was constituted.[3016] Nor could these facts be included in the evidence of a policy qualified as "criminal" with respect to ex-KR. Furthermore, as it has also been seen above, the Chamber was not seised of an alleged policy against ex-KR.[3017]

1579. As has been seen above, the examination of the evidence did not make it possible to find that the crime of persecution on political grounds was constituted in relation to ex-KR at TK. Therefore, the finding incorporating these facts in a policy qualified as "criminal" should be reversed.[3018] As has been seen above, the CAH of persecution on political grounds is not constituted in relation to ex-KR at the 1JD Worksite. The finding incorporating these facts in a policy qualified as "criminal" should be invalidated.[3019]

1580. As has been seen above, the Chamber was not seised of any specific policy regarding ex-KR in all regions. In fact, the only specific policy regarding them defined by the CO was a policy against ex-KR "during the movement from Phnom Penh".[3020]

1581. The Chamber had so few arguments to uphold the existence of specific treatment of ex-KR upheld by the Appellant that it particularly relied on statements attributed to KHIEU Samphan just after the victory over LON Nol's troops made in a context of end of armed hostility with the language of propaganda in line with the victory of the KPNLAF. Thus, it carried out a selective examination of the evidence by only using from his victory message of 21 April 1975 the phrase stating that

[3014] See above, §372-373, 451-457.
[3015] See above, §490-492.
[3016] See above, §500-504.
[3017] See above, §522-530.
[3018] See above, §719-726.
[3019] See above, §798-803.
[3020] See above, §522-530. CO, §206.

"the enemy had 'died in agony'".[3021] However, this speech was praise for the victorious troops and the enemies in question were the "American imperialists" and their allies at the head "of the most corrupt regime that exists" and not all of ex-KR.[3022]

1582. Nor did the Chamber hesitate to make use of the events at Tuol Puol Chrey in the NEZ[3023] to conclude the existence of such a policy, even though KHIEU Samphan had been acquitted of these facts by the Supreme Court, which found "on the inapplicability of the theory of joint criminal enterprise, because the existence of the policy consisting of taking specific measures (and therefore of a joint criminal enterprise) has not been established".[3024]

1583. The only reason why the Chamber, on the foundation of a confused concept of the enemies, found that a policy existed against ex-KR was that it was necessary to have the *mens rea* of the crime of persecution on political grounds. In any case, an objective and impartial examination of the factual elements did not make it possible to find on the specific treatment of ex-KR in the Tram Kok cooperatives, or at the 1JD Worksite where all the workers lived in the same conditions, or in the S-21 security centre and at KTC where all detainees suffered the same fate. The Chamber therefore wrongfully concluded that the crime of persecution on political grounds with respect to ex-KR was constituted in the different places and was part of the common purpose.[3025]

1584. The use of elements of which the Chamber was not seised to make up for its lack of evidence on the sites regarding which it was seised is an error that should be sanctioned. All its findings made in breach of the matters of which it was seised to attempt to establish a criminal policy should therefore be reversed.[3026] Its general finding on the fact that it existed and that it formed part of the common purpose should also be reversed.[3027]

[3021] Reasons for Judgement, §4037.
[3022] Victory message from KHIEU Samphan, 21.04.1975, **E3/118**, ERN (EN) 00166994, 00166977 ("After the most courageous and stubborn fight, after enduring all sorts of suffering and difficulties with great heroism and after enduring great sacrifices for 5 years and 1 month, our most valiant CPNLAF and our great people have totally smashed the most ferocious war of aggression of **the** U.S. imperialists and completely crushed the most traitorous, fascist and corrupt regime of traitors Lon Nol, Sirik Matak, Son Ngoc Thanh, Cheng Heng, In Tam, Long Boret and Sosthene Fernandez.", emphasis added).
[3023] Reasons for Judgement, §4036.
[3024] Case 002/001 Appeal Judgement, 23.11.2016, §1100. See also §859 in which the Supreme Court found that the evidence opposes "the existence of any generalised policy as of 4 June 1975.".
[3025] Reasons for Judgement, §4059-4061.
[3026] Reasons for Judgement, §4026-4033, 4035, 4038, 4042-4047, 4051, 4053.
[3027] Reasons for Judgement, §4060-4061.

1585. Insofar as it is only on the basis of this policy that the Chamber found KHIEU Samphan guilty of the crimes committed on the different sites of Case 002/02, it would also be advisable to overturn the decision on conviction in this respect.[3028]

Section IV. ALLEGED POLICY REGARDING THE BUDDHISTS

1586. As has been seen above, the material competence of the Chamber did not include the facts of "discrimination" against the Buddhists and the Buddhist monks that occurred in the TK cooperatives. The Chamber therefore erred in law by considering itself seised and judging the crime of persecution on religious grounds regarding the Buddhists and the Buddhist monks at TK. Therefore, its findings incorporating these facts in a policy qualified as "criminal" should therefore be reversed.[3029]

1587. As stated above, the Chamber erred in law by characterising the crime of persecution on religious grounds against the Buddhists and the Buddhist monks in the absence of any intention to exclude the Buddhists from society.[3030]

1588. As also seen above, the Chamber erred by judging as constituted beyond reasonable doubt the crime of persecution on religious grounds regarding the Buddhists and Buddhist monks at TK.[3031]

1589. The findings reached by the Chamber regarding the existence of a policy regarding the Buddhists have all been made in breach of the matters of which the Co-Investigating Judges and subsequently the Chamber were seised. KHIEU Samphan therefore did not have to respond to this and these findings should primarily be reversed. Secondarily, the Supreme Court will only be able find that the Chamber erred in fact and in law to find that a criminal policy existed against the Buddhists based on the foundation of the factual elements of the case file. On the one hand, it has not been proved beyond reasonable doubt that there was discriminatory treatment against the Buddhist monks, or that the crime of persecution on religious grounds had been committed at TK or elsewhere.[3032]

[3028] Reasons for Judgement, §4299.
[3029] See above, §426-434.
[3030] See above, §641-656.
[3031] See above, §743-747.
[3032] See above, §743-747.

1590. In fact, in revolutionary DK, priority was given to the reconstruction of the country to which the entire population had been called. All religious practices had been restricted, without any specific measure having been taken against any of them, since everyone received the same treatment, which is the opposite of any discrimination. It erred in law by applying the concept of indirect discrimination, which did not exist at the time of the facts.[3033]

1591. This is the reason why the Chamber was unable to establish any specific treatment regarding the Buddhist monks at TK or elsewhere.[3034] It was unable 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. All of its findings in this respect should be reversed, including the convictions of the Appellant in this regard.[3035]

Chapter V. REGULATION OF MARRIAGE

1592. As has been seen above, it was not possible to find on the existence of a criminal policy regarding the organisation of forced marriages and the commission of rape in this context.[3036]

Chapter VI. ERRORS REGARDING THE ALLEGED COMMON PURPOSE

1593. An in-depth examination of each alleged policy by the Chamber and of the facts in support of the alleged crimes reveals the accumulation of its errors to connect them with the common purpose. As indicated at the beginning of part IV of this brief, the starting premise of the Chamber regarding the definition of a political purpose of the CPK only through the prism of "destroying the enemy" is false. However, it is based on this incorrect premise that the Chamber, like the Co-Investigating Judges before it, then constructed the different policies. This led to bias in the manner in which it examined the evidence and also affected its reasoning.

Section I. A COMMON PURPOSE OTHER THAN "CRIMINAL" POLICIES

1594. The many variations in the common purpose defined by the Chamber attest to the biased way in which it has considered it, namely for the purpose of being able to include the criminal policies in it. However, the Chamber erred by defining this purpose in reference to the historical periods

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[3033] See above, §954-956.
[3034] See above, §743-747.
[3035] Reasons for Judgement, §4017-4022, §4297-4298.
[3036] See above, §1243-1280 (errors in the regulation), §1341-1398 (rape).

experienced by the CPK and by finding that the deviations in the application of this purpose were the foundation of it.[3037] The 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. This purpose was not criminal in itself and the Chamber erred by defining its objectives and its content and by concluding that its implementation involved criminal policies.[3038]

1595. The purpose of the establishment and operation of the cooperatives was part of a collective economic choice in line with the Marxist foundation of the CPK. The fact that the first cooperatives were established to supply the front during the war against LON Nol's regime did not transform this system of shared organisation into a system of "destroying the enemy".[3039] Similarly, the fact that the local leaders did not follow the CPK recommendations and that these cooperatives failed in their goal of improving the situation of the population is not a manifestation of a deliberate "policy" of enslavement and ill treatment, but of the failure of an economic project focused on large-scale farming in a crisis situation.[3040]

1596. The speeches given during the period of AC were not manifestations of a "policy" but official stances of DK in response to military attacks in a context in which power relations were not in favour of the Cambodian camp.[3041] Similarly, the attacks against the Vietnamese State, the military enemy, were unrelated to a policy regarding people of Vietnamese descent living in Cambodia.[3042]

1597. The relegation of all religions to the background and the restriction of religious practices were the contrary of specific measures regarding certain groups since they affected the entire population equally.[3043] Furthermore, the Cham, the Buddhists, ex-KR and NP lived in the same way as the rest of the population in the cooperatives and on the worksites.[3044]

[3037] Reasons for Judgement, §4068-4074.
[3038] Reasons for Judgement, §4068-4074
[3039] See above, §1490-1510.
[3040] See above, §1503-1504.
[3041] See above, §1073-1085.
[3042] See above, §1058-1097, 1551-1560.
[3043] See above, §743-747, 934-963.
[3044] See above, §719-747, 763-767, 787-813.

1598. The operation of the security centres under the control of the army in the utmost secrecy[3045] led to a deviation in security that was not part of the common purpose of establishing a socialist revolution in Cambodia. Therefore, the Chamber wrongfully qualified this deviation as a "policy of eliminating enemies" which existed before the DK regime, particularly by distorting the ideological discourse of class struggle.[3046]

1599. Instead of examining the facts globally and objectively, the Chamber only not took them into consideration when they endorsed its theory of criminal policies by completely concealing the exculpatory evidence.[3047] It was this constant inculpatory approach that led it not only to err in law, by breaching the principle of legality to use crimes that did not exist in CIL at the time of the facts, but also to err in fact in its interpretation of the evidence.[3048] Its findings on the regulation of marriage are representative of the legal and factual errors of the Reasons for Judgement.[3049]

1600. The core of the Chamber's errors is the fact that it considered that because crimes had been committed, there was a criminal policy. However, crimes do not make a policy. This reasoning is the result of the syllogism criticised in the way in which the Chamber applied the law of the JCE.[3050] Without a link between KHIEU Samphan and the crimes, it decided to create criminal policies to make a conviction stick. However, just as crimes do not make a policy, participation in a common purpose that is not criminal in itself does not make criminal intent.

Section II. PARTIPATION OTHER THAN CRIMINAL INTENT

1601. The Chamber erred in fact and in law by finding that the shared purpose became criminal through policies that were necessary for its implementation.[3051] The purpose of its biased examination of the CPK communications and administrative network was to lead to the "knock-on effect" of implicating KHIEU Samphan due to being unable to prove his contribution to a criminal aspect of the common purpose,[3052] in the same way as the identity of the members sharing in the common

[3045] See above, §1905.
[3046] See above, §1473-1479.
[3047] Reasons for Judgement, §4068-4074
[3048] See above, §642-657.
[3049] See above, §1189-1280.
[3050] See below, §1999-2000.
[3051] Reasons for Judgement, §4068.
[3052] Reasons for Judgement, §4069-4073. See above, §1644-1649.

purpose corresponding to all DK officials identified in the various CPK organisations and the zone and district leaders.[3053]

1602. Basically, the mere support of the Appellant for the shared purpose of establishing a socialist revolution in DK was not synonymous with support for a criminal plan. The Chamber's finding that "KHIEU Samphan promoted the common purpose and encouraged the masses on its implementation through the policies" was not sufficient for it to find on his participation in the JCE.[3054] It should have established his support and his contribution to the criminal aspects of the common purpose to find regarding his criminal intent.

1603. However, we will see below that the elements produced to find regarding the Appellant's knowledge of and contribution to the crimes, particularly the scope of his role during the DK regime,[3055] are both factual and legal errors in an attempt to extend responsibility under JCE to a poorly defined common purpose.[3056] In any case, the biased examination of the evidence by the Chamber and its incorrect application of the law have marred its findings on the common purpose, which should be reversed.[3057]

Part V. ERRORS REGARDING RESPONSIBILITY

Title I. BREACH OF THE PRINCIPLE OF INDIVIDUAL RESPONSIBILITY

Chapter I. LACK OF CONNECTION BETWEEN THE APPELLANT AND THE CRIME SITES

1604. One of the most striking aspects of the Reasons for Judgement is the fact that the Chamber believed that it could leave aside establishing KHIEU Samphan's connections with the crime sites of Case 002/02 and therefore with the crimes. It concentrated its reasoning on the existence of criminal policies in order to "criminalise" the common purpose to arrive at a conviction for JCE. However, as we have seen above, the law of JCE requires KHIEU Samphan's contribution to the criminal aspect of the common purpose to be established and, given the reasoning of the Chamber, to the criminal aspect of the alleged policies. Before considering the errors that were committed in the

[3053] Reasons for Judgement, §4070.
[3054] Reasons for Judgement, §4070.
[3055] See below, §1652-1803.
[3056] See below, §1804-1934; 2001-2030.
[3057] Reasons for Judgement, §4068-4074.

examination of KHIEU Samphan's responsibility, it is useful to state how the Chamber unsuccessfully attempted to connect KHIEU Samphan with specific crime sites.

Section I. LACK OF CONNECTION WITH CRIMES AT TK

1605. In the Reasons for Judgement in relation to the TK cooperatives, KHIEU Samphan was only the subject of general information regarding his impressions in 1969 on his arrival into the countryside,[3058] one of his general policy speeches in 1976,[3059] his analyses of the cooperatives after DK,[3060] and his interpretation also after the facts of the DK Constitution on religion[3061] and a supposed declaration on the lesser importance of the monks for which no reference can be found.[3062] Apart from the irrelevant comment about the likelihood of a visit that they were unable to establish,[3063] it must be stated that nothing in the facts on the TK cooperatives would make it possible to conclude that KHIEU Samphan had a direct connection with the crime sites and with the crimes.

Section II. LACK OF CONNECTION WITH THE CRIMES AT THE TTD

1606. In the Reasons for Judgement in relation to the TTD, KHIEU Samphan was only the subject of general information regarding the same general political discourse in 1977 in which he praised "the strength of [...] people" and the achievements of DK in as a whole in terms of propaganda specific to the context of the commemoration of 15 April during which he spoke.[3064] The Chamber also referred to one of his statements to the court in which KHIEU Samphan talked about a visit to the TTD explaining that he did not know that the dams had been "constructed in exchange of such great loss".[3065] We will see below how the official visits were organised by the site leaders in such a way that the workers' difficulties were not visible.[3066] In any case, no element has established his presence at the time when the crimes were committed at the TTD and it was therefore impossible

[3058] Reasons for Judgement, §904.
[3059] Reasons for Judgement, §970.
[3060] Reasons for Judgement, §1021-1022.
[3061] Reasons for Judgement, §1090.
[3062] Reasons for Judgement, §1185, fn 4037 where it is not a question of KHIEU Samphan.
[3063] Reasons for Judgement, §1137: "In the final analysis, although it is likely that NUON Chea and KHIEU Samphan visited Tram Kak district during the relevant periods, […] the evidence does not establish the circumstances of any particular visit of these leaders to Tram Kak district with sufficient specificity".
[3064] Reasons for Judgement, §1221 fn 4163, 1224 fn 4170, 1296 fn 4433, 1316 fn 4504.
[3065] Reasons for Judgement, §1254.
[3066] See below, §1843-1844, 2130.

for the Chamber to make a connection between KHIEU Samphan and the crimes committed at the TTD.

1607. However, this did not prevent it from concluding in a particularly incongruous way, even after establishing that KHIEU Samphan was travelling in China, Vietnam and North Korea at the end of August 1975 when the Standing Committee visited the North West Zone, that it "is satisfied that by virtue of [his position] of seniority within the Party, [he was] aware of the report and participated in the development of plans and policies reflected therein.".[3067] This unreasonable and partial finding nonetheless did not demonstrate a connection between KHIEU Samphan and the crimes committed at the TTD.

Section III. LACK OF CONNECTION WITH THE CRIMES AT THE 1JD Worksite

1608. In the Reasons for Judgement in connection with the 1JD Worksite, KHIEU Samphan was only the subject of general information regarding his subsequent analysis of the facts regarding the construction of the dams[3068] and again regarding his speech on the occasion of the commemoration of the 15 April Victory in 1977.[3069] The Chamber was also obliged to find that "it is not proved to the requisite standard that KHIEU Samphan visited the Dam Worksite".[3070] Once again, no element made it possible to connect the Appellant to the 1JD Worksite and even less so to the crimes that were committed there.

Section IV. LACK OF CONNECTION WITH THE CRIMES AT KCA

1609. In the Reasons for Judgement in connection with KCA, KHIEU Samphan was only the subject of general information regarding his presence at three meetings of the SC on 9 October 1975, 22 February 1976 and 15 May 1976 when the KCA Project was discussed.[3071] The Chamber also had to state that the evidence in the case file regarding "a visit of KHIEU Samphan at the Kampong Chhnang Airfield cannot be established beyond reasonable doubt".[3072] Once again, nothing

[3067] Reasons for Judgement, §1256, finding appearing in fn 4289.
[3068] Reasons for Judgement, §1508, fn 5145.
[3069] Reasons for Judgement, §1517, fn 5181-5182; §1527, fn 5207.
[3070] Reasons for Judgement, §1490.
[3071] Reasons for Judgement, §1723, fn 5834-5835, §1724 fn; §1724 fn 5838, §1727 fn 5854.
[3072] Reasons for Judgement, §1792.

established a connection between the Appellant and the KCA site, and even less so with the crimes that were committed there.

Section V. LACK OF CONNECTION WITH THE CRIMES AT S-21

1610. In the Reasons for Judgement in relation with S-21, KHIEU Samphan was only the subject of general information regarding a speech in 1978 delivered to commemorate the 17 April Victory,[3073] a connection made between a speech by POL Pot and a "future speech by the Brother Head of State" only mentioned in the S-21 Notebook without it being established that he was talking about the Appellant,[3074] information about a letter that was sent to him by HUOT Sambath from S-21 without anything making it possible to conclude that he received it,[3075] and information about his statements regarding 870 but without any connection to S-21.[3076] The Chamber then referred to several statements from Duch mentioning his discussions with NUON Chea regarding the mention of KHIEU Samphan's name in certain confessions, without the Appellant having been informed of this,[3077] MAM Nai's evidence contradicted by Duch placing S-21 under the responsibility of the CC.[3078] It also noted that Pang had not sent Duch any message from KHIEU Samphan.[3079] Finally, it referred to statements from the Appellant taken after the regime, in which he gives his analysis of the purges and where it will be seen that they do not in any way demonstrate his knowledge of the facts at the time.[3080]

1611. The Chamber also examined the case of a number of CPK cadres who were purged but without being able to establish a connection between their presence at S-21 and KHIEU Samphan,[3081] including KANG Chap who it stated had been the cause of the arrest of the Appellant's family.[3082] It also talked about a supposed meeting with Duch on 6 January 1979 just before the arrival of the Vietnamese about which the chairman of S-21 gave conflicting statements, but which in any case did not permit a connection to be established between KHIEU Samphan and S-21 at the time of the

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[3073] Reasons for Judgement, §2173 fn 7301.
[3074] Reasons for Judgement, §2173 fn 7298, §2557.
[3075] Reasons for Judgement, §2179.
[3076] Reasons for Judgement, §2189, fn 7349.
[3077] Reasons for Judgement, §2227, fn 7491, §2228 nbp7494
[3078] Reasons for Judgement, §2183, fn 7327.
[3079] Reasons for Judgement, §2213, fn 7430.
[3080] Reasons for Judgement, §2270 fn 7656, §2313, fn 7816; See also below, §1858-1861.
[3081] Reasons for Judgement, §2300, §2313, fn 7813 and 7816, §2318 See also below, §1851-1853, 1862-1873.
[3082] Reasons for Judgement, §2320.

facts.[3083] Apart from the circumstantial evidence with its reasoning about the purges, the Chamber therefore was not able to establish a connection between KHIEU Samphan and S-21, neither his presence there nor his knowledge of the place.

Section VI. LACK OF CONNECTION WITH THE CRIMES AT KTC

1612. In the Reasons for Judgement in connection with KTC, KHIEU Samphan was only the subject of information in the context of a report stating that his name had been mentioned by somebody in Trapeang Thom South commune.[3084] Nothing else could be stated to establish a connection between the Appellant and KTC and even less so with the crimes that may have been committed there.

Section VII. LACK OF CONNECTION WITH THE CRIMES AT AU KANSENG

1613. In the Reasons for Judgement in connection with Au Kanseng, KHIEU Samphan is only mentioned once when reference is made to a "CPK rally held in July 1975 at the Olympic Stadium in Phnom Penh" on the occasion of the creation of Division 801.[3085] Nothing else could be stated by the Chamber to establish a connection between the Appellant and Au Kanseng and even less so with the crimes that may have been committed there.

Section VIII. LACK OF CONNECTION WITH THE CRIMES AT PHNOM KRAOL

1614. In the Reasons for Judgement in connection with PK, KHIEU Samphan is only mentioned once when the names generally used in the telegram codes of the K17 communication unit are stated.[3086] However, none of the telegrams received by KHIEU Samphan were in connection with PK.[3087] Furthermore, SAO Sarun testified that he had only had contact once with KHIEU Samphan as part of his activities in connection with "economic issues".[3088] Nothing else could be stated by the Chamber to establish a connection between the Appellant and PK and even less so with the crimes that may have been committed there.

1615. **General conclusion.** It must be stated that the Chamber has found it difficult to establish a connection between KHIEU Samphan and the crime sites that are the subject of Case 002/02. This

[3083] Reasons for Judgement, §2373, §2557-2558.
[3084] Reasons for Judgement, §2723, §2805.
[3085] Reasons for Judgement, §2863.
[3086] Reasons for Judgement, §2863.
[3087] See below, §1624-1625. See also §1856.
[3088] Reasons for Judgement, §3041.

is what explains that the only reason for attempting to establish his responsibility was to make use of the theory of JCE to attempt to establish an indirect link by the construction of criminal policies. This need is even more flagrant in the context of the treatment of specific groups, the Vietnamese, Cham and former Khmer Republic officials for whom the concept of a policy was essential to try to connect KHIEU Samphan with the crimes through his speeches and activities during DK. However, this did not remove the drawback of the need to prove not a mere contribution to the non-criminal common purpose but the contribution to the alleged criminal aspect of the policies identified by the Chamber. The Chamber committed numerous errors that did not allow it to find on KHIEU Samphan's contribution to the crimes.

Chapter II. RUSES TO MAKE UP FOR THE LACK OF CONNECTION AND COLLECTIVISATION OF LIABILITY

1616. In order to make up for the lack of connection between KHIEU Samphan and the crimes, the Chamber used artificial means to include his responsibility in a collective responsibility through the use of generic expressions (Section I), through assumptions about the means of communication and messages to which he had access (Section II) by concealing the principle of secrecy (Section III).

Section I. ERRORS IN THE USE OF GENERIC EXPRESSIONS

1617. In a collectivisation of responsibility contrary to its obligation to seek the individual responsibility of the Appellant, throughout the Reasons for Judgement the Chamber used generic expressions that nonetheless did not refer to any specific organisation of the CPK. It therefore erred in fact and in law by reaching findings on the responsibility of KHIEU Samphan using the expressions "Party Centre" (I), "*Angkar*" (II), and "870" (III) without identifying the members of the JCE to whom it was referring.

I. "PARTY CENTRE"

1618. The Chamber considered that the expression "Party Centre" referred collectively to the senior executive organs of the CPK based in Phnom Penh, namely, the Standing Committee, Central Committee, Military Committee, Office 870, Government Office (S-71) and sub-offices of the Government Office.[3089] In the analysis of the Reasons for Judgement, notably in Parts *16. The*

[3089] Reasons for Judgement, part *5.1.4. The Party Centre.*

Common Purpose and *18. The Criminal Responsibility of KHIEU Samphan*, this generic expression has been used incorrectly to connect KHIEU Samphan to all the decisions made by the DK organisations to which he did not belong.[3090]

A. The "Party Centre" is not defined out of context

1619. The Chamber has not given any coherent reason for referring to the SC and all the units subordinated to S-71 under the same name of "Party Centre", while neither the experts nor the former CPK cadres who testified were able to give a precise definition of it.[3091] According to HEDER, this "somewhat ambiguous" expression referred to an echelon of the Party structure or hierarchy that could be made up of several organisations or only one depending on the context.[3092]

1620. The Chamber therefore erred by using this expression on its own account without referring to the evidence to determine to what and to whom this "Centre" referred when it used this expression. Faced with the lack of clarity of the expression, it could not use this expression by including different offices and levels depending on what it wished to find.[3093] Without exact determination of what this concept involved in each case, the Chamber erred in fact by using this generic concept to reach findings from it regarding the responsibility of KHIEU Samphan, which are consequently marred by error.[3094]

B. Errors regarding communications (part 6 of the Reasons for Judgement)

1. Part *6.2. Lines of communication*

1621. The use of the expression "Party Centre" was thus the cause of several errors by the Chamber in the Reasons for Judgement. It erred by concluding in §483 that "outside the Party Centre, there was minimal lateral communication". This finding did not make it possible to establish which specific organisations or offices it was referring to insofar as the witnesses on which it based the

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[3090] See for example: Reasons for Judgement, §377(fn 1106), 384 (fn 1142), 3879 (fn 12939), 3911(fn 13047), 3962-3963, and 4065 (fn 13435).
[3091] Reasons for Judgement, §360-361, see fn 1026-1027.
[3092] Stephen HEDER: T. 11.07.2013, **E1/222.1**, before 09.37.55.
[3093] For example: Reasons for Judgement, §361, the Chamber considered that this "Party Centre" also included the offices around S-71, including K-12; Reasons for Judgement, §368, fn 1064, it found that unit K-12 looked after the fleet of vehicles and drivers for the "Party Centre"; Reasons for Judgement, §377 fn 1106 and §384 fn 1142, the Chamber found that the "Party Centre" took direct control of the autonomous sectors and, conversely, received reports from them; Reasons for Judgement, §424, fn 1280, the Chamber found that the KPNLAF were under the direct control of the zones and not of the "Party Centre" on 17 April 1975.
[3094] See for example, Reasons for Judgement, §4208, 4314, 4317, 4322.

finding said that they did not know what it was referring to, could only give hypotheses about it or even did not mention it.[3095]

1622. The Chamber also erred by concluding in §484 on the communication within the "Party Centre", "[s]urviving meeting minutes indicate that the Central Committee and the Standing Committee convened regularly to discuss CPK policy".[3096] However, the meeting minutes that it used only existed between September 1975 and June 1976 and it could not rely on the questionable documents from GOSCHA whose lack of reliability has been seen above.[3097] The Chamber therefore could not reach findings about the frequency of such meetings for the entire DK period. Furthermore, an unbiased assessment of these minutes should have led it to find that the decisions were always made by "*Angkar*" or the "comrade secretary" or even by the standing committee and certainly not by the CC.[3098]

1623. In this same process of conflation and confusion, the Chamber also erred by reaching inculpatory findings by stating that the senior CPK leaders met with each other in various combinations at K1

[3095] See Reasons for Judgement, fn 1524 (in §483). NY Kan: T. 30.05.2012, **E1/78.1**, around 09.39.31 (he did not mention the "Party Centre" at all, but simply said "We have to communicate through hierarchical structure"). Craig ETCHESON, Transcript of Case 001, 21.05.2009, **E3/55**, ERN EN 00330384 (even though he did talk about the "Party Centre", he nonetheless stated that "the [Party Centre] was the only organ that knew what was happening everywhere in the country"). SUON Kanil: T. 14.12.2012, **E1/154.1**, before 14.37.36 ("Q. Staying on this subject of a telegram from the sector to you, at the zone, what was the name of the office or unit based at the Centre which dealt with telegrams? A. I don't know. During that time, names were not revealed, and that -- I only knew my work, when others were supposed to know theirs."). PHAN Van: T. 13.12.2012, **E1/153.1**, before 09.10.24 ("the communication went through 870."). See also fn 1525 (in section §483). *Duch*: T. 28.03.2012, **E1/55.1**, around 09.53.41 ("Q. Would the zone committee be expected to report to another level or not, on the general situation? A. Direct above -- directly above the committee was the Central Standing Committee, namely the secretary and deputy secretary of the Central Standing Committee."). PRAK Yut: T. 21.01.2016, **E1/380.1**, around 09.21.16 (its upper echelon was limited to the sector only). SOU Soeurn: T. 04.06.2015, **E1/310.1**, around 15.25.52 (she did not mention the "Party Centre", but simply the upper level of the sector). SUON Kanil: T. 14.12.2012, **E1/154.1**, before 14.37.36. NORNG Sophang, head of the telegrams unit for POL Pot in Phnom Penh: he talked about "the Centre", nonetheless acknowledged that he did not know what it was, T. 04.09.2012, **E1/121.1**, after 09.42.13; T. 05.09.2012, **E1/122.1**, at 11.35.41 ("I was myself confused. I did not know 'who' was referring to the Standing Committee. But in the telegram service, for us, it didn't matter where they were and who was doing what. Our role was to send the telegrams ()."). YUN Kim: T. 19.06.2012, **E1/88.1**, around 10.18.59 (he simply stated that "the Centre" was in Phnom Penh).

[3096] Reasons for Judgement, §484 fn 1526 (which refers to §357.

[3097] Reasons for Judgement, §357 fn 1011. See above, §218-225.

[3098] Reasons for Judgement, §484 fn 1526. For example, Minutes of Meeting on Health and Social Affairs, 10.06.1976, **E3/226**, ERN EN 00183367-00183369. Minutes of Meeting on the Work of the Villages, 08.03.1976, **E3/232**, ERN EN 00182631-00182632. See also Minutes of Meeting, 10.03.1976, **E3/237**, ERN EN 00543730. (problem with translation in the French version regarding the PC, therefore see Khmer version ERN KH 00072476). These minutes mention that it was *Angkar* who had spoken and the SC that had decided to create a Party Leadership Committee in the Ministry of Industry.

and K3. In fact, no witness was able to state without speculation that this geographical proximity involved the participation of everyone in the common meetings.[3099]

1624. Similarly, the Chamber erred by reaching general findings about the communications sent to the nebulous "Party Centre" regarding transmissions of orders, requests and information by telephone and telegrams from the lower echelons.[3100] By using the generic term, the Chamber has completely concealed evidence from OEUN Tan chief guard of POL Pot and of NORNG Sophang, head of the telegrams unit that made it possible to exclude KHIEU Samphan from this decision-making "Party Centre".[3101]

2. Part *6.2.2. Communication between the Party Centre and Zones or autonomous sectors*

1625. The Chamber erred by finding that the zones and autonomous sectors reported directly to the "Party Centre", whereas the evidence allowed it to identify the specific recipients which did not include the Appellant.[3102] In fact, the most cited witnesses, namely PHAN Van and SAO Sarun, both from the autonomous region of Mondulkiri, and NORNG Sophang, who was in charge of the telegrams, indeed distinguished between the communications addressed to POL Pot[3103] from those addressed and received by KHIEU Samphan, those of the latter being in non-confidential format and related to production distribution.[3104]

[3099] Reasons for Judgement, §484 fn 1527 which also refers to §589. *Duch*: T. 28.03.2012, **E1/55.1**, around 13.39.28, he did not know about the "Centre" office because it was secret, see the Khmer version, p. 49, L. 5-6. OEUN Tan: T. 13.06.2012, **E1/86.1**, before 09.46.20 (he saw the leaders hold meetings but never knew what they were about because he was approximately 20 metres away). SA Vi: T. 08.01.2013, **E1/156.1**, around 11.40.05 (he never took part in any meetings during DK), and around 09.58.56 (he belonged to the second layer of guards and patrolled at night). SALOTH Ban: T. 23.04.2012, **E1/66.1**, around 14.09.35 (he never attended the CC meetings, but only saw KHIEU Samphan meeting with NUON Chea and POL Pot at K1 when he went to visit his wife who was a cook for this office).

[3100] Reasons for Judgement, §485, 486.

[3101] Reasons for Judgement, §485 fn 1529-1530 and §486 fn 1531-1533. See in particular OEUN Tan: T. 13.06.2012, **E1/86.1**, between 13.41.50 and 13.53.13. See also SA Vi, a subordinate of OEUN Tan at K-1 who explained that the latter was receiving orders from POL Pot and NUON Chea, T. 08.01.2013, **E1/156.1**, around 11.35.52. NORNG Sophang: T. 03.09.2012, **E1/120.1**, at 13.58.00. In spite of his communications with KHIEU Samphan about sending goods to the bases, NORNG Sophang stated that he never received any instructions from his superior to send telegrams received from the bases in copy to KHIEU Samphan.

[3102] Reasons for Judgement, §487 fn 1534.

[3103] SAO Sarun: T. 07.06.2012, **E1/83.1**, after 09.59.22 where the Prosecution showed him the DK telegram, Telegram from DK, 01.01.1978, **E3/383**, then according to him 870 was POL Pot (translation problem, see Khmer version p. 19, L. 6), before 10.22.44 (it was POL Pot who responded to the exchange of telegrams); T. 11.06.2012, **E1/84.1**, after 09.23.42; T. 12.06.2012, **E1/85.1,** after 15.40.08.

[3104] PHAN Van, son of Laing, former chief of the Mondulkiri region before SAO Sarun, said that the telegrams sent to Hem related to issues other than security, namely material for distribution in the regions and were in non-confidential format: T. 11.12.2012, **E1/151.1**, at 15.19.48, translation problem, see Khmer version, p. 76, L. 5-7, around 15.50.25

1626. Furthermore, other evidence in the case file also supported the finding that the decision-making authority rested with POL Pot and NUON Chea because of their position on the SC.[3105] It was therefore erroneous that the Chamber reached the findings using the term "Party Centre" as it could establish who the recipients of each type of message were and exclude KHIEU Samphan from the telegrams that did not correspond to his responsibilities.

C. Errors in the findings in Part *16. The common purpose*

1627. The nebulous term "Party Centre" was widely misused by the Chamber in its findings even though the evidence did not refer to it. For example, it concluded that KHIEU Samphan admitted in his book that the forced evacuations were part of a programme established by "the Party Centre", whereas in his book he spoke only of POL Pot and the CPK leadership, specifying that he was outside the core KR leadership, i.e. the Permanent Office.[3106]

1628. Similarly, the Chamber considered it established that "the Party Centre issued instructions concerning work hours" at the 1JD Worksite .[3107] However, it can be seen in the elements of documentary evidence referenced, namely a speech made by POL Pot in 1978, the post-regime book written by KHIEU Samphan, an RF issue, an FBIS report and two other CPK documents, that none of them refer to the "Party Centre", each one mentioning different identified bodies.[3108] The Chamber therefore erred in deliberately making findings aimed at creating a globalising entity that did not in fact exist.[3109]

"[KHIEU Samphan] had nothing to do with security. I've never seen his name associated with security issues."; NORNG Sophang: T. 03.09.2012, **E1/120.1**, around 13.50.43, around 13.53.08, around 13.56.04. NORNG Sophang, communications officer, said he had sent telegrams to the "Centre", distinguishing those addressed to KHIEU Samphan, which were "open" for distribution of material to the zones and for national holidays, from those of POL Pot.

[3105] Draft Statute of the Communist Party of Kampuchea, undated document, **E3/8380,** p. 22-23, ERN EN 00940584-00940585.

[3106] Reasons for Judgement, §3879 fn 12939. Book by KHIEU Samphan, *Cambodia's Recent History and the Reasons behind the Decisions I Made,* May 2007, **E3/18**, p. 117-118, ERN EN 00103781-00103782.

[3107] Reasons for Judgement, §3911, fn 13047 which refers to §1277 which in turn refers to §1509.

[3108] Reasons for Judgement, §1509, finding based on §1505-1508, fn 5137-5145. For example, the Chamber cited KHIEU Samphan's book when he simply referred to the technical problems of local officials, Book by KHIEU Samphan, *Considerations on the History of Cambodia*, **E3/16**, p. 90-91, ERN EN 00498303-00498305.

[3109] Another example: Reasons for Judgement, §3913. The Chamber found that "the uppermost echelon of the CPK including POL Pot NUON Chea and KHIEU Samphan were aware of living conditions on the ground". However, the evidence supporting his findings that the "Party Centre" intended to keep the workforce healthy but that the CPK had not responded adequately to the very high incidence of disease and widespread famine is a minutes of a meeting where the term *Angkar* is used. See fn 13058 (of §3911) which was based on the minutes of the meeting, 08.03. 1976, **E3/232** and a document FBIS, *Radio Calls for Attention to Year's Last Crop,* 29.11.1977 (FBIS), **E3/1339.** The Chamber also

1629. The Chamber also distorted and misrepresented evidence in support of its findings that the telegrams and reports produced before [it] were addressed to the "Party Centre" proving the existence of a chain of communication through the regular and systematic sending of reports following the chain of command between the zones and the CPK leadership, when they were all addressed to the *Angkar*, which has a different meaning.[3110]

D. Errors in the findings in Part *18. Criminal responsibility*

1630. In its findings on the Appellant's responsibility, it is understood that the Chamber's errors in using this broad and undefined expression of "Party Centre" were intended to reach the finding that the Appellant had knowledge of the crimes, contributed to them and was responsible for them.[3111] However, the nebulous nature has led to contradictory findings.

1631. Indeed, it initially concluded that "this proximity to the Party Centre ensured KHIEU Samphan's ongoing knowledge of the development of plans, their implementation and the substantial likelihood that crimes within the scope of [Case 002/02] would occur," that "was privy to public statements made by members of the Party Centre" and therefore was aware of the commission of the crimes and of "the substantial likelihood that further implementation of these policies would result in the crimes committed". [3112] It did not then include KHIEU Samphan in this "Party Centre". However, it went on to conclude that "as a senior leader with unique standing in the 'Party Centre', KHIEU Samphan supported the common purpose [...]". [3113]

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used this broad and nebulous formula in its findings on marriage and on the AuKg Security Centre without taking care to specify to which CPK body it was referring exactly: on the replacement of parental authority in accordance with the Guidelines of the "Party Centre" (§4065, fn 13435); AuKg regularly relayed information to the "Party Centre" about its activities, including the execution of more than 100 Jarai prisoners (§4070).

[3110] Reasons for Judgement, §3899 (fn 12999) and 3962-3963.

[3111] Reasons for Judgement, knowledge §4208 and 4236, other modes of participation §4314 and 4317 and the responsibility of the hierarchical superior §4322. Although the latter mode of responsibility was not retained, the Chamber considered that the principle of democratic centralism would have given KHIEU Samphan the possibility of intervening in the meetings of the "Party Centre", in particular those of the SC.

[3112] Reasons for Judgement, §4208 (emphasis added). In the same vein, Reasons for Judgement, §4314, on the subject of cooperatives and worksites, the Chamber found: "In public, KHIEU Samphan openly and actively encouraged and provided moral support to CPK cadres in the implementation of the Party Centre's policies at any and every cost"; Reasons for Judgement, §4317, the Chamber found that by his actions, KHIEU Samphan would have provided practical assistance and moral support to the Party Centre in the development and implementation of the Party Centre's policy on security centres and therefore considered it established that "assisted and facilitated the commission of the crime against humanity of murder (with dolus eventualis) at security centres and within the context of internal purges".

[3113] Reasons for Judgement, §4236 (emphasis added).

1632. **Conclusion.** Any reasonable trier of fact would have been careful to make findings by distinguishing between the different bodies of the CPK on the basis of the evidence used. These contradictions in the Chamber's reasoning attest to its lack of methodology and demonstrate the extent to which it erred in its use of the term "Party Centre", which taints all the findings it has drawn on this issue.[3114]

II. "*ANGKAR*"

1633. As with the term "Party Centre", the Chamber used the term *Angkar* throughout the Reasons for Judgement to artificially link KHIEU Samphan to the crimes in Case 002/02 even though it was aware of the ambiguity of this concept, which had to be interpreted in the light of the context.[3115]

A. Errors in the findings in Part *16. The common purpose*

1634. The Chamber concluded in §3962 that "Telegrams dispatched to *Angkar* bear conclusive evidence of the Standing Committee's direct involvement in the campaign to identify and eliminate enemy networks".[3116] Now, for the rest of Part 16, we understand from its reasoning that it identified POL Pot as the *Angkar*.[3117] However, it was sometimes confused in its analysis of the evidence by using the generic term *Angkar* for reports and telegrams sent from different zones when the expressions on the documents were different, Committee 870, *Angkar* 870 or *Bong Pol* or brother. [3118] This did not prevent the Chamber from being "convinced" - wrongly - that these elements "demonstrate the monitoring by the Central and Standing Committees of the implementation of the Party's policies in accordance with their mandates.".[3119] No reasonable judge could reach such a finding when the evidence showed a power focused on the person of POL Pot personally mentioned in the documents.[3120]

[3114] Reasons for Judgement, §4208, 4236-4328, 4314, 4317, 4382-4383.
[3115] Reasons for Judgement, Part *5.1.8. the Angkar*, §342 fn 944 (where the Chamber found that the *Angkar* was a faceless entity and perceived as having absolute power of control over the whole society), §388. See also below, §1640-1649.
[3116] Reasons for Judgement, §3962.
[3117] Reasons for Judgement, §3013 fn 13065 where it refers to the minutes of SC meetings where the decisions of POL Pot are the decisions of the *Angkar*.
[3118] Reasons for Judgement, §3912 fn 13048, §3964 fn 13189-13193.
[3119] Reasons for Judgement, §3964, fn 13189-13194.
[3120] Reasons for Judgement, §3912 fn 13048, §3964 fn 13189-13193. It is worth recalling the testimony of SAO Sarun, Head of Autonomous Region 105, whose name appears on the available telegrams, who explained to the Chamber that POL Pot was indeed the addressee of the telegrams and that it was he who replied. SAO Sarun: T. 07.06.2012, **E1/83.1**, after 09.59.22 where the Prosecution showed him the DK telegram, DK Telegram, 01.01.1978, **E3/383**, then according

1635. The Chamber therefore erred in being vague on the expression when it should have reasoned its decision according to the context of the evidence and not made general findings on the term *Angkar* when it could refer to the Party, POL Pot alone or local civilian or military authorities depending on the context as will be seen below.

B. Errors in the findings in Part *18. Criminal responsibility*

1636. Here again, it must be noted that the Chamber's errors were not insignificant but consisted of using the term *Angkar* to facilitate the link with the Appellant.[3121] Indeed, the Chamber noted that KHIEU Samphan is said to have encouraged the population to support the *Angkar* programme for the construction and defence of the DK and/or to promote "*Angkar's* Four Year Economic Plan and 'maintain under all circumstances' the targets set by the Party".[3122] However, an unbiased reading of the evidence supporting these findings shows that it is not the term *Angkar* that is used, but rather that of the people or the Party.[3123] The Chamber therefore erred in fact and in law by failing to justify which exact person or body the documents on which it relied referred to.[3124]

III. "870"

1637. Code 870, which also has several different meanings depending on the context, was used by the Chamber to link KHIEU Samphan to the crimes, in particular through his contribution as a participant in the JCE.[3125] It committed an error in fact by making no distinction between code 870

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to him 870 was POL Pot (translation problem, see Khmer version p. 19, L. 6), before 10.22.44 (it was POL Pot who responded to telegram exchanges); T. 11.06.2012, **E1/84.1**, after 09.23.42; T. 12.06.2012, **E1/85.1**, after 15.40.08 (Office 870 or Brother 870 meant POL Pot).

[3121] Notably in *18.1.2. The Accused's knowledge that crimes would most likely be committed,* 18.2.1.1. *Supporting the common purpose* (§4257), 18.2.1.2. *Promoting the common purpose* (§4263) and 18.2.1.3. *Encouraging inciting and legitimising the implementation of the Common Purpose through its policies* (§4267, 4268).

[3122] Reasons for Judgement, fn 13912 (of §4257), fn 13925 (of §4267, underligned in the original) which refers to fn 12489 (of §3742) based on several statements of KHIEU Samphan.

[3123] Reasons for Judgement, §3742, fn 12489.

[3124] See also Reasons for Judgement, §4268 (*18.2.1.3. Encouraging inciting and legitimising the implementation of the Common Purpose through its policies*) and 4304 (*18.2.2 Intent*). See also §4248 fn 13862 which refers to 3569 and 3611 (fn 12053) where the Chamber used this expression to find that KHIEU Samphan had participated in the JCE, which allegedly called on the population to divest itself of any personal feelings towards its parents in favour of the *Angkar*, relying solely on the testimony of CHEA Deap, which did not explain the meaning given to the *Angkar*. See also below, §1233-1242.

[3125] Reasons for Judgement, §4071 (*16.4.5. Legal findings*); §4225 (*18.1.2.2 Security centres, execution sites and internal purges*); §4257 (*18.2.1.1 Supporting the common purpose*); §4276 (*18.2.1.5 Enabling and controlling the implementation of the Common Purpose and its policies*).

having several different meanings and Office 870 to conclude on his contribution to the crimes of which he is accused through the exercise of his duties in Office 870.[3126]

1638. The Chamber erred in fact and in law by failing to draw all the consequences from the fact that KHIEU Samphan had not succeeded Doeun or had a leading role in Office 870 and that it was not in a position to determine his precise functions with that body.[3127] However, as will be seen below, the duty of KHIEU Samphan in connection with this office was limited to the distribution of materials to different zones and to certain aspects of trade in accordance with the decision of the SC.[3128] In any event, the Chamber erred in fact and in law by making findings as to the responsibility of KHIEU Samphan by analysing reports and telegrams because of their supposed link with Office 870, whereas an impartial reading of the documents should have led it to find that several terms were used for the addressees, namely committee 870, *Angkar* 870, Office 870 or sometimes Bang.[3129]

1639. Thus, the Chamber was required to specify the context in which code 870 was used before making its findings, while on the other hand several witnesses had to explain that code 870 referred to different bodies,[3130] the vagueness being deliberately maintained in the context of the principle of

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[3126] Reasons for Judgement, §4389.

[3127] Reasons for Judgement, §615 (*8.3.4.1. Membership of Office 870).*

[3128] Reasons for Judgement, §609. NORNG Sophang: T. 03.09.2012, **E1/120.1**, around 13.49.09 (he confirmed his statement contained in the written records of interview concerning telegrams concerning KHIEU Samphan relating to the distribution of salt, husked rice, fabric, clothing, sandals and various materials for such and such a unit for distribution to the inhabitants. He dealt with various materials and products for the people), around 14.01.02. SALOTH Ban: T. 25.04.2012, **E1/68.1,** around 11.11.46 ("I did not know the details of his roles and functions. Everybody who worked in Office 870 would be -- said that the person would bear responsibility in that office"); T. 26.04.2012, **E1/69.1**, around 09.26.46, after 09.38.34 ("As for Mr. Khieu Samphan, he only remained within the ministry; he did not go out."). SAO Sarun: T. 07.06.2012, **E1/83.1**, around 11.56.02 (this was the only time they spoke, and only on matters of material to be provided to the population) See also below, §1763-1769.

[3129] Reasons for Judgement, §4071, "KE Pauk was responsible for the construction of the 1st January Dam and reported on its construction to Office 870. Northwest Zone Secretary RUOS Nhim often visited Trapeang Thma Dam, provided detailed reports about living and working conditions in the Zone to Office 870 and directly oversaw the Sector 5 Committee responsible for the Dam's construction". Other elements in the case file also suggested that some of these telegrams were addressed to POL Pot and/or NUON Chea. See in particular the telegrams from KE Pauk, Telegram from DK, 02.04.1976, **E3/952**, ERN EN 00182658-00182659; from SAO Phim, Telegram from DK, 11.1975, **E3/879**, ERN EN 00182595-00182597. It should be noted that although SUON Kanil, a decoder in the CZ identified the 870 or M-870 committee as an entity, it acknowledged that it had no contact with Office 870, SUON Kanil: T. 17.12.2012, **E1/155.1**, around 11.29.38, at 11.40.46.

[3130] Stephen HEDER: T. 17.07.2013, **E1/225.1**, after 15.09.07, around 15.34.04; See for example, Minutes of SC meeting, 09.10.1975, **E3/182**, ERN EN 00183393-00183394 (Comrade Yem: the Office (kariyalai) 870), ERN EN 00183395 (in the last paragraph concerning the functions of this *kariyalai* regarding the notes of the different meetings and the archives), see the Khmer version, ERN KH 00019111. See also OEUN Tan: T. 13.06.2012, **E1/86.1**, between 13.41.50 and 13.53.13, head of POL Pot's protective guard, he explained that POL Pot himself kept documents,

CPK secrecy.[3131] It also erred in fact by ignoring the testimony of NORNG Sophang, who was responsible for the telegrams. Indeed, the Appellant stated that KHIEU Samphan was not from the 870 Committee which he designated as the [SC] which had a different communication system to the Appellant.[3132] By ignoring all these elements in its findings on the responsibility of KHIEU Samphan linked according to it to 870, the Chamber erred. It could not use this artificial and erroneous means to conclude that it supported and assisted the CPK in achieving its objectives and "the smooth functioning of the DK administration" to the detriment of its population.[3133] All of its findings in this respect should be reversed.

Section II. ERRORS CONCERNING THE MEANS OF COMMUNICATION

1640. To mitigate the lack of evidence linking the alleged crimes to KHIEU Samphan, the Chamber concluded that KHIEU Samphan's participation was linked to his access to revolutionary magazines (I) and to the military structures and communications (II).

I. RF/RY MAGAZINES

1641. The Chamber concluded that the revolutionary magazines RF and RY were means of disseminating and promoting the various CPK policies under the common purpose to Party members.[3134] They were both used to disseminate information regarding people considered enemies by the Party.[3135] The Chamber then erred by stating in a peremptory manner that through his access to these magazines, KHIEU Samphan had knowledge of the crimes, in particular of the fate of the enemies,

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messages and correspondence in general at K-1. SAO Sarun: T. 07.06.2012, **E1/83.1**, after 09.59.22 about the DK telegram, 01.01.1978, **E3/383**, according to him 870 was POL Pot (translation problem, see Khmer version p. 19, L. 6), before 10.22.44 (it was POL Pot who responded to telegram exchanges); T. 11.06.2012, **E1/84.1**, after 09.23.42; T. 12.06.2012, **E1/85.1**, after 15.40.08 (Office 870 or Brother 870 meant POL Pot).

[3131] Reasons for Judgement, §362.

[3132] NORNG Sophang: Written record of interview, 18.02.2009, **E3/64**, ERN EN 00334052-00334053. The SC transmitted messages by Pon and Thé messengers who would take them directly to the 870 Committee while KHIEU Samphan sent handwritten letters by K-1 messengers which were then passed on to K-1 or sometimes he telephoned.

[3133] Reasons for Judgement, §4257, 4276.Also §4225 ("In reaching this finding the Chamber has considered KHIEU Samphan's attendance at and participation in Standing Committee meetings his close relationship with and proximity to POL Pot and NUON Chea and 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 DK.").

[3134] For example, Reasons for Judgement, §3739 (16.2.2. *17 April 1975 to 6 January 1979: The Socialist Revolution*), §3747 (16.3.1. *Chronological Overview of the CPK's Notion of Enemies*), §3758-3759, 3777, 3780, 3782.

[3135] Reasons for Judgement, *16. Common Purpose,* e.g. §3863 (16.3.2.3. *Dissemination of information regarding enemies*), fn 12901-12905 which refer to other parties. On the Chamber's errors on these real or supposed enemies, see also above, §1451-1488.

and that his statements echoed the articles concerning the Vietnamese.[3136] On this last point, it is worth recalling the context of speeches during an AC period that is completely concealed by the Chamber.[3137]

1642. On the one hand, the Chamber erred when it came to the evidentiary value of those reviews, of which it was seen that only two originals are in the case file[3138] and, in so far as those documents were in evidence for the whole of case file 002, the remarks made about them in 002/01 remain the same.[3139] On the other hand, it erred in its findings on the actual access of these journals by all Party members, especially at the lower levels of the district.[3140] Indeed, a number of former high-ranking executives from different areas gave very different testimonies, saying that they had failed to receive them or were not aware of them,[3141] while others did not pay attention to their content, which was not available to all.[3142] Therefore, the Chamber's findings on broad access to these magazines by Party members were not consistent with the evidence in the case file.

1643. Nor could it conclude without detailed evidence that KHIEU Samphan would have had access to all of these magazines "By virtue of his positions of responsibility" or that he would have read the

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[3136] Reasons for Judgement, §4226 (18.1.2. *Knowledge Concurrent with the Commission of the Crimes - Security Centres, execution sites and internal purges); §4253 (18.1.3. Knowledge Arising After the Commission of the Crimes*); §4269 (18.2.1.3. *Encouraging inciting and legitimising the implementation of the Common Purpose through its policies).*

[3137] See above, §1486-1488.

[3138] Reasons for Judgement, §478. See above, §323.

[3139] AB 002/01, §28; CB 002/01, §519.

[3140] Reasons for Judgement, §477, fn 1500, 1501.

[3141] In TK, the district chiefs received them but not the commune chiefs: PECH Chim: T. 23.04.2012, **E1/291.1**, around 15.49.47. NEANG Ouch: T. 09.03.2015, **E1/273.1**, around 13.53.21 ("they were distributed by the commune, but I was not interested in reading them."), at 13.53.21 (There were not many copies of the magazines...They were distributed to communes, one for each commune). NUT Nov: T. 12.03.2015, **E1/276.1**, around 14.15.04 (Srae Ronoung commune chief); T. 16.03.2015, **E1/277.1**, around 15.44.38 (I never received the 'Revolutionary Flag'. I was not provided with any copies. Perhaps the upper echelon received 'Revolutionary Flags'. As for me, I never read it). KHOEM Boeurn: T. 05.05.2015, **E1/297.1,** around 14.36.39 (she confirmed her previous statement that she was not aware of the existence of the revolutionary magazines when she was in the commune but only when she worked in the district). RIEL Son: T. 17.03.2015, **E1/278.1**, around 14.14.52 (deputy head of TK district hospital, denied ever having seen any RF); T. 18.03.2015, **E1/279.1**, at 15.35.52. Elsewhere in the country, PAN Chhuong: T. 30.11.2015, **E1/359.1,** at 11.18.37 (supervisor of mobile forces in sector 5 below Ta Val said he has never seen this type of magazine). MOENG Vet: T. 26.07.2016, **E1/448.1**, before 11.20.00.

[3142] PECH Chim: T. 23.04.2012, **E1/291.1**, around 15.49.47 ("some policy lines were also repeated in the magazine as a reminder to the cadres. However, sometimes, because we were engaging in our daily affairs, we tended to forget about the policies and it did not mean that we did not want to adhere to the policies"). PAK Sok: T. 16.12.2015, **E1/369.1**, at 14.32.34 ("heard of those magazines at that time, but I was not really interested in DK 'Revolutionary Flag' magazines. I did not bother to make analysis of those magazines."). CHIN Kimthong: T. 22.03.2016, **E1/406.1,** at 11.26.10 ("Regarding the 'Revolutionary Flag' magazines or youth magazines, sometimes I read them and sometimes I did not, and I cannot recall the contents of what I read.").

specific articles quoted to conclude he was aware of the facts. Thus, its submissions that the Appellant was aware of the arrests of CHAN Chakrei, Chhouk and KEO Meas, and of the implementation of various CPK policies through these arrests, is pure speculation.[3143]

II. MILITARY STRUCTURES AND COMMUNICATIONS

1644. The Chamber also erred in its findings on military structures and communications by deciding, in particular, to use the term "Party Centre" to refer collectively to the senior leadership of the CPK based in Phnom Penh, including the military committee.[3144] This use throughout the Reasons for Judgement[3145] enabled it to make erroneous findings without taking into account the specific responsibilities of the different bodies of the CPK and included those typically assigned to the army in order to artificially link them to KHIEU Samphan.[3146]

1645. The Chamber erred in fact in considering that at the creation of the new KRA, a number of military zone divisions were placed under "the control of the Central Committee", and in particular under the command of the General Staff.[3147] However, no element of evidence leads to this finding. Indeed, the witnesses it cited, namely KUNG Kim and Duch, never spoke of the CC but did indicate that the central army should report to SON Sen's General Staff.[3148] LONH Dos confirmed this in his written statement. While he also indicated that SON Sen worked at the K-1 "Central Committee Office" with POL Pot and others, he never went there and therefore did not know how his decisions were made.[3149] The Chamber also wrongly used an RF of August 1975 to corroborate the thesis of a central army under the control of the "CC" because in the original Khmer version of this

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[3143] Reasons for Judgement, §4226 and 4253. For the first paragraph, the Chamber also relied on the post-DK interviews of KHIEU Samphan and the isolated and confused account of EM Oeun during Case 002/01 EM Oeun: T. 29.08.2012, **E1/117.1**, between 09.46.41 and 09.51.21. The "undated" post-DK statements of KHIEU Samphan did not allow the Chamber to find on his knowledge during the regime, fn 13789-13790.
[3144] Reasons for Judgement, §461. See above, §1618-1632.
[3145] Notably in Parts 5 and 6 and Part 16. Common Purpose and 18. Responsibility.
[3146] Reasons for Judgement, §424, 427, 450, 454, 508-511, 3962-3963, 4068-4074, 4208, 4317, 4236.
[3147] Reasons for Judgement, §424, fn 1282.
[3148] KUNG Kim: T. 24.10.2012, E1/138.1, around 15.36.09, at 15.49.36, he referred to armies or central forces, specifying that he was under the staff, and did not mention the CC. *DUCH*: T. 28.03.2012, E1/55.1, between 10.21.41 and 10.27.24, the central army was under the direct control of the general staff. According to him, it was controlled by the secretary and deputy secretary of the Party, by the SC.
[3149] Written Record of Interview of Witness LONH Dos, 20.11.2009, **E3/70**, Q/A 14, 16-19 ("I only knew that he left the General Staff almost every morning for the Centre. He went to K-l, but I did not know with whom he met there. I don't know what he did there, and I never reached there. I did not know the location of K-1. I only knew that he went there.").

document, the expression "Party Centre" and not "Central Committee" is used.[3150] In the same way, it misrepresented the testimonies of HEDER and Duch to conclude on "the supervision of the Central Committee and the Military Committee" over the KRA.[3151] Indeed, Stephen HEDER placed it under the authority of the staff controlled by SON Sen, specifying that it was attached to "POL Pot", while Duch only reported to the various governing bodies of the Party.[3152] The Chamber's finding is therefore erroneous in several respects and must be reversed.

1646. In §508 of the Reasons for Judgement, it also misrepresented the evidence cited in support of its finding that the messages and written reports received by SON Sen were passed on to "other CPK leaders" when it was clear that they were only passed on to "the *Angkar"* which was seen to essentially consist of POL Pot for this type of reports" (translation ours).[3153] Moreover, in §509 the Chamber erroneously used several reports and telegrams to conclude that the communication from certain military divisions was addressed to the staff and then passed on by SON Sen to the "Party Centre".[3154] However, the evidence used did not allow the Chamber to reach such a finding. It could not seriously rely on the written statement of LONH Dos, who, in addition to the fact that he did not appear, indicated that he had never been to SON Sen's office and was therefore not in a position to know what he was doing with the reports.[3155] In addition, in other parts of its Reasons for Judgement, the Chamber has used reports and telegrams confirming that the recipient of the annotations of SON Sen *alias* Khieu on reports received from the military divisions was the *Angkar*.[3156]

[3150] Reasons for Judgement, fn 1282 (of §424). Revolutionary Flag, August 1975, **E3/5**, p. 13-14, ERN EN 00401488-00401489, see the Khmer version, p. 24, ERN KH 00063324. While T. Carney, *Cambodia 1975-1978: Rendez-vous With Death*, **E3/49**, p. 11-12, ERN EN 00105136-00105137, he based himself on this Revolutionary Flag of August 1975, and according to this document, he noted "General Staff of the Revolutionary Armed Forces of Kampuchea POL Pot: Chairman SON SEN *alias* KHJEU: Chief of the General Staff".

[3151] Reasons for Judgement, §427.

[3152] Reasons for Judgement, fn 1295 (of §427). Stephen HEDER: T. 11.07.2013, **E1/222.1**, at 14.08.22. *Duch*: T. 26.03.2012, **E1/53.1**, around 10.14.29. Moreover, days later, *Duch* explained to the Chamber that the central army was under the control of the SC, T. 28.03.2012, **E1/55.1**, between 10.21.41 and 10.27.24.

[3153] Reasons for Judgement, §508. See fn 1589 which refers to the Military Report of the DK de Mut, 12.08.1977, **E3/1082**, ERN EN 00233972. DK de San military report, 06.04.1977, **E3/1199**, ERN EN 00531038.

[3154] Reasons for Judgement, §509 fn 1590. Reference is made to the written statements of LONH Dos, and parts of Judgement *12.4.2.4* and *12.5*. There is, moreover, a problem of discrepancy between the linguistic versions of §509. Indeed, in Khmer, we speak of the CC of the Party, whereas in the French and English versions it is "the Party Centre".

[3155] Written Record of Interview of Witness LONH Dos, 20.11.2009, **E3/70**, Q/A 16-19.

[3156] For example, in section *12.4.2.4:* Oversight of Division 801 by the RAK General Staff, Reasons for Judgement, fn 9824-9825 (of §2873), Khieu's annotations were addressed to the *Angkar*, and not to the "Party Centre" as the Chamber falsely noted. See also Telegram from DK, 06.04.1977, **E3/1199.** Telegram from DK, 29.05.1977, **E3/1127**.

1647. Finally, in Part 12.5, in particular in §3047 concerning Division 920, the Chamber again wrongly concluded that "[t]he 920 Division reported directly to the 'Party Centre'" and received instructions from SON Sen, the Chief of Staff" (translation ours). Indeed, while Duch and SAO Sarun, quoted in reference, did indeed mention that "the Centre" was in direct contact with the central army, Duch specified that it was POL Pot himself, responsible for the military and to whom the chief of staff had to report,[3157] while SAO Sarun admitted not even knowing the composition of the CC.[3158] In addition, other written documents confirm that Division 920 was under the command of Khieu/SON Sen, and that the latter transmitted reports and/or telegrams to *Angkar* and/or Brother 87.[3159]

1648. This corroborating evidence again led to the finding that the *Angkar* in this context referred to POL Pot. So the Chamber has actually erred in fact by knowingly using the name "Party Centre" in place of *Angkar* and any other code used by POL Pot.[3160] However, the minutes of the SC meeting of 9 October 1975 clearly mentions "Comrade Secretary: General responsibility over the military and the economy",[3161] a military function of POL Pot confirmed by several witnesses on the witness stand.[3162] In its Prosecution, however, the Chamber preferred to wrongly conclude that "Military personnel also occasionally participated in large meetings or rallies in Phnom Penh, some of which

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Telegram from DK, 24.08.1977, **E3/1033.** Telegram from DK, 12.08.1977, **E3/1082.**

[3157] Reasons for Judgement, fn 10318 (of §3047). *Duch*: T. 28.03.2012, **E1/55.1**, *après* 11.20.45. It should be noted that there was a problem of translation into French in this reference. The witness did not refer to the CC, but rather to the "Party Centre". See the Khmer version, p. 36, L. 5-6.

[3158] Reasons for Judgement, fn 10318 (of §3047). SAO Sarun: T. 07.06.2012, **E1/83.1**, before 10.04.01 ("Q. Do you recall who was on the Central Committee as of 1978? A. I did not know about this matter as it was the affair of the upper echelon."); T. 11.06.2012, **E1/84.1**, after 09.23.42, after 09.36.51 (it is POL Pot who gave him instructions and with whom he was in contact), between 09.56.12 and 10.06.48 (even if he had claimed to have seen the members of the CC in a meeting after 17 April 1975 including KHIEU Samphan, then his explanations did not match). See the Khmer version, which is clearer in this sense, especially on p. 18-20.

[3159] Reasons for Judgement, fn 10318 (of §3047), for example, Telegram from DK, 09.03.1976, **E3/1022** (copy to Brother 87). Telegram from DK, 06.04.1977, **E3/1199** (annotation: *Angkar*).

[3160] Reasons for Judgement, e.g. §508, 509, 2875.

[3161] Minutes of the Meeting of the Standing Committee 09.10.1975, **E3/182**, ERN EN 00183393. (emphasis added)

[3162] *Duch*: T. 28.03.2012, **E1/55.1**, between 10.21.41 and 10.27.24. UNG Ren: T. 10.01.2013, **E1/158.1**, around 15.49.17 (Deputy Chief of Division 801, "on the military side, there was Son Sen who was in charge and above division level. And above Son Sen, I would say there would be Pol Pot and no one else who would be above Son Sen."). Stephen HEDER: T. 11.07.2013, **E1/222.1**, at 14.08.22. Interview with IENG Sary by Stephen HEDER, 17.12.1996, **E3/89**, ERN EN 00417606 (The army was under the command of POL Pot and SON Sen).

were attended by DK CPK senior leaders, including NUON Chea and KHIEU Samphan"[3163], although the evidence used did not establish this beyond reasonable doubt.[3164]

1649. **In parts *16. Common Purpose* and *18. Criminal responsibility of KHIEU Samphan.*** In these parts, the purpose of the Chamber's errors is measured in order to include KHIEU Samphan in military-style decisions.[3165] It considered, among others, that SON Sen had "regularly relayed information to the 'Party Centre'" concerning its activities, including the execution of more than 100 Jarai prisoners in connection with the AuKg security centre.[3166] Again, it was unclear to whom specifically this information would have been given. It is due to this vagueness that the Chamber wrongly concluded that KHIEU Samphan had given his support to the common purpose, through his participation in the SC meetings of 9 October 1975 and thereafter where SON Sen would have reported on the construction of the KCA.[3167] However, as will be seen below, the KCA's discussions at the draft stage did not lead to the finding that the KCA was aware of the Appellant's crimes and even less so of his military responsibilities, even by proxy.[3168] The Chamber's erroneous approach by its use of generic formulas to ensure vagueness should be penalised and its findings reversed.[3169]

[3163] Reasons for Judgement, §510.

[3164] Reasons for Judgement, §510 fn 1596. CHHAOM Se's statement and the written statements of low evidentiary value by PRAK Yoeun and KOY Mon refer to different gatherings but always in 1975 - i.e. in the aftermath of the victory - which did not make it possible to establish a link between KHIEU Samphan and the army outside his factitious functions of the FUNK period. CHHAOM Se: T. 11.01.2013, **E1/159.1**, after 14.04.06 (rally in July 1975 at the Olympic Stadium for the creation of the Central Army. See the Khmer version, p. 59-60, L. 24-4), before 14.11.49. Written record of interview of PRAK Yoeun, 04.03.2008, **E3/3471**, ERN FR 00205019 (he declared to have participated only once in the Party's anniversary ceremony after the liberation where he allegedly saw "NUON Chea and KHIEU Samphan on the stage" and it was KHIEU Samphan who made a speech). Written record of interview of KOY Mon, 29.05.2008, **E3/369**, ERN EN 00272715-00272716 (An assembly in 1975 at the Olympic Stadium "chaired by Pol Pot with Ieng Sary, Khieu Samphan, Nuon Chea, Prince Paen Nuth were attending as chairpersons. Among its contents, the conference emphasized that the 17 April 1975 victory was made possible by the people and army. It also proposed plans for the central and zone armies to promote production and do rice farming. The conference declared [CPK] leaders by referring to Pol Pot as secretary of Party Center, Nuon Chea as deputy secretary of Party Center, Khieu Samphan as President of the State Presidium, Ieng Sary was in charge of foreign affairs and Prince Paen Nuth was a minister of the Royal Palace.") (emphasis added).

[3165] See above, §1618-1632.

[3166] Reasons for Judgement, §4070 In the same paragraph, just afterwards, it says, "UNON Chea and POL Pot personally gave instructions to the secretary of Sector 105 who supervised the [PK] security centre and ensured that all directives from the upper echelon were implemented throughout the Autonomous Sector." ().

[3167] Reasons for Judgement, §4258.

[3168] See below, §1742, 1846-1848.

[3169] Reasons for Judgement, §3962-3963, 4068-4074, 4208, 4317, 4236, 4258.

Section III. PRINCIPLE OF SECRECY

1650. The Chamber acknowledged that "the precise operational structure of the CPK was shrouded in secrecy", stating that since the "early days of the Party", secrecy was "essential" even after it came to power to "to obfuscate and obscure its internal workings".[3170] However, it erred by limiting this principle of secrecy to the cadres of a lower level who only had superficial knowledge of the power inside the Party.[3171] Indeed, the evidence has amply demonstrated that the principle of secrecy applies to all Party members, even the highest level cadres. This principle, which stemmed from a long period of secrecy, encouraged everyone to limit themselves to their area of responsibility, to look after their own affairs and not to interfere in the affairs of others. It has been confirmed by a

[3170] Reasons for Judgement, §342, 3939. See also §398 concerning the ten criteria listed in the Statutes for the selection of Party leaders, including: 5) revolutionary vigilance, maintenance of secrecy and defence of the Party's revolutionary forces. See, for example, §342 and 362 concerning Office 870 ("This uncertainty as to the precise meaning of "870" was consistent with the CPK's general emphasis on secrecy").
[3171] Reasons for Judgement, §342, fn 945.

multitude of witnesses at all levels.[3172] The Chamber even used it as a charge to conclude that the treatment of enemies was shrouded in the utmost secrecy.[3173]

1651. The Chamber therefore wrongly held that this principle of secrecy did not apply to KHIEU Samphan because of his presence and participation in SC meetings, "his close relationship with and proximity to POL Pot and NUON Chea", his role with Office 870 until the end of the regime after Doeun's disappearance.[3174] However, this finding is pure speculation. In summary, in the absence of evidence of its knowledge, it concluded that the Appellant "could not not know"

[3172] See for example the supreme cadres close to POL Pot before and under the DK: *Duch* the chief of S-21 admitted not being aware of any details of 870 or the Centre, and on several occasions he repeated that everyone was only concerned with their own tasks, *Duch*: T. 28.03.2012, **E1/55.1**, around 10.03.58, around 13.35.18, at 13.39.28, around 14.19.10; T. 29.03.2012, **E1/56.1**, before 10.19.00 (S-21 was not related to any other department except SON Sen, NUON Chea and Pâng who represented POL Pot); T. 02.04.2012, **E1/57.1**, before 09.58.19; T. 05.04.2012, **E1/60.1**, at 14.04.29 (his understanding of the organisation of the DK regime improved after reviewing the investigation file); T. 09.04. 2012, **E1/61.1**, before 09.40.52 (he never went to Office 870), at 10.00.23 ("A. The saying goes that mind your own business. One eye must know what was happening at S-21. Besides that, it's not my business.") T. 22.06.2016, **E1/442.1**, around 09.27.36 (the principle of secrecy had to be absolute). SAO Sarun: T. 07.06.2012, **E1/83.1**, before 10.04.01 ("Q. Do you recall who was on the Central Committee as of 1978? A. I did not know about this matter as it was the affair of the upper echelon."); T. 11.06.2012, **E1/84.1**, before 11.40.59. SALOTH Ban, an official at the Ministry of Foreign Affairs, has repeatedly pointed out the principle of secrecy, according to which each person only deals with his own tasks and not with the affairs of others, T. 23.04.2012, **E1/66.1**, before 09.58.31, after 14.10.50; T. 24.04.2012, **E1/67.1**, before 09.05.00, at 09.42.46; T. 25.04.2012, **E1/68.1**, before 11.51.57 ("Everyone at the time minded his or her own business, and that is a theory in order to protect the general security."), before 11.51.57; T. 30.04.2012, **E1/70.1**, at 09.14.06, at 14.01.18 ("only things that confined to the level you are working at and that you were not knowledgeable of anything above that or below that? Is that correct? A. Yes, it is. Q. Thank you. What -- what about the other institutions, other ministries at the Ministry of Foreign Affairs, those who hold - or, rather, held particular positions? Were they knowledgeable of other matters other than their own business? A. I don't know what happened to them. I don't know whether they were authorized to do any other things or anything. But when it comes to Mr. Ieng Sary, he only educated me, told me to mind my own business, and that I should not care for other people's business; that's what I was taught and told.") T. 02.05.2012, **E1/71.1**, at 09.45.57 ("Was it the theory to keep secrets, as part of the study session? A. This theory was studied during the study session on a daily basis."), at 09.48.53. IENG Phan, a regimental commander of an SWZ regiment that participated in the fighting in the EZ, IENG Phan: T. 20.05.2013, **E1/193.1**, around 10.19.48; T. 01.11.2016, **E1/493.1**, from 09.46.49 ("secrecy was the considerable important principle within the DK. They would not let everyone know everything. [...] as I stated earlier, within the DK, during the time, the secrecy was an important principle. I minded my own business, my superior minded his own business. So there was clear distinction between the work that we performed. Some information was revealed to the subordinates and some was not."). CHHOUK Rin: T. 23.04.2013, **E1/182.1**, after 11.14.42 ("everything was confidential during that period. [...] the information about the leaders was very confidential."). NORNG Sophang: T. 05.09.2012, **E1/122.1**, *à* 11.35.41 ("I was myself confused. I did not know 'who' was referring to the Standing Committee. But in the telegram service, for us, it didn't matter where they were and who was doing what. Our role was to send the telegrams [...] in fact, I had little knowledge of them") (). See the Khmer version, p. 31, L. 5-12; T. 06.09.2012, **E1/123.1**, from 11.59.49 ("We had to adhere to three principles of secrecy [(sic)]. Whatever we were not supposed to speak out, we must not speak out. Whatever we must not ask questions, we had to keep silent. So we did not know, we did not hear, we did not see, and we did not speak."), around 13.42.28. PRAK Yut: T. 25.01.2012, **E1/33.1**, before 14.17.40.

[3173] Reasons for Judgement, 3938-3939, 3968, 3986. However, in §3958, it is noted that "Despite the Party's policy of secrecy the smashing of enemies was widely reported within Party ranks.".

[3174] Reasons for Judgement, §4225.

(translation ours). In so concluding, the Chamber erred in fact and in law by, in particular, obscuring the numerous testimonies attesting to KHIEU Samphan's limited access to the most secret information.[3175] As to his role with Office 870 and Trade, it will be seen below that this did not allow for a finding that the principle of secrecy did not apply to the Appellant.[3176] This finding must therefore be reversed.

Title II. GENERAL ERRORS ON KHIEU SAMPHAN'S ROLES

Chapter I. ERRORS IN THE PERIOD PRIOR TO DK

Section I. CHILDHOOD, YOUTH AND CAREERS

1652. To support its finding that KHIEU Samphan was aware that crimes were likely being committed and that he had supported the common purpose before the facts,[3177] the Chamber erred in fact by retracing his career, in particular his doctoral thesis (I) and his activities and associations (II).

I. ERROR ON THE DOCTORAL THESIS

1653. After describing the content of the thesis defended by KHIEU Samphan in 1959 showing the difference between the ideas expressed therein and the subsequent policy of the CPK,[3178] the Chamber stated that he had written that the population should be "driven" towards collective production,[3179] before concluding as to his "positive disposition toward the CPK's policies of collectivism including through the population's subjugation to state production initiatives".[3180] However, this thesis is never about coercing anyone, quite the contrary.[3181] It could in no way be

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[3175] Thus, OEUN Tan, head of the guard in the K-1 Office and responsible for delivering telegrams and letters to POL Pot stated that he never delivered telegrams to anyone other than NUON Chea after POL Pot had read them, stating that Pol Pot kept his documents at K-1. OEUN Tan: T. 13.06.2012, **E1/86.1**, between 13.41.50 and 13.53.13. See also SA Vi, a subordinate of OEUN Tan at K-1, who explained that the latter was receiving orders from POL Pot and NUON Chea, T. 08.01.2013, **E1/156.1**, around 11.35.52. See also NORNG Sophang: T. 03.09.2012, **E1/120.1**, around 13.50.43, around 13.53.08, around 13.56.04, at 13.58.00. See above, §1621-1624.

[3176] See below, §1763-1769 and 1770-1798.

[3177] Reasons for Judgement, §3884, 4206, 4257.

[3178] Reasons for Judgement, §567-568.

[3179] Reasons for Judgement, §3884.

[3180] Reasons for Judgement, §4206.

[3181] Thesis by KHIEU Samphan, **E3/123** (dedicated to Sihanouk and Cambodia, ERN FR 00236472 [No corresponding page in English]): For these reasons the government must strive to mobilize the peasant masses for mutual aid (…) and finally to make peasants gradually accustomed to working cooperatively The organization of mutual aid teams in which the instruments of production tools and land and the produce remain private property though used collectively is fully consistent with contemporary Khmer peasant thinking (…). Methodical organization of the peasant force into mutual aid teams and then into cooperatives will magnify its effectiveness ten times over and make possible the clearing of new land its irrigation and its draining New lands can thus be opened up without upsetting current technology and

inferred from this that KHIEU Samphan was aware that crimes would be committed. This finding must be reversed.

II. ERRORS IN ACTIVITIES AND ATTENDANCE

1654. Before concluding that KHIEU Samphan had supported the CPK and its policies even before he joined the Party[3182], the Chamber expressed its conviction that he personally knew students who had returned from abroad and who would later hold important positions within the CPK.[3183] To do so, it erroneously described his activities and attendance, both in France for his studies and on his return to Cambodia.

1655. The Chamber thus associated KHIEU Samphan 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 and his subsequent appointment as president of the Union of Khmer Students.[3184] If this finding is based on his statements, the Chamber does not explain why it did not take into account all of his statements. Indeed, KHIEU Samphan described his acquaintances and motivations of the time, demonstrating his minor involvement in the Marxist sphere and his political independence.[3185]

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without absorbing too much capital which could otherwise be employed in the development of industry" (p. 103 ERN EN 00750636). "Let there be no misunderstanding of our proposition. We are not proposing to eliminate the classes having the highest incomes. (…) Rather we believe ways can and must be found to bring out their contributive potential by attempting to transform these landlords retailers and usurers into a class of industrial or agrarian capitalist entrepreneurs An effort will thus be made to deter them from unproductive activities and to encourage them to participate in production. (…) reductions in rents and usury and the prospect of industrialization (…) would induce landlords to reorganize their property gradually to replace outmoded techniques of cultivation with capitalist methods involving the use of capital and salaried workers." (p. 74-75 ERN EN 00750607-00750608). "landowners knowing that rent is lower and usury outlawed and that an opportunity for even higher profit is available through industry and agriculture might be persuaded to transform themselves into agrarian or industrial capitalist entrepreneurs In this manner one source of new energy can be generated" (p. 100 ERN EN 00750633). "It might also be useful to give landlords any explanation required to help them appreciate how they fit into the reform" (p. 100-101 ERN EN 00750633-00750634).

[3182] Reasons for Judgement, §4257.

[3183] Reasons for Judgement, §573.

[3184] Reasons for Judgement, §565-566.

[3185] Reasons for Judgement, fn 15757 (of §565) where it is based in particular on the statement of KHIEU Samphan: T. 13.12.2011, **E1/21.1**, between 14.20.36 and 14.25.11 ("Ok Sakun, he approached me and he persuaded me to join the Circle of Marxists, and I responded to him that I wanted independence for my country but I did not understand anything about Marxists or communism. […] I did not want him to see me as a coward, so I eventually accepted it. But I, at that time, observed the overall situation in Paris. It was politically motivated so I had to keep my distance in order to examine, observe and consider it. And I decided to go to Montpellier […] three years afterwards, I came to Paris to prepare my dissertation on economics. At that time, I had to attend the regular meeting of the Circle of Marxists. But the historical context back then changed very swiftly because the Geneva Conference recognized Cambodia's independence, so it was not like the era of Salot Sa, Yun Soeun, and Rath Samoeun. At that time, they were trying to join the resistance forces against the French colonialism. At that time, they emphasized on patriotism, but when I came

1656. With no indication that upon his return to Cambodia KHIEU Samphan met with these future CPK leaders, the Chamber erroneously labelled the independent newspaper he founded, the Monitor, as "communist".[3186] It did not just distort the comments made by KHIEU Samphan, but it also used the uncorroborated comments by IENG Thirith declaring that he had participated in the financing of the *Observateur* newspaper during an interview outside the judicial framework.[3187] It even went so far as to use the contents of KOY Thuon's confession to S-21.[3188] Moreover, consideration of the evidence should have led to a finding in favour of the Appellant.[3189]

1657. Moreover, the constant close monitoring and harassment by the authorities to which KHIEU Samphan was subjected[3190] should have prevented the Chamber from assuming any proximity to the future leaders of the CPK at the time. In any case, the knowledge of intellectuals who had also followed their studies in France could not prove that KHIEU Samphan supported the purpose and the activities of the CPK.

1658. Thus, on the basis of the evidence, no reasonable judge could have found any personal knowledge leading to the finding that there was any support for a common criminal purpose. Let alone by omitting the exculpatory evidence demonstrating KHIEU Samphan's stated willingness from the

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to Paris, they emphasized on patriotism and in order to protect Cambodia's independence. […] Before I returned to Cambodia -- before returning to Cambodia, Ieng Sary handed over the role to me and I believe that probably at that time there was no other choice for him. Those who were strong believers and active, such as Ok Sakun and Son Sen, all returned to Cambodia" (emphasis added). See also T. 25.10.2013, **E1/234.1**, around 15.18.25, around 15.32.24; Book by KHIEU Samphan, *Cambodia's Recent History and the Reasons behind the Decisions I Made,* May 2007, **E3/18**, p. 33-34, ERN EN 00103739-00103740 ("I joined the French Communist Party because I sincerely believed in fraternity among peoples of all nations.").

[3186] Reasons for Judgement, §569.

[3187] Reasons for Judgement, fn 1773 (of §569).

[3188] Reasons for Judgement, fn 1773 (of §569). See above, §258-290.

[3189] KHIEU Samphan: T. 13.12.2011, **E1/21.1**, around 14.37.32 ("The friends who I know while I was in France, and who returned to the country before I did, including Hou Youn, Hu Nim, and other friends whom I knew through these two people, proposed that I should publish a newspaper as a voice for the intellectuals, the professors, and the civil servants […] it emphasized to the Cambodian leaders that there needs to be a measure for democratic reform in order to make a balance in the society and to bridge the social gap between the rich and the poor, so that the lower strata of the society could also benefit from the neutral policy as well as to expand the political basis to oppose the positions – the oppositions by Lon Nol and his clique. I intended to those -- the leaders of Kampuchea -- that's why the newspaper was published in French. Because the leadership level at that time did not really prefer to read the newspapers in Khmer", emphasis added), after 14.40.42 ("It was clear that my newspaper was not a Communist one, and it was not financed by the Communists […] Even if there were some Communist supporters, the majority of them were the Assembly Representatives, namely Hou Youn, Hu Nim, Uch Ven, So Nem, etc.", emphasis added). HUN Chhunly: T. 07.12.2012, **E1/150.1**, before 15.58.25 ("*L'Observateur* newspaper does not turn a blind eye on or support social injustice."). PHILIP Short: T. 06.03.2013, **E1/189.1**, after 11.34.16.

[3190] Reasons for Judgement, §569.

time of SIHANOUK's regime to serve his nation and reform gently and from above,[3191] as well as his integrity, sense of honour and incorruptibility.[3192]

1659. Consequently, the errors committed by the Chamber resulted in a miscarriage of justice and its subsequent findings of KHIEU Samphan's responsibility must be reversed.

Section II. CPK MEMBER

1660. On the one hand, the Chamber found that KHIEU Samphan was aware that crimes had been committed after 1975, because since his admission to the ranks of the CPK in 1969, policies had been planned and tested and modus operandi had emerged "which were evident" to him as a "prominent member of the CPK leadership".[3193] On the other hand, it concluded that it had given its support to the CPK and its policies since "at least 1967".[3194] These somewhat contradictory findings are based on distortions of evidence and speculation.

1661. The Chamber dated KHIEU Samphan's so-called support for the CPK and its policies at the latest from 1967, i.e. from when he went into the countryside,[3195] two years before he joined the CPK. According to it, the precise date of this membership did not matter, since "by 1970 [KHIEU Samphan] was personally acquainted with" the future leaders of the CPK.[3196] It also claimed that NUON Chea had taken KHIEU Samphan into the countryside.[3197]

1662. Firstly, an objective and impartial reading of the sources supporting the latter assertion demonstrates that it is totally unfounded.[3198] Secondly, it has just been seen that the previous "personal knowledge" of the future leaders of the CPK is also unfounded and insufficient to reach

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[3191] Reasons for Judgement, §570-571; AB 002/01, §246; KHIEU Samphan: T. 13.12.2011, **E1/21.1**, at 15.25.54 ("but I took that opportunity to work for his interest and also for the interests of the country. I did not forget my plan to reform the economy so that there was a foundation for an independent national economy."); PHILIP Short: T. 06.03.2013, **E1/189.1**, at 11.34.16; Book by Elizabeth BECKER "When the War is over", 1986, **E3/20**, p. 111-112, ERN EN 00237816-00237817.

[3192] The Defence notes that the Chamber did not reiterate in 002/02, despite the absence of counter-evidence, its findings of 002/01 on the subject: Judgement 002/01, 07.08.2014, §360 and 988. See also, for example, *Duch*: T. 28.03.2012, **E1/55.1**, before 11.47.11 (KHIEU Samphan was considered as "the prophet of the Buddha because he was one of the most clean person. That's why Sihanouk trusted him.").

[3193] Reasons for Judgement, §4207.

[3194] Reasons for Judgement, §4257

[3195] Reasons for Judgement, §4257, referring to §573-574.

[3196] Reasons for Judgement, §573.

[3197] Reasons for Judgement, §572, referring to §211.

[3198] Reasons for Judgement, fn 486 (of §211).

an incriminating finding.[3199] Finally, it is difficult to understand how simply fleeing from death threats and then moving from village to village to hide implies any support for the CPK and its policies from there.

1663. Above all, the date of KHIEU Samphan's accession to the CPK in 1969 is important. Its belated character compared to that of the future leaders of the CPK, which is more than two years after he went into the countryside, shows that he was distanced from the CPK and its activities. Because of this, and because of his lack of seniority in the Party, he could not be considered by the Party to be a "senior member of the leadership" and to have knowledge of planned policies. This is further evidenced by the fact that he did not become an alternate member of the CC until two years later in 1971, and then ex officio only five years later in 1976.[3200]

1664. Consequently, the errors committed by the Chamber resulted in a miscarriage of justice and its subsequent findings of KHIEU Samphan's responsibility must be reversed.

Section III. FROM 1970 TO 17 APRIL 1975

1665. The Chamber erroneously concluded that KHIEU Samphan played an important role in the period from 1970 to April 1975 in order to find him criminally liable.[3201]

I. SUPPORT FOR FUNK/GRUNK

1666. By recalling that "KHIEU Samphan later neither denied his support for FUNK nor sought publicly to clarify his role",[3202] the Chamber failed to consider the circumstances of the support initiated by POL Pot provided by the KR to the FUNK, created by SIHANOUK after the LON Nol coup d'état against him.[3203] KHIEU Samphan also explained that he had accepted to be introduced as "the personification" of the FUNK taking into consideration the situation of the country,[3204] despite the

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[3199] See above, §1654-1659.
[3200] Reasons for Judgement, §574.
[3201] Reasons for Judgement, §219, 220, 231-232, 575-581 and in particular 582.
[3202] Reasons for Judgement, §575.
[3203] The message of support sent to SIHANOUK between the creation of the FUNK and that of the GRUNK, even signed by HOU Youn, HU Nim and KHIEU Samphan, was actually sent to him by POL Pot. See DK MFA Publication: "Black Paper", September 1978, **E3/23,** p. 34-35 and 35, 39 ERN EN 00082530 and 00082530, 00082532; Book by Philip SHORT, *Pol Pot: The History of a Nightmare*, **E3/9**, p. 199-200, ERN 00396399-00396400. Book by KHIEU Samphan, *Considerations on the History of Cambodia*, **E3/16**, p. 38 and 40, ERN 00498257-00498259.
[3204] Book by KHIEU Samphan, *Cambodia's Recent History and the Reasons behind the Decisions I Made,* May 2007, **E3/18**, p. 42, ERN EN 00103744: "But before taking on this duty, I had to agree to assume the role as an important leader of the country's internal resistance. Frankly, this greatly embarrassed me a lot. But it was a "sacrifice" I could not refuse if I wanted to contribute in accordance with my possibilities at the time to the battle for the salvation of our

previous threats by the Prince that had prompted him to take refuge in the countryside.[3205] The Chamber therefore misjudged the political context of the time by concluding that his role was "in reassuring the public about the CPK's plans",[3206] whereas the personification of the FUNK was SIHANOUK himself. Moreover, it gave a very overestimated presentation of his functions,[3207] whereas in fact they were symbolic and confined to the diplomatic representation of the movement.[3208]

II. PROPAGANDA, SPEECHES AND CALLS FOR A VIOLENT STRUGGLE

1667. In reaching its erroneous finding, the Chamber also made several errors attributing various speeches and/or press releases of the FUNK/GRUNK to KHIEU Samphan, which in its view proved his support for the common purpose.[3209] However, it could not base its findings on the speeches made during times of war to conclude that there was intrinsic violence of movement and indeed violence committed by the Appellant. Not only did it ignore the numerous testimonies to the contrary,[3210] but it also obscured the evidence that SIHANOUK had a fundamental role in the communication of the FUNK/GRUNK.[3211]

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country.".

[3205] Reasons for Judgement, §572.

[3206] Reasons for Judgement, §582.

[3207] Reasons for Judgement, §219, 220, 576-577.

[3208] See in this respect THIOUNN Prasith, written record of witness statement 08.06.2009, **E3/96**, ERN EN 00346945 ("Prior to 1975 he was deputy prime minister of the GRUNK and commander in chief of the armed forces a bogus title because Pol Pot was the actual commander Also during the same period when he travelled abroad it was IENG Sary who exercised power while KHIEU Samphan was the head of delegation."). Reasons for Judgement, §580, fn 1815 (receipt of the delegation of December 1974) and 1816 (appointment of January 1975). Reasons for Judgement, §580 fn 1815 which was based on the article *PRGRSV-NFLSV Delegation Visits 25-29 December, 05.01.1975* (FBIS), **E3/30**, ERN EN 00166668-00166670. It should be noted that in this article, only FUNK/GRUNK members are mentioned, namely HU Nim, HOU Yun, and KEAT Chhon.

[3209] Reasons for Judgement, §231-232, 578, 581, 582.

[3210] ROCHOEM Ton, *alias* PHY Phuon: T. 25.07.2012, **E1/96.1**, between 15.41.13 and 15.46.03 (remembering KHIEU Samphan mentioning the importance of bringing together all forces from all social strata, and saying that he never advocated violence but respect for moral principles); KIM Vun: T. 22.08.2012, **E1/112.1**, after 14.30.48 (on the wordings of the Front and the call for vigilance and patience in wartime). T. 22.08.2012, **E1/112.1**, before 14.35.26 (asked whether KHIEU Samphan had used words of a violent nature: "I have never heard or were never told things like that. At the beginning, we learned the 12-point morality."). It should be noted that the witness indicated that he did not think that KHIEU Samphan wrote his speeches at the time himself.

[3211] SUONG Sikoeun: T. 02.08.2012, **E1/101.1**, around 14.28.26 (concerning the AKI: "At that time, the King was -- the Prince was the head. Whatever the Prince would like us to print, we had to follow, and we had no intentions to hide anything from him. Politically, we had no intention to keep anything from being published if these were from the Prince."); NGO Thong Hoeung: T. 09.08.2012, **E1/105.1**, around 15.44.32 (FUNK bulletin: "As a matter of fact, Prince Norodom Sihanouk was the head of FUNK. And usually he also had his own bulletin. He likes to have his own bulletin, and another bulletin was -- came from the FUNK office. And the content was also broadcast on the FUNK radio."). KIM Vun: T. 22.08.2012, **E1/112.1**, *à* 13.56.18: "I do not think Mr. Khieu Samphan wrote these statements alone.

1668. Thus, the Chamber erroneously concluded that the Appellant's role between 1970 and 1975 contributed to the common purpose, much less to any criminal aspect of that purpose or to any criminal policy. Its findings will therefore be reversed.[3212]

Section IV. PARTICIPATION IN CC MEETINGS IN JUNE 1974 AND APRIL 1975

1669. The Chamber made serious errors in its findings on the participation and support of KHIEU Samphan in the meetings concerning the final assault and evacuation of Phnom Penh.[3213]

I. REVIEW OF THE JUNE 1974 MEETING

1670. The Chamber reviewed its finding from Case 002/01 concerning KHIEU Samphan's participation in the June 1974 meeting at which it held that the decision to evacuate Phnom Penh was taken.[3214] This turnaround took place after the reversal by the Supreme Court of Khieu Samphan´s Request for Admission of Additional Evidence on this point against the partial assessment of the evidence.[3215] The manner in which the Chamber reversed its decision on this June 1974 CC meeting on the basis of the same evidence in Case 002/01 illustrates the bias that has been a factor in many of its findings.[3216]

1671. While it had speculated at length in Judgement 002/01 about KHIEU Samphan's participation in this meeting[3217], it strongly rejected the statement of SO Socheat accused of lying in "her willingness to help her husband" (translation ours),[3218] it has radically reversed its findings.

1672. In Case 002/02, because of the different stakes, the Chamber therefore stated that it was no longer "satisfied" that KHIEU Samphan was present at the June 1974 meeting while continuing to use exactly the same statements of his key witness ROCHOEM Ton, but concluding this time that he was referring instead to a meeting in April 1975. [3219]

Within the CPK (phon.), without the participation of Prince Norodom Sihanouk, he would not have been able to write such statements. But that's conjecture on my part. But, in principle, the statements of the leaders of the FUNK could never have been written without the authorisation of the former prince." (paraphrase and emphasis added).

[3212] Reasons for Judgement, §582, 4257, 4306, 4389.

[3213] Reasons for Judgement, §3880-3882.

[3214] Judgement 002/01, 07.08.2014, §142.

[3215] Case 002/01 Appeal Judgement, 23.11.2016, §1008-1009.

[3216] Reasons for Judgement, §230, 583-584, 587-588.

[3217] Judgement 002/01, 07.08.2014, §138.

[3219] Reasons for Judgement, §588 and 586.

1673. This reversal is all the more spectacular and demonstrates all the more the approach to be taken by the Chamber that it had judged with great detail "very likely" in Case 002/01 that the date of the discussion on the evacuation of Phnom Penh had been specifically chosen in June 1974 to "enable KHIEU Samphan [...] to attend".[3220] Rejecting out of hand the numerous contradictions raised by the Defence on the statements made by PHY Phuon concerning this date of June 1974, it had on the contrary considered his statement to be very "clear".[3221]

1674. However, in an interview for which the Defence had unsuccessfully requested admission into evidence, ROCHOEM Ton admitted after his appearance in the 002/01 trial that he had been confused[3222], calling into question his own credibility.

1675. It is symptomatic that however "clear" the Chamber found this evidence, it came to a different finding on it in Case 002/02, since it was in April 1975 that it set the evacuation decision this time.

II. MEETING OF 1975 AT B-5

A. Contradictions and lack of credibility of PHY Phuon ignored

1676. The testimony of ROCHOEM Ton *alias* PHY Phuon was indeed indispensable for involving KHIEU Samphan in the evacuation plan of Phnom Penh and thus in this part of the common CPK purpose.[3223] PHY Phuon's inconsistencies were therefore again ignored while SO Socheat's testimony was scrutinised.[3224] However, it is necessary to go back to PHY Phuon's testimony to note that his description of two different meetings did not warrant substituting one for the other.[3225]

1677. Furthermore, the Chamber very conveniently ignored the evidence contradicting the testimony of ROCHOEM Ton *alias* PHY Phuon *alias* Cheam. When asked about him for the period before 17 April 1975, his superior SALOTH Ban, a guard close to POL Pot, of which he was also the nephew and medic, explained that PHY Phuon was not based at B-5: "Cheam went there once in a while

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[3220] Judgement 002/01, 07.08.2014, §138: "The Chamber considers it very likely that the June 1974 meeting was scheduled to enable KHIEU Samphan and IENG Sary to attend and report to the members of the CPK Central Committee on the highly successful meetings with senior Chinese Vietnamese and Laotian leaders.".
[3221] Judgement 002/01, 07.08.2014, §139.
[3222] Request of KHIEU Samphan, 14.08.2012, **E220**. KRT Witness Recants Hor Namhong Claim, 13.08.2012 (The Cambodia Daily), **E220.1**, ERN EN 00834516.
[3223] Reasons for Judgement, §3380 ("The plan to liberate and evacuate Phnom Penh was finalised in early April 1975 at a meeting at Office B-5 attended by POL Pot, NUON Chea, KHIEU Samphan, SON Sen, VORN Vet, KOY Thuon, KE Pauk, SAO Phim and Ta Mok").
[3224] Reasons for Judgement, §586 and 588. See also Judgement 002/01, 07.08.2014, §139.
[3225] CB 002/01, §20-33.

as a messenger, or to go and find food supply or fish for the people at the hut.".[3226] The Chamber did not take into account the testimony of SALOTH Ban, which greatly put the leading role played by ROCHOEM Ton/PHY Phuon into perspective.

1678. SALOTH Ban was confirmed in this matter by OEUN Tan, another important POL Pot bodyguard. Both recalled that in application of the principle of secrecy, confirmed by many former executives, there were rules imposed on bodyguards to keep a distance during meetings that did not allow them to hear anything.[3227] PHY Phuon's account should have been confronted with this other evidence and the Chamber should have concluded that it was impossible for him to hear the topics of discussion in a meeting of such importance.

B. Details of inconsistencies with the evidence on B-5

1679. The Chamber erred in concluding that it was established beyond reasonable doubt that the accounts of ROCHOEM Ton would be "corroborated" by the statements of NUON Chea, IENG Sary and KHIEU Samphan. It also failed to explain why it had discounted key evidence contradicting the version of ROCHOEM Ton *alias* PHY Phuon. A comparative table of the contents of the different testimonies is however illuminating on the irreconcilable differences between the testimonies:

Name	Description of B-5 and the meeting
ROCHOEM Ton *alias* PHY Phuon	- Office B-5 is located in Tang Poun village.[3228] - He mentions a large meeting during which POL Pot, NUON Chea, KHIEU Samphan and Ta Mok, SON Sen, KOY Thuon, VORN Vet, CHENG An, SAO Phim would have discussed the evacuation of the capital, and then "the whole 15 meeting applauded and approved the idea".[3229]
NUON Chea	- Present at the evacuation meeting, which was not at B-5. - POL Pot moved to Office B-5 in early April 1975 as the command centre for the liberation of Phnom Penh. That B-5 office was under the command of POL Pot.

[3226] SALOTH Ban: T. 25.04.2012, **E1/68.1**, at 11.29.12. See also T. 26.04.2012, **E1/69.1**, from 13.40.02 Cheam was east of the Tonlé Sap with Pang, "The hut that I referred to, where I stayed -- that is, the one situated to the west of Tonle Sap, in the area of Krang Beng or Krang Doung: Pang was not there. There was myself, who was the second supervisor after Pol Pot. So Pang did not make any trip between the west and the east of the river; he always stationed at the east of the river".

[3227] OEUN Tan: T. 13.06.2012, **E1/86.1**, before 11.33.02 (never knew anything about the purpose of these meetings as I was simply a bodyguard. The leaders never told us about that. My work was only to guard the meetings and I was to position myself 20-metres away from the meeting. They never told us.").

[3228] ROCHOEM Ton *alias* PHY Phuon: T. 26.07.2012, **E1/97.1**, around 09.53.39.

[3229] ROCHOEM Ton *alias* PHY Phuon: T. 26.07.2012, **E1/97.1**, around 09.42.32 and around 09.51.13.

Name	Description of B-5 and the meeting
	- He said about POL Pot at B-5: "There was nobody else [...] There were those people from the zone who went to report to him. The place I saw was possibly a secret place and there were only himself and some guards. As I said earlier, that was guerrilla warfare so we had to be vigilant, secretive in order to succeed. If we reveal ourselves and the locations, then we would be attacked by the enemy. Q. Did you ever attend any meetings at the B-5 Office? A. I recall that I did not actually have any meeting there, but once in a while, yes, I went to -- I went there to meet with Pol Pot.".[3230] It is important to note that in the Khmer version, UNON Chea denied ever having participated in any meeting at B-5.[3231]
KHIEU Samphan	- He did not participate in the work but only followed the events that POL Pot summarised to him from time to time.[3232] - He declared: By the end of March 1975, I was invited to the general headquarters of the Communist Party of Kampuchea in Phourn Dong, west of Oudong, to follow the last offensive against the capital more closely. […] Every day, with a few army officers, I followed the battles progression on the radio".[3233]
IENG Sary	- He dated the decision on the evacuation of Phnom Penh at late March or early April, when he did not witness it. - In addition, he mentioned his face-to-face meeting with POL Pot in 1974 to try to discuss the subject, he reports: Pol Pot replied to me that they already had all the experience they needed and that I should not concern myself with this and should instead concern myself with my duties abroad […] So the solution to the problem was to evacuate that was the only way to solve the problem. I responded by asking whether this meant a total evacuation or what and he said to wait and see what the concrete situation would be at the time. Nevertheless, the term evacuation was already being used in 1974.".[3234]
SALOTH Ban	- He was still with POL Pot before the liberation of Phnom Penh and was "the second supervisor after Pol Pot". There was only one cook and two guards there. NUON Chea came to see POL Pot only once or twice.[3235]

[3230] NUON Chea: T. 30.01.2012, **E1/35.1**, before 10.21.31 (emphasis added).
[3231] *Ibid idem*, the Khmer versions of the transcript, p. 19, L. 3-4, 6-7.
[3232] KHIEU Samphan, Written Record of Interview of Charged Person, 13.12.2007, **E3/27**, ERN EN 00156742-00156743; T. 13.12.2011, **E1/21.1**, after 16.01.33.
[3233] Book by KHIEU Samphan, *Cambodia's Recent History and the Reasons behind the Decisions I Made*, May 2007, **E3/18**, p. 53-54, ERN 00103749-00103750 (emphasis added).
[3234] Interview Transcript Steve HEDER (SH) with IENG Sary (IS), 17.12.1996, **E3/89**, ERN EN 00417603.
[3235] SALOTH Ban: T. 25.04.2012, **E1/68.1**, around 11.27.36; T. 26.04.2012, **E1/69.1**, before 11.35.18, after 13.41.45 ("Pang was not there. There was myself, who was the second supervisor after Pol Pot.").

Name	Description of B-5 and the meeting
	- The meetings of "the three, or four, or five-person meetings were not held. The meetings were usually between one or two individuals.".[3236] - He saw KHIEU Samphan, but there was no "major meeting".[3237]

1680. It is not clear how, by comparing these different versions, the Chamber could conclude that the statements of NUON Chea, IENG Sary and KHIEU Samphan corroborated those of PHY Phuon. Its finding is deeply flawed.

C. Other evidence ignored

1681. Furthermore, the Chamber should have drawn the consequences from its finding that KHIEU Samphan had nothing to do with military affairs. IENG Sary said that POL Pot asked him to mind his own business and explained that it was POL Pot, SON Sen, NUON Chea and the area chiefs who managed the evacuation.[3238] The Chamber also erred in failing to note that KHIEU Samphan, a mere alternate member of the CC, was not able to participate in the decision-making process.[3239]

1682. Even if POL Pot had indeed moved west of Oudong to facilitate the command for the liberation of Phnom Penh, whether in 002/01 or 002/02, the Chamber unreasonably relied solely on the testimony of ROCHOEM Ton to conclude that KHIEU Samphan had participated in and approved the plan to evacuate Phnom Penh in April 1975. That a meeting was held in Taing Poun on that date as described by the witness has indeed not been established beyond reasonable doubt. Its finding should therefore be reversed.

[3236] SALOTH Ban: T. 23.04.2012, **E1/66.1**, around 11.12.49, before 11.55.32 (emphasis added), ("Q. Who was working in that office? That office whose name changed with time, but which was still in the region? Who were the leaders who worked in that office? A. Pol Pot. Q. Did any leaders from other regions and zones come to visit Pol Pot in that office? A. It was at his behest, and once in a while one or two zone leaders were invited to meet him in that place,"), after 11.30.51 ("Between 1970 and 1975, yes, most of the time I was close to him.").
[3237] SALOTH Ban: T. 25.04.2012, **E1/68.1**, at 11.25.22.
[3238] Interview Transcript Steve HEDER (SH) with IENG Sary (IS), 17.12.1996, **E3/89**, ERN EN 00417603. Reasons for Judgement, §3882 ("Zone Secretaries sought and received instructions from senior leaders including POL Pot NUON Chea and SON Sen stationed at B-5 at the time."). SALOTH Ban: T. 25.01.2012, **E1/68.1**, after 11.25.22.
[3239] Communist Party of Kampuchea Statute, 1976, undated document, **E3/130**, p. 23-24, ERN EN 00184044-00184045.

Chapter II. ERRORS REGARDING PLACES OF RESIDENCE, WORK AND MOVEMENTS

1683. The Chamber committed a series of errors in drawing incorrect findings about KHIEU Samphan's place of residence and work as well as regarding his movements within the country. These errors were then used to conclude his knowledge of the crimes and his responsibility.[3240]

Section I. ERRORS REGARDING PROXIMITY WITH CPK LEADERS

1684. The Chamber listened at length to the fact that KHIEU Samphan remained in close contact with POL Pot, NUON Chea and other CPK leaders throughout the DK because of his residence and work between offices K-1 and K-3.[3241] It thus extrapolated on what the Appellant would have known because of this proximity and that they possibly would have "met with each other".[3242] As we have seen above, the principle of secrecy was essential in the operation of the CPK.[3243] Moreover, the Chamber did not draw the consequences from the fact that although he regularly visited K-1, KHIEU Samphan was never a member of the SC. It should have rightly noted that physical proximity does not mean proximity of power or responsibility. It therefore wrongly concluded that "this proximity" to the "Party Centre" would have allowed KHIEU Samphan to be constantly aware of the development of plans, their implementation and the real likelihood that the crimes would be committed.[3244]

1685. On the other hand, an impartial examination of the evidence shows that after leaving K-1, KHIEU Samphan lived in K-3, whereas NUON Chea and IENG Sary only came there from time to time, while POL Pot always resided in K-1.[3245] Therefore, this difference in residence and especially the difference in the role of KHIEU Samphan focused on the distribution of materials to the zones and regions was confirmed by a number of witnesses.[3246] Moreover, they all indicated that they did not

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[3240] Reasons for Judgement, §4208, 4225 and 4314.
[3241] Reasons for Judgement, §484, 581, 583-588.
[3242] Reasons for Judgement, §484, fn 1527. In this respect, it is important to note that only PHAN Van talked about face-to-face interviews and this related to IENG Thirith and NUON Chea, T. 12.12.2012, **E1/152.1,** 10.07.28.
[3243] See above, §1650-1651.
[3244] Reasons for Judgement, §4208 and 4225.
[3245] Reasons for Judgement, §484. It is important to note that PHAN Van spoke about the meeting IENG Thirith had with NUON Chea, T. 12.12.2012, **E1/152.1,** 10.07.28. Therefore, it is not reasonable to add them all in order to reach an incriminating finding against KHIEU Samphan.
[3246] OEUN Tan: T. 13.06.2012, **E1/86.1**, at 11.13.46 (KHIEU Samphan and NUON Chea living at K-3, IENG Sary at B-1); SAUT Toeung: Written Record of Witness Interview, 02.12.2009, **E3/423**, Q/A 183 ("sometimes Ta NUON Chea stayed in K- l0 and some other time he stayed in K-3"); T. 18.04.2012, **E1/63.1**, around 14.05.17; LENG Chhoeung: T. 17.06.2013, **E1/208.1**, between 09.47.01 and 09.48.51. Translation problem, see the Khmer version p.

know the content of the discussions between the residents of K-1 and K-3, which made it impossible to confirm the theory that KHIEU Samphan was informed of everything,[3247] a theory also contradicted by the evidence related to the communications.[3248]

Section II. ERRORS REGARDING VISITS TO WORKSITES

1686. The Chamber also erred in fact in concluding that the Appellant "travelled to the Cambodian countryside to visit worksites during the DK era" as if it were a common habit.[3249] However, only one "tour" made by SIHANOUK accompanied by KHIEU Samphan is referred to on the TTD website.[3250] The manner in which these visits were organised did not allow for the finding that "KHIEU Samphan observed the abject living and working conditions of worker-peasants, including starvation, illness and disease".[3251]

1687. Moreover, the Chamber conveniently omitted the remarks made by SIHANOUK who stated in an interview shortly after the DK: We visited some cooperatives, we visited rice farms, we visited worksites where people were working with their hands. These people were not unhappy, they didn't look terrorized, they didn't look famished - they didn't look famished.".[3252] One may not want to give credit to this media intervention. However, the witness HENG Samuoth who worked at TTD explained that when receiving delegations' visits to the construction site, emphasis was placed on those who were heavier and of good physical appearance, which was confirmed by other witnesses.[3253]

1688. Finally, the Chamber should especially have drawn the consequences of its own findings on the impossibility of finding the presence of KHIEU Samphan at most of the worksites that are the subject matter of Case 002/02.[3254] As a result of his limited functions, his movements within the country have also been limited.

13, L. 12. (the witness explained that although he had seen them all at K-3, but not every day because each one had his work, they lived "in different places").
[3247] Reasons for Judgement, §589, fn 4846.
[3248] See for example, Reasons for Judgement, §3912. See above, §1624-1625, 1650-1651.
[3249] Reasons for Judgement, §590, fn 1849 referring to §606.
[3250] Reasons for Judgement, §606.
[3251] Reasons for Judgement, §4314.
[3252] Closing arguments: T. 25.10.2013, **E1/234.1**, between 10.58.52 and 11.01.47.
[3253] MAM Soeurm, *alias* HENG Samuoth: T. 28.07.2015, **E1/324.1**, before 15.38.45. Other witnesses: See above, §1843.
[3254] See above, §1605-1609.

1689. The Chamber's incorrect findings about his "closeness" to the CPK leadership and his infrequent visits to the country could not serve as a basis for holding him responsible for a joint-criminal enterprise or for providing assistance and encouragement. Any findings of the Chamber to the contrary must be reversed.[3255]

Chapter III. ERRORS REGARDING ROLES DURING THE DK

Section I. DEPUTY VICE MINISTER, MINISTER OF NATIONAL DEFENSE AND KPNLAF COMMANDER

1690. The Chamber erred in fact in concluding that "the attribution [special national congresses in April and December 1975 and a FUNK congress in February 1975] to KHIEU Samphan as GRUNK Deputy Prime Minister and FUNK representative, among others, served effectively to legitimise the CPK's agenda internationally".[3256] First of all, the Chamber erred in using KHIEU Samphan's alleged participation in congresses as an incriminating element when it further concluded that "it is not clear [...] whether the April and December 1975 congresses genuinely took place.".[3257] In the absence of evidence that these congresses actually took place, the Chamber could not logically conclude that the Appellant had conferred in any way "to legitimise the CPK's agenda internationally".[3258] For the same reasons, it also could not conclude that it was established that these uncertain congresses reflected the political line advocated by the CPK at the time.[3259] In the absence of certainty, the finding that it was impossible to conclude that such conventions were held should have led the Chamber to refrain from making any findings about them.

1691. The Chamber erred by finding that KHIEU Samphan would have participated in important meetings or gatherings with military personnel in Phnom Penh.[3260] An impartial review of the evidence in support of this finding shows that the Appellant was present only at the 1975 rallies and that this can be explained by his purely symbolic position as KPNLAF Commander.[3261] Its finding that the Appellant had "promoted confirmed and endorsed the common purpose" in this

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[3255] Reasons for Judgement, §4306, 4313-4318.
[3256] Reasons for Judgement, §593.
[3257] Reasons for Judgement, §593.
[3258] Reasons for Judgement, §593.
[3259] Reasons for Judgement, §3735 and fn 13908 (of §4262).
[3260] Reasons for Judgement, §510.
[3261] Reasons for Judgement, fn 1596 where the Chamber used the testimony of CHHAOM Sè and the written statements of PRAK Yoeun and KOY Mon. See below, §1724.

context is also incorrect in view of the historical context.[3262] Indeed, as was seen in Case 002/01, the FUNK/GRUNK were made up of different components, headed by SIHANOUK.[3263] If the logic of the Chamber were to be followed, SIHANOUK's participation in the FUNK/GRUNK would be tantamount to saying that the latter would also have supported the political line of the CPK during this period and that he would have adhered to the common purpose. This shows the limits of such reasoning. No reasonable trier of fact could ever have reached such a finding. The Chamber erred in its assessment of the evidence and the political context of the time. Its findings along with those based on this reasoning must be reversed.[3264]

Section II. PRESIDENT OF THE STATE PRESIDIUM

1692. The Chamber committed several errors of fact in finding the criminal responsibility of KHIEU Samphan due to his position as President of the State Presidium,[3265] on the organisation relating to his appointment (I), on his roles and responsibilities (II) and on his speeches (III).

I. ERROR REGARDING THE APPOINTMENT

1693. As will be demonstrated below, the Chamber erred by finding that it was the CC who would have appointed KHIEU Samphan the position of President of the State Presidium a few days before the resignation of SIHANOUK based on one document entitled "Decision of the Central Committee Regarding a Number of Matters" dated 30 March 1976.[3266] However, the Chamber also recognised that after the new government was created, "Government ministers and ministerial staff reported to and took directions from the CPK Standing Committee".[3267] This therefore supports the

[3262]Reasons for Judgement, §4262 (*18.2.1.2. Promoting the Common Purpose*). See also §3735 ("Between 25 and 27 April 1975, KHIEU Samphan reportedly chaired") and 3897 ("On 14 December 1975, KHIEU Samphan chaired a National Congress at which he was reported to have presented the new constitution").
[3263] Judgement, 002/01, 07.08.2014, §98. See also GRUNK Report entitled: "Cambodia's Seat in the United Nations", 1973, **E3/28**, p. 24, 26-27, ERN EN 00068116-00068117, p. 31-32, ERN EN 00068119-00068120.
[3264] Reasons for Judgement, §593, 3735, 3897, 4262, 4306-4308.
[3265] Reasons for Judgement, §596-599 and 4241-4243, 4253, 4257, 4262-4264, 4265-4270, 4271, 4273, 4281, 4314, 4389.
[3266] Reasons for Judgement, §596, 414. See below, §1717. See also the Minutes of Meeting of the Standing Committee The Front, 11.03. 1976, **E3/197,** ERN EN 00182640-00182641 (POL Pot who made decisions following the request for the resignation of SIHANOUK with the agreement of the standing committee); Philip SHORT: T. 06.05.2013, **EI/189.1**, around 11.58.16 (CC meetings were very rare and gatherings to absorb decisions that were already being made by the SC).
[3267] Reasons for Judgement, §416 (emphasis added).

Defence's arguments that the appointment decision was rather taken by the Standing Committee. This error has led to a miscarriage of justice and must be sanctioned.

II. ERRORS RELATING TO ROLES AND RESPONSIBILITIES

1694. Moreover, despite its recognition since Case 002/01 that KHIEU Samphan's official position as President of the Presidium was only "largely symbolic",[3268] the Chamber used it as a charge against him. It ignored the CPK's mistrust of him, as evidenced by the fact that he was not the only one in the position, but was accompanied by two other important people of a higher rank than him in the CPK (namely SAO Phim and RUOS Nhim as Vice-Presidents of the Presidium), which was not the case for SIHANOUK as "Head of State".[3269] This mistrust is further evidenced by his promotion as a full member of the CC in 1976, the same year as his appointment to the Presidium, when he had been appointed as an alternate member five years earlier.[3270]

1695. The Chamber also erred in considering that in this role, his responsibilities were essentially confined to diplomatic duties and "the general promotion of the CPK line" in particular through speeches delivered in this capacity.[3271] Among other things, he is said to have supported the CPK and its policies[3272], endorsed and promoted the Party's goal of building and defending the country relying solely on its own forces in a great leap forward,[3273] and called on the people to work collectively in the rice fields and factories to increase production and defend the country, etc.[3274]

1696. However, the Chamber chose to make the assertion that he was charged with "the general promotion of the CPK line" without explaining that this was "the CPK line", which in the general sense is not criminal in and of itself. As the Chamber subsequently acknowledged, the policy was not in itself criminal in nature, unlike its implementation.[3275]

[3268] Judgement 002/01, 07.08.2014, §381; Reasons for Judgement, §599.
[3269] Reasons for Judgement, §596, fn 1868.
[3270] He was appointed as an alternate member in 1970, the same year as his appointment to the FUNK/GRUNK, which is no coincidence. Although he went back to the maquis or countryside in 1967, it was not until two years later that he was admitted as a Party member by Ta Mok.
[3271] Reasons for Judgement, §599.
[3272] Reasons for Judgement, §4257.
[3273] Reasons for Judgement, §4262.
[3274] Reasons for Judgement, §4265.
[3275] Reasons for Judgement, §3743.

1697. On the other hand, the Chamber concluded 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.[3276] There is no evidence that he would have received these letters.[3277]

III. ERRORS REGARDING SPEECHES

1698. With regard to the different speeches attributed to KHIEU Samphan, several mistakes were made in using them as evidence of support for the establishment of the new state and/or approval of the policies adopted by the CPK and/or denunciation of Vietnamese aggression.[3278]

A. Mistakenly attributed speeches

1699. The Chamber attributed the speech of 11 April 1976 to KHIEU Samphan (the first to be attributed to him after his appointment to the Presidium) "supporting the creation of the new DK state and its institutions".[3279] Then it used that same speech again to confirm that the "objective of achieving a 'great and magnificent leap' was again promoted by KHIEU Samphan" and "KHIEU Samphan endorsed the priority of building and defending an independent and self-reliant country quickly".[3280]

1700. However, this attribution is completely incorrect and had already been reversed on appeal in Case 002/01.[3281] Neither the name KHIEU Samphan nor the President of the Presidium were identified as the person who gave the speech.[3282] Therefore, the assertion that KHIEU Samphan made a speech and thus, according to the Chamber, supported the establishment of the new DK state and its institutions and others must be reversed.

1701. Another example of statements wrongly attributed to KHIEU Samphan as President of the Presidium can be found in a document dated September 1976, which was used by the Chamber to

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[3276] Reasons for Judgement, §4048.
[3277] See below, §1799-1803.
[3278] Reasons for Judgement, §598.
[3279] Reasons for Judgement, §598, fn 1877, 3739. Document on Conference I of Legislature I of the People's Representative Assembly of Kampuchea, 11-13.4.1976, **E3/165**.
[3280] Reasons for Judgement, §3739.
[3281] Case 002/001 Appeal Judgement, 23.11.2016, §1023.
[3282] Document on conference I of legislature I of the people's representative assembly of Kampuchea, 11-13.04.1976, **E3/165**; First Plenary Session of the First Legislature of the People's Representatives Assembly of Kampuchea Press Release, 14.04.1976, **E3/262**.See also above, §1421.

hold him responsible.[3283] The Chamber could not rely on this dubious, unsubstantiated document, which one witness even explained was a fake interview.[3284]

B. Other speeches

1702. In support of its finding on KHIEU Samphan's speeches as President of the Presidium, the Chamber used a speech from January 1976 on the new draft constitution, while he was still Deputy Prime Minister of GRUNK.[3285] It used the three speeches broadcast on the celebration of the anniversary of 17 April,[3286] and those following the border war against Vietnam which was becoming more and more intensive,[3287] in a biased and partial way in its findings on the common purpose.[3288] However, these speeches did not lead to the finding that KHIEU Samphan approved or supported any criminal aspect of the common purpose, nor that he was aware of the alleged crimes.[3289] The Chamber's errors concerning the speeches are further expanded in the relevant parts of this brief.

1703. In conclusion, the errors of fact committed by the Chamber in finding the criminal responsibility of KHIEU Samphan because of his position as President of the State Presidium and the consideration of this symbolic position as an aggravating factor have led to a miscarriage of justice and must be reversed.

Section III. "MEMBER" OF THE CC AND STANDING COMMITTEE

1704. The Chamber erred in fact in holding that KHIEU Samphan was part of a select group of "well-informed" CPK members because of his membership in the CC and that he also held a "unique

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[3283] See for example: Reasons for Judgement, §4241 and fn 13844, §4253 and fn 13875 (document **E3/608**).
[3284] See for example fn 13844 (of §4241), fn 13875 (of §4253). Key documents hearing: T. 10.01.2017, **E1/518.1**, after 11.14.48 where the defence pointed out that François PONCHAUD had confirmed on the stand that it was "fake".
[3285] Reasons for Judgement, fn 1878 of §598, Phnom Penh reportage on third national congress: Report of Khieu Samphan (FBIS), 05.01.1976, **E3/273**.
[3286] Reasons for Judgement, fn 1876-1880 of §598.
[3287] Reasons for Judgement, fn 1880 of §598.
[3288] See for example, Reasons for Judgement, §§3734, 3773, 3807, 3823, 3857, 3909, 3916, 3960, 3970.
[3289] For example, the importance of improving the living conditions of the population and its implementation to reverse forced labour and enslavement: "Anniversary of 17 Apr. victory celebrated" (FBIS), 15.04.1976, **E3/275**, ERN EN 00167634-00167635; "Khieu Samphan's Speech at Anniversary Meeting" (SWB), 15.04.1977, **E3/201**, ERN EN 00419513-00419515.

position" in the Party through his "attendance at numerous Standing Committee meetings",[3290] "where important matters were discussed and crucial decisions were made".[3291]

1705. KHIEU Samphan was first an alternate member and then a full member of the CC but has never been a member of the Standing Committee. The Chamber recognised that "[a]lthough the CPK Statute vested the highest level of operational authority in the Central Committee, effective control over the CPK was ultimately exercised by the Permanent Committee of the Central Committee (also known as the Standing Committee)".[3292] In contradiction with this finding, it committed errors of fact in condemning KHIEU Samphan on account of his membership of the CC (I) and his presence at certain meetings of the SC (II), in particular through the DC (III).

I. MEMBERSHIP OF THE CENTRAL COMMITTEE

1706. In an attempt to link KHIEU Samphan to the crimes, the Chamber extended the powers of the CC (A) to which it attributed decisions of the SC (B), conveniently dated his admission as a full member of the CC (C) and placed him in Congresses without evidence (D).

A. Errors in the scope of duties and powers of the Central Committee

1707. As a preliminary matter, while noting that there was no provision in the CPK Statutes for any level other than that of CC members, the Chamber relied solely on the "expectations" of Duch to estimate that the Central Committee members was between 20 and 30 "and reserve members".[3293] It could not do so without explaining itself, especially in view of the obvious lack of knowledge of Duch's facts on the subject, the latter having in particular never been a member of the CC and not having attended any meeting of that body (the same for the Standing Committee).[3294]

[3290] Reasons for Judgement, §604 and 624.
[3291] Reasons for Judgement, §4236-4238.
[3292] Reasons for Judgement, §357. See also §346: "As noted below, the Standing Committee was the highest decision-making body of the CPK".
[3293] Reasons for Judgement, §356.
[3294] For example, *Duch*: T. 22.06.2016, **E1/442.1**, p. 3-4, between 09.03.13 and 09.08.33; T. 02.04.2012, **E1/57.1**, before 11.13.54 ("Personally, I never attended meetings are the central office or the Standing Committee meetings."); T. 05.04.2012, **E1/60.1**, from 13.34.55 (translation problem in French, see the Khmer version p. 51, L. 8-9: as a member of the Party, he did not participate in the meetings of the CC and SC, nor did he have access to the documents of the meetings of these committees), after 13.45.15 ("The work of the Central -- Standing Committee cannot be known by me, but in principle I understand that because my superior told me that"); T. 09.04.2012, **E1/61.1**, after 09.40.52, after 09.47.10.

1708. The Chamber then relied solely on written notes containing a transcript of the 1971 Statutes, the author of which was unknown, to state that the CC had power of appointment,[3295] whereas it had stated that it would rely on their contents only if they were corroborated.[3296]

1709. In addition, the Chamber relied on the CPK Statutes to declare that it was the CC's responsibility to monitor the implementation of Party policies, as well as on a book of KHIEU Samphan who supposedly "acknowledged" that the CC "issued directives".[3297] It expressed confidence that regular telegrams sent by zone secretaries reporting on the situation showed that the CC and SC were monitoring the implementation of the Party's policies in accordance with their role.[3298]

1710. The Chamber did not explain why it was relying on the statutes when it noted the difference between the theory of the statutes and the reality.[3299] It distorted KHIEU Samphan's writings and did not take account of his statements before the Judges, supported by other evidence, according to which the CC, which is subordinate to the SC, had no effective power and was merely a forum for the dissemination of decisions already taken by the SC.[3300]

1711. Furthermore, an objective examination of the telegrams mentioned shows that they were not addressed to the CC but to "*Angkar*" or "*Angkar* 870" or "Committee 870" with the same four members of the SC copied in.[3301] Similarly, documents relied upon by the Chamber also refer to weekly reports to be sent to Office 870 or the SC,[3302] never to the CC. In addition, witnesses testified that the telegrams were delivered to POL Pot and NUON Chea only.[3303]

1712. On the contrary, these elements demonstrate that the Central Committee played no role in monitoring the implementation of Party policies and that its theoretical statutory powers were in

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[3295] Reasons for Judgement, §357.
[3296] Reasons for Judgement, §344.
[3297] Reasons for Judgement, §355 and 600.
[3298] Reasons for Judgement, §3964. See also §3899.
[3299] For example: Reasons for Judgement, §357. Moreover, while according to the Statutes the Assembly must meet every four years, in practice the Chamber has reported congresses held in 1960, 1971, 1976 and 1978.
[3300] The Defence expressly refers here to developments in its AB 002/01, §122-123.
[3301] Reasons for Judgement, fn 13189-13193 (of §3964). The members of the SC in question are POL Pot, NUON Chea, IENG Sary and VORN Vet. See also the telegrams mentioned in fn 12999 (of §3899) addressed to "*Angkar*".
[3302] For example: Decision of the Central Committee Regarding a Number of Matters, 30.03.1976, **E3/12**, ERN EN 00182809-00182810 (Office 870); Minutes of meeting on base work, 08.03.1976, **E3/232**, ERN EN 00182633-00182634 (SC).
[3303] See above, §1624-1625.

fact "delegated"[3304] to the Standing Committee (specifically POL Pot and NUON Chea). Therefore, the Chamber could not reasonably extend the functions of the Central Committee and infer that KHIEU Samphan was "well informed" or that he contributed to the crimes.[3305]

B. Errors in attributing Standing Committee decisions to the Central Committee

1713. KHIEU Samphan became a member (alternate) of the Central Committee in 1971, and the Chamber conveniently and erroneously attributed important decisions made by the Standing Committee to the Central Committee.

1714. Firstly, according to the Chamber, the Central Committee made the decision in May 1972 to close the markets, end the use of money and organise cooperatives in the liberated zones.[3306] It based its ruling solely on SHORT and NUON Chea. While the former mentioned the Central Committee, the latter stated that it was a decision of the Standing Committee.[3307] The Chamber did not explain why it relied on the expert's version on this point rather than on the direct testimony of NUON Chea, a member of the Standing Committee (whereas it did the opposite when he was tried).[3308] No reasonable trier of fact could have held KHIEU Samphan criminally liable on this basis.[3309]

1715. Secondly, in support of its finding on the existence of a CPK policy against enemies, the Chamber attributed a mid-1974 decision to close the door to party membership in order to prevent spies from infiltrating the party to the Central Committee.[3310] It unreasonably relied on and misrepresented three Revolutionary Flags since they never refer to the Central Committee, but to the "Party".[3311]

1716. Thirdly, according to the Chamber, it was again the Central Committee that discussed plans for the final assault and evacuation of Phnom Penh in June 1974.[3312] It has not yet explained why it did not accept NUON Chea's direct testimony that it was an "extraordinary session" of the [Standing

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[3304] To use the expression used by the Chamber in the *Duch* Trial Judgement, 26.07.2010, §85.
[3305] Reasons for Judgement, §604, 624, 3913, 4257, 4259, 4260.
[3306] Reasons for Judgement, §239 and 3872.
[3307] Reasons for Judgement, §227 and fn 538 (SHORT, which states that this is an initiative of POL Pot); §239 and fn 570 (NUON Chea).
[3308] See, for example: Reasons for Judgement, §397 regarding democratic centralism. It is therefore a perfect illustration of the biased application of a double standard by the Chamber (see above, §234).
[3309] Reasons for Judgement, §4207, where the Chamber indicates that KHIEU Samphan "was then part" of the Central Committee, without even specifying that he was in any event an alternate member without the right to vote at that time, and without stating any evidence that he had been present.
[3310] Reasons for Judgement, §402 and 3940.
[3311] Reasons for Judgement, fn 1204 (of §402).
[3312] Reasons for Judgement, §230 and 3880.

Committee]",[3313] against a single Revolutionary Flag reporting a meeting of the Central Committee on that date out of all the cited evidence on which it relied.[3314]

1717. Fourthly, the Chamber considered that the Central Committee was responsible for the document of March 30, 1976, entitled "Decision of the Central Committee Regarding a Number of Matters", concerning, in particular, appointments to the government, the establishment of a reporting system, the power of enforcement or the fixing of national holidays.[3315] Not only is this document (with no mention of the participants) questionable,[3316] but no witnesses claimed to have seen it during the DK and there is no evidence that a Central Committee meeting took place. In addition, experts have attributed it to the Standing Committee, as the Chamber noted in case file 001.[3317] However, it never explained in either 002/01 or 002/02 why it did not take their views into account on this point, especially despite its own finding that it was the Standing Committee that made the crucial decisions.[3318]

1718. In view of this finding and the evidence, the Chamber should have recognised that all of the above decisions were made by the Standing Committee. Furthermore, even if these were decisions of the Central Committee, it was never established either that a meeting took place or that KHIEU Samphan was present. Moreover, with regard to the decision of June 1974, the Chamber reversed in 002/02 its finding in 002/01 that KHIEU Samphan had attended.[3319] Even if it had been a meeting of the Central Committee, it should have taken this into account and recognised that not all members necessarily attended the meetings, like the Standing Committee and Congresses.[3320]

1719. Therefore, the Chamber could not infer from these decisions and from KHIEU Samphan's membership in the Central Committee any knowledge, intent or contribution to the crimes.[3321]

[3313] NUON Chea: T. 22.11.2011, **E1/14.1**, after 15.14.19.
[3314] Reasons for Judgement, fn 547 (of §230).
[3315] Reasons for Judgement, in particular §414, 416, 596, 3739, 3855-3856, 3899, 3955. See also §4259-4260.
[3316] See above, §323; Appeal Brief 002/01, §499.
[3317] Philip SHORT: T. 06.05.2013, **E1/189.1**, around 13.58.09. See also the testimony of Craig ETCHESON in Case 001: *Duch* Trial Judgement, 26.07.2010, §103.
[3318] For example: Reasons for Judgement, §346, 357, 604, 624, 4322.
[3319] See above, §1669-1675. On the basis of the same evidence as in 002/01, this time the Chamber stated that it "has found no convincing evidence that either Khieu Samphan or Ieng Sary attended this meeting" (fn 548 of §230 of the Reasons for Judgement).
[3320] Reasons for Judgement, §357, where the Chamber finds that the Standing Committee "could be (and often were) convened in the absence of one or more Committee members". For the Congresses, see below, §1723-1728.
[3321] Reasons for Judgement, §4207, 4208, 4259, 4260, 4313, 4316.

C. Errors on the date of admission as a full member

1720. In order to implicate KHIEU Samphan in particular in the decision of 30 March 1976,[3322] the Chamber erroneously dated his admission to the Central Committee as a full member in January 1976 during the 4th Party Congress which would have taken place on that date and during which the Party's Statutes would have been adopted.[3323]

1721. First of all, the document containing these Statutes is not dated.[3324] Secondly, most of the evidence supporting either the finding on the date of the congress[3325] or the date of admission of KHIEU Samphan[3326] do not support the finding at all. The rest of the evidence mentioned, namely the statements of KHIEU Samphan and the testimony of HEDER, are insufficient. Essentially, KHIEU Samphan has 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 (and as close to the facts as possible) to June 1976.[3327] When asked about the date of adoption of the Statutes, HEDER stated that he had been told in interviews that it was in January 1976, and mentioned the potential existence of a reference in documents, which he did not give.[3328] While he then made the link between the 4th Congress and the admission of KHIEU Samphan as a full member,[3329] SHORT (omitted by the Chamber) had stated that KHIEU Samphan was promoted to full member at the same time as he

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[3322] Reasons for Judgement, §4257, 4259 and 4260 in particular.
[3323] Reasons for Judgement, §343 and fn 948, 355, 574, 600, 3738.
[3324] As the Chamber has noted, however, on the 40 or so occasions when it has referred to it ("Communist Party of Kampuchea Statute, **E3/130**, undated document" except one, fn 12466 of §3738 ("Communist Party of Kampuchea Statute, **E3/130** [**E3/214**], January 1976").
[3325] Reasons for Judgement, fn 948 (of §344): *Duch*: T. 21.03.2012, **E1/52.1**, after 13.55.26 (*Duch* did not talk about the Congress but simply about the Statutes and mentioned the date "1976" after it was given to him in the question asked); Written record of analysis by Craig ETCHESON, 18.07.2007, **E3/494**, p. 3, ERN EN 00142828 (ETCHESON refers at the end of his analysis to a document that in fact never mentions either the 4th congress, or the Statutes, or even the date of 1976. See the document admitted to the case file as Exhibit **E3/196**).
[3326] Reasons for Judgement, fn 998 (of §355) and fn 1789 of (§574): SALOTH Ban and *Duch* only mentioned "1976". The same is true of IENG Sary's interview with HEDER.
[3327] Reasons for Judgement, fn 998 (of §355) and fn 1789 of (§574) [references here in chronological order]: Letter of 2001, **E3/205**, ERN EN 00149526 ("in-mid-1976"); Book **E3/18**, p. 140, ERN EN 00103793 ("June 1976") - see also p. 58 fn 50, ERN EN 00103752 ("June 1976"); Written record of interview of charged person, 13.12.2007, **E3/27**, p. 10, ERN EN 00156750 ("1976 "); T. 29.05.2013, **E1/198.1**, at 14.43.26 ("late 1975 or early 1976").
[3328] Reasons for Judgement, fn 948 (of §343): Stephen HEDER: T. 11.07.2013, **E1/222.1**, at 09.47.25.
[3329] Reasons for Judgement, fn 998 (of §355) and fn 1789 (of §574): Stephen HEDER: T. 15.07.2013, **E1/223.1**, before 11.09.40.

was appointed Head of State.[3330] However, according to the Chamber, this appointment was made unofficially by the "Central Committee" on 30 March 1976 and officially in mid-April.[3331]

1722. In the light of this evidence, no reasonable judge could have concluded that KHIEU Samphan had become a full member in January1976 during the 4th CPK Congress and implicated him in the decision of the Central Committee of 30 March 1976. He should have been given the benefit of the doubt, especially since there is no evidence that he would have been present at that Congress.

D. Errors regarding presence at Congresses

1723. In order to hold KHIEU Samphan responsible, the Chamber relied on his participation in the 1976 and 1978 CPK Congresses,[3332] without any evidence of his presence.

1724. In all its findings relating to the 4th Congress of 1976,[3333] the Chamber did not mention any evidence of KHIEU Samphan's participation. It simply stated that hundreds of people, including members of the Central Committee, had attended,[3334] based on the testimony of CHHAOM Se, who did not talk about the Congress but about a military rally in September 1975.[3335]

1725. As for the 5th Congress, the Chamber concluded that it took place on 1 and 2 November 1978,[3336] on the basis of evidence that did not mention the presence of KHIEU Samphan.[3337] According to them, the main or only function of this unusually brief meeting was to elect a new management team.[3338] In asserting that hundreds of people who were members of the Central Committee

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[3330] Philip SHORT: T. 06.05.2013, **E1/189.1**, around 13.44.33.
[3331] Reasons for Judgement, §596.
[3332] Reasons for Judgement, §4229, 4257, 4259, 4260 in particular.
[3333] Reasons for Judgement, §343, 345, 574, 3738, 3765, 4257, 4259. The only evidence is in fn 958 (of §345) discussed below and in fn 948 (of §343): Stephen HEDER: T. 11.07.2013, **E1/222.1**, at 09.47.25 (where he states that he was told in interviews that the Statutes were adopted in January 1976); *Duch*: T. 21.03.2012, **E1/52.1**, after 13.55.26 (*Duch* did not talk about the Congress but simply about the Statutes and mentioned the date "1976" after it was given to him in the question asked); Written record of analysis by Craig ETCHESON, 18.07.2007, **E3/494**, p. 3, ERN EN 00142828 (ETCHESON writes that the Statutes were adopted at a Party convention in 1976, and refers at the end of his analysis to a document that in fact never mentions either the 4th congress, or the Statutes, or even the date of 1976. See the document admitted to the case file as Exhibit **E3/196**).
[3334] Reasons for Judgement, §345.
[3335] Reasons for Judgement, fn 958 (of §345): CHHAOM Se: T. 11.01.2013, **E1/159.1**, p. 56 around 11.51.10, p. 68-69 around 13.55.37. See also: T. 11.01.2013, **E1/159.1**, between 09.21.23 and 09.23.05, (the three meetings he attended took place at the Olympic Stadium), before 09.28.07 (the three meetings took place in 1975 and only in 1975). The only other witness mentioned in this fn, SAO Sarun, refers to a rally in 1978, see below.
[3336] Reasons for Judgement, §2321 and 3742.
[3337] Reasons for Judgement, fn 787 (of §2321) and fn 12486 (of §3742):
[3338]Document on the 5th Pol Pot-Ieng Sary Congress, 01-02.11.1978, **E3/816** (with no mention of the names of the participants); *Pol Pot: The History of a Nightmare*, SHORT **E3/9**, ERN EN 00396599-00396600.

attended,[3339] it relied on SAO Sarun's statements that the rally he attended in 1978 had been held in September for 10 days, and that the matters discussed were mainly to ensure that the population had enough food and shelter, or to reopen the markets.[3340] If SAO Sarun mentioned the presence of KHIEU Samphan at this rally (upon simple request for confirmation of his minutes of the hearing),[3341] it cannot be established beyond reasonable doubt that it was the 5th Party Congress as established by the Chamber.

1726. In addition, the Chamber ignored KHIEU Samphan's statement in response to the Co-Investigating Judges on the interval between congresses that the 1976 Congress was the "third and final Congress" after that of 1960 and of 1971.[3342] Therefore, there is no indication that he would have participated in the congresses or even that he would have had even the slightest knowledge of a congress in 1978.

1727. In addition, the Chamber ignored the Statutes on which it relied heavily, according to which "[t]he number of representatives with full rights to be invited to participate in the Assembly shall be decided by the Central Committee".[3343] Thus, it was not intended that all Central Committee members would necessarily attend conventions.

1728. Consequently, the Chamber could not conclude that KHIEU Samphan had participated in the 4th and 5th CPK Congresses and hold him responsible on this basis.[3344]

1729. **In conclusion**, the Chamber could in no way infer from KHIEU Samphan's mere membership in the Central Committee that he was part of a group of well-informed members and that he had contributed to the crimes.[3345] The errors it made resulted in a miscarriage of justice and its findings must be reversed.

[3339] Reasons for Judgement, §345 and fn 958 referring to T. 11.06.2012, **E1/84.1**, p. 19-24. The elements referenced in fn 957 of the same §345 in support of the existence of the 5th Congress include the same testimony as SAO Sarun, p. 17. None of them report the presence of KHIEU Samphan.
[3340] SAO Sarun: T. 11.06.2012, **E1/84.1**, p. 16-24.
[3341] SAO Sarun: T. 11.06.2012, **E1/84.1**, p. 24, between 10.03.04 and 10.04.52.
[3342] Written record of interview of charged person, 13.12.2007, **E3/27**, ERN EN 00156750-00156751 (emphasis added).
[3343] Communist Party of Kampuchea Statute, **E3/130**, article 22, ERN EN 00184045. Reasons for Judgement, §345, where the Chamber indicates, among other things, that the General Assembly was also called the Party Congress.
[3344] Reasons for Judgement, §2321, 4229, 4257, 4259, 4260.
[3345] Reasons for Judgement, §574, 604, 624, 3913, 3964, 4207, 4208, 4229, 4257, 4259, 4260, 4313, 4316.

II. PRESENCE AT SPECIFIC STANDING COMMITTEE MEETINGS

1730. KHIEU Samphan was never a member of the Standing Committee, the "highest decision-making body of the CPK[3346] - during DK, the Chamber deducted responsibility for his attendance at some of its meetings. It erred in fact on the evidence of these meetings during the regime (A), on KHIEU Samphan's "participation" in them (B) and on his "unique position" (C).

A. Errors regarding evidence of Standing Committee meetings during the DK

1731. The Chamber considered that the minutes of meetings held to date showed that the Standing Committee met regularly to discuss CPK policy during the DK.[3347] It relied on 38 documents relating to Standing Committee meetings, 26 of which were admitted prior to Case 002/02 and the others during and at the end of the trial (the latter documents to be used for corroboration purposes only).[3348]

1732. The Appellant refers to his previous arguments on the admission and the very low or lack of probative value of these documents, none of which were provided in their original form and from which none of the persons from whom they originated appeared.[3349]

1733. However, even assuming that these documents were indeed copies of the originals, they could not form the basis for the findings drawn by the Chamber. All that could be deduced from this was that some meetings had taken place on certain dates and dealt with certain subjects, sometimes with the mention of certain people present (without any indication of how long they had been present at the meeting). The Chamber could not go beyond this and extrapolate.

1734. Out of all these documents, only 16 include the name KHIEU Samphan among those present (without any indication of how long he was present), on dates between 9 October 1975 and 10 June 1976, relating to certain subjects.[3350]

[3346] Reasons for Judgement, §346.
[3347] Reasons for Judgement, §484, referring to §357, referring to §347. See also §3740.
[3348] Reasons for Judgement, §347-354.
[3349] See above, §217-226 and 326-328.
[3350] Reasons for Judgement, fn 1011 (of §357). While the Chamber does indicate that 16 documents refer to the presence of KHIEU Samphan, the following list is incorrect. Of the 20 documents listed, only 16 are relevant: E3/197, E3/217, E3/218, E3/219, E3/220, E3/221, E3/222, E3/223, E3/224, E3/226, E3/227, E3/229, E3/230, E3/231, E3/232, E3/233.

1735. The Chamber could not go further and conclude that he was responsible (for subsequent events as well) by making generalisations without evidence about his participation in "numerous meetings" of the Standing Committee or his "regular attendance" at Standing Committee meetings which would have given him "a position of unique standing" throughout the DK.[3351]

B. Errors regarding the "attendance" of KHIEU Samphan at Standing Committee meetings

1736. KHIEU Samphan never hid the fact that he had attended meetings "expanded" to include non-members of the Standing Committee, dealing with general matters. However, he always indicated that he had been invited in connection with his very limited, essentially ceremonial functions, and that he had never taken part in the discussion or participated in any decision-making.[3352] To contradict him, the Chamber conducted an incorrect and biased analysis of the 16 copies of minutes of meetings indicating his attendance.

1737. To affirm that KHIEU Samphan "participated in some Standing Committee meetings", it relied on two copies of minutes indicating that he "contributed on at least two occasions".[3353] However, these two documents prove attendance on only two occasions: he reported to the Standing Committee on an election and another on the resignation of SIHANOUK.[3354] The mere presentation of a report demonstrates subordination, a hierarchy,[3355] and does not mean taking part in a debate or a decision.[3356] Secondly, the topics of these two reports are very specific and unrelated to any crime or criminal purpose.[3357]

1738. A correct reading of the copies of the 16 minutes of meetings that mention KHIEU Samphan shows that his participation was entirely passive on 14 occasions and insignificant on two occasions, and focused on issues related to his functions concerning FUNK/GRUNK and the people. In fact,

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[3351] Reasons for Judgement, §3740, 4225, 4230, 4236, 4239, 4257, 4258, 4277, 4316.
[3352] Reasons for Judgement, §601. See also fn 1891 and 1892 of §603.
[3353] Reasons for Judgement, §602.
[3354] Minutes of meeting on base work, 08.03.1976, **E3/232**; Minutes of Meeting of the Standing Committee The Front, 11-13.03.1976, **E3/197**. The content of these minutes does not even mention any proposal, only reported facts.
[3355] SHORT: T. 06.05.2013, **E1/189.1**, from p. 66 L.19 to p. 67 L.10, around 13.39.09.
[3356] Following the report on the elections, *"Angkar"* gives directives (**E3/232**, p.1-3 ERN EN 00182628-00182630). Following the report on the resignation of SIHANOUK, *"Angkar"* makes observations and *"Comrade Secretary"* decides which measures to take (**E3/197**, p. 1-5 ERN EN 00182638-00182642).
[3357] It should also be noted that it was after the report that the false nature of the elections came to light. (**E3/232**).

neither of these documents mention any statement attributable to the Appellant or any contribution other than these two reports.[3358]

1739. Moreover, to declare that KHIEU Samphan was "kept well-informed during the DK era" despite his denials of knowledge of crimes, the Chamber provided a general list of "discussed" issues.[3359] However, nothing in the contents of these copies of the minutes of meetings between October 1975 and June 1976 allows for the finding that there was knowledge of crimes during this period,[3360] and even less so afterwards.

1740. Consequently, the Chamber could not infer from KHIEU Samphan's attendance at certain meetings of the Standing Committee any knowledge, intent or contribution to the crimes committed during the DK.[3361]

1741. Its extrapolations and partiality are perfectly illustrated by committing KHIEU Samphan's responsibility on the basis of three copies of minutes of meetings where the Kampong Chhnang Airfield would have been discussed in his presence. According to the Chamber, KHIEU Samphan attended a meeting of the Standing Committee in October 1975 and "later meetings" during which SON Sen would have reported on the construction of the airfield.[3362]

1742. First of all, the 1st minutes of the meeting held on October 1975 (the Standing Committee was considering the construction) does not mention the names of the participants and therefore there is no indication that KHIEU Samphan was present.[3363] The 2nd minutes of the meeting of March 1976

[3358] Not even when trade issues are mentioned.

[3359] Reasons for Judgement, §603.

[3360] For example, with regard to the matter "of arrests" only one of the 16 minutes of meetings was dated 8 March 1976. These minutes refer to the arrest of a certain person named Loeun and his supporters by soldiers in the area, as well as UK Moeun who was planning to flee to Vietnam. Following this report, *Angkar* recommended that inquiries be carried out (Minutes of meeting on base work, 08.03.1976, **E3/232**, ERN EN 00182629-00182632). This information is insufficient to find that illegal or large-scale arrests were known. All the more so since, at that date, the major arrests had not yet begun. On the issue of "living conditions in the countryside (including disease, death and food shortages)", the Chamber relied on two minutes in which it is stated that the objective of *Angkar* was to manage the living conditions of the population with the importance of the local authority providing accurate harvest figures in order to be able to solve reported problems (Minutes of meeting on base work, 08.03.1976, **E3/232**, ERN EN 00182632-00182633), or the aim of the CPK in the production of medicines and their delivery to the bases in cooperation with trade in order to serve the population. (Minutes of meeting on the health and social affairs, 10.06.1976, **E3/226**, ERN EN 00183367-00183368).

[3361] Reasons for Judgement, §3740, 3891, 3913, 4208, 4224, 4225, 4228, 4230, 4236, 4239, 4257, 4258, 4277, 4284, 4313, 4316.

[3362] Reasons for Judgement, §4258. See also §424, 1723 (fn 5834-8536), 1727 (fn 5854), 4313.

[3363] Reasons for Judgement, §1723 and fn 5834 referencing Minutes of Meeting E3/182. Moreover, the Chamber had not previously listed these Minutes of Meeting among those indicating the presence of KHIEU Samphan (Reasons for

indicated that the Standing Committee was continuing to study the matter.[3364] The 3rd minutes of May 1976 from which the Chamber stated that "at least at one Standing Committee meeting, SON Sen reported to the Standing Committee on the progress of the Airfield construction" are the only minutes to report on this. This simply indicates: "It has to be backfilled with a lot of gravel" and covered to "keep it cool".[3365] Finally, the Chamber did not note that the minutes of the April 1976 meeting during which the decision to build the Kampong Chhnang Airfield would have been made did not mention the presence of KHIEU Samphan.[3366]

1743. No reasonable trier of fact could have held KHIEU Samphan responsible for crimes on the basis of this evidence.

1744. Similarly, the Chamber could not do so on the basis of a single isolated written statement to the effect that he attended a meeting of the Standing Committee in September 1975 and concluded that he regularly participated in the meetings at which the essential issues of the common purpose were discussed, in particular those relating to agriculture, drought and industry.[3367] On that basis alone, it could not even conclude that such a meeting had taken place.

C. Errors on the "unique position" of KHIEU Samphan

1745. According to the Chamber, KHIEU Samphan had a "unique position of standing within the Party by virtue of his attendance at numerous Standing Committee meetings, where important matters were discussed and crucial decisions were made".[3368] It did not explain any further than that.

1746. KHIEU Samphan was not the only one in the Party to have participated in SC meetings "expanded" to include non-members. But, as the Chamber further recognised, unlike the others, KHIEU Samphan had no responsibility in the zones or regions and no effective power in leading a specific unit.[3369] Unlike the others, he was a late entrant to the Party, his appointments to government

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Judgement, fn 1011 of §357).

[3364] Reasons for Judgement, §1723 and fn 5835 referencing Minutes of Meeting E3/229.

[3365] Reasons for Judgement, §1727 and fn 5854 referencing Minutes of Meeting E3/222.

[3366] Reasons for Judgement, §1723 and fn 5836 referencing Minutes of Meeting E3/235.

[3367] Reasons for Judgement, §4258 and fn 13891, referring to §3891, referencing in fn 12977 an interview of IENG Sary by Stephen HEDER, 17.12.1996, **E3/89**. On the value of written statements (including those of deceased witnesses), see above, §296-302.

[3368] Reasons for Judgement, §340, 604, 624, 4224, 4230, 4236, 4277, 4316.

[3369] For example: Reasons for Judgement, §4320-4325 (where the Chamber did not hold the hierarchical command/superior responsibility recognising that KHIEU Samphan did not have effective control, recognising in particular that his role in the trade and commerce "was limited to administrative functions", §616 (where it states that

positions since 1970 were "nominal", and "entailed no actual military authority or responsibility", given his roles were "mostly confined to diplomatic duties".[3370] Unlike the others, KHIEU Samphan was only appointed as a full member of the Central Committee to be able to occupy the position of Head of State following the resignation of SIHANOUK.[3371]

1747. Therefore, beyond copies of minutes of meetings of the Standing Committee demonstrating an occasional and always passive presence, with the exception of two minor presentations of reports, all the evidence in the case file led to the finding that KHIEU Samphan occupied a unique position within the Party: a position without influence or power that the CPK considered useful to give to an intellectual who was not part of the "inner circle".[3372]

1748. **In conclusion**, the Chamber could in no way deduce from KHIEU Samphan's attendance at certain Standing Committee meetings that he held a unique position in the Party and hold him responsible in this regard. The errors it made resulted in a miscarriage of justice and its findings must be reversed.

III. DEMOCRATIC CENTRALISM

1749. The Chamber again erred in fact in considering that KHIEU Samphan had attended Central Committee and Standing Committee meetings in accordance with the methods of democratic centralism ("DC") giving him the opportunity to intervene.[3373]

1750. With regard to the Central Committee, the evidence could not support such an assertion with regard to the meetings to which the Chamber appears to be referring.[3374] There was either no evidence of a meeting or no evidence, or insufficient evidence that KHIEU Samphan was present.[3375] *A fortiori*, there was no evidence of any intervention on his part.

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it is impossible for it to find that he was even a leading cadre in Office 870). See also: Judgement 002/01, 07.08.2014, §1005 and 1007 (where the Chamber had recognised that KHIEU Samphan did not have the power to give orders, alone or collectively, as he did not have sufficient authority).

[3370] Reasons for Judgement, §576-577, 593-595, 597, 599.

[3371] Reasons for Judgement, §596.

[3372] Appeal Brief 002/01, §547 and references cited.

[3373] Reasons for Judgement, §and 4322; §390-397 and 399.

[3374] Reasons for Judgement, §4259 which appears to be talking about the Party Congresses and the decision of 30.03.1976.

[3375] See above, §1717 and 1723-1728.

1751. With regard to the Standing Committee, the supreme decision-making body, the Chamber did not specify which meetings were involved.[3376] It expressed confidence that key SC's decisions had not been "not simply made unilaterally by POL Pot, but rather were made collectively; that is to say, with the input of, and with a broad consensus from, the entire Committee".[3377] However, KHIEU Samphan was not a member of the Standing Committee. In addition, there is no evidence that KHIEU Samphan was not involved other than to present a report (twice).[3378]

1752. Moreover, this finding of the Chamber is inconsistent with its finding that it was POL Pot and NUON Chea that were exercising "ultimate decision-making authority" or held the "position of ultimate policy and decision-maker".[3379] Moreover, this finding is based on carefully selected statements by NUON Chea, IENG Sary and KHIEU Samphan, for once favoured here over those of the experts for the defence.[3380] The Appellant refers to his previous arguments on the selectivity, value and distortion of the statements used, which are contradicted by other evidence.[3381] He simply adds that the Chamber did not explain why it chose to rely on an undated statement by an unknown author rather than the statement he made before the Co-Investigating Judges in a judicial context of the highest probative value.[3382] Finally, a reading of the copies of the minutes of Standing Committee meetings on which the Chamber relied heavily shows that it was either the secretary alone or the Secretary and Deputy Secretary who made the decisions.[3383]

[3376] Reasons for Judgement, §4322.
[3377] Reasons for Judgement, §397 (emphasis added).
[3378] See above, §1737-1738.
[3379] Reasons for Judgement, §561, 4127, 4187, 4196, 4377.
[3380] Reasons for Judgement, §392-395 and 397. Once again, this is a perfect illustration of the double standard applied by the Chamber, see above, §234.
[3381] Appeal Brief 002/01, §126-138.
[3382] Written record of interview of charged person, 13.12.2007, **E3/27**, ERN EN 00156749 ("the central committee did not have effective power as opposed to the standing committee, and in this committee, based on the principle of centralised democracies, the most important persons were the secretary and deputy secretary, who were Pol Pot and Nuon Chea. [...] The secretary and the deputy secretary exercised their power in between the general meetings, meaning they decided on everything within the framework of the tasks decided by the general meeting. This means that Pol Pot played a very significant role").
[3383] For example, minutes of meetings at which decisions were taken or instructions given indicating the presence of the Secretary and Deputy Secretary, who are the only members of the Standing Committee: Minutes of meeting regarding propaganda works, 01.06.1976, **E3/225**, ERN EN 00182715, 00182717-00182718; Minutes of meeting on base work, 08.03.1976, **E3/232**, ERN EN 00182628-00182629, 00182630-00182634; Minutes of meeting on the health and social affairs, 10.06.1976, **E3/226**, ERN EN 00183363-00183364, 00183367-00183373 (the Secretary made the decisions).

1753. In conclusion, the Chamber could not rely on the terms of Democratic Centralism to hold KHIEU Samphan liable and its findings must be reversed.

Section IV. RESIDUAL FUNCTIONS

I. EDUCATION SESSIONS

1754. The Chamber erred in fact and in law in concluding that between 17 April 1975 and 1978, KHIEU Samphan "attended and lectured at political training sessions" which were attended by "combatants to CPK cadres and returnees from overseas, numbering in the tens to the thousands" who he was "lecturing on identifying 'enemies' and uncovering 'traitors'".[3384] In this part of the Reasons for Judgement, the Chamber's biased analysis of the evidence is particularly apparent. The witnesses cited in reaching this finding have diverse and varied accounts of the content of the training courses and the comments attributed to KHIEU Samphan. On the one hand, the Chamber violated the principles of examination of evidence by systematically ignoring the numerous and important contradictions of the witnesses who testified against statements attributed to KHIEU Samphan (A). On the other hand, it also erred in its assessment of the testimonies on the content of these political training sessions and the role of the Appellant within the scope of these sessions (B).

A. Errors relating to the credibility of witnesses for the Prosecution

1755. Of all the witnesses cited by the Chamber in support of its finding, EM Oeun and EK Hen are the only ones to have attributed statements concerning "enemies" to KHIEU Samphan specifically. The Chamber has used their testimony in order to reach its finding that the Appellant contributed to the dissemination of the policy with respect to "enemies". Neither of those statements, however, could justify finding beyond reasonable doubt that the Appellant had in fact disseminated such a policy or that he had intended to support it in any way.

1756. The Chamber has committed a factual error by accepting as credible the statements made by the only witnesses to testify that they had heard KHIEU Samphan call for the identification and uncovering of enemies and traitors. The witnesses in question are EK Hen (1) and EM Oeun (2).[3385]

[3384] Reasons for Judgement, §607.

[3385] On the specific issue of statements attributed to KHIEU Samphan on the subject of marriage, as part of a training session at Wat Ounalom, the Chamber also cited CHEA Diep. See above, §1233-1237.

However, no reasonable trier of fact would have considered those statements as sufficiently credible/reliable to establish exactly what it was that he allegedly said.

1. Contradictions in EM Oeun's testimony

1757. The Chamber has used the testimony of EM Oeun to establish that the Appellant allegedly referred to "traitors to the Revolution" and "infiltrated enemies".[3386] A Civil Party, he has not provided credible testimony before the court, however. Indeed, both in court and in his civil party statements, his testimony is rife with contradictions and inconsistencies. EM Oeun has stated that he "only attended the session on one occasion" at Borei Keila.[3387] His purportedly word-for-word recollection of KHIEU Samphan's supposed speech calling for the surveillance of "enemies" seems all the more unlikely as EM Oeun explained that all the speakers repeated the same things.[3388] Although his arrival in Phnom Penh in June 1975[3389] provided him with a reference point, he was unable to situate that training session on a coherent timeline. Depending on where he was in his testimony, he thus first situated it in 1977,[3390] then in 1975,[3391] then in 1976,[3392] and finally said that "the political training session took place about two months after [he] arrived at the hospital".[3393]

1758. The epitome of implausibility was reached when he claimed that at the time the training session was held, KHIEU Samphan was President of the Presidium, a role he had heard about from his father, although the latter had disappeared in 1974![3394] Moreover, the many versions he gave regarding the circumstances surrounding his mother's death, which could and did change over the

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[3386] Reasons for Judgement, fn 1904. EM Oeun: T. 27.08.2012, **E1/115.1**, p. 25-33, 45-46 as quoted by the Chamber.
[3387] EM Oeun: T. 27.08.2012, **E1/115.1**, after 10.11.49.
[3388] EM Oeun: T. 23.08.2012, **E1/113.1**, around 15.51.52.
[3389] EM Oeun: T. 28.08.2012, **E1/116.1**, around 09.11.47 (arrival at the Soviet Hospital in June 1975).
[3390] EM Oeun: T. 28.08.2012, **E1/116.1**, before 09.11.47: ("I believe it was in late 1977").
[3391] EM Oeun: T. 28.08.2012, **E1/116.1**, around 09.15.11. When asked how long he had been in Phnom Penh at the time he attended the training session at Borei Keila, he answered: "I think it was about two months before I attended that political session"; see also around 09.16.20.
[3392] EM Oeun: T. 28.08.2012, **E1/116.1**, before 09.22.46 and after 09.25.36.
[3393] EM Oeun: T. 28.08.2012, **E1/116.1**, from 09.22.46 and around 09.28.59.
[3394] EM Oeun: T. 28.08.2012, **E1/116.1**, around 14.59.53. On his father's disappearance: around 15.24.58 ("It is sure that it was in 1974."); around 15.31.46: "Yes, that is correct; it was in 1974."); on KHIEU Samphan's role around 15.49.17 ("I knew about their roles from Mr. So Phim and my father, and I learned from them about the roles of Mr. Khieu Samphan and Mr. Nuon Chea."). For the record, KHIEU Samphan was appointed President of the Presidium in April 1976: Document on conference I of legislature I of the people's representative assembly of Kampuchea, 11-13 April 1976, **E3/165**, ERN EN 00184066-00184067. EM Oeun: T. 27.08.2012, **E1/116.1**, around 15.57.30: "the truth was that my father did tell me about that."

course of a single hearing depending on who it was that was questioning him,[3395] as well as his particularly surprising statements regarding his marriage ultimately served to undermine the overall credibility of his testimony.[3396] The Chamber could not reasonably rely on his testimony in its deliberations and has failed in its duty to provide a properly substantiated decision by completely disregarding the constant contradictions in his testimony as a whole, despite the fact that they had been raised during his questioning by the Defence teams.

2. EK Hen's confused statements

1759. EK Hen's statements were likewise too confused to be relied upon by the Chamber to establish what KHIEU Samphan allegedly said. In court she stated that she had attended two meetings, in 1976 and 1978. The second meeting, she said, had dealt with the topic of enemies, but she was unable to say whether the speaker had been NUON Chea or indeed KHIEU Samphan.[3397] Her contradictory accounts as to the identity of the speaker and the content of their remarks are further weakened by the new version that appears in her Written Record of Interview from Case Files 003/004 that was recently admitted into evidence.[3398] As she herself has acknowledged, EK Hen's answers were undoubtedly "not right to the order of the questions" and her memory "is not as good as it used to be".[3399] In any event, in light of so much confusion and lack of detail, the Chamber should not have relied on her testimony in reaching its finding.

[3395] EM Oeun: T. 28.08.2012, **E1/116.1**, before 15.02.25("my mother died after my father was taken away"); before 15.26.39 ("and immediately after that in 1974 my mother also died and she died because she saw my father being taken away. And I remember the date because it was the time when my mother passed away."); T. 29.08.2012, **E1/117.1**, before 09.50.00 (about the reason for my mother's death. My mother – earlier on, I thought that my mother was dead because of the aerial bombardment by B 52 of the U.S. And then, later on, when I went back home, I thought over it again and I thought of the date when my father was arrested and brought away."); around 09.51.21 ("So there were a lot of misery in our life back then because we were constantly threatened by aerial bombardment. And the next morning my mother died."). In his Civil Party application, 29.01.2010, **E3/1729,** ERN EN 00751866, EM Oeun had in fact given a completely different description, saying that she had been arrested at Prey Preah Smaon pagoda and killed by POL Pot: T. 29.08.2012, **E1/117.1**, after 10.12.02; around 10.14.24 (confirming that his mother died as a result of American bombardments).

[3396] EM Oeun: T. 27.08.2012, **E1/115.1**, after 16.03.21. See also above, §1172.

[3397] EK Hen: T. 03.07.2013, **E1/217.1**, after 14.04.37 and before 15.28.00. Her confusion becomes all the more apparent when listening to the recording of her interview with CIJ investigators: Transcription **D94/8.1**, ERN EN 00937315-00937317, played back during the hearing: T. 03.07.2013, **E1/217.1,** after 14.31.48.

[3398] KHIEU Samphân's Request for Admission of Additional Evidence, 08.10.2019, **F51**, §16-54.

[3399] EK Hen: T. 03.07.2013, **E1/217.1,** around 14.15.01. It should be noted that although her recollections are unclear, she did indicate that the remarks she attributes to KHIEU Samphan contained nothing negative. EK Hen: T. 03.07.2013, **E1/217.1,** before 11.23.39 ("He talked about the struggle and said we had to help one other. It was good advice.").

B. Errors relating to the content of political training

1760. Finally, the Chamber erred by using statements attributed to KHIEU Samphan relating to the CPK's general economic project as attesting to his contribution to the JCE. In fact, with the exception of the above-mentioned witnesses with their inconsistent and confused statements, the topics covered in the training sessions, as described by the witnesses cited in the Reasons for Judgement, do not serve to substantiate any criminal intent on the part of the Appellant. There is no basis for finding that the policy outlined during the training sessions was criminal *per se,* nor that KHIEU Samphan played any significant role in it. The witnesses cited by the Chamber, PEAN Khean, PHY Phuon, NGO Thong Hoeung, CHEA Say, Philip SHORT and SAO Sarun, made no statements that would support such a finding.

1761. The witnesses who mentioned KHIEU Samphan's presence during mass assemblies said that he spoke very little, since it was NUON Chea who acted as instructor.[3400] One such witness was CHEA Say, who added that "Khieu Samphan rarely gave instructions at a study session".[3401] Several other witnesses mentioned that KHIEU Samphan was simply present at the opening of the sessions, including SAO Sarun, who said – without his statement having being noted – that he had only ever been instructed by POL Pot and NUON Chea.[3402] His testimony was corroborated by ROCHOEM Ton *alias* PHY Phuon, a key witness for the Chamber in the trial of Case 002/01: "[T]he people who led the meetings were mainly Pol Pot and Nuon Chea,"[3403] even if IENG Sary and KHIEU Samphan were present. Moreover, he did not recall seeing the term "smashing" mentioned as regards enemies.[3404] The Chamber erred by completely disregarding that section of his testimony.

1762. With regard to the content of the sessions, CHEA Say also stated that they were not incited to "do [ ] anything bad" but rather encouraged to "strive to work hard in order to build the country", and he added that he has "always focus[ed] on the good point or positive point" that was instilled in

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[3400] This is consistent with the educational role the latter has always said that he took on. NUON Chea: T. 22.11.2011, **E1/14.1**, after 14.55.43; T. 15.12.2011, **E1/23.1**, after 14.05.10. See also Reasons for Judgement, §541, fn 1688.

[3401] CHEA Say: T. 20.09.2012, **E1/124.1,** after 13.59.04: ("Khieu Samphan rarely gave instructions at a study session, mostly it was by Mr. Nuon Chea. […] I was saying that, when I attended the study session, I met him only on one occasion. And on the other occasion it was Nuon Chea who shared the sessions.").

[3402] SAO Sarun: T. 06.06.2012, **E1/82.1,** around 10.00.04 and around 11.03.32. Also worth noting is the testimony of SUONG Sikoeun, a former cadre at the MFA, who remembered a session for Party cadre at Borei Keila during which he reportedly saw KHIEU Samphan from a distance, but who further stated: SUONG Sikoeun, T. 06.08.2012, **E1/102.1**, around 14.18.22: "Pot and Nuon Chea were the speakers in those political education sessions.".

[3403] ROCHOEM Ton *alias* PHY Phuon: T. 26.07.2012, **E1/97.1,** before 14.31.06.

[3404] ROCHOEM Ton *alias* PHY Phuon: T. 31.07.2012, **E1/99.1**, before 11.36.08.

him, namely to "do good act to other people and not a bad act and to help them if needed".[3405] PEAN Khean in turn described a speech that outlined an economic development policy for building "a prosperous country".[3406] The Chamber has also erred by failing to note that the hearsay statements reported by ONG Thong Hoeung[3407] or indeed Philip SHORT[3408] showed no evidence of criminal intent on the part of KHIEU Samphan. It has thus incorrectly found that the Appellant's attendance at training sessions was sufficient to find that he had significantly contributed to the JCE. All its findings in this regard will therefore be reversed.[3409]

II. MEMBER OF OFFICE 870

1763. The Chamber has correctly determined that "as a result of the paucity of evidence relating to his functions within Office 870, the Chamber is unable to find that KHIEU Samphan served as the chairman of Office 870 or was in fact a "leading cadre" thereof".[3410] However, it has committed a factual error by determining firstly that KHIEU Samphan became a member of Office 870 in October 1975 (A) and then referring to *Doeun* as the Appellant's "predecessor" in that office, thereby extrapolating KHIEU Samphan's role in a manner that is at variance with its own findings (B).

A. Errors relating to KHIEU Samphan's status as a member of Office 870 in October 1975

1764. The Chamber has committed a factual error in its findings with respect to the Appellant's involvement with Office 870 by failing to note that such involvement exclusively concerned matters relating to trade and commerce. First, the Chamber has incorrectly determined that "SUA Vasi *alias* Doeun, [...] was appointed as chairman of the Office in October 1975, and KHIEU Samphan [...] joined at around the same time".[3411] To make that finding, the Chamber relied, *inter*

[3405] CHEA Say: T. 20.09.2012, **E1/124.1,** after 10.26.22.
[3406] PEAN Khean: T. 17.05.2012**, E1/73.1**, p. 20 to 24 as quoted by the Chamber.
[3407] ONG Thong Hoeung: T. 14.08.2012, **E1/107.1,** around 13.59.56. There is no direct testimony regarding the political training sessions that KHIEU Samphan allegedly held for intellectuals. ONG Thong Hoeun reported statements that his wife said she had heard when she arrived in Cambodia in early 1976. T. 07.08.2012, **E1/103.1,** before 15.36.23 ("first, Khieu Samphan [...] he talked that it was right that we were patriotic, that were returning to Cambodia, and, number two, Cambodia is being developed and it needs the resources, and also that we had to build ourselves. And besides that, I cannot recall any other point.").
[3408] Philip SHORT, Pol Pot: The history of a nightmare, **E3/9**, p. 315-318, ERN EN 00396523-00396526.
[3409] Reasons for Judgement §605, 607, 3736, 3739 and §4253, 4262, 4264, 4272, 4306.
[3410] Reasons for Judgement, §616.
[3411] Reasons for Judgement, §608.

alia, on the Minutes of the Meeting of the Standing Committee dated 9 October 1975.[3412] At no point, however, does that document refer to the Appellant as a member of Office 870 but rather appoints him as "[r]esponsible for the Front and the Royal Government and Commerce for accounting and pricing".[3413] Nothing in the Minutes links this appointment to a role of any kind within Office 870, to which other individuals were indeed assigned.[3414]

1765. Furthermore, the Chamber could not base itself on the Appellant's statements, as he has always caused some confusion by referring to the totality of his duties in connection with the price tables, his responsibilities with regard to the distribution of goods in the zones and the question of exports.[3415] However, official CPK documents provide some clarification regarding his somewhat confused memories.

1766. Although KHIEU Samphan mentioned October 1975 as the date on which he took up the totality of his duties, the available Standing Committee Minutes from 1976 make it possible to correct his estimate, since the Commerce Committee was not created until 13 March 1976 "to make examinations and preparations for merchandise which must be purchased".[3416] The Appellant was designated as a "technical staff assistant[ ]" along with Vann (IENG Sary) and Touch only on 21 April of that year, as is stated in the section of the Minutes "on Commerce and Industry" and then only for matters "concerning the Korean commercial delegation".[3417] Thus, the scope of his appointed role in that sector was particularly limited. The Chamber could therefore not find on the basis of such evidence that the Appellant "became a member of Office 870 in October 1975". Nothing in the other Standing Committee Minutes cited by the Chamber in support of its finding

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[3412] Reasons for Judgement, §608, fn 1909.

[3413] Minutes of Meeting of the Standing Committee, 09.10.1975, **E3/182,** p. 1-2, ERN EN 00183393-00183394 ("Comarade Hem: Responsible for the Front and the Royal Government and Commerce **for accounting and pricing**" emphasis added). The person in charge of "Domestic and International Commerce" was KOY Thuon (Comrade Thuch).

[3414] Minutes of the Meeting of the Standing Committee, 09.10.1975, **E3/182,** p. 2, ERN EN 00183394. In the minutes, Doeun was appointed "Chairman, Political Office of 870" and "Comrade Yem" was appointed to Office 870.

[3415] KHIEU Samphan, *Cambodia's recent history and the reasons behind the decisions I made*, 2004, **E3/18**, p. 65-66, ERN EN 00103755-00103756.

[3416] Minutes of the Meeting of the Standing Committee Minutes, 13.03.1976, **E3/234**, p. 1, ERN EN 00182649 ("After the outline reports of Comrade Van and Comrade Thuch regarding contacts with China, the Standing Committee has made the following decision: 1- Commerce: A. To appoint a committee to make examinations and preparations for merchandise which must be purchased.") The Minutes then set out the committee's responsibilities concerning "lists for purchase as aid from others and lists of merchandise for purchase from others".

[3417] Summary of the decisions of the Standing Committee in the Meeting of 19-20-21 April 1976, **E3/236**, p. 4-5, ERN EN 00183419-00183420.

would indicate that KHIEU Samphan was assigned any particular role in connection with Office 870 other than in those spheres, whether before or after October 1975.[3418]

1767. However, in the Summary of the Decisions of the Standing Committee pertaining to several meetings held in April 1976, it is clearly stated that committees were created "surrounding Office 870"[3419] and "[i]n the Office, as technical staff assistants: Comrade Văn [...], Comrade Hèm [...], Comrade Touch [...]".[3420] KHIEU Samphan is only mentioned from April 1976 onward "[i]n the Office", in a role limited to "technical staff assistant[ ]", which is consistent with the role he has always maintained that he played with regard to trade and commerce. Hence, the Chamber has incorrectly found that he was a member of Office 870 from October 1975 onward and, again incorrectly, has failed to show the relationship between the technical assistance he provided to the Office and his limited spheres of activity within the Commerce Committee.[3421] That was the reasonable finding to reach, however, and was consistent moreover with the Chamber's finding that there was insufficient evidence to prove his status as a leading cadre of Office 870.

B. Incorrect characterisation of Doeun as KHIEU Samphan's "predecessor"

1768. The Chamber has rightly determined that "[t]he precise contours of KHIEU Samphan's responsibilities within Office 870 [...] remain unclear", which led it quite logically to find that it was not able to ascertain whether in fact he had been chairman or even a leading cadre of the office in question.[3422] Hence, it is blatantly contradictory to refer to Doeun in the same sentence as being KHIEU Samphan's "predecessor", as the Chamber has done. The Chamber's wording is incorrect, as it would be equivalent to saying that KHIEU Samphan in fact replaced Doeun, a finding that the Chamber has rightly rejected. These inaccuracies are indeed significant as they form the basis for the Chamber's extrapolations as regards the information to which KHIEU Samphan allegedly had access as a result of his membership in Office 870 and as regards his alleged activities after Doeun disappeared. Simply noting that "a number of telegrams [were] put before the Chamber bearing

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[3418] Reasons for Judgement, §608, fn 1909, wherein reference is made to the minutes of the meeting of the Standing Committee, **E3/227**, **E3/231**, **E3/232**, **E3/233**, **E3/217**, **E3/197**, **E3/220**, **E3/222**.
[3419] Summary of the decisions of the Standing Committee in the Meeting of 19-20-21 April 1976, **E3/236**, p. 1, ERN EN 00183416 ("Preparations to organize various committees surrounding Office 870: 1. Commerce Committee: - Comrade Rith Member – Comrade Nhem Member – Comrade Chhoeun Member" (emphasis added).
[3420] Summary of the decisions of the Standing Committee in the Meeting of 19-20-21 April 1976, **E3/236**, p. 4-5, ERN EN 00183419-00183420 (emphasis added).
[3421] See below, §1770-1798.
[3422] Reasons for Judgement, §616.

dates in 1977 and 1978 addressed to "M-870" fails to provide any evidence proving that KHIEU Samphan was their intended recipient.[3423] Furthermore, no messages or telegrams addressed to KHIEU Samphan within the scope of his activities would support a finding that his activities had changed after Doeun left.[3424]

1769. In light of the fact that the Chamber was not able to determine "the precise function of Bureau 870",[3425] it has erred by failing to fully address the consequences of its assessment regarding the lack of substantiating evidence that the Appellant indeed occupied a position of senior leadership or that he replaced Doeun. The Chamber has thus also committed an error by reaching incriminatory findings relating to KHIEU Samphan based on such extrapolations, which it then used to support its finding that he had significantly contributed to the JCE. Those incorrect findings should therefore be invalidated in their entirety.[3426]

III. OVERSIGHT OF THE COMMERCE COMMITTEE

1770. The Chamber has committed factual errors by determining that "KHIEU Samphan exercised considerable oversight and was therefore thoroughly apprised of DK trade and commerce matters".[3427] To reach that finding, it has misinterpreted the evidence detailing his responsibilities concerning trade and commerce (A) and extrapolated his actual role on the basis of reports addressed to him (B) and the visits and training sessions he allegedly carried out (C).

A. Errors relating to KHIEU Samphan's responsibilities and their scope within the Commerce Committee

1771. The Chamber erred by finding that the Appellant "exercised significant oversight of DK's commercial affairs" whilst also stating that it was unable "to delineate the precise capacity in which KHIEU Samphan exercised these functions".[3428] That incorrect finding is due in particular to its partial reading of the documents that refer to KHIEU Samphan's responsibilities with respect to trade and commerce. The Chamber has committed errors as regards the substance of those

[3423] Reasons for Judgement, §615.
[3424] See above, §1624-1625.
[3425] Reasons for Judgement, §365.
[3426] Reasons for Judgement, §608, 610, 616, 4225, 4257, 4276, 4306, 4307.
[3427] Reasons for Judgement, §621.
[3428] Reasons for Judgement, §619.

responsibilities (1) by extrapolating from the reports that were copied to him (2) and from his alleged visits to and training sessions at the Commerce Committee's warehouses (3).

1. Error with respect to the nature of KHIEU Samphan's responsibilities

1772. Although the Chamber has correctly cited the Minutes of the Meeting of the Standing Committee dated 9 October 1975, which assigned responsibility for "[c]ommerce for accounting and pricing" to KHIEU Samphan, it has in fact failed to note that the document mentions "Comrade Thuch", *alias* KOY Thuon, as responsible for "Domestic and International Commerce".[3429] As is clear from that document, the Appellant's responsibilities with respect to trade and commerce were narrowly restricted from 1975 onwards.[3430] Similarly, although the Chamber has correctly cited the Minutes of the 13 March 1976 meeting in reference to KHIEU Samphan's responsibilities regarding trade relations with China and the committee on "the matter of banks",[3431] it has not, however, noted the evidence that indicates the limits of such technical assistance (a) and the absence of evidence regarding instructions he may have given (b).

a. Ignorance of the purely technical nature of KHIEU Samphan's responsibilities

1773. The Chamber's finding that KHIEU Samphan supervised the Commerce Committee is contradicted by the official DK documents it has cited. It could not reach such a finding while at the same time noting that according to two Minutes of the meeting in April 1976, VORN Vet was in charge of the Commerce Committee and the members appointed to it were Rith, Nhem and Chhoeun.[3432]

[3429] Reasons for Judgement, §617, fn 1945.

[3430] As regards the Minutes of the Meeting of the Standing Committee, 09.10.1975, **E3/182**, it should be pointed out that the French translation has lost some of the meaning of the Khmer original, which states in ERN 00019108 (ERN FR 000292868) "Camarade Hem, responsable du front et du gouvernement royal, du commerce **pour ce qui est des listes et des prix**". This important distinction is also found in the English translation, ERN 00183393: "*Responsible for the Front and the Royal Government, and Commerce* ***for accounting and pricing***". Thus, the Minutes clearly show that the scope of the Appellant's activities was limited, as KHIEU Samphan has always maintained: Written Record of Interview of Charged Person, 14.12.2007, **E3/37**, ERN EN 00156752-00156757; Book by KHIEU Samphan, *Cambodia's recent history and the reasons behind the decisions I made*, 2004, **E3/18**, p. 65-67, ERN EN 00103755-00103756, p. 154, ERN EN 00103800; "*Letter from KHIEU Samphan: Appealing to all my compatriots*, Pailin, August 16, 2001", **E3/205**, ERN EN 00149527.

[3431] Reasons for Judgement, §617, fn 1946.

[3432] Reasons for Judgement, §617, fn 1948. Summary of the decisions of the Standing Committee in the Meeting of 19-20-21 April 1976, **E3/236**, p. 1-2, ERN EN 00183416-00183418. See also Decision of the Central Committee Regarding a Number of Matters, 30.03.1976, **E3/12**, ERN EN 00182814 "[The government] must be totally an organization of the Party. […] Must have influence in the Party, in the country, outside the country, with friendly countries and with enemies […] Comrade Vorn: Deputy Prime Minister for Economies and Finances […] 1. The work of the government: All three Deputy Prime Ministers are responsible. Therefore, all three Deputy Prime Ministers must be strong".

Moreover, the Minutes of the Meeting of the Standing Committee from 21 April 1976 clearly state that "on Commerce and Industry" and concerning the Korean delegation, KHIEU Samphan *alias Hem* was appointed together with Vann and Touch "[i]n the Office, as technical staff assistants".[3433] The Chamber has therefore committed a factual error by failing to consider the implications of that clarification on its understanding of the Appellant's technical role in Trade and Commerce.

1774. Similarly, the Chamber could not find that KHIEU Samphan held any decision-making authority or hierarchical status, as it was Doeun and not KHIEU Samphan who was designated in May 1976 to set up a foreign trade team.[3434] It was thus incorrect on the part of the Chamber to imply that the Appellant took on more responsibility within the Committee from October 1976 onward, on the alleged grounds that the Commerce Committee's "reporting lines had shifted from Doeun to KHIEU Samphan".[3435] That claim is contradicted by very concrete evidence that the Chamber has overlooked. Not only were these reports on trade sent to KHIEU Samphan while Doeun was still Chairman of the Commerce Committee,[3436] but it was in fact Doeun who, in his capacity as Chairman, gave a speech at a "banquet for Comrade VORN Vet" organised in February 1977 by a delegation from Yugoslavia.[3437]

1775. The Chamber has also failed to note that it was IENG Sary, assisted by VAN Rith, who led negotiations with the Chinese in December 1978.[3438] Although he was copied on "reports of discussions with foreign trade delegations and other communications relating to international trade", KHIEU Samphan was thus neither a negotiator nor a decision-maker. As several witnesses

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[3433] Reasons for Judgement, §617, fn 1948. Summary of the decisions of the Standing Committee in the Meeting of 19-20-21 April 1976, **E3/236**, ERN EN 00183419-00183420.

[3434] Record of Standing Committee Meeting: Commerce Matters, 07.05.1976, E3/220, ERN EN 00182706-00182707. It is important to emphasise that it is Doeun who reported back to the SC.

[3435] Reasons for Judgement, §618. See also §4225 wherein the Chamber unreasonably notes "Khieu Samphan's assumption of Doeun's oversight responsibilities in the Commerce Committee".

[3436] *Khieu Samphan receives Yugoslav trade delegation*, 03.02.1977, **E3/1485**, ERN EN 00168405: ("(…) Present at the talks on the Cambodian side were Comrade Vorn Vet, deputy prime minister for economy; Comrade Chhoeur Doeun, chairman of the Commerce Committee; Comrade Cheng An, chairman of the Industry Committee; and a number of cadres from the foreign Ministry", emphasis added). Moreover, while KHIEU Samphan is cited as receiving the foreign delegation in his role as President of the State Presidium, he is not the one leading the negotiations.

[3437] "Khieu Samphan receives Yugoslav trade delegation", 03.02.1977, **E3/1485**, ERN EN 00168405-00168406, 00168407-00168408.

[3438] Minutes of meeting between comrade IENG Sary and PR China's Commercial delegation, 2 December 1978, **E3/1639**, ERN EN 00755587-00755588. Minutes of the negotiation between the commerce delegation of the Democratic Kampuchea and the delegation of Ministry of Foreign Trade of the People's Republic of China, 3 December 1978, in the afternoon, **E3/829**, ERN EN 00756521-00756522.

have confirmed, decision-making was done at the Standing Committee level.[3439] The Chamber erred by ignoring such evidence, which indeed contradicts its finding.

b. Lack of evidence relating to instructions given by KHIEU Samphan

1776. Of the massive number of documents referred to in §617-621 of the Reasons for Judgement, the Chamber has cited only five documents, together with the statement of SAR Kimlomouth that supposedly corroborates them, to support its contention that the "Commerce Committee frequently sought guidance from KHIEU Samphan on matters of trade".[3440]

• Misinterpretation of documents copied to KHIEU Samphan for opinion

1777. The Chamber has committed a factual error in that the documents it cites do not show that requests for his opinion stemmed from any overall authority KHIEU Samphan might have held within the Commerce Committee. They simply relate directly to the technical missions he had been assigned to carry out.

1778. The subject of the Commerce Committee's report dated 27 September 1977, for example, relates to the practical arrangements for shipping cargo as part of trade with Yugoslavia.[3441] The report dated 1 December 1977 deals once again with trade with Yugoslavia and the discussions held "at the Ministry of Commerce" concerning the type and quantity of the equipment to be purchased.[3442] The report dated 24 January 1978 concerns Chinese assistance for machine repairs and negotiations regarding the terms and quantities for latex purchases.[3443] It appears from the report that VORN Vet had expressed his position "during the party of the Ministry of Commerce [...]" and "agreed with the Chinese friend's idea".[3444] The document dated 3 February 1978 is a message addressed to Sok with regard to trade with China, and deals with orders for various products and commodities (motor oil, tar, car parts, etc.).[3445] The report dated 28 April 1978 also deals with trade with

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[3439] SUONG Sikoeun: T. 08.08.2012, **E1/104.1**, around 11.29.41; Philip SHORT, *POL Pot, the history of a nightmare,* **E3/9**, p. 308, ERN EN 00396516; T. 06.05.2013, **E3/189.1**, around 13.42.31.
[3440] Reasons for Judgement, §619, fn 1954.
[3441] Commerce Committee report, 27.09.1977, **E3/1615**, ERN EN 00234312.
[3442] Commerce Committee report, 01.12.1977, **E3/3514**, ERN EN 00634425-00634427.
[3443] Commerce Committee report, 24.01.1978, **E3/3455**, ERN EN 00634422-00634424.
[3444] Commerce Committee report, 24.01.1978, **E3/3455**, ERN EN 00634422-00634424. The report concludes with a reference to a decision that has already been taken.
[3445] Commerce Committee report, 03.02.1978, **E3/334**, ERN EN 00647721-00647725.

China,[3446] while the report dated 12 November 1978 concerns tractors from Yugoslavia.[3447]As the subjects of all of the documents directly concerned material that was to be distributed to the zones in the future, the requests for KHIEU Samphan's opinion were made in connection to his tasks in that sphere. Furthermore, it should be noted that 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.

1779. Thus, requests for KHIEU Samphan's "opinion" or "recommendations" – the terms used in these documents – appear to be of a purely formal nature. Moreover, no documents have been found in which KHIEU Samphan allegedly gives instructions. The Chamber has thus erred by holding that the fact that he was copied on reports indicates that he held supervisory authority.

1780. However, there is another reasonable finding, which is that KHIEU Samphan was copied on all of the reports because he was supposed to provide technical assistance in light of his experience in trade and commerce during the SIHANOUK administration.[3448] Moreover, as will be seen below,[3449] the documents all confirm the limited scope of the Appellant's responsibilities, which he himself has never challenged.

• **Errors relating to the testimony of SAR Kimlomouth**

1781. Similarly, the Chamber has committed a factual error by relying on the testimony of SAR Kimlomouth to reach its finding that the "Commerce Committee frequently sought guidance from KHIEU Samphan on matters of trade".[3450]

1782. ***Erroneous findings based on the witness's assumptions*** First, the witness in question was called by the Chamber to corroborate documents that do not in fact substantiate the Chamber's finding, as has just been discussed here. Second, SAR Kimlomouth's testimony falls far short of proving the Chamber's contentions. Although he served as an interpreter for the Commerce Committee, as shown for example by report E3/1615, what he says with regard to KHIEU Samphan does not correspond to events that he himself allegedly witnessed. The witness clearly stated at the hearing

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[3446] Commerce Committee report, 28.04.1978, **E3/3461**, ERN EN 00711449-00711450. The report deals with wheat and fuel oil *inter alia*.
[3447] Commerce Committee report, 12.11.1978, **E3/1637**, ERN EN 00711512-00711513 (bearing annotation: "Already sent to brother Hem").
[3448] David CHANDLER: T. 19.07.2012, **E1/92.1**, around 14.10.06.
[3449] See below, §1785-1790.
[3450] Reasons for Judgement, §619, fn 1954.

that his comments on the documents shown to him by CIJ investigators, documents which he had never seen prior to that time, were in fact speculation on his part.[3451] Likewise, he very honestly acknowledged that he had never at any time worked with the Appellant during the DK period, and had not even known what the Appellant's exact role was in relation to trade and commerce.[3452] That is a point that the Chamber should indeed have noted: the fact that SAR Kimlomuth was unaware of KHIEU Samphan's exact responsibilities is obviously inconsistent with the contention that he held considerable power within the Commerce Committee. It is clear that the Chamber has incorrectly assessed the evidence by using SAR Kimlomuth's assumptions and interpretations to reach the finding that he "confirm[s] that VAN Rith could not make certain decisions and had to defer to VORN Vet and KHIEU Samphan)".[3453] It could not reasonably infer from that testimony that the Appellant held any oversight authority whatever. Its finding should therefore be invalidated.

1783. ***Failure to take into account that banking activities were virtually non-existent.*** The Chamber has likewise committed a factual error by not assessing the implications of the lack of banking activity under the DK regime, which effectively rendered one of KHIEU Samphan's alleged responsibilities devoid of any substance. Whereas the Chamber has adopted SAR Kimlomouth's mere assumptions as a basis for its findings, it has completely ignored another important section of his testimony which shows that there were in fact objective limitations to KHIEU Samphan's activities. Called to Phnom Penh to work at the Foreign Trade Bank of Cambodia, SAR Kimlomouth described the bank as a "near-empty institution"[3454] where "only when there were foreign delegates, then we would meet with them; otherwise, no operation was taking place" due

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[3451] SAR Kimlomouth: T. 05.06.2012, **E1/81.1**, around 10.15.37 ("Q. Thank you. Let me confirm that for what you have just stated: you did not know the actual fact of the relationship between the person by the name of Hem in relation to the Commerce or Economic Committee before you were shown the document by the investigator from the OCIJ; is that correct? A: "Yes, that is correct. I made my conclusion relying on those documents", emphasis added) T. 04.06.2012, **E1/80.1**, around 09.33.51 ("Due to the communication letter, I concluded that it was so." emphasis added); T. 04.06.2012, **E1/80.1**, around 09.39.59 ("…I saw documents concerning Brother Hem that were shown to me by the Office of Co-Investigating Judges. It was from those documents that I found out that certain documents were addressed to Brother Hem and Brother Vorn", emphasis added).

[3452] SAR Kimlomouth: T. 31.05.2012, **E1/79.1**, around 15.28.44; T. 05.06.2012, **E1/81.1**, around 10.31.40; T. 31.05.2012, **E1/79.1**, around 11.24.35.

[3453] Reasons for Judgement, §619, fn 1954, fn 1960. See also the Defence's discussion of the witness's suppositions and the questionable methods used by investigators and the Prosecution in their questioning of the witness: *Conclusions finales de KHIEU Samphan dans 002/01*, 26.09.2013, §245-249. [In French and Khmer only]

[3454] SAR Kimlomouth: T. 31.05. 2012, **E1/79.1**, around 09.40.47.

to the lack of foreign currency and expertise.[3455] SAR Kimlomouth further described it as a "mere symbolic or nominal bank" operating as best it could but whose activity was minimal.[3456] Quite apart from the fact that the witness never met the Appellant as part of his responsibilities during the DK period, the Chamber should have taken into account his description of the limited activities of both the banking sector and the Commerce Committee. Hence, the Chamber could not consider KHIEU Samphan's responsibilities with regard to such a "near-empty institution" as evidence that he had significant authority over matters relating to trade and commerce. It has erred through its partial and partisan analysis of the testimony in question.

• **Errors relating to technical assistance tasks**

1784. Similarly, the Chamber could not rely on KHIEU Samphan's role in "facilitat[ing] the distribution of equipment and products to the zones"[3457] as a basis to reach its finding that he exercised "significant oversight" of the Commerce Committee.[3458] Those witnesses who mention this as one of KHIEU Samphan's tasks have described his work as being primarily technical and administrative in nature, as it in fact consisted in dealing with the requests for goods that were submitted by the Zones.[3459] The Chamber has committed a factual error by not taking such exculpatory evidence into consideration. It has likewise committed a factual error by not assessing the implications of the fact that there is no evidence that KHIEU Samphan gave any instructions with regard to trade and commerce other than when it pertained to the distribution of goods in the Zones. In fact, it is apparent from the Reasons for Judgement that the Chamber has extrapolated from the documents submitted to it.

B. Extrapolation from reports addressed to KHIEU Samphan

1785. The Chamber has committed factual errors by reaching the finding, on the basis of DK official documents that were either addressed directly to him or copied to him, that the Appellant exercised

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[3455] SAR Kimlomouth: T. 31.05. 2012, **E1/79.1**, around 09.42.32.
[3456] SAR Kimlomouth: T. 04.06.2012, E**1/80.1**, around 14.01.37.
[3457] Reasons for Judgement, §619.
[3458] Reasons for Judgement, §621.
[3459] KHIEV Neou: T. 21.06.2012, **E1/90.1**, around 10.56.01, around 15.13.18. The witness also describes meeting the Appellant on two occasions: T. 21.06.2012, **E1/90.1**, around 14.21.34, around 11.34.38, around 11.49.18 (KHIEU Samphan "was pleased that this materials could be used for the need of the people"). KIM Vun: T. 22.08.2012, **E1/112.1,** around 15.58.02. SAO Sarun: T. 07.06.2012, **E1/83.1,** around 11.56.02; SUONG Sikoeun: T. 14.08.2012, **E1/107.1,** around 15.37.13.

oversight of the Commerce Committee.[3460] On the contrary, careful scrutiny of these reports and documents confirms the limited scope of the technical assistance KHIEU Samphan was assigned to provide, as set out in the aforementioned Minutes of the Standing Committee Meeting. Only a biased and erroneous reading of these documents could have led the Chamber to see them as showing general oversight of the Commerce Committee.

1786. The Chamber's reasoning is incorrect as the content of the reports and the annotations they bear do not refer to KHIEU Samphan's decisions, but rather to decisions specifically made by VORN Vet[3461] or more generally, to pending decisions by *Angkar*.[3462]

1787. As discussed above,[3463] it was logical to copy KHIEU Samphan on documents "on the use of a line of credit extended to DK by China"[3464] because of his status as a member of the Committee that was set up "to examine the purchasing accounts, [...] [and] the items" to be purchased in China.[3465] This would also explain why "messages to, from and between FORTRA and Ren Fung" were likewise addressed to him.[3466] Those letters, which pertain to highly technical exchanges relating to the sale of raw materials and industrial parts, do not show that KHIEU Samphan had any oversight authority, however.

1788. The Chamber's contention that "reports concerning these areas were nevertheless primarily forwarded to him, with Deputy Prime Minister for Economics VORN Vet frequently copied into reports as the second recipient behind KHIEU Samphan" is yet another extrapolation. In fact, the Chamber has no basis to find that the order that names appeared on the list of copied recipients was in any way significant. Furthermore, as has been discussed, negotiations with the delegation from

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[3460] Reasons for Judgement, §618, fn 1949-1951, §619, fn 1954 to 1959, §620, fn 1960-1963.
[3461] For example: Equipment/materials that Yugoslavia offered to sell, **E3/340,** ERN EN 00681191: VAN Rith wrote the following comment: "Brother Hem instructed that Brother Vorn decided not to purchase. Ways of response to [illegible] is sought". Thus, VORN Vet was the decision-maker, not KHIEU Samphan.
[3462] For example: To Respected and Beloved Brother Hem: Report about the meeting with Korea, 01.11.1976, **E3/2041**, ERN EN 00334993-00334994 (The report is copied to KHIEU Samphan, but states: "Our opinion: We will notify [...] after Angkar makes a decision"). Other documents addressed or copied to KHIEU Samphan bear similar annotations: To Respected and Beloved Brother Doeun: Report about the meeting with Korea, 29.10.1976**, E3/2038**, ERN EN 00337499 ("Wait for us to ask Angkar's opinion first"); To Respected and Beloved Brother Hem: Report about the meeting with Korea, 29.10.1976**, E3/2040**, ERN EN 00332556, "All the issues raised by the Korean comrades will be taken to Angkar"); To Respected and Beloved Brother Hem: Report about the meeting with Korea, 01.11.1976, **E3/2041**, ERN EN 00334994 ("Request Angkar to form opinion in order to inform them on this matter").
[3463] See above, §1777-1780.
[3464] Reasons for Judgement, §619, fn 1957.
[3465] Record of Standing Committee Meeting: Commerce Matters, 07.05.1976, **E3/220**, ERN EN 00182706-00182707.
[3466] Reasons for Judgement, §619.

Yugoslavia were led by VORN Vet directly, whereas KHIEU Samphan had no means of knowing the content of the discussions except through the reports on which he was copied.[3467] That simple fact shows that he was not part of the decision-making chain, although he was kept informed.

1789. The Chamber has likewise erred by stating that KHIEU Samphan continued to be copied on reports in late 1978, "[f]ollowing VORN Vet's arrest", as if that arrest had a bearing on the reports in question. The documents cited by the Chamber concerning business dealings with China via the Hong Kong-based company[3468] were in fact consistent with those sent on previous occasions. Hence, the practice of sending documents for purposes of information only continued unchanged.

1790. Moreover, of the three documents cited by the Chamber relating to late 1978, the first concerns transport arrangements for cargo from China,[3469] the second is a report of negotiations with a Chinese delegation and was also addressed to *Bang* Van (IENG Sary),[3470] and as concerns the third, not all the handwritten annotations are legible and the identity of the first recipient is not apparent.[3471] The Chamber erred by failing to note that KHIEU Samphan was not the only recipient of those reports, and thus could not infer that there was anything distinctive characterising the period that followed VORN Vet's arrest. All of the reports relate in any case to trade relations with China, a sector that KHIEU Samphan was required to monitor insofar as it pertained to equipment that had to be imported. The Chamber has thus erred by determining that the number of reports copied to him were in themselves sufficient grounds to find that KHIEU Samphan had held significant authority, whereas those reports in fact were consistent with the limited scope of his responsibilities as defined by the SC.

C. Errors with regard to visits and training sessions

1791. Similarly, the Chamber erred by determining that KHIEU Samphan's visits to state warehouses with VAN Rith were evidence of his "considerable" power within the Commerce Committee. The

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[3467] See above, §1773-1775.
[3468] Reasons for Judgement, §620, fn 1963.
[3469] Commerce Committee report, 08.11.1978, **E3/1636**, ERN EN 00700544.
[3470] Minutes of the negotiation between the commerce delegation of the Democratic Kampuchea and the delegation of Ministry of Foreign Trade of the People's Republic of China, 3 December 1978, **E3/829**, ERN EN 00756522.
[3471] FORTRA Letter to Ren Fung, 07.12.1978, **E3/2520**, ERN EN 00685581 (bearing the annotation: "Already sent to the destination through K11.").

quotations it has retained from certain witness statements -- even those that were carefully selected -- fail to justify such a finding.[3472]

1792. ROS Suy, for instance, who worked in a state warehouse, confirmed that material was indeed exported in exchange for items that were subsequently dispatched to the bases.[3473] As the witness's statement attests, it was logical for KHIEU Samphan to be kept informed of such trade operations. Moreover, although he referred to KHIEU Samphan's rare visits, he was unable to describe exactly what the latter's role was.[3474] For ROS Suy, Rith was the person in charge of the Commerce Committee.[3475] SIM Hao, whom the Chamber has also quoted, was working in a factory. During that time, he reportedly saw Rith and KHIEU Samphan visit the factory to inspect goods intended for export.[3476] It was because he knew that KHIEU Samphan was the Head of State that he assumed he was Rith's superior, without being aware of any further details.[3477] His testimony as a whole, however, likewise fails to support the Chamber's finding that KHIEU Samphan had considerable oversight of the Commerce Committee, which the witness could see only through the lens of his own factory.

1793. The Chamber has also based its discussion of KHIEU Samphan's visits on YEN Kuch's written statement. First of all, the Chamber has committed factual and legal errors by using a written statement to establish KHIEU Samphan's acts and conduct.[3478] That document should have been dismissed. Second, the statement in question does not shed any light on KHIEU Samphan's role in Commerce. In fact, YEN Kuch simply stated that he had seen NUON Chea and KHIEU Samphan during a warehouse inspection, but added that "VAN Rith was the highest-ranking leader" at the Ministry of Commerce (translation ours).[3479]

1794. Finally, the Chamber has committed a factual error by finding, on the basis of a single witness's testimony, that KHIEU Samphan allegedly conducted "meetings with workers and commerce

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[3472] Reasons for Judgement, §620, fn 1964. The witnesses are RUOS Suy, SIM Hao, YEN Kuck and BEIT Boeurn *alias* BIT Na.
[3473] ROS Suy: T. 25.04.2013, **E1/184.1**, around 10.21.04, around 15.35.09, around 16.00.38.
[3474] ROS Suy: T. 25.04.2013, **E1/184.1**, around 10.36.27, around 13.53.19, around 14.30.59. It should be noted that ROS Suy remembered KHIEU Samphan's humble demeanour.
[3475] ROS Suy: T. 25.04.2013, **E1/184.1**, around 15.33.01.
[3476] SIM Hao: T. 12.06. 2013, **E1/206.1**, around 14.34.58, around 15.34.27.
[3477] SIM Hao: T. 13.06.2013, **E1/207.2**, around 13.57.40; T. 12.06.2013, **E1/206.1**, around 14.34.58.
[3478] See above, §296-305.
[3479] Written record of witness interview of YEN Kuch, 02.09.2009, **E3/437**, ERN EN 00375484-00375485.

cadres" during which he "denounc[ed] as enemies of the Party "those who were lazy to work'".[3480] Not only was BIT Na the only witness to have attended several meetings where KHIEU Samphan was present, but her uncorroborated information does not appear entirely reliable, given how approximate and generally confused her recollections are. She stated in court, for instance, that she had no idea of KHIEU Samphan's responsibilities[3481] or what the SC was[3482].

1795. As to her knowledge of the Commerce Committee, the Chamber has not noted the contradictions in her statements, which were nonetheless raised during questioning by the Defence. For instance, in her interview with DC-Cam in 2004, she first stated that the Head of the Commerce Office was a woman,[3483] and then went on to say that there was no one senior to VAN Rith in the Commerce Committee.[3484] Furthermore, in her testimony before the CIJ in 2016, she surmised that VORN Vet and SON Sen were one and the same person,[3485] a supposition she then confirmed in court.[3486] The Chamber has also erred by failing to note that in addition to being confused, BIT Na's "memories" were not expressed spontaneously. It was only during her second interview, in response to a leading question from the DC-Cam interviewer, that she first mentioned that KHIEU Samphan had attended a training session at *Borei Keila*.[3487] However, when the question was raised as to who

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[3480] Reasons for Judgement, §620, fn 1965.

[3481] BEIT Boeurn, *alias* BIT Na: T. 28.11.2016, **E1/502.1**, around 13.50.40 ("During the regime, I did not know what position he held. But what I knew was that Khieu Samphan was subordinate to Nuon Chea") and after 15.23.30, she infers that he allegedly attended four Commerce Committee meetings "to give advice".

[3482] BEIT Boeurn, *alias* BIT Na: T. 28.11.2016, **E1/502.**1, around 13.52.56.

[3483] BEIT Boeurn, *alias* BIT Na: DC-Cam Interview, 20.10.2004, **E3/5647**, ERN EN 00640147-00640148.

[3484] BEIT Boeurn, *alias* BIT Na: DC-Cam Interview, 20.10.2004, **E3/5647**, ERN EN 00640145 ("Q: At the Ministry of Commerce who was above Vann Rith? A: There was only he."). During her in-court testimony, the witness confirmed that she had made that statement: T. 28.11.2016, **E1/502.**1, around 14.10.52.

[3485] BEIT Boeurn, *alias* BIT Na: Written Record of Interview, 03.02.2016, **E3/10721**, Q/A 131 (I never saw VORN Vet or SON Sen. I only heard about them and suspected they could be the same person.").

[3486] BEIT Boeurn, *alias* BIT Na: T. 28.11.2016, **E1/502.**1, around 13.58.08.

[3487] BEIT Boeurn, *alias* BIT Na: DC-Cam Interview, 20.10.2004, **E3/5647**, ERN EN 00640149-00640150. First, the person interviewing Sochea brought up NUON Chea. Then, although the witness had not yet said anything about him, in the next question the interviewer added: ("When you went to study there with NUON Chea and KHIEU Samphan, were you a full right member?"). The same strategy would be repeated in all the questions that followed. DC-Cam Interview, 20.10.2004, **E3/5647**, ERN EN 00640149-00640150. During her first interview with DC-Cam, the witness did not mention KHIEU Samphan at all with regard to the training sessions. See DC-Cam Interview, 07.12.2002, **E3/5647,** ERN EN 00640178-00640180, "[Q] Sochea: When they came to teach, did they introduce themselves to the class? Did they tell the class their names or did you know them by yourself? [A] Na: We found it out through colleagues." ERN EN 00640178-00640180. ERN EN 00640182-00640183: "[Q] Sochea: During that time did you hear or know any other leaders' names than those you mentioned above? [A] Na: No. [Q] Sochea: Whose names did you hear then? Na: During that time there were Pol Pot, Nuon Chea and Son Sen. Sochea: Were that all? Na: Yes" (emphasis added)

had allegedly discussed the issue of enemies, the Chamber carefully avoided noting that BIT Na said it was NUON Chea.[3488]

1796. Above all, the Chamber has conducted a partial and partisan analysis of her testimony by failing to note an essential element in her statements, which completely alters the meaning of its finding that KHIEU Samphan had allegedly denounced "those who were lazy to work" as enemies of the Party. In the witness's earlier statement, as was recalled during the hearing, the segment of the interview that relates to enemies reads as follows:

> "Q: Did they talk about classifying people like what type of people were the enemy of the revolution? Was it what they spoke in class? And did KHIEU Samphan and NUON Chea teach about that? Did they explain what elements were the enemy of *Angkar*? A: Oh! Sometimes they said that there were enemy inside our self, and it was the ideological enemy which made us to become lazy."[3489]

1797. The Chamber has thus erred in its findings as regards BIT Na's credibility, *inter alia* by disregarding those sections of her testimony that were obtained as a result of questioning by the Defence. By retaining such unreliable testimony and using it selectively and solely as evidence of guilt, it has failed in its duty to provide a properly reasoned decision. In no case could the Chamber rely on her testimony as its basis for conclusively determining KHIEU Samphan's role as regards Trade and Commerce.

1798. **Conclusion** None of the testimony supported the finding that KHIEU Samphan held considerable authority over the Commerce Committee. The Chamber's incorrect contention is further compounded by its acknowledgement, in setting aside the issue of superior responsibility, that "[d]espite [...] being fully apprised of DK trade and commerce matters, KHIEU Samphan's role was limited to administrative functions within that role".[3490] The Chamber has reached its finding that KHIEU Samphan held considerable oversight authority through the accumulation of its various factual errors. Its finding will therefore be annulled.

[3488] BEIT Boeurn, *alias* BIT Na: DC-Cam Interview, 20.10.2004, **E3/5647**, ERN FR 00332566 ("Q. Who was the speaker, KHIEU Samphan or NUON Chea? A. NUON Chea was the teacher.").
[3489] BEIT Boeurn, *alias* BIT Na: DC-Cam Interview, 20.10.2004, **E3/5647**, ERN EN 00640151-00640152. (emphasis added).
[3490] Reasons for Judgement, §4323.

IV. RESPONSIBILITY FOR THE MFA

1799. When it stated that it could not determine that KHIEU Samphan had taken on responsibility for the MFA in the absence of IENG Sary in light of the "paucity" of evidence against him, the Chamber nevertheless noted the "possibility" that KHIEU Samphan may have provided periodic and limited temporary assistance from time to time.[3491]

1800. This apparently was the basis for its subsequent finding that KHIEU Samphan "could not ignore" letters that Amnesty International addressed to him in his capacity as Head of State, "considering his strong connection to in particular IENG Sary and the Ministry of Foreign Affairs", but without any evidence that the letters in question had ever reached him.[3492]

1801. Strong connections to IENG Sary and the MFA are mere speculation, however, and do not constitute evidence that he in fact received the letters in question, especially since the Chamber was unable to determine that any such "strong connection" indeed existed on the basis of whatever periodic and temporary assistance KHIEU Samphan may have given the MFA during IENG Sary's absences.

1802. The Chamber's finding that it was "possib[le]"that KHIEU Samphan provided periodic and temporary assistance to the MFA is unreasonable in view of the "paucity" of evidence on the matter,[3493] which consists of the statements made by LONG Norin, SALOTH Ban and SUONG Sikoeun in Case 002/01, statements moreover that the Chamber has assessed in a partial and partisan manner. LONG Norin explained that when there were visitors in IENG Sary's absence, "Khieu Samphan and Vorn Vet would come but they would not be making any decision", and that ensuring the "interim" meant that KHIEU Samphan and VORN Vet came to welcome the visitors to the Ministry when IENG Sary was absent.[3494] The Chamber has distorted and misrepresented the testimony of SALOTH Ban, an important official at the MFA, who stated that KHIEU Samphan's presence at the Ministry had been limited to meetings "with the intellectual groups" (and not for the purpose of "holding meetings about foreigners" as the Chamber claims), without

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[3491] Reasons for Judgement, §623.
[3492] Reasons for Judgement, §4250 and 4253. See also §4048. The mere fact that he was President of the Presidium does not constitute evidence that he received letters addressed to him.
[3493] Reasons for Judgement, fn 1966-1971 of §622-623.
[3494] LONG Norin: T. 08.12.2014, **E1/19.1**, after 14.25.38.

the witness having been in "direct contact" with him.[3495] SUONG Sikoeun, an intellectual, stated that on the two occasions he met with KHIEU Samphan, it had been to discuss an article for publication, although the article itself never materialised.[3496]

1803. On the basis of that evidence, no reasonable trier of fact could have found that KHIEU Samphan had provided temporary assistance of any kind as part of whatever residual functions he might have had, nor that he had any connection with IENG Sary and the MFA, and above all, would certainly not have inferred from letters that KHIEU Samphan might or might not have received from Amnesty International and/or could not have ignored that KHIEU Samphan knew that crimes had been committed. The Chamber's error has resulted in a miscarriage of justice and its finding must be reversed.

Title III. ERRORS RELATING TO KHIEU SAMPHAN'S KNOWLEDGE

Chapter I. THE REQUISITE LEVEL OF KNOWLEDGE VARIES AT DIFFERENT TIMES

1804. The Chamber has erred in law by stating that the requisite level of knowledge varies depending on whether the criminal offences with which the Accused is charged materialised before, concurrent with or after the commission of the crimes.[3497] The Chamber's statement is not clear. It is all the more perplexing as its sole support is a footnote which simply refers to paragraphs pertaining to the *mens rea* required under the modes of liability for JCE I: planning, instigation, ordering, aiding and abetting and superior responsibility. The present Brief will limit the scope of its discussion to the Chamber's findings that have resulted in prejudice to the Appellant, *i.e.* only those findings that relate to the modes of liability under which the Appellant was convicted.

1805. The Chamber stated at § 3715 that the *mens rea* required under JCE I is direct intent. There is no reference therein to the requisite level of knowledge varying according to the time the alleged act took place. It will be shown that the Chamber erred in its application of the law when it legally characterised KHIEU Samphan's *mens rea* in respect to the JCE through the use of evidence subsequent to the events in question that neither establishes his knowledge nor his intent at the time

[3495] SALOTH Ban: T. 23.04.2012, **E1/66.1**, before 14.19.52; T. 25.04.2012, **E1/68.1**, at 11.13.46.
[3496] Reasons for Judgement, fn 1970 (of §623) quoting SUONG Sikoeun.
[3497] Reasons for Judgement, §4204, fn 13726 referring to §3715, 3717, 3719, 3720, 3722 and 3725.

those events took place, so as to then reach the finding that he possessed both the requisite knowledge and the culpable intent to commit the crimes.[3498]

1806. At § 3722, the Chamber has stated that the requisite *mens rea* for aiding and abetting is the accused's conduct in the knowledge that a crime was likely to be committed and that through his conduct, he facilitated the commission of the crime by the main perpetrator. It must also be shown that the accused was aware of the essential elements of the crime committed by the main perpetrator. It will be seen below that the Chamber has not established such knowledge in relation to the killings at TK, TTD, 1JD Worksite, KCA, S-21, KTC and PK.[3499]

1807. It would thus appear that what the Chamber meant to say was that the requisite level of knowledge varies according to the alleged mode of liability. In any case, the Chamber has erred in law by asserting that the requisite level of knowledge varies according to the time the alleged acts occurred in relation to the time the crime was committed.

Chapter II. AWARENESS THAT CRIMES WOULD BE COMMITTED

1808. The Defence contends principally that the Chamber's demonstration that KHIEU Samphan was aware of "the substantial likelihood of the commission of crimes"[3500] could not serve as a basis to substantiate KHIEU Samphan's intent to aid and abet those crimes.[3501] The Chamber has indeed erred in law by defining the *mens rea* of aiding and abetting as "know[ing] that a crime would likely be committed".[3502] As will be shown below, this lesser degree of intent did not exist at the time of the incriminated acts.[3503] Accordingly, the Chamber's finding must be reversed.[3504]

1809. In the alternative, the Chamber has also committed factual errors in order to reach that finding. The Chamber should not have used the Appellant's thesis as a basis on which to determine "his positive disposition toward the CPK's policies of collectivism including through the population's subjugation to state production initiatives".[3505] To do so is a misuse of KHIEU Samphan's economic study, in which he advocated the reform of the peasant/agricultural world in his country

[3498] See below, §2031-2038.
[3499] See below, §2137-2140.
[3500] Reasons for Judgement, Section 18.1.1.
[3501] See in particular Reasons for Judgement, §4315, fn 14028 and §4317, fn 14033.
[3502] Reasons for Judgement, §3722.
[3503] See below, §2137-2140.
[3504] Reasons for Judgement, §4208.
[3505] Reasons for Judgement, §4206.

in such a way as to include all classes of the population.[3506] Furthermore, at no time was the idea of "subjugat[ing]" the population ever considered in his thesis -- the reverse is in fact the case.[3507] The Chamber has likewise erred by taking the position that between 1969 and April 1975, policies were planned and tested in the liberated areas "which were evident to KHIEU Samphan as a prominent member of the CPK leadership".[3508] At that time, however, KHIEU Samphan had just been inducted as a member of the CPK. The leadership did not trust him and he was mostly kept at a distance.[3509] In 1971, when he did become a candidate member of the CC, he had no authority.[3510] No reasonable trier of fact could have found that between 1969 and April 1975, he had been "a prominent member of the CPK leadership" and thus necessarily aware of the policies being implemented in the liberated areas. Moreover, the Chamber is merely speculating as to the extent of his knowledge of policy implementation. It has absolutely not clarified what those "policies" and "patterns of conduct" were, much less in what regard they were criminal.[3511] Such a speculative and unclear approach must be sanctioned.

1810. The Chamber has also failed to state the reasons underpinning its contention that in 1972, when it was "decided to close markets and organise cooperatives by forcibly and communally harnessing human resources to increase rice production", that showed that KHIEU Samphan was aware of the "substantial likelihood of the commission of crimes".[3512] That decision is in no way criminal in nature and does not support the assumption that crimes would be committed. Moreover, as has already been stated, as a candidate member of the CC in 1972, KHIEU Samphan did not have any authority. Thus, the Chamber has still less justification for its contention that by virtue of his authority within the CPK, in September 1972 "[he was] calling for the "elimination" of the Khmer

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[3506] Thesis by Khieu Samphan, *Cambodia's Economy and Industrial Development*, May 1959, **E3/123**, ERNEN 00750607-00750608: "[we are not proposing to eliminate the classes having the highest incomes"; ERN EN 00750633: "It might also be useful to give landlords any explanation required to help them appreciate how they fit into the reform".
[3507]Thesis by Khieu Samphan, *Cambodia's Economy and Industrial Development*, May 1959, **E3/123**, ERN EN 00750636: "the government must strive to mobilize the peasant masses for mutual aid (…) and finally to make peasants gradually accustomed to working cooperatively. The organization of mutual aid teams in which the instruments of production tools and land and the produce remain private property though used collectively is fully consistent with contemporary Khmer peasant thinking". See also above, §1652-1659.
[3508] Reasons for Judgement, §4207.
[3509] See above, §1660-1664.
[3510] See above, §1660-1664.
[3511] Reasons for Judgement, §4207 "policies were planned, tested and implemented in 'liberated' areas, and patterns of conduct emerged".
[3512] Reasons for Judgement, §4207.

Republic leadership and planning the country's liberation from republican forces through violent means".[3513] It should be recalled that a state of ongoing armed hostility existed at the time between the CPK and the KR, and until proven otherwise, war by definition means that there are reciprocal acts of violence between the belligerent parties. The Chamber has thus failed to justify how that indicated that there was a likelihood that crimes would be committed after liberation.

1811. The Chamber has likewise erred by failing to clarify whether KHIEU Samphan indeed knew of the acts it cites, such as the execution of political opponents and the purges within the ranks of the CPK that occurred as early as 1973, the persecution of Buddhist monks between 1973 and 1975, the policy on family building laid out by early 1974 and the execution of persons affiliated with Vietnam.[3514] Without evidence as to KHIEU Samphan's knowledge of those events, the Chamber was not justified in engaging in speculation based on the positions KHIEU Samphan held within the FUNK/GRUNK and later within the CPK itself, nor on his contacts with its senior leaders.[3515] Moreover, as discussed above, its findings are incorrect as concerns his role before as well as during the DK period.[3516] Accordingly, the Chamber's finding regarding KHIEU Samphan's knowledge of "the substantial likelihood of the commission of crimes" must be reversed.[3517]

1812. The Chamber has stated that it is "satisfied" that KHIEU Samphan 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" and that he "knew of the above CPK policies" in their entirety.[3518] That overarching finding encompasses the alleged criminal policy of forced marriage. In the preceding paragraph, the Chamber had found incorrectly that from 1974, "[t]he CPK had also laid out its policy on family building [...] and had begun arranging the marriages of cadres".[3519] Equally incorrectly, the Chamber found that "the policy to regulate family building and marriage involved the commission of crimes which were encompassed by the common purpose"[3520] and that

[3513] Reasons for Judgement, §4207 (emphasis added).
[3514] Reasons for Judgement, §4207.
[3515] Reasons for Judgement, §4208.
[3516] See above, §1652-1803.
[3517] Reasons for Judgement, section 18.1.1.
[3518] Reasons for Judgement, §4208.
[3519] Reasons for Judgement, §4207 (emphasis added), fn 13735 where the Chamber refers to Section 3.5: *Marriage in Cambodia before 1975* and to §3540.)
[3520] Reasons for Judgement, §4064.

"marriages were forcibly arranged".[3521] As has been shown above, however, it was only through the commission of glaring factual and legal errors that the Chamber was able to find that such a policy existed for the purpose of increasing the population.[3522]

1813. Furthermore, the Chamber has made use of evidence outside the temporal scope of the trial in its attempt to establish an RMO, which it was unable to do owing to the lack of evidence relating to forced marriage for the period prior to 1975.[3523] Its finding that KHIEU Samphan knew that crimes were going to be committed thus has no basis in fact. As has been shown above, however, the regulations on marriage introduced by the CPK well before the DK regime required on the contrary that future spouses consent to the marriage, in accordance with the 12 moral principles.[3524] As a result, the Chamber has in no way established that prior to April 1975, KHIEU Samphan was aware that crimes would be committed.

1814. Nor could the Chamber broadly rely on the Appellant's symbolic roles during the FUNK/GRUNK period and yet fail to justify how those roles could have made him aware that crimes related to marriage were going to be committed in the future.[3525] Furthermore, the Chamber's finding contradicts its own determination that "FUNK promoted a political program of equality to both sexes and sought to 'wipe out backward traditions discriminating against women'" including *inter alia* by abolishing polygamy,[3526] a stand that is irreconcilable with a policy of forced marriage resulting in marital rape.[3527]

1815. The Chamber has also erred through its reliance on the Appellant's roles and activities as well as on his attendance at meetings during the DK period to find that he was aware of the "substantial

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[3521] Reasons for Judgement, §4066.
[3522] See above, in particular 1212-1215 (Document: "*Revolutionary and Non-Revolutionary World Views Regarding the Matter of Family Building*").
[3523] See the testimonies of cadres who married of their own free will: PRAK Yut: T. 19.01.2016, **E1/378.1**, before 11.10.23, before 11.12.11, around 11.19.18 the Chamber described her marriage as having been "arranged" although the witness insisted that she had consented to it, and stated "I did not say that I was forced to marry him, but because I loved him, too, so then I followed the Angkar's instructions and if I were not to like my husband, I would refuse it" (emphasis added). SOV Maing: T. 27.10.2016, **E1/491.1**, before 09.33.5 ("Q. Was the woman to whom you were married someone that you had known before your marriage? A. Yes, we knew each other, and we had some relationship. We loved each other. Q. So this was a marriage that you wanted to do, the both of you. Is that correct? A. That's correct."). SO Socheat: T. 10.06.2013, **E1/204.1**, between 14.01.57 and 14.13.19.
[3524] See above, §1666.
[3525] Reasons for Judgement, §4208.
[3526] Reasons for Judgement, §273.
[3527] Reasons for Judgement, §4066.

likelihood" that crimes would be committed, whereas there is no evidence whatsoever of any CPK decision to institute a policy of forced marriages.[3528] The evidence, in particular the testimony of civil party CHEA Deap, lacks credibility and did not support the finding that KHIEU Samphan was aware of forced marriages or of any such policy in that regard.[3529] Any findings to the contrary by the Chamber shall be reversed.[3530]

Chapter III. KNOWLEDGE OF CRIMES AT THE TIME THEY WERE COMMITTED

Section I. COOPERATIVES AND WORKSITES

I. ERRORS COMMON TO ALL SITES

1816. To find on the awareness of KHIEU Samphan, the Chamber used several of the Appellant's statements given after the events, typically in the form of interviews.[3531] It notably used these statements to assert that the Appellant "knew of the abject working conditions at cooperatives and worksites during the DK period.".[3532] However, the Chamber retained this general finding based on a deliberate distortion of these interviews by ignoring all the exculpatory elements showing that the statements by KHIEU Samphan were based on information obtained after the DK period.

A. Distortion of KHIEU Samphan's statements during interviews

1. Interview of KHIEU Samphan with HENG Reasksmey

1817. First, the Chamber noted that KHIEU Samphan "reflected on the necessity to work hard regardless of illness to achieve a rice yield three times greater than that of China and Vietnam".[3533] What it did not say was that, prior to making these remarks, he explained to his interviewer that at the time of the events, he was not aware of the living conditions for the inhabitants, nor of executions on the various sites:

> "as I have said, I stayed at home only: I was confined to one place only. It was the High Command Headquarters of the Democratic Kampuchean Leaders. I went out only when I was required to accompany the King; [on his duties]. No duties, no going out. Each minded their own business. No one was allowed to care about the others' duties. I had to obey the rules. But why?... I also think about

[3528] Reasons for Judgement, §4208.
[3529] See above, §1244 ("Errors relative to supervision and communication of regulations").
[3530] Reasons for Judgement, §4207-4208, 4326-4327.
[3531] Reasons for Judgement, §4214.
[3532] Reasons for Judgement, §4216.
[3533] Reasons for Judgement, §4214, reference fn. 13756: Interview of KHIEU Samphan with HENG Reasksmey, undated doc., **E3/587**, ERN 00613204-00613205.

> it, and keep searching. As I said before, I preferred to do so because it was right. However, people keep insulting the Khmer Rouge claiming that they deprived the people of food… it is hard. We must investigate this further. So what if once we find out while we are searching? In my opinion".[3534]

1818. The remarks by the Appellant are quite simply speculation as he himself acknowledged. Thus, although the Chamber retained these reflections against the Appellant, accusing him of self-justification, it deliberately omitted to point out that this remark was necessary because KHIEU Samphan had no knowledge of the crimes at the time they were committed.

2. Interview of KHIEU Samphan with an unknown interviewer at an unknown date (E3/4050)

1819. The Chamber used two other transcriptions of interviews with KHIEU Samphan without any information enabling verifying their authenticity.[3535] It used the first interview E3/4050 to say that "his post DK interviews reveal his contemporaneous knowledge that 'both the healthy people and the sick people had to work' adding that 'moderately sick people had to work too'".[3536] Following this extract, the Chamber found that the Appellant knew about the living and working conditions at the time of the events. But KHIEU Samphan once again was making the remarks **after** the events. Nothing in the excerpt transcribed indicates that he was speaking of knowledge he had under the DK.

1820. Moreover, the authenticity of this piece of evidence poses a huge problem. It is undated, such that it is not known when KHIEU Samphan is supposed to have given this information. Apart from the fact that it was after the events, nothing else is known. But the date is a crucial element when it is known that the Appellant had given lots of information after the events, especially after he had read the works of Philip SHORT, a fact the Chamber itself has pointed out in other parts of the Reasons for Judgement.[3537] The author of the supposed re-transcription is also unknown and the question to which KHIEU Samphan appears to reply is not transcribed either. It is probably therefore an incomplete document. Finally, in footnote 13757 relative to this document, the Chamber "does not consider that KHIEU Samphan was necessarily referring to conditions at Trapeang Thma Dam, but

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[3534]Interview of KHIEU Samphan with HENG Reasksmey, undated doc., **E3/587**, ERN 00680028-00680029 (emphasis added).
[3535] Interview with KHIEU Samphan, unknown interviewer at an unknown date **E3/4050**; Interview with KHIEU Samphan, unknown interviewer at an unknown date, **E3/4043**.
[3536] Reasons for Judgement, §4214; Interview of KHIEU Samphan with an unknown interviewer at an unknown date, **E3/4050**.
[3537] Reasons for Judgement, §194.

is rather demonstrable of his wider knowledge of working conditions at worksite." (emphasis added). In reality, the Chamber was speculating because it could not know to what the Appellant was referring by simply reading this document. This is the reason for using the word 'rather' which is nothing more than an expression of that extrapolation. The account is imprecise and not detailed and the questions not transcribed. In such circumstances, it is impossible to know exactly to what the Appellant was referring. Consequently, the Chamber should not have made a finding based on this document E3/4050 which does not meet the minimum standard for assessing evidence and the authenticity of which is objectively questionable.

3. Interview of KHIEU Samphan with an unknown interviewer at an unknown date (E3/4043)

1821. The Chamber then used a second interview E3/4043 to state that KHIEU Samphan "described the abysmal conditions at worksites and workers' suffering during the DK period".[3538] An examination of this document poses the same problems of authenticity as for the previous interview: there is no information concerning the date, nor concerning the author of the document and the questions asked are not re-transcribed. It is thus impossible to know the context in which KHIEU Samphan replied to the questions.

1822. In the absence of these elements and above all without knowing the questions asked, it is only feasible to have a subjective view of these two interviews, which means that it is objectively impossible to make findings respecting the normal standards of assessing evidence. By not taking account of the particular circumstances, the Chamber voluntarily distorted the remarks made by KHIEU Samphan. Thus, it recalls the following passages:

> "However, regarding the lack of medicines, I had the task to buy them from abroad. Much was purchased, nothing other than medicines for diarrhoea, fever so called-general disease medicines, not sophisticated medicines such as penicillin or medicines for lung ailments and such. We went all-out to collect all the money we could to buy general medicines. I was the one who implemented this. It was not me who made the decision; the Standing Committee made the decision. *but I was the one who implemented it, and this is what I saw.* But there was not enough. No matter how much we [purchased] there was never enough *People were forced to work without food while they could barely walk but even so they were made to work.* [...] [T]he majority of deaths [was] from lack of medicine, starvation, not because they were deprived of food and medicine, but because there were shortages."

[3538] Reasons for Judgement, §4214.

(emphasis by the Chamber).[3539]

1823. The reproduction of this extract is deceptive. The Chamber has voluntarily cut out exculpatory elements to produce a testimony exclusively against KHIEU Samphan by deliberately distorting his remarks. It has effectively fabricated this extract by piecing together phrases in answers to different questions. In reality, from one phrase to another, the Appellant was answering a different question. The Chamber has simply proceeded with a selection of inculpatory elements to present them in the form of a single item which is a straightforward case of distorting evidence and conduct that should be sanctioned.

1824. And in addition, it must not be forgotten that the questions have almost never been re-transcribed because of audibility problems. This biased construction is not a faithful representation of the remarks by KHIEU Samphan as can be seen from a comparison of the original extracts:

Extract reproduced by the Chamber	**Original extract of the interview**
"However, regarding the lack of medicines, I had the task to buy them from abroad. Much was purchased, nothing other than medicines for diarrhoea, fever so called-general disease medicines, not sophisticated medicines such as penicillin or medicines for lung ailments and such. We went all-out to collect all the money we could to buy general medicines. I was the one who implemented this. It was not me who made the decision; the Standing Committee made the decision. but *I was the one who implemented it and that is what I saw.* But there was not enough. No matter how much we [purchased] there was never enough [...] *People were forced to work without food, while they could barely walk, but even so, they were made to work.* [...]. "[3540]	"However, regarding the lack of medicines, I had the task to buy them from abroad. Much was purchased, nothing other than medicines for diarrhoea, fever so called-general disease medicines, not sophisticated medicines such as penicillin or medicines for lung ailments and such. We went all-out to collect all the money we could to buy general medicines. I was the one who implemented this. It was not me who made the decision; the Standing Committee made the decision. *I was the one who implemented it and that is what I saw.* But there was not enough. No matter how much we [purchased] there was never enough. At that time? the situation was that the war had just ended. It was normal that there would be shortages and outages. We had to fight while we were extremely short of anything! Why were people forced like that? People were forced to work without food, while they could barely walk, but even so, they were made to work".[3541]

1825. In this extract, the Chamber omitted to transcribe the underlined part inserted by the Defence. However, this part recalls the historical, that is the post-war, context which is an exculpatory element since it is independent of the will of the DK. When the Appellant presented the fact that he handled the supply of medicines, the Chamber re-transcribed his remarks in order to create an

[3539] Reasons for Judgement, §4214 (emphasis by the Chamber).
[3540] Interview of KHIEU Samphan with an unknown interviewer at an unknown date, **E3/4043**, ERN EN 00786109; Reasons for Judgement, §4214.
[3541] Interview of KHIEU Samphan with an unknown interviewer at an unknown date, **E3/4043**, ERN EN 00786109.

inculpatory element: "I was the one who implemented this. It was not me who made the decision; the Standing Committee made the decision, but I was the one who implemented it and that is what I saw. But there was not enough. No matter how much we [purchased] there was never enough".[3542] The Chamber deliberately suppressed the passage which follows.

1826. Finally, the interrogatory remark by KHIEU Samphan "Why were people forced like that" seems rather like a search for understanding on his behalf.[3543] But in order to be certain, it is necessary to know the questions, and that is not the case here. In doubt, it would have been reasonable to conclude, once again, that the Appellant was making his remarks after the events.

Extract reproduced by the Chamber	**Original extract of the interview**
"the majority of deaths were from lack of medicine, starvation, not because they were deprived of food and medicine, but because there were shortages".[3544]	"They did not know how to manage daily work and living issues. They did not know how. It was not that they did not know how; some of them were irresponsible. That was what led to the deaths, and the majority of deaths were from lack of medicine, starvation, not because they were deprived of food and medicine, but because there were shortages. What I've just said makes [these things] crystal clear".[3545]

1827. In the second extract, an initial question (not re-transcribed) was asked, to which KHIEU Samphan replies saying "**To my understanding**" which suggests that it is something that he understood after studying relevant documents well after the events, as he never ceased to repeat during the hearings.[3546] Whereas KHIEU Samphan criticised the administrative capability of certain leaders following his understanding after the events, the Chamber truncated his remarks retaining only the following: "the majority of deaths were from lack of medicine, starvation, not because they were deprived of food and medicine, but because there were shortages".[3547] This truncated presentation

[3542] Interview of KHIEU Samphan with an unknown interviewer at an unknown date, **E3/4043**, ERN EN 00786109 (emphasis added).
[3543] Interview of KHIEU Samphan with an unknown interviewer at an unknown date, **E3/4043**, ERN EN 00786109.
[3544] Interview of KHIEU Samphan with an unknown interviewer at an unknown date, **E3/4043**, ERN EN 00786109-00786110; Reasons for Judgement, §4214.
[3545] Interview of KHIEU Samphan with an unknown interviewer at an unknown date, **E3/4043**, ERN EN 00786109-00786110.
[3546] Interview of KHIEU Samphan with an unknown interviewer at an unknown date, **E3/4043**, ERN EN 00786109 (emphasis added).
[3547] Interview of KHIEU Samphan with an unknown interviewer at an unknown date, **E3/4043**, ERN EN 00786109-00786110; Reasons for Judgement, §4214.

provided as an affirmation does not reflect the doubts and questions expressed by the Appellant in this interview after the events.

1828. The Chamber has therefore completely misrepresented and distorted the Appellant's statements. All the findings it subsequently drew from the supposed knowledge of KHIEU Samphan are based on breaches of the standard of evidence.[3548] Given the problems of authenticity and the standard of evidence, documents E3/4043 and E3/4050 should have been removed from the debates.[3549] Their use as inculpatory elements invalidates these findings.

B. Errors concerning knowledge of living conditions in Preah Vihear

1829. The Chamber mentioned "KHIEU Samphan's contemporaneous knowledge about living conditions in cooperatives in Preah Vihear".[3550]

1. The cooperative in Preah Vihear is out of scope for the trial

1830. As a preliminary point, it is necessary to recall that the Chamber is only seised for the cooperative in Tram Kak and the worksites of TTD, 1JD Worksite and KCA. Thus, the cooperatives in Preah Vihear are not within the scope of the trial and KHIEU Samphan is not required to answer on the subject. The Chamber may not use an out-of-scope element for finding on facts for which it has been seised. This is a deductive procedure and should be sanctioned. In the alternative, it committed several errors in its assessment of the evidence on which it based its findings.

2. Errors in the approach to evidence

1831. In effect, to make this finding, the Chamber referred to paragraphs § 4232 to 4234. First, it used an open letter written by the Appellant on 16 August 2001, entitled "*Letter From Khieu Samphan Appealing to all My Compatriots*"[3551] to find that KHIEU Samphan was aware of the crimes committed during the internal purges throughout the DK period.[3552] It also used it to say that he was aware of the living conditions in the worksites and in the cooperatives.[3553] Once again, the

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[3548] Reasons for Judgement, §4214-4218.
[3549] Interview with KHIEU Samphan, unknown interviewer at an unknown date, **E3/4050;** Interview with KHIEU Samphan, unknown interviewer at an unknown date, **E3/4043**.
[3550] Reasons for Judgement, §4216.
[3551] Letter From Khieu Samphan Appealing to all My Compatriots, 16.08.2001, **E3/205**.
[3552] Reasons for Judgement, §4235.
[3553] Reasons for Judgement, §4216.

Chamber has distorted the remarks from KHIEU Samphan. In reality, he raised the arrest of members of his wife's family in the Preah Vihear province. The Judges distorted the context of the events. KHIEU Samphan explained in particular having 'learnt' of the arrests "accidentally".[3554] Moreover, this statement corroborates all the other elements of the case file which have demonstrated that KHIEU Samphan was not in charge of security.[3555]

1832. In the same document and in an extract conveniently not reproduced by the Chamber, he explained that he thought that these arrests were isolated incidents:

> "My wife, who was in tears, told me about it. Her siblings and relatives, along with many other people, were shackled on both their hands and legs for over a year, causing nasty wounds on their bodies. However, when the captives were released and the Zone Party secretaries were arrested, I knew that this was act of individuals. The rules prohibited me from travelling without permission".[3556]

1833. Thus, the Chamber used this document from KHIEU Samphan to assert general knowledge concerning security centres, worksites, and cooperatives whereas, in the same text, he explains that he thought that they were isolated acts by the Party secretary in that zone.

1834. The Chamber then used the testimony of MEAS Vœun to try to corroborate this supposed understanding of KHIEU Samphan. However, although MEAS Voeun testified that KHIEU Samphan had asked him about the situation in Preah Vihear and that he had sent him a report,[3557] he also indicated that he had not received a reply such that it has not been established that the latter had been aware.[3558] Moreover, he also indicated that he had not met KHIEU Samphan and that he initially went to Preah Vihear on the orders of Pol Pot in order "to conduct investigation concerning the arrest and imprisonment of some people, whether or not that was the case".[3559] It is appropriate to recall that this visit of MEAS Voeun coincided with an escalation of the armed hostility. He said that subsequently he went to this province where he noted the "many", numerous arrests carried out by the local zone leader and freed the people thus detained.[3560]

[3554] Letter From Khieu Samphan Appealing to all My Compatriots, 16.08.2001, **E3/205,** ERN EN 00149526-00149527.
[3555] See below, §1842-1844.
[3556] Letter From Khieu Samphan Appealing to all My Compatriots, 16.08.2001, **E3/205**, ERN EN 00149526-00149527.
[3557] Reasons for Judgement, §4233; MEAS Voeun: T. 04.10.2012, **E1/130.1**, around 14.07.52 and 14.12.58.
[3558] MEAS Voeun: T. 04.10.2012, **E1/130.1**, around 09.42.45.
[3559] MEAS Voeun: T. 04.10.2012, **E1/130.1**, between 14.04.13 and 14.12.58.
[3560] MEAS Voeun, T. dated 04.10.2012, **E1/130.1**, around 14.27.54.

1835. In conclusion, nothing in the account by MEAS Vœun contradicts the version given by KHIEU Samphan and nothing enabled the Chamber to find that this incident confirmed his knowledge of the events within all the cooperatives and at TK in particular. Quite the contrary because the fact that it was necessary to have the survey from MEAS Voeun to find out the details of his family members demonstrates rather his ignorance of the situation in the field. In any case, all this information concerned solely Preah Vihear and not the rest of the sites mentioned in the CO. Consequently, it was wrong of the Chamber to use this out-of-scope site to conclude that it "finds that KHIEU Samphan knew of the abject working conditions at cooperatives and worksites during the DK period".[3561] This assertion by the Chamber relies solely on speculation and on the distortion of pieces of evidence. The findings relative to the cooperative at Preah Vihear and their use in the Reasons for Judgement should therefore be annulled.[3562]

C. Errors concerning knowledge of discriminatory treatment for NP

1836. The Chamber considered that it was established that "KHIEU Samphan knew of the discriminatory treatment meted out to New People at cooperatives and worksites".[3563] For drawing this finding, it relied exclusively on the book by KHIEU Samphan entitled "*Considerations on the History of Cambodia From the Early Stage to the Period of Democratic Kampuchea*"[3564] in distorting his remarks.

1837. However, this work is not a representation of the knowledge of the facts that the Appellant had during the DK era. KHIEU Samphan offered in this work his contemporaneous analysis of the events under the DK after having read several works by experts. Moreover, the Chamber contradicted itself in its reasons by making this finding, because in the part relative to the assessment of evidence it announced another use of this work:

> "The Chamber found helpful KHIEU Samphan's testimony with regard to events preceding the DK era and has relied upon it subject to the appropriate caution and corroboration. The Chamber has nevertheless relied upon his publication, *Considerations on the History of Cambodia from the Early Stage to the Period of Democratic Kampuchea* in a limited sense, noting its extensive references to the works of Philip SHORT and other authors. The Chamber has referred to this publication only

[3561] Reasons for Judgement, §4216.
[3562] Reasons for Judgement, §4216.
[3563] Reasons for Judgement, §4217.
[3564] Book by KHIEU Samphan, *Considerations on the History of Cambodia from the Early Stage to the Period of Democratic Kampuchea*, **E3/16**.

insofar as it proffers unique, unaccredited historical accounts by the Accused, or corroborates other reliable accounts before the Chamber".[3565]

1838. It is clear that the Chamber did not follow the rule it fixed for itself and used the work by KHIEU Samphan exclusively to find that he was aware of the discriminatory treatment targeting NP at the time of the events.. This finding made in breach of the standards of evaluating evidence should be annulled.

D. Lack of evidence of knowledge of crimes committed in the cooperatives and worksites at the time of the events

1839. The finding that KHIEU Samphan knew of the abject working conditions at cooperatives and worksites during the DK period was arrived at in breach of the rules relative to the right of evidence.[3566] No probative element confirms this thesis. On the contrary, the Chamber omitted to take into account the exculpatory elements. Its finding is particularly representative of the manner in which it failed in its obligation to give reasons for its decision. In fact, it made reference to none of the sites concerned by Case 002/02 and only deduced the knowledge and the responsibility of the Appellant by the use of some very general wording.

1840. At no point in time did the Chamber take the trouble to give grounds for its finding site by site as should have been done. This absence of a link between KHIEU Samphan and the sites implicated in this prosecution is a perfect illustration of the deductive approach used by the Chamber. The link between the Appellant and the crime sites is neither established in the Reasons for Judgement relative to his responsibility, nor in the findings relative to the legal characterisation of the facts for each of the crimes. They are nowhere to be found. Such an absence should have led the Chamber to note that there was no piece of evidence enabling the establishment beyond reasonable doubt that, at the time of the events, KHIEU Samphan was aware of the crimes committed in the worksites and in the cooperatives with which he is charged. All findings to the contrary should be annulled.[3567]

II. TRAM KAK

[3565] Reasons for Judgement, §194 (emphasis added).
[3566] Reasons for Judgement, §4216.
[3567] Reasons for Judgement, §4210-4218.

1841. At TK, the Chamber found for CAHs of murder, enslavement, deportation, persecution on political grounds, persecution on religious and racial grounds, OIA through attacks against human dignity and enforced disappearances.[3568] Throughout the Reasons for the Judgement under appeal relative to the Appellant's knowledge of the crimes being committed in the cooperatives and on the worksites, the Chamber never referred to the TK cooperatives site. No piece of evidence is provided concerning this site. It could not therefore establish any intent to commit the crimes.[3569]

III. THE TRAPEANG THMA DAM

A. Lack of awareness at the time of the events

1842. The Chamber has confused awareness of the existence of the site and knowledge of the crimes committed there. Indeed, while it has recalled the pieces of evidence affirming that KHIEU Samphan knew of the existence of the TTD site, nothing linked him with the crimes committed. Nothing demonstrates any knowledge of crimes at the time of the events.[3570] The Chamber contented itself with a general finding to establish the Appellant's awareness of the crimes committed on the TTD site by "considering that it was established that KHIEU Samphan knew of the crimes committed in the course of the policy to establish and operate cooperatives and worksites".[3571] This finding, devoid of any detail, illustrates the deductive reasoning adopted by the Chamber in the absence of pieces of evidence relative to the Appellant's awareness at the time of the events of the crimes committed on the TTD site. It should be annulled and the resulting sentencing of KHIEU Samphan reversed.[3572]

B. Errors committed by the Chamber in inferring the knowledge of KHIEU Samphan

1843. During Case 002/01, KHIEU Samphan stated that he visited the TTD site: "I was excited when I saw those large-scale dams. But during the course of the proceedings before this Chamber, when I have heard the testimonies of the witnesses, I was so shocked, as I was not aware that the dams, the canals were constructed in exchange of such great loss".[3573] After having heard several witnesses and civil parties speak about official visits to the site, including that of KHIEU Samphan,

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[3568] Reasons for Judgement, §1145, 1155, 1159, 1179, 1187, 1192, 1199, 1204.
[3569] Reasons for Judgement, §4283-4287.
[3570] See below, §1843-1844.
[3571] Reasons for Judgement, §4218.
[3572] Reasons for Judgement, §4210-4218.
[3573] KHIEU Samphan: T. 29.05.2013, **E1/198.1**, p. 21-22 and 22-23; Reasons for Judgement, §1254.

the Chamber recalled: "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".[3574]

1844. The Chamber did not reach the conclusions from its own finding. In effect, it simply needs to be asked why the local authorities would have hidden the situation of the workers by displaying the worksite with workers in good health. The logical finding that the Chamber should have made is that a person only tries to hide something from somebody else if the latter is not already aware of it. Thus, if a person hides from the visiting dignitaries and from KHIEU Samphan the reality of the workers' situation at the TTD, it is because they were all unaware of the reality of the living and working conditions at the site. Nothing in the case file indicates the contrary. However, the Chamber completely ignored this aspect and, in contradiction with its own findings, found for the individual responsibility of the Appellant and for his knowledge of the crimes at the TTD site because he would have "[excluded] dispelling any notion that he did not personally observe conditions at these sites or have actual knowledge of them". [3575] In acting this way, the Chamber contradicted its reasons in paragraph § 1260 and deliberately omitted the elements exculpatory for the Appellant. No piece of evidence placed in the case file enabled the finding that KHIEU Samphan was aware of the crimes committed at the TTD site during the DK period. The overall finding according to which he was aware of the crimes committed within the framework of the policy of the establishment and operating of the cooperatives and worksites, including the TTD site, should be annulled.[3576]

IV. 1ST JANUARY DAM

1845. At 1JD Worksite, the Chamber found that CAHs of murder, enslavement, deportation, persecution on political, religious and racial grounds, OIA through attacks against human dignity and enforced disappearances were established.[3577] Throughout the Reasons for the Judgement under appeal relative to the Appellant's knowledge of the crimes being committed in the cooperatives and on

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[3574] Reasons for Judgement, §1260 (emphasis added), See fn 4303: "T., 25 August 2015 (NHIP Horl), **E1/336.1**, p. 31-32, 32-33, 34-35 and 35-36; T., 18 August 2015 (CHHUM Seng), **E1/332.1**, p. 39 (testifying that when the Dam was inaugurated, *Ta* Val ordered that the 'well-built and healthy people' be invited 'to stand in the front line to welcome the Chinese delegation')".
[3575] Reasons for Judgement, §4213.
[3576] Reasons for Judgement, §4218.
[3577] Reasons for Judgement, §1166, 1673, 1684, 1692, 1697, 1707, 1712.

the worksites, not once did the Chamber refer to the 1JD Worksite. No piece of evidence is provided concerning this site. It never mentioned that KHIEU Samphan had knowledge that these crimes were being committed at the 1JD Worksite. Consequently, it could not establish any intent to commit the above-mentioned crimes.[3578]

V. KAMPONG CHHNANG AIRFIELD

1846. The Chamber stated that it was "satisfied that KHIEU Samphan knew of the crimes committed in the course of the policy to establish and operate cooperatives and worksites".[3579] Throughout the Reasons for the Judgement under appeal relative to the Appellant's knowledge of the crimes being committed in the cooperatives and on the worksites, the Chamber never referred to the KCA site. No piece of evidence is provided concerning this site. Such silence is a flagrant admission that it had no piece of evidence for finding that KHIEU Samphan was aware of events at the KCA site.

1847. The Chamber contented itself with establishing this awareness by the use of some very general findings adopted using a deductive approach and an erroneous reading of the out-of-context pieces of evidence.[3580] Knowledge of the conditions specific to the operation of the KCA could hardly be less conducive to such treatment because of the particularity of the site. In effect, as the Chamber itself recalled, the KCA site was above all a military site: "The Airfield was built in close cooperation with China as a key component of the DK military strategy".[3581] For this reason, the command structure of the KCA was in the hands of the DK regime's military leaders, as the Chamber itself recalled: "Division 502 of the RAK, the air force division, was tasked with defending the airspace of Cambodia. In addition to other tasks, such as guarding the Pochentong airport, Division 502 led the construction of the Kampong Chhnang Airfield".[3582]

1848. It is thus established that this site was administered by the military chain of command which in no way corresponds to the responsibilities which KHIEU Samphan exercised under the DK. It is said in many places in the Reasons for Judgement, that the Appellant had no power involving military matters nor any effective control within any command structure.[3583] The Chamber used minutes of

[3578] Reasons for Judgement, §4283-4287.
[3579] Reasons for Judgement, §4218.
[3580] See above, "Errors common to all sites", §1816-1840.
[3581] Reasons for Judgement, §1723.
[3582] Reasons for Judgement, §1725.
[3583] Reasons for Judgement, §4320-4325.

SC meetings which do not enable the knowledge of crimes to be established.[3584] This being the case, there exists no link between the KCA site and KHIEU Samphan. No piece of evidence linked the Appellant to the KCA during the whole period of DK so it was impossible to find that he had knowledge of crimes committed on this site. Consequently, the general finding that "KHIEU Samphan knew of the crimes committed in the course of the policy to establish and operate cooperatives and worksites", including the KCA site, should be annulled.[3585]

Section II. SECURITY CENTRES

1849. The Chamber erred in fact by considering that KHIEU Samphan was aware of the crimes committed during internal purges carried out throughout the DK period.[3586] First, it is appropriate to point out that the purges do not constitute an underlying felony nor a 'crime site' – they are crimes committed in the security centres and which were dealt with in the 002/02 trial which the Chamber was charged with judging. Although crimes were committed as part of the purges in certain security centres, they represent only a part of the crimes committed in the security centres. Thus, the Chamber should have established that KHIEU Samphan knew that crimes were being committed in each of the four security centres subject of the proceedings in the 002/02 trial, which it did not do (I). In addition, its findings about KHIEU Samphan's knowledge of crimes committed during the purges are also erroneous (II).

I. LACK OF AWARENESS AT THE TIME OF THE EVENTS

1850. In finding for KHIEU Samphan's knowledge of crimes committed during internal purges,[3587] the Chamber wrongly dispensed with the need to establish KHIEU Samphan's awareness at the time of the events at S-21 (A), in KTC (B), at AuKg (C) and in PK (D).

A. Lack of awareness that crimes were being committed at S-21

1851. At S-21, the Chamber found that CAHs of murder, extermination, enslavement, imprisonment, torture, persecution on political and racial grounds, OIA through attacks against human dignity were constituted.[3588] It also found that grave breaches of the GC, such as wilful killing, torture,

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[3584] See above, §1741-1742.
[3585] Reasons for Judgement, §4218.
[3586] Reasons for Judgement, §4235.
[3587] Reasons for Judgement, §4235.
[3588] Reasons for Judgement, §2560-2618.

inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or a civilian the rights of fair and regular trial, and the unlawful detention of civilians were established.[3589]

1852. The Chamber never mentioned that KHIEU Samphan had knowledge that the above-mentioned CAHs were being committed. Consequently, although knowledge of the crimes is not an element constitutive of the responsibility for a JCE, the Chamber nonetheless widely used it to deduce the intent. Thus, for S-21, in the absence of KHIEU Samphan knowing that crimes were being committed, it is clearly difficult to establish a direct intent to commit those crimes.[3590]

1853. Conversely, relating to help and encouragement, the knowledge of the principal elements constitutive of the crime is an element that must be established.[3591] At S-21, the Chamber found that murders with *dolus eventualis* had been committed based on the conditions for detention, the practice of blood-drawing and medical experiments[3592]. In the absence of knowledge of crimes committed at S-21, its finding according to which "KHIEU Samphan was at all times aware of the essential elements of the crimes committed by direct perpetrators" should be annulled and he should be acquitted of having aided and encouraged the commission of a CAH of murder with *dolus eventualis* at S-21[3593]

B. Lack of awareness that crimes were being committed in KTC

1854. At KTC, the Chamber found that CAHs of murder, extermination, imprisonment, torture, persecution on political grounds, OIA through attacks against human dignity and enforced disappearances were committed.[3594] It never mentioned that KHIEU Samphan had knowledge that these crimes were being committed at KTC. Consequently, it could not establish any direct intent to commit the above-mentioned crimes.[3595]

C. Lack of awareness that crimes were being committed at AuKg

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[3589] Reasons for Judgement, §2619-2633. KHIEU Samphan's knowledge of the facts constitutive of grave breaches of the GC relative to Vietnamese prisoners of war and civilians is contested below in paragraphs 1888-1889 and 1904-1909.
[3590] Reasons for Judgement, §4283-4287.
[3591] Reasons for Judgement, §4312.
[3592] Reasons for Judgement, §2564-2565 and 2567-2568.
[3593] Reasons for Judgement, §4317-4318.
[3594] Reasons for Judgement, §2817, 2827, 2832, 2843, 2847, 2851, 2858.
[3595] Reasons for Judgement, §4283-4287.

1855. At AuKg, the Chamber found that CAHs of murder, extermination, enslavement, imprisonment, torture, persecution on political grounds, persecution on racial grounds and OIA through attacks against human dignity were established.[3596] It never mentioned that KHIEU Samphan had knowledge that these crimes were being committed at AuKg Consequently, it could not establish any direct intent to commit the above-mentioned crimes.[3597]

D. Lack of awareness that crimes were being committed in PK

1856. At PK, the Chamber found that CAHs of murder, enslavement, imprisonment, persecution on political grounds, OIA through attacks against human dignity and enforced disappearances were committed.[3598] It never mentioned that KHIEU Samphan had knowledge that these crimes were being committed at PK. Consequently, it could not establish any direct intent to commit the above-mentioned crimes.[3599]

II. ERRORS CONCERNING KNOWLEDGE OF CRIMES COMMITTED DURING THE PURGES

1857. Numerous errors were committed by the Chamber in finding that KHIEU Samphan was aware that crimes were committed during purges throughout the DK period. It should not have based its findings on post-DK statements for establishing the Appellant's knowledge at the time of the events (A). It also erred in considering that KHIEU Samphan was aware of the arrest and death of high-ranking cadres on the one hand (B) and of lower-ranking cadres and the civil population on the other hand (C).

A. Error relying on post-DK statements for establishing knowledge

1858. To find that KHIEU Samphan was aware of the arrest and death of high-ranking cadres "throughout the DK period",[3600] the Chamber relies exclusively on interviews and publications by KHIEU Samphan dating from after the DK regime. Such a procedure is problematic for establishing knowledge at the time the crimes were committed.[3601] The Chamber notably considered that KHIEU Samphan's statements that he was unaware of the existence of arrests during the regime

[3596] Reasons for Judgement, §2959-3010.
[3597] Reasons for Judgement, §4283-4287.
[3598] Reasons for Judgement, §3117, 3126, 3131, 3151, 3159 and 3166.
[3599] Reasons for Judgement, §4283-4287.
[3600] Reasons for Judgement, §4224.
[3601] Reasons for Judgement, sections 18.1.2.

were not convincing because he had admitted being a witness to arrests.[3602] But this is a misrepresentation of KHIEU Samphan's remarks cited in a footnote because he said:

> "I observed that some members of the Central Committee disappeared one after another. I could not inform you about these names because I was not close to them. Nonetheless, I did not know the extent of the arrests at that time. ".[3603]

1859. Thus, the Appellant has never said that he was witness to any arrests. There is clearly a difference between no longer seeing certain persons and witnessing their arrest, especially at a period when the principle of secrecy was at the heart of the CPK's operational mode. The Chamber could not therefore use these statements as a basis for deducing the Appellant's knowledge of any arrests at the time of the events.

1860. It also committed an error in using an interview that KHIEU Samphan had with Stephen HEDER in 1980 to establish his knowledge of arrests and deaths of former high-ranking cadres during the DK regime.[3604] Indeed, this interview obtained out of judicial context has a poor probative value. The content of this interview is more a post-regime political analysis of the problem of party cadres accused of treason which does not allow the affirmation that KHIEU Samphan had any knowledge of their arrests at the time. The Chamber also erroneously affirmed that KHIEU Samphan had acknowledged in this same interview "that 'less than half' of the Central Committee had been swept away as part of the purges, along with 'half [of] the Standing Committee'".[3605] Once again, this is a distortion of the remarks. In fact, he explained that these numbers corresponded to the "Vietnamese agents" who had infiltrated the ranks of the Central and Standing Committees. He did not say that the figure represented the number of purges. Moreover, this interview was held after the DK regime and cannot support that KHIEU Samphan was aware of the arrests of high-ranking cadres at the time of the events.

1861. Generally speaking, the Chamber erred in basing findings on interviews, often undated, with KHIEU Samphan carried out after the events to affirm that he was aware of the arrests of high-ranking cadres at the time of the events.[3606] KHIEU Samphan has never said that he had been aware

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[3602] Reasons for Judgement, §4220.
[3603] Reasons for Judgement, §4220, fn 13769 referring to the Written Record of Interview of Charged Person KHIEU Samphan, 14.12.2007, **E3/210**, ERN EN 00156948-00156950 (emphasis added).
[3604] Reasons for Judgement, §4221.
[3605] Reasons for Judgement, §4222.
[3606] Reasons for Judgement, §4221-4223.

of these arrests during the DK in these interviews which are really post-DK analyses. On the contrary, he clearly stated that he became aware of the arrests only in 1979[3607] Consequently, no reasonable judge of facts could conclude that KHIEU Samphan was aware of the arrests and deaths of high-ranking cadres at the time of the events. The Chamber should have accepted the consequences of the absence of elements for supporting the idea of contemporaneous knowledge of the facts. Its findings should be annulled.

B. Errors concerning knowledge of purges of certain high-ranking CPK cadres

1. Doeun

1862. The Chamber erred by finding that KHIEU Samphan knew that Doeun had been the victim of a purge.[3608] It considered that the explanations of KHIEU Samphan according to which he learned about the arrest of Doeun after the fall of the regime were not convincing based solely on circumstantial evidence. But, without the evidence of a precise meeting at which the arrest of Doeun was discussed in the presence of KHIEU Samphan, it was not possible for the Chamber to deduce from his presence at certain meetings that he was aware. The same argument applies when talking about "his close relationship with and proximity to POL Pot and NUON Chea". These assertions have moreover been contested above.[3609]

1863. The assertion that KHIEU Samphan "remained as one of the few members in Office 870 after Doeun's disappearance" does not demonstrate that he had knowledge of his arrest. The principle of secrecy was omnipresent within the CPK. Without direct evidence of knowledge of this arrest, the explanation by KHIEU Samphan that he was not worried about the absence of Doeun in view of his frequent absences is another reasonable and possible explanation. As has been seen, nothing enabled the finding that he had taken over the supervisory functions in the Commerce Committee following the purges of the Ministry's cadres.[3610] Even if that had been the case, it would still not establish KHIEU Samphan's knowledge of the arrest of Doeun in the absence of a precise element to this effect. The speculative approach of the Chamber should be sanctioned and the finding concerning KHIEU Samphan's knowledge of Doeun's arrest should be annulled.

[3607] Written record of interview with KHIEU Samphan, 14.12.2007, **E3/210**, ERN 00156948-00156950.
[3608] Reasons for Judgement, §4225.
[3609] See above, §1684-1686.
[3610] See above, §1770-1798.

2. CHAN Chakrei, Chhouk, KOY Thuon and KEO Meas

1864. The Chamber committed errors in finding that KHIEU Samphan knew of the fate reserved for CHAN Chakrei, for Chhouk, for KEO Meas and for KOY Thuon.[3611] It should not have relied on the testimony of civil party EM Oeun for affirming that the Appellant had reiterated during a political training session in Borei Keila the accusations of NUON Chea against CHAN Chakrei, KOY Thuon and KEO Meas. The number of contradictions in the civil party's testimony should have led the Chamber to note its lack of credibility.[3612] The interviews granted by KHIEU Samphan after the DK, with some being undated and presented out-of-context, are equally of low probative value. In addition, and above all, these are explanations of what he understood after the fall of the regime.[3613] Therefore, these interviews do not allow the finding either that KHIEU Samphan knew about the purges at the time of the events.

1865. In addition, the Chamber used the RF in which CHAN Chakrei, Chhouk and KEO Meas were "openly denounced", to find that KHIEU Samphan knew of their arrest because such magazines were "available to" KHIEU Samphan.[3614] Such a peremptory affirmation should be excluded.[3615] In fact, it is not established that KHIEU Samphan had access to the magazines or read them. Finally, the Chamber relied on the book by KHIEU Samphan mentioning the nine-month detention of KOY Thuon when the SC sent him to S-21.[3616] However, as has already been mentioned many times, the Appellant referred to works by numerous authors – including Philip SHORT and Ben KIERNAN – to understand and analyse what happened during the regime.[3617] The Chamber knowingly ignored

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[3611] Reasons for Judgement, §4226.
[3612] See above, §1690-1803; notably the contradictions from EM Oeun §1757-1758; See equally AB 002/01, §532.
[3613] See for example Interview with KHIEU Samphan, undated document, **E3/4024**: "But, with the arrests, he collected much information; he had to assemble a lot of information. As long as I knew him, Mr Pol Pot implemented that principle; he was a leader who monitored, and especially he was a leader who monitored his cadres very closely." (emphasis added).
[3614] Reasons for Judgement, §4226.
[3615] See above, §1641-1643.
[3616] Reasons for Judgement, §4226.
[3617] Book by KHIEU Samphan, *Considerations on the History of Cambodia From the Early Stage to the Period of Democratic Kampuchea,* **E3/16**, ERN EN 00498273-00498274 "I am inclined to agree with David [(sic)] Short that Pol Pot was not so stupid as to believe documents that came from the use of torture. But Philip Short seems to have Over-spoken somewhat in saying that the role of (Prison) S-21 and the confessions it supplied was not to provide information, but was rather to provide the proof of "treason" that the leadership needed to arrest those they had already decided to arrest." (emphasis added).

this fact to find that the book by KHIEU Samphan could establish his knowledge at the time of the events. Its finding should be annulled.

3. HU Nim

1866. The Chamber erred in fact in finding that KHIEU Samphan "knew of HU Nim's arrest and death at the time".[3618] It recognised, however, that there was no reason to consider that the Appellant had effectively received the letter from HU Nim imprisoned at S-21. On the other hand, it used the post-DK statements dated 2007 to the CIJ in which KHIEU Samphan is interrogated after having documented what he did not know during the DK period. This written record of interview could not demonstrate that KHIEU Samphan knew about the arrest of HU Nim at the time of the facts. Moreover, he explains there that it was impossible for him to "make my disagreement public" and that POL Pot had made it very clear that he was only a "technician".[3619] Finally, according to the testimony from CHEA Deap, KHIEU Samphan "summoned" the messengers from HU Nim for them to be "interrogated". Apart from the criticism concerning its lack of credibility,[3620] his remarks talk about a political training session with an assembly and not of an interrogation led by KHIEU Samphan as the Chamber led us to believe, having specified that nothing was mentioned about what subjects may have been discussed. In the light of all these elements, the Judges could not find beyond reasonable doubt that he had knowledge of HU Nim's arrest at the time it was made.

4. CHOU Chet *alias* Sy

1867. The Chamber erred in fact by finding that KHIEU Samphan knew about the execution of CHOU Chet.[3621] It used yet again the post-DK interview with Stephen HEDER about which he said it was necessary to differentiate what he had learned after DK from what he really knew at the time of the events. In addition, the general unsupported non-specific testimony by Philip SHORT according to which "POL Pot assigned KHIEU Samphan the task of investigating '[…] delicate' matters" does not establish either that he knew about the arrest and execution of CHOU Chet at the time of the events.

[3618] Reasons for Judgement, §4227.
[3619] Written Record of Interview of Charged Person, 14.12.2007, **E3/37**, ERN EN 00156756-00156757.
[3620] See above, §1233-1242 ("Credibility granted erroneously to the isolated testimony of civil party CHEA Dieap").
[3621] Reasons for Judgement, §4228.

1868. Finally, it is unreasonable for any judge of fact to rely solely on hearsay evidence to find that "KHIEU Samphan was involved in Standing Committee discussions about CHOU Chet's fate".[3622] And above all, it is imperative that the part of Duch's testimony according to which he learned from Pang that KHIEU Samphan had been invited to participate in the discussions concerning the fate of CHOU Chet be excluded because it is tainted by torture. In effect, although Duch contradicted himself in various statements, it is clear from some of his written interview records that he had this conversation with Pang after having been interrogated at S-21.[3623] Duch tried to contest his previous statements by affirming that his conversation with Pang took place before his interrogation,[3624] which, whatever the case, does not negate the fact that the interview took place while Pang was detained at S-21. No one can deny the climate of generalised coercion in the place nor the risk that such information was obtained under torture or at least under constraint. That should clearly have prevented any reasonable judge of fact from considering the information reliable and from relying on it to make such a determining finding relative to the responsibility of KHIEU Samphan.[3625] The finding of the Chamber relative to the knowledge that KHIEU Samphan had concerning the fate reserved for CHOU Chet and his execution should therefore be annulled.

5. VORN Vet and SAO Phim

1869. The Chamber erred in fact by finding that KHIEU Samphan "knew the circumstances of VORN Vet and SAO Phim's fates".[3626] It used the post-DK statements of KHIEU Samphan solely in the case of SAO Phim and principally in the case of VORN Vet. As seen above, these statements did not enable the Chamber to establish his knowledge of the facts at the time the events took place.

1870. For VORN Vet, the Chamber considered that KHIEU Samphan was aware of his arrest at the Fifth Party Congress at the end of 1978 at which he was present. The sources used by the Chamber have an intrinsically weak probative value. These come from a written statement by KÈ Pork, obtained out of scope, and a written record of an interview by Duch, itself based on what KÈ Pork said. In

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[3622] Reasons for Judgement, §4228 citing *Duch*'s testimony.
[3623] Written Record of Interview of Charged Person, 4-5-6.05.1999, **E3/347**, ERN EN 00002507 "*And according to what was responded by, no said by Chheum Sam-aok* alias *Pang who told me this after he had fully completed his responses already and I was chatting informally and reminiscing with him, maybe ten days after that in some necessary cases, Khieu Samphan was summoned to participate in meetings about arrests*".
[3624] T. 23.06.2016, **E1/443.1**, between 09.44.22 and 10.07.50.
[3625] It is appropriate to recall that the Defence's objections were wrongly rejected during the Prosecution's interrogation concerning the circumstances of this "conversation".
[3626] Reasons for Judgement, §4229.

addition, it is a distortion of evidence. In effect, the autobiography of KÈ Pork clearly places the arrest after the end of the Congress:

> "In 1978 before the Vietnamese invaded Cambodia, when we were conducting the fifth general assembly in the national assembly building, people became disorganized. Then Cheng An reported there was a small boat floating on the river. But, when closely inspected, it was a boat loaded with handmade bran-cake. Nevertheless, the assembly was closed. Pol Pot told me to stay waiting to see a movie. I was wondering of what was going on. I decided to stay in the building of the Central Committee. To my amazement, at one in the morning, they captured *Ta* Keu and Vorn Vet. After that Pol Pot questioned me whether I saw the movie. I had thought it was a motion picture. In fact, it was the scene of arresting *Ta* Keu and Vorn Vet. ".[3627]

1871. Thus, the Chamber erred in affirming that VORN Vet was arrested "during" the Fifth Congress and could not consider the written record of an interview of Duch as a corroborative element because it was based on the same source: KÈ Pork.[3628] As for the book by Philip SHORT also cited by the Chamber, it simply mentions that VORN Vet was sent to S-21 the day after the Congress. No element enables the finding of the presence of KHIEU Samphan at the Congress nor of his presence afterwards, even if he did attend it.[3629] This distortion of evidence should be sanctioned. Without any piece of evidence, the finding that he knew about the arrest of VORN Vet at the time it took place should be annulled.

6. VEUNG Chhaem, *alias* SOTH Saphon, *alias* Phuong

1872. The Chamber committed an error in finding that KHIEU Samphan "knowingly and actively facilitated the arrest imprisonment and execution of Phuong".[3630] It has once again distorted the contents of his book which, far from mentioning any help in this arrest, on the contrary indicated that looking after the comfort of Phuong he was not worried about anything in particular because "this had become a habit every time civil servants came from different zones or regions to receive instructions from the Party on matters of their own concern".[3631] These detailed statements by KHIEU Samphan have been distorted by the Chamber. However, they demonstrated the great secrecy in which arrests were carried by the members of the SC who were in charge of them.

[3627] KE Pauk's Autobiography from 1949-1985, undated document, **E3/2782**, ERN EN 00089714-00089716 (emphasis added).
[3628] Reasons for Judgement, §2321, fn 7847.
[3629] See above, §1704-1753.
[3630] Reasons for Judgement, §4230.
[3631] Book by KHIEU Samphan, *Cambodia's Recent History and the Reasons behind the Decisions I Made,* May 2007, **E3/18**, ERN EN 00103789.

1873. Having no other probative element to establish that KHIEU Samphan was aware of the arrest of Phuong, the Chamber fell back on the hackneyed argument of "KHIEU Samphan's position of unique standing within the Party and closeness to POL Pot and NUON Chea". Such speculation is unreasonable and could not be the sole element in support of the Chamber's finding. Without direct evidence showing that KHIEU Samphan knew of the arrest of Phuong at the time of the event, this finding should be annulled.

C. Errors concerning knowledge of lower level purges

1874. The Chamber erred in fact and in law by finding that KHIEU Samphan had "his knowledge of the widespread purges and executions of the country's population".[3632] First it results from an unreasonable extrapolation. In fact, the evidence under analysis is delimited to events which took place in Preah Vihear and of which KHIEU Samphan would have known.[3633] However, Preah Vihear is not one of the crime sites or security centres in the scope of the 002/02 trial. In addition, the Chamber has not explained how KHIEU Samphan could have knowledge of arrests and the conditions of detention throughout the whole of DK based on a single event.[3634] Such an extrapolation is unreasonable and should be annulled.

1875. The other element used by the Chamber to support its assertion is an undated interview that KHIEU Samphan had with an unidentified person, document E3/4041, which presents significant authenticity issues.[3635] It is undated, and the date is an essential element when the information KHIEU Samphan accumulated after the regime is known.[3636] In addition, the document only transcribes the answers from KHIEU Samphan so we do not know what the questions were. Also, certain phrases cited by the Chamber are in brackets which probably means that they were not the original statements by KHIEU Samphan.[3637] With such reliability and authenticity issues, no reasonable judge of fact could base its findings for criminal responsibility of KHIEU Samphan on such a document. It should be excluded and the finding annulled.

[3632] Reasons for Judgement, §4231.
[3633] Reasons for Judgement, §4232 and 4233.
[3634] See above, §1830-1835.
[3635] Reasons for Judgement, §4231.
[3636] Reasons for Judgement, §194.
[3637] Reasons for Judgement, §4231, citing the undated Interview with KHIEU Samphan, **E3/4041**, ERN EN 00790270-00790271 "[As a result, many were arrested]", "[This is what led to the large number of arrests]".

1876. The Chamber in addition distorted the contents of an open letter written by KHIEU Samphan in 2001. In effect, it only cited the passage in which he explained that he had learnt "accidentally" of a case of members of his wife's family being arrested.[3638] On the other hand, it made no mention of the explanations where he says he was not at all aware of the massacres and that party discipline forbade him to travel without authorisation. The Appellant had, however, recalled the principle of secrecy:

> "At the same time, the secret and strict discipline of 'you know only what you do; you do not know, hear or see other people tasks' prevented other people from telling me about this tragedy. This also stopped me from knowing about anything that was happening in the country. I only knew what the leaders of the CPK allowed me to. Only when the movement failed did my relatives, victims, and witnesses tell me about this massacre, which would cause one's head to tingle upon hearing.".[3639]

1877. Consequently, the Chamber could not reasonably find from this open letter that KHIEU Samphan was aware of "the arrest and detention of civilians or indeed the conditions faced by the population across the country".[3640]

1878. In the same vein, it relied on the testimony of MEAS Voeun according to which KHIEU Samphan sent him a telegram asking for information concerning the fate of his wife's family.[3641] Not only did MEAS Voeun state that he was not in a position to know whether his return telegram had been received by KHIEU Samphan,[3642] but in addition, the fact that the latter had asked for such information demonstrates rather that he did not possess it. Consequently, the Chamber's deduction that KHIEU Samphan knew about living conditions, arrests, and executions of people other than his in-laws was not the only reasonable one possible and constituted an extrapolation. Thus, this should be annulled and cannot serve as the grounds for a general finding concerning KHIEU Samphan's knowledge that crimes were committed during the internal purges.[3643]

[3638] Reasons for Judgement, §4232 citing the Letter From Khieu Samphan: Appealing To All My Compatriots, 16.08.2001, **E3/205**, ERN EN 00149526-00149527.
[3639] Letter From Khieu Samphan: Appealing To All My Compatriots, 16.08.2001, **E3/205,** ERN EN 00149526-00149527.
[3640] Reasons for Judgement, §4234.
[3641] Reasons for Judgement, §4233.
[3642] T. 09.10.2012, **E1/132.1**, between 14.15.23 and 14.25.12: "With regard to the response, Euy and Ol told me that the message could not be communicated because of the line problem. So he told me that the message was not sent out." (emphasis added), "And I wrote to him on that, telling him about his parents and sisters or brothers and also the living condition of the people, in brief. And with regard to my report -- written report to him, I have no idea whether it was transmitted to him or not because I never received anything back from him. And that was the only one occasion that I did write to him".
[3643] Reasons for Judgement, §4234 and 4235.

Section III. SPECIFIC GROUPS

I. CHAM

1879. The Chamber erred in fact and in law by compensating for the absence of direct or indirect evidence testifying that KHIEU Samphan was aware at the time of the events of the crimes committed against the Cham with which he is charged (A) using erroneous inferences (B).

A. Lack of awareness at the time of the events

1880. There is no relevant direct or indirect evidence testifying that KHIEU Samphan was aware at the time of the events of the following crimes for which he is charged: – crimes of alleged murder and extermination at the Wat Au Trakuon in 1977 and in Trea village in 1978; – CAH of imprisonment in 1978 and of torture the day of the arrest of IT Sen in 1978 in Trea village; – CAH of persecution on political grounds during MOP2; – crime of persecution on religious grounds during the DK and – the crime of OIA of enforced population transfer at the end of 1975.

B. Errors concerning inferences of the awareness of KHIEU Samphan

1881. The Chamber's erroneous finding according to which KHIEU Samphan "knew of the commission of crimes committed against the Cham during the DK period" is 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.[3644] However, although it is possible to prove knowledge using indirect evidence, such a finding must be the sole reasonable finding possible. The Chamber erred in law by making a finding of awareness in a general, vague and overall manner ("some crimes", "during the DK period") without specifying the crimes of which KHIEU Samphan 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 Samphan's knowledge without explaining why its finding was the sole reasonable finding possible.

1882. First, the Chamber did not establish in a reasonable manner that the CPK had expressly taken measures directed at the Cham during the DK.[3645] It then erred in fact and of law by considering as established the fact that KHIEU Samphan had "stressed the importance of preserving 'forever the

[3644] Reasons for Judgement, §4236.
[3645] See above, §892- 965; §1561-1585.

fruits of the revolution and the Kampuchean race'"[3646] without indicating a single reference to this citation. In reality, it is an extract from the FBIS summary E3/294 dated 30 September 1978 of which the original Khmer version is not available. It could not use this without corroboration.[3647]

1883. Even if these remarks had been made by KHIEU Samphan in such terms, the Chamber erred in fact by inferring from them his knowledge of specific crimes from the fact that their date "coincided" with the alleged policy of destruction of the Cham from 1977-1978 and of the Vietnamese in April 1977. This biased interpretation was not the sole reasonable finding possible when there was an escalation of the AC with Vietnam.

1884. The Chamber could neither rely on the support by KHIEU Samphan of the non-criminal common purpose for the finding of his knowledge of the implementation of policies "aimed at establishing an atheistic and homogeneous Khmer society of worker-peasants" without explaining how this was the sole reasonable finding possible.[3648] Its finding on his "unique" position or being a "senior leader" was not a demonstration of knowledge of specific crimes.

1885. In effect, the Chamber should have explained on what concrete factual elements it relied for finding that KHIEU Samphan knew that the common purpose implies crimes against the Cham and that he wished that they be committed. [3649] It did not do this because, in view of the evidence, it could not find that KHIEU Samphan was driven by the required criminal intent for each of the crimes with which he is charged. All its adverse findings should be annulled including the guilty verdict on this point.[3650]

II. VIETNAMESE

1886. Principally, it is appropriate to recall that the Chamber was incorrectly seised for events constitutive of deportation of Vietnamese in TK, Prey Veng and Svay Rieng[3651] and for events constitutive of CAH and genocide against the Vietnamese outside the provinces of Prey Veng and of Svay Rieng.[3652] Thus, it should only have examined evidence relative to KHIEU Samphan's knowledge

[3646] Reasons for Judgement, §4236.
[3647] Reasons for Judgement, §3747.
[3648] Reasons for Judgement, §4326.
[3649] Reasons for Judgement, §4326.
[3650] Reasons for Judgement, §4306.
[3651] See above, §380-385.
[3652] See above, §435-438, 520-521.

of the crimes committed against the Vietnamese in these two provinces. In addition, the Chamber committed errors of fact which prevented it from establishing the CAHs of deportation of Vietnamese, extermination, persecution on racial grounds and the crime of genocide.[3653] Its errors also meant that it was unable to establish the CAH of murder of Vietnamese in Svay Rieng, in Kampong Chhnang, in Kratie, in territorial waters on 19 March 1978 and at the pagoda in Ksach concerning the grandparents of Chantha and the family of Chum.[3654] Consequently, its finding according to which "KHIEU Samphan knew of the crimes committed against the Vietnamese during the DK period" should logically be annulled.[3655]

1887. Nevertheless, in the alternative, by admitting that the crimes were effectively committed, the absence of evidence relative to KHIEU Samphan's awareness of crimes being committed against the Vietnamese at the time they were committed (A) did not enable its inference (B).

A. Lack of awareness at the time of the events

1888. § 4237 and 4239 of the Reasons for Judgement never state that KHIEU Samphan is aware of the following facts:

- the deportation of Vietnamese gathered in TK district from late 1975 to early 1976, in particular for a period of four days in early 1976;[3656]
- the deportation of Vietnamese from the Prey Veng province in 1975 and 1976;[3657]
- the murder of four Vietnamese families at Svay Rieng in 1978, of Vietnamese fishermen and refugees in DK territorial waters on 19 March 1978 and at the port of Ou Chheu Teal after April or May 1977, of relatives of PRAK Doeun and members of six other Vietnamese families in 1977, relatives of UCH Sunlay and family members of three or four other Khmers in Kratie province in September 1978, of Vietnamese civilians at Wat Khsach in late 1978;[3658]
- the arrest of ethnic Vietnamese in Prey Veng province between 1977 and 1979;[3659]
- the arrest, detention and killings of Vietnamese at S-21;[3660]
- the arrest and execution of Vietnamese at AuKg.[3661]

[3653] See above, §686-718, 748-755, 756, 966-1097.
[3654] See above, §987-1017.
[3655] Reasons for Judgement, §4239.
[3656] Reasons for Judgement, §1157 and 3509.
[3657] Reasons for Judgement, §3503-3507.
[3658] Reasons for Judgement, §3497, 3499-3501, 3510-3513 and 3515-3519.
[3659] Reasons for Judgement, §3509-3513.
[3660] Reasons for Judgement, §2605-2610 and 3509.
[3661] Reasons for Judgement, §2959, 2994-2999 and 3509.

1889. In effect, if the Chamber is satisfied that "KHIEU Samphan knew of the crimes committed against the Vietnamese during the DK period,"[3662] it never said what crimes he was aware of, and why and when he became aware thereof. In addition, the dates of the crimes are often imprecise with only the year specified. Thus, the Chamber never sought to determine where KHIEU Samphan was at the time of the crimes, or what he had said before, during or after the events which could demonstrate that he had been aware of these. It should not have inferred KHIEU Samphan's knowledge of unspecified crimes against the Vietnamese from circumstantial evidence.

B. Errors in the inference of KHIEU Samphan's knowledge

1890. Firstly, the Chamber should not have accepted that the existence of a CPK policy to take specific measures against the Vietnamese made it possible to infer knowledge on the part of Khieu Samphan. In addition, it erred in interpreting and misrepresenting public statements by KHIEU Samphan to infer knowledge on his part of crimes committed against the Vietnamese (1). Finally, the evidence used by the Chamber did not provide a basis for it to find that KHIEU Samphan was aware of the protected person status of the Vietnamese detainees and that they were subjected to ill-treatment (2).

1. Error of relying on a CPK policy to infer KHIEU Samphan's knowledge

a. Errors in relation to knowledge of the deportation

1891. The Chamber wrongly found that KHIEU Samphan advocated the return of the Vietnamese populations to Vietnam.[3663] It referred to § 4271 which, on the subject of the expulsion of the Vietnamese, it refers to § 3390, in particular to fn 11437, and to § 3400 Reasons for Judgement. However, in §3400, the part of the speech quoted by the Chamber makes no mention at all of the removal of Vietnamese from Cambodia:

> "Our people have relentlessly fought to defend the country against imperialists, expansionists, annexationists and reactionary forces of all sorts to lead the socialist revolution and boost production. In particular, the fight against Vietnam the aggressor that wants to grab and annex our territory further, raised the political awareness and patriotism of our people and again *stirred up their national hatred* and class hatred. Consequently, our people's political and ideological awareness was further developed. [not underlined in the original]".[3664]

[3662] Reasons for Judgement, §4239.
[3663] Reasons for Judgement, §4237, fn 13826.
[3664] Reasons for Judgement, §3400 referring to the speech of KHIEU Samphan, 17.04.1978, **E3/169**, ERN EN 00280394.

1892. Therefore, it cannot be inferred from this evidence that KHIEU Samphan knew that Vietnamese from Cambodia were deported to Vietnam. As for § 3390, it states: "Witness EK Hen, who was a worker in a 'garment unit' under the authority of Office 870, testified that she attended, together with 400 to 500 participants, a training session conducted by KHIEU Samphan where he explained that: 'Khmer had to be united and Khmer shall be free of Vietnamese, or the "*Yuon*", and that we had to love one another'". In the footnote, the Chamber explained that "EK Hen testified that there were 'only Cambodians, no Yuon' in the country at the time. The Chamber also recalls that this training occurred after Pang was denounced (he was arrested in or around April 1978)".[3665]

1893. The numerous contradictions and memory problems of the witness during her statements should have led the Chamber to exclude her testimony.[3666] In fact, she confused several times training sessions which were given by KHIEU Samphan and by NUON Chea respectively on dates as distant as 1976 and mid-1978 and which addressed different subjects. The Chamber has therefore contradicted itself by dating this training after April 1978 and yet maintaining that the remarks of KHIEU Samphan indicating that he was aware that deportations of the Vietnamese to Vietnam were being conducted in late 1975, early 1976 … It should therefore never have derived such a decisive factual finding from statements given by such an unreliable witness, 40 years after the fact, who had furthermore exhibited significant memory problems.[3667] It would therefore have been reasonable to reject EK Hen's statements.[3668] Furthermore, if multiple interpretations were possible, the point is to determine how these alleged comments would have been understood by the assembly during this political training. Indeed, in determining the meaning to be given to a public statement, what is relevant is the way in which those present interpreted the speaker's remarks at the material time and not how judges 40 years later interpret these.[3669] However, according to EK Hen, it was clearly a message of solidarity and unity addressed to the workers.[3670] Nothing emerges from her statements about the remarks attributed to KHIEU Samphan to suggest these would have been perceived as advocating the return of Vietnamese to Vietnam. Thus, it was

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[3665] Reasons for Judgement, §3390, fn 11437.
[3666] Request of 08.10.2019, **F51**, §20-28. Also See above, §2140.
[3667] Request of 08.10.2019, **F51**, §23-24.
[3668] Request of 08.10.2019, **F51**, §20-28 + Annex, **F51.1.1**.
[3669] *Reasons of Judge Geoffrey Henderson*, Gbagbo Case (ICC), 16.07.2019, §291 and 293.
[3670] T. 03.07.2013, **E1/217.1**, before 11.23.39 "He spoke about the work, about the struggle, and that we should allow one another and assist one another. He gave us good advice. He did not want us to argue each another, but rather to consolidate and to strive to work hard to build the country, as the war had just ended."

unreasonable for the Judges to state categorically that "KHIEU Samphan openly advocated for removal of Vietnamese populations back to Vietnam".

1894. The Chamber also used as "corroboration" the transcript of an interview with NEOU Sarem on *Voice of America*.[3671] However, this statement created outside the judicial context has very little probative value.[3672] In any event, it cannot be used to report the acts and behaviour of the Accused.[3673] In addition, the Chamber did not explain 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[3674] and that of NEOU Sarem in late 1976.[3675] It was therefore not possible for the Chamber to find on the basis of these items of evidence that the words of KHIEU Samphan "mirrored the substance form and ultimate implementation13827 of the common purpose of deporting all Vietnamese peoples across the border in 1975 and 1976".[3676] Furthermore, even if the statements of the Appellant reflected the common purpose to deport the Vietnamese, this does not exempt the Chamber from the necessity of substantiating his [KHIEU's] knowledge that Vietnamese people from the TK 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 Samphan was aware that the crime of deportation was committed against the Vietnamese during the DK. This finding should be rejected.

b. <u>Errors in claimed hate speech statements</u>

1895. The Chamber also erred in considering that KHIEU Samphan "urged the DK population to 'hate the *Yuons* more and more each day', and encouraged vigilance and 'seething' anger against the

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[3671] Reasons for Judgement, §4237, fn 13826 referring to §4271 referring to §3390 and fn 11437 "T., 3 July 2013 (EK Hen), E1/217.1, p. 39 to 43, 46 and 48. The Chamber explained that according to EK Hen, there were "only Cambodians, no 'Yuons'" in the country at the time, and recalls that this training took place after the denunciation of Pang (Arrested in or around April 1978). Also see *Transcript of NEOU Sarem's Interview by VOA Khmer Service*, E3/6934, p. 7, 11 and 113, ERN (En) 01003407-01003411-01003513 (NEOU Sarem, who was in France, returned to Cambodia in early 1976; upon arrival, she attended training sessions at the Khmer-Soviet Institute in Phnom Penh with other returnees; she reports that KHIEU Samphan, who gave courses to them, said the following: "All people in Kampuchea had to do farming. Those who did not know how to do farming, especially the Vietnamese, would be sent back to Vietnam. So the Khmer Rouge had prepared a plan to send the Vietnamese back to Vietnam " [unofficial translation]).

[3672] Reasons for Judgement, §69.

[3673] Request of 08.10.2019, **F51**, §30-34 and §41-44. See also Reasons for Judgement, §71-72.

[3674] Reasons for Judgement, §4272.

[3675] *Transcript of NEOU Sarem's Interview by VOA Khmer Service*, **E3/6934**, ERN EN 01003407-01003411-01003513.

[3676] Reasons for Judgement, §4237.

Vietnamese enemy, saying that he, along with other leaders, called for the expulsion, extermination and destruction of the Vietnamese and that to "protect the revolution and the 'Kampuchean race', KHIEU Samphan called for DK to be 'permanently clean[ed]' of the Vietnamese in order to 'be free' from them".[3677] First, the claim that "KHIEU Samphan called for DK to be 'permanently clean[ed]' of the Vietnamese in order to 'be free' from them" is false. This quotation comes from an RF from April 1977 cited in §3407 of the Reasons.[3678] These words were therefore not spoken by KHIEU Samphan. This erroneous finding must be reversed.

1896. The Chamber also erred by finding that these calls by KHIEU Samphan were "often indiscriminate and often directed at the ethnic Vietnamese population in general".[3679] However, the Chamber established no link between these words and the crimes committed against the ethnic Vietnamese, such as at Wat Khsach or in Kratie for example, not making it possible to determine whether KHIEU Samphan was actually aware of these. Above all, it should be recalled that the Chamber erred in conflating the enemy Vietnamese state with the ethnic population living in Cambodia.[3680]

1897. Before considering the content of the remarks and the persons targeted by them, it is necessary to examine the nature of the documents on which the Chamber relied to find that KHIEU Samphan made the said remarks. It referred in particular to § 3406 and 3407 of the Reasons for the Judgement, and in general to § 3416 which corresponds to the finding on the existence of a policy against the Vietnamese.

Calls of 1978 and 1979

1898. In §3406, the Chamber cited at fn 11484 four documents containing transcriptions of speeches of KHIEU Samphan in foreign reports.[3681] Although it did not specify this, it turns out that two of these documents transcribe the same speech that KHIEU Samphan made on 15 April 1978 at a

[3677] Reasons for Judgement, §4238.
[3678] Reasons for Judgement, §3407, fn 11503 referring to fn 11498 citing The Revolutionary Flag of April 1977, **E3/742**, ERN EN 00478501-00478503.
[3679] Reasons for Judgement, §4238.
[3680] See above, §1058-1097, 1551-1560.
[3681] Reasons for Judgement, §3406, fn 11484 citing the following documents: *Document du Kampuchéa démocratique intitulé:* "Vive le 3ème anniversaire de la grandiose victoire du 17 Avril et de la fondation du Kampuchéa démocratique – Discours du Comrade KHIEU Samphan, Président du Présidium de l'Etat du Kampuchéa démocratique ", **E3/169**, 17.04.1979; Phnom Penh Rally Marks 17 April Anniversary: Excerpts from Recording of Speech at the Meeting by Khieu Samphan: (case file SWB/FE/5791/B), **E3/562**, 15.04.1978; *Sihanouk Attends, Khieu Samphan Addresses KCP Banquet* (FBIS file), **E3/294**, 30.09.1978; *Armed Forces Meeting Supports Government Statement on SRV Aggression* (FBIS file), **E3/296**, 03.01.1979.

mass rally in Phnom Penh to celebrate the 3rd anniversary of the victory of the 17 April. These are, on the one hand, extracts from the recording of KHIEU Samphan's speech of 15 April 1978, transcribed in an SWB file, document E3/562, and, on the other, the transcription of the same speech in a collection of documents. distributed by the Committee of Patriots of Democratic Kampuchea in France, document **E3/169**. Reading these two documents highlights the unreliability that should be accorded to these transcriptions of foreign files such as SWB, FBIS or French periodicals. Thus, although it is the same speech, the words transcribed as well as passages of the speech do not coincide at all. To take just one example, in the transcription in documents distributed by the Committee of Patriots of Democratic Kampuchea in France, words transcribed in the SWB file such as "To exterminate resolutely all agents of the expansionist annexationist Vietnamese aggressors from our units and from Cambodian territory forever" will never be found.[3682] These words are, however, quoted by the Chamber as if KHIEU Samphan had actually spoken them.[3683]

1899. It was therefore unreasonable to rely on this. The FBIS and SWB files, like the collection of documents distributed by the Committee of Patriots of Democratic Kampuchea in France, are foreign reports in which speeches delivered by DK leaders are translated into English or French. In addition, these are often only partial transcriptions of speeches which do not always allow the comments to be seen in context.[3684] It is therefore evident that these documents can be assigned little probative value. In the same way as the two documents transcribing the same speech referred to above, they are not suitable for use for corroborative purposes due to discrepancies.[3685] Therefore, the Chamber should not have relied on them to demonstrate KHIEU Samphan's knowledge of crimes against the Vietnamese were committed. Thus, its observation in §3406 according to which "KHIEU Samphan continued stressing the importance of protecting and preserving the success of the revolution and the 'Kampuchean race' from Vietnamese 'expansionists' and 'annexationists' must be dismissed as it cannot be verified beyond reasonable doubt.

[3682] Extracts from the recording of KHIEU Samphan's speech (SWB file), 15.04.1978, **E3/562**, ERN EN S 00010563-00010564.
[3683] Reasons for Judgement, §4238 and §4293 which refers to §4238.
[3684] See for example: (SWB file), 15.04.1978, **E3/562**, ERN EN S00010558 "*Excerpts from recording of speech at the meeting by Khieu Samphan*" (emphasis added).
[3685] Reasons for Judgement, §3747.

1900. In any event, even if their general content – disregarding specific words – were reliable, it should be recalled that these speeches were made between April 1978 and January 1979. After all, these were made in the context of armed conflict and in particular after two large-scale military offensives by Vietnam. The words cited by the Chamber are clearly a propaganda message.[3686] As Chairman of the State Presidium, KHIEU Samphan was referring to the country's defence against Vietnam as an enemy nation. In any case, it was only possible to regard his remarks as being directed at the Vietnamese ethnic population by distorting them. This is what the Chamber did by systematically isolating the term "Kampuchean race", although the speeches, when read in their entirety, are calls for national solidarity and the unity of the Cambodian people in a difficult situation. Furthermore, the Chamber did not explain how it was possible to deduce from wanting to preserve the "Kampuchean race" that KHIEU Samphan had knowledge that crimes were committed against the ethnic Vietnamese resident in Cambodia.[3687] No reasonable trier of fact would have found that his words were aimed at them, especially since the Chamber also referred to the words reported by EK Hen[3688] which however could not demonstrate that the Appellant had knowledge that the crimes were being committed against ethnic Vietnamese in Cambodia.[3689]

Errors in relation to CPK publications

1901. The Chamber also cited § 3407 of the Reasons for Judgement as evidence of KHIEU Samphan's knowledge.[3690] However, this paragraph refers to publications of the CPK between 1977 and 1979, in particular RF and RY, which were not written by KHIEU Samphan and cannot be used as a basis to characterise his statements. In addition, there was no evidence to suggest that KHIEU Samphan had access to these publications and in particular that he read each one of them.[3691] Finally, the Chamber misrepresented the meaning of these documents by not taking sufficient account of their propaganda content.[3692] Its approach of picking out pejorative adjectives and listing them side-by-side is a distortion of the evidence. However, it is clear that, when read in their context, these terms

[3686] Reasons for Judgement, §3747.
[3687] Reasons for Judgement, §4238.
[3688] Reasons for Judgement, §3406, fn 11484.
[3689] See above, §1891-1894; Also see KHIEU Samphân's Request for Admission of Additional Evidence 08.10.2019, **F51**, §20-28.
[3690] Reasons for Judgement, §4238, fn 13829.
[3691] See above, §1616-1688.
[3692] Reasons for Judgement, §3747.

referred to the Vietnamese enemy as the State or Vietnamese agents who were seen in terms of Party cadres or members accused of having links with Vietnam.[3693] It was not reasonable to assume that these terms meant ethnic Vietnamese living in Cambodia.

1902. The Chamber then referred to § 3416 which is a finding on the existence of policy towards the Vietnamese. However, this finding is incorrect in that the evidence does not demonstrate the existence of a policy directed against the ethnic Vietnamese in Cambodia.[3694] In addition, the speeches of KHIEU Samphan quoted by the Chamber in support of this policy exclusively come from SWB or FBIS files.[3695] The lack of reliability of these documents should have led the Chamber to dismiss them, just like the book by NORODOM Sihanouk.[3696] Consequently, the Chamber could not rely on any original speech by KHIEU Samphan, as the transcripts used were not reliable. As this was the only evidence which enabled it to find that KHIEU Samphan was aware that crimes were being committed against the ethnic Vietnamese in Cambodia, its findings must be rejected.

1903. However, even assuming that KHIEU Samphan made these comments, their content would not allow us to find that ethnic Vietnamese were targeted. The Chamber never established a link between these speeches and the alleged crimes against ethnic Vietnamese. It was therefore not reasonable to find that KHIEU Samphan was aware of the murder of ethnic Vietnamese in Svay Rieng or in the Wat Khsach, for example. Consequently, the Chamber's finding concerning the supposed knowledge of KHIEU Samphan on the basis of such evidence must be reversed.[3697] It will be seen below[3698] that this finding was decisive in the Chamber finding that the Appellant intended to commit crimes against the Vietnamese. Consequently, it could not find either that KHIEU Samphan, because of his participation in a JCE, had committed the CAH of murder, extermination, deportation, persecution on racial grounds and in the crime of genocide.[3699]

[3693] See above, §1058-1097; 1551-1560.
[3694] See above, §1551-1560.
[3695] Reasons for Judgement, §3393 Reasons for Judgement, §3393 quoting: "Speech by Khieu Samphan at a commemorative meeting" (case file SWB/FE/5490/C), **E3/200**, 15.04.197; §3399 citing: Mass rally in Phnom Penh to celebrate the 3rd anniversary of the victory of the 17 April (case file SWB/FE/5791/B), **E3/562**, 16.04.1978; §3400 citing: Document from Democratic Kampuchea entitled: "Long live the 3rd anniversary of the grand victory of April 17 and the founding of Democratic Kampuchea – Speech delivered by Comrade KHIEU Samphan, Chairman of the State Presidium of Democratic Kampuchea", **E3/169**, 17.04.1978.
[3696] Reasons for Judgement, §3401.
[3697] Reasons for Judgement, §4239.
[3698] See below, §2075-2090.
[3699] Reasons for Judgement, §4306.

2. Errors in finding that KHIEU Samphan knew that crimes against the Vietnamese were committed at S-21

1904. The Chamber erred in fact and in law in considering that KHIEU Samphan "was aware of the protected status of Vietnamese detainees at S 21 Security Centre and knew of their ill treatment".[3700] In its view, KHIEU Samphan was aware of the status of Vietnamese protected persons at S-21 and the ill-treatment inflicted on them in his capacity as a member of Office 870 and "position of unique standing within the Party".[3701] Not only was this statement erroneous,[3702] but above all it was not the only reasonable deduction possible. Indeed, the Chamber has passed over without comment the principle of secrecy which nevertheless applied to all members of the Party.[3703] By virtue of this principle, the CPK cadres, including KHIEU Samphan, were not aware of the details concerning the organisation within the Party. In addition, they were not kept informed of matters outside their remit.

1905. S-21 was a security centre directly under the General Staff.[3704] However, KHIEU Samphan had no military office.[3705] In addition, all the witnesses who worked at S-21 explained that it was kept under high security. The perimeter was guarded by a double fence,[3706] and there was only one entrance, guarded by secret police, through which only S-21 vehicles were allowed to enter.[3707] Duch explained: "Nobody would want to make contact with us, and we were not allowed to make contact with outsiders. And that was the purpose of the security for S-21 compound." Some witnesses, guards at S-21, also testified that they had no right to communicate with the outside. Secrecy was also required with regard to interrogations.[3708] The documents prepared at S-21

[3700] Reasons for Judgement, §4239. It would appear that the reference to section 4.1 is erroneous and that the Chamber should have referred to section 4.3.2.4. "Knowledge of the Accused", in particular §340.
[3701] Reasons for Judgement, §340.
[3702] See above, §1704-1753; also see §603-604 of the Reasons for Judgement.
[3703] See above, §1650-1651.
[3704] *Duch*: T. 20.06.2016, **E1/440.1**, p. 42, around 11.11.28; Interview with Kaing Guek Eav, aka *Duch* by UNHCR, 04-06.05.1999, **E3/347**, ERN EN 0002523.
[3705] See above, §1644-1649.
[3706] TAY Teng: T. 21.04.2016, **E1/420.1**, p. 79-80, before 14.01.44. LACH Mean: T. 26.04.2016, **E1/422.1**, p. 53-55, between 13.49.58 and 13.53.09. PRAK Khan: T. 02.05.2016, **E1/425.1**, p. 32-33, between 10.38.58 and 10.40.24. HIM Huy: T. 05.05.2016, **E1/428.1**, p. 88-91, between 15.13.48 and 15.18.45. SUOS Thy: T. 02.06.2016, **E1/430.1**, p. 35-36, around 10.54.18. *Duch*: T. 22.06.2016, **E1/442.1**, p. 4-12, between 09.08.33 and 09.25.31.
[3707] PRAK Khan: T. 27.04.2016, **E1/423.1**, p. 13-14, between 09.29.58 and 09.35.53. *Duch*: T. 22.06.2016, **E1/442.1**, p. 10-11, around 09.23.44. HIM Huy: T. 05.05.2016, **E1/428.1**, p. 21-22, after 09.50.07, p. 90-91, between 15.18.45 and 15.20.32.
[3708] LACH Mean: T. 26.04.2016, **E1/422.1**, p. 55-56, around 13.55.02. PRAK Khan: T. 02.05.2016, **E1/425.1**, p. 35-

circulated along a very strict chain of command.[3709] Given the security surrounding S-21 and its military command, no reasonable trier of facts could have found that KHIEU Samphan was aware of the ill-treatment of Vietnamese detainees at S-21.

1906. The Chamber also cannot refer to a brief meeting between KHIEU Samphan and Duch on 6 January 1979 as evidence that the former was aware of the ill-treatment inflicted on the Vietnamese at S-21.[3710] Indeed, as the Chamber itself noted, Duch contradicted himself in his statements relating to KHIEU Samphan.[3711] Before the Cambodian military court in 2002, Duch had affirmed that he had never met KHIEU Samphan: "As for KHIEU Samphan and IENG Sary up until today I have never once met them."[3712] On the other hand, in later statements, he indicated that he had met KHIEU Samphan at the Buddhist seminary at a meeting on 6 January 1979. These contradictions call into question the credibility of Duch, especially after he stated in court that his memories were fresher at the time.[3713] The nebulous explanations about the "suspicious" content of his written record of interview before the 2002 military court also impair the credibility of the witness.[3714] As there was doubt, the Chamber should therefore have excluded his statements.

1907. In any event, even if this meeting actually took place, it would not demonstrate KHIEU Samphan's knowledge of the protected person status of Vietnamese detainees and the ill-treatment inflicted on them. According to Duch's most recent statements, the meeting took place outside of S-21, at the Suramarit Buddhist seminary. Other persons not belonging to S-21, including the chief of the State warehouse, also participated in the meeting.[3715] KHIEU Samphan would have addressed the few people present, and not directly to Duch, to urge them to continue their work despite the advance of the Vietnamese. This interview, lasting a few minutes[3716], would have been the first and only

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37, between 10.47.50 and 10.51.45. HIM Huy: T. 05.05.2016, **E1/428.1**, p. 78-80, between 14.30.30 and 14.33.49. *Duch*: T. 22.06.2016, **E1/442.1**, p. 11-12, after 09.25.31, p. 80, around 14.20.30.

[3709] HIM Huy: T. 05.05.2016, **E1/428.1**, p. 40-41, between 10.59.25 and 11.00.38. SUOS Thy: T. 02.06.2016, **E1/430.1**, p. 41-42, between 11.09.57 and 11.12.42, p. 42, after 11.14.20; T. 06.06.2016, **E1/432.1**, p. 55-56, between 15.40.53 and 13.48.02. *Duch*: T. 09.06.2016, **E1/435.1**, p. 16-19, between 09.43.41 and 09.47.39; T. 22.06.2016, **E1/442.1**, p. 42-43, between 11.08.05 and 11.09.49.

[3710] Reasons for Judgement, §340.

[3711] Reasons for Judgement, §2557, fn 8673.

[3712] Record of Interrogation, 04.07.2002, **E3/530**, ERN EN 00329134-00329135.

[3713] T. 22.06.2016, **E1/442.1**, between 15.41.10 and 15.52.35.

[3714] T. 22.06.2016, **E1/442.1**, between 15.41.10 and 16.04.13.

[3715] T. 14.06.2016, **E1/437.1**, at 09.34.56.

[3716] T. 23.06.2019, **E1/443.1**, at 09.29.20.

time that the witness met KHIEU Samphan.[3717] Duch also said that he was surprised as normally they were not allowed to meet:

> "[I] met him exactly one time. I couldn't understand why I was meeting Khieu Samphan meaning because I had no right to meet him and he had no right to meet me either Why did he come But I accepted his instructions and disseminated them in S 21 This was not an unofficial meeting. ".[3718]

1908. Thus, it is obvious that KHIEU Samphan had no connection with S-21 and that he did not know Duch at the material time. No reasonable judge of fact could have inferred from this meeting that the Appellant had knowledge of S-21 and what was happening there. Consequently, the Chamber could not infer from these items of evidence that KHIEU Samphan knew of the condition of detained Vietnamese with protected person status and the ill-treatment inflicted on them. Finally, it erred in relying on the transmission of confessions, photographs and a film of Vietnamese prisoners of war to find that KHIEU Samphan was aware of the ill-treatment inflicted on the former.[3719] Firstly, with regard to the film, the Chamber conceded that it had been shown during a study session for the personnel of S-21.[3720] It therefore cannot be assumed that KHIEU Samphan had knowledge of it. Furthermore, the transmission of confessions and photographs of Vietnamese soldiers detained at S-21 did not in any way provide grounds for finding that KHIEU Samphan was aware that they were being ill-treated. These confessions and photographs did not reveal how these prisoners of war were treated at the security centre. The Chamber's deductions must therefore be rejected.

1909. In conclusion, the Judges did not dispose over evidence to demonstrate that KHIEU Samphan had any knowledge of the crimes that were committed at S-21. On the contrary, the security and secrecy surrounding this site, added to the fact that it was subject to the military hierarchy, are all factors which should have led the Chamber to find that the Appellant was not aware of what was happening at S-21 at the material time. Its finding must be reversed.[3721]

III. BUDDHISTS

[3717] T. 14.06.2016, **E1/437.1**, after 09.39.14.
[3718] Written Record of Interview of Charged Person, 23.08.2007, **E3/452**, ERN EN 00147565-00147566.
[3719] Reasons for Judgement, §340.
[3720] Reasons for Judgement, §338 and 2476.
[3721] Reasons for Judgement, §4239.

1910. The Chamber erred in fact and in law in compensating for the absence of direct or indirect evidence attesting that KHIEU Samphan had knowledge at the time of the facts of the commission of the crimes against the Buddhists of which he is accused (A) by means of false inferences (B).

A. Lack of awareness at the time of the events

1911. There is no direct evidence that KHIEU Samphan was aware of the commissioning of persecution on religious grounds targeting monks and Buddhists in TK.

B. Errors in the inference of KHIEU Samphan's knowledge

1. A general, vague and unsubstantiated finding

1912. The Chamber erred in law by making a finding on knowledge in a general, vague and global manner ("the crimes", "during the DK period") without specifying the crimes of which KHIEU Samphan would have been aware and especially when he would have known about them.[3722] In this case, only one crime is alleged. Consequently, KHIEU Samphan has no idea of the "crimes" referred to in this finding which should be reversed.

2. An alleged CPK policy insufficient to prove knowledge

1913. The Chamber did not establish in a reasoned manner how the alleged CPK policy requiring the monks to defrock proved KHIEU Samphan's knowledge that the alleged crime of persecution on religious grounds was being committed in TK. It erred in fact by inferring from the alleged existence of a policy emanating from a legal entity the knowledge of a specific "crime" by an individual. It did not explain its reasoning, nor why this deduction was the only reasonable finding possible. Its finding must be reversed.

3. Accusatory interpretation of public support for Buddhism

1914. The Chamber erred in fact in finding that the public statements of KHIEU Samphan were a "subterfuge" and "a charade of normalcy" based on the following evidence: FUNK's proclamation of 5 April 1974 that Buddhism was and would remain the State religion;[3723] the speeches of KHIEU

[3722] Reasons for Judgement, §4243.

[3723] Reasons for Judgement, §4240; fn 13834 citing §263 making reference to fn 659: "FUNK Political Program", Doc. no **E3/1391**, p. 11, ERN (EN) S 00012638 ("Buddhism is and will remain to be the State religion. "). See also the publication of the National United Front of Kampuchea (FUNK): "*Nouvelles du Cambodge* (No. 695)", Doc. no E3/1254, 3-5 April 1974, ERN (FR) S 00000083-S 00000084".

Samphan as reported in the FBIS file before 17 April 1975;[3724] the speech of KHIEU Samphan transmitted on 21 April 1975 paying homage to the *Sangha* as reported in the FBIS file and a communiqué dated 28 April 1975[3725] published after a Special National Congress chaired by KHIEU Samphan in his capacity as "GRUNK Deputy Prime Minister", according to which members of the Buddhist clergy attended to represent the *Sangha* as reported in the FBIS file.[3726]

1915. Apart from the Chamber erring in fact and in law on the basis of evidence of inherently low probative value, namely documents from the uncorroborated FBIS file,[3727] it did not explain in what way it was able to deduce KHIEU Samphan's knowledge of the specific crimes taking place in TK.

1916. The Chamber deduced KHIEU Samphan's knowledge of the alleged crime of persecution on religious grounds at TK, and thus of the arrests of monks and their alleged defrocking at TK from evidence which has nothing to do with the TK cooperatives. These various speeches and documents never mention the TK cooperatives and date from just a few days before the KR came to power or before. In fact, their dates range from 5 April 1974 to 28 April 1975. In any case, no connection has been established between these dates and the alleged crimes at TK.

1917. The Chamber erred in fact by assuming that KHIEU Samphan knew that monks had been arrested and defrocked at TK.[3728] Although the Chamber avoided expressly stating this, it did not make the appropriate findings from the lack of evidence to support this allegation. No reasonable judge of fact would engage in so much speculation in relation to the mere presence of clergy at the reception of NORODOM Sihanouk[3729] in September 1975 or to the Appellant having "abruptly ceased his praise of Buddhist monks" in speeches reported in the FBIS file.[3730]

1918. The Chamber's biased and erroneous approach is all the more apparent when its assertion that the Appellant was "fervently instructing" with regard to Buddhism is examined, which it was hard put

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[3724] Reasons for Judgement, §4240, fn 13835.
[3725] Reasons for Judgement, §4240, fn 13836.
[3726] Reasons for Judgement, §4240, fn 13837 citing §1086, making reference to fn 3622: "Special National Congress Retains Sihanouk Penn Nouth" (FBIS file), **E3/118**, 28 April 1975, ERN (EN) 00167004 and 00167012.". fn 3623 should also be cited which refers to SIHANOUK: "Sihanouk Message to Khieu Samphan hails Special Congress" (FBIS file), **E3/1364**, May 1975, ERN (EN) 00167031 and 00167034.".
[3727] Reasons for Judgement, §3747.
[3728] Reasons for Judgement, §4240-4241.
[3729] Reasons for Judgement, §4241.
[3730] Reasons for Judgement, §4242.

to substantiate.[3731] It also persisted in its baseless speculations by finding that he had been "instructing the arrangement of marriages in the absence of monks and in a manner fundamentally inconsistent with Buddhist traditions". [3732] This claim is not based on any evidence, not even on the – itself questionable – testimony of CHEA Deap, the only civil party to have mentioned the Appellant in connection with marriage.[3733] The assertion that "such practices continued unabated throughout 1977 and 1978 under KHIEU Samphan's watch" is just as gratuitous and unfounded.[3734] It must be noted that the legal reasoning and the obligation to state reasons were subordinated to the Chamber's striving for effect.

1919. KHIEU Samphan declared that he was not informed of questions concerning the practice of religions under DK.[3735] The Chamber erred in fact in rejecting this assertion when it had no evidence to the contrary.[3736] In any event, the prohibition of the ostentatious practice of Buddhism like all religions during the DK period could not serve to establish knowledge of KHIEU Samphan of the alleged crime of persecution on religious grounds in TK. The alleged knowledge of KHIEU Samphan of the crime of persecution on religious grounds targeting Buddhist monks and Buddhists in TK on the basis of this evidence was certainly not the only reasonable finding possible, but the only incriminating finding. It must be reversed.[3737]

1920. There is no evidence to support this general assertion. The Chamber made a reference in a footnote to §3570 of the Reasons for the Judgement in which appears this excerpt from a speech by KHIEU Samphan: "[D]etermined to draw inspiration from the noble and lofty revolutionary heroism of our Revolutionary Army by […] resolutely putting the interests of the nation, the class, the people and the revolution over the personal and family interests and by mobilising all [their] efforts to fulfil all the tasks entrusted by the Party to each of [them]."[3738] There is no mention of Buddhism in this speech.

IV. Ex-KR

[3731] Reasons for Judgement, §4242.
[3732] Reasons for Judgement, §4242.
[3733] See above, §1233-1242.
[3734] Reasons for Judgement, §4242 (emphasis added).
[3735] T. 23.06.2017, **E1/528.1**, between 10.50.47 and 10.53.45.
[3736] Reasons for Judgement, §4243.
[3737] Reasons for Judgement, §4243, fn 13850 referring to §3570.
[3738] Reasons for Judgement, §3570, fn 11981: "Text of KHIEU Samphan Speech at the Occasion of the Third Anniversary of the Glorious April 17 and the Founding of the Democratic Kampuchea, E3/202, undated non, p. 5, ERN (EN) 00002960.

1921. The Chamber erred in fact and in law by compensating for the absence of direct or indirect evidence attesting that KHIEU Samphan had knowledge at the time of the facts of the commission of the crimes against ex-KR officials by means of incorrect inferences. Indeed, it did not expressly state its knowledge at the time of the committing of acts of CAH of persecution on political grounds towards the ex-KR officials in TK, 1JD, S-21 and KTC and of the CAH of murder perpetrated against the ex-KR officials between 20 April 1975 and the end of May 1975 and between October 1975 and the end of DK at S-21 and KTC.[3739] On the other hand, it incomprehensibly used evidence prior to 17 April 1975 to make its findings from a general knowledge of the crimes at the time they were committed.

A. Errors in the inference of KHIEU Samphan's knowledge

1. "Determining" role of KHIEU Samphan in the CPK's victory on 17 April 1975

1922. The Chamber erred in fact by upholding its unfounded finding that KHIEU Samphan had played a decisive role in the victory of the CPK on 17 April 1975 while also recognising that he had no military role.[3740]

2. Speech by KHIEU Samphan in late 1972, 31 December 1974 and January 1975

1923. In §4244 of the Reasons for Judgement, the Chamber referred to a speech by KHIEU Samphan in 1972, but there is no mention of his call to eliminate high-ranking ex-KR members and their subordinates "by the end of 1972" in §4037 to which it referred.[3741] There is also no mention of the final assault announced by KHIEU Samphan on 31 December 1974 in §232 to which he also referred.[3742] The Chamber was mistaken because it was in §231 that it mentioned "a radio statement of 31 December 1974 attributed to KHIEU Samphan".[3743] Finally, it also referred to a statement attributed to KHIEU Samphan dated 26 February 1975 on the killing of the seven KR traitors.[3744]

1924. In any event, apart from the point that these speeches were reported from the FBIS file with intrinsically low probative value, the Chamber should not have relied on these statements issued in

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[3739] Reasons for Judgement, §4244-4245 and reference to section 18.2.2.3.4.
[3740] Reasons for Judgement, §4244.
[3741] Reasons for Judgement, §4244, fn 13853.
[3742] Reasons for Judgement, §4244, fn 13854.
[3743] Reasons for Judgement, §231, fn 554: "*Cambodians Urged to Unite in New Year's Offensive (FBIS file), Doc. no E3/30, 31 December 1974, ERN (EN) 00166659-00166661.*"
[3744] Reasons for Judgement, §4244, fn 13855 referring to §231.

the midst of armed hostility with soldiers from the KR to make findings over the trial period. Even if these speeches were authentic, they are not suitable to establish any knowledge on the part of KHIEU Samphan as regards the subsequent committing of crimes against the ex-KR officials in TK, 1JD, S-21 and KTC. Furthermore, as we saw above, these facts have already been tried in Case 002/01.[3745]

3. Assurances of amnesty from KHIEU Samphan, GRUNK and FUNK

1925. The alleged assurances of amnesty offered by KHIEU Samphan to ex-KR officials in March and April 1975 on condition that they join FUNK in no way prove knowledge of subsequently committed crimes. All the sources indicated in the footnote of § 4028 are speeches as reported in the FBIS file.[3746]

4. Statements on the destruction of the old regime

1926. The same goes for the alleged exhortations to bring down the authoritarian LON Nol regime.[3747] The victory message of KHIEU Samphan of 21 April 1975 as reported in the FBIS file does not in any way prove the knowledge of KHIEU Samphan of the committing of subsequent crimes.[3748] Hailing the destruction of a defeated regime in the event of a military victory is not a crime. Nor can it serve as evidence of knowledge of later crimes. It must be noted that the Chamber had no evidence that enabled it to prove knowledge on the part of Khieu.

B. Alleged knowledge of specific crimes

1927. The Chamber referred to its "detailed" assessment of intent with regard to "the extent of KHIEU Samphan's knowledge with respect to specific crimes committed against former Khmer Republic officials".[3749] As will be seen below, there is no evidence that KHIEU Samphan knew that the CAH of persecution on political grounds was committed against the ex-KR officials in TK, 1JD, S-21 and KTC and that the CAH of murder was committed against the ex-KR officials between 20 April

[3745] See above, §1582; Case 002/01 Appeal Judgement, 23.11.2016, §1100. See also §859 in which the Supreme Court found that the evidence opposes "the existence of any generalised policy as of 4 June 1975.".
[3746] Reasons for Judgement, §4028.
[3747] Reasons for Judgement, §4245, fn 13857 referring to §4027.
[3748] Reasons for Judgement, §4245, fn 13858 referring to §4037.
[3749] Reasons for Judgement, §4246, referring to section 18.2.2.3.4.

1975 and the end of May 1975 and between October 1975 and the end of the DK at S-21 and KTC.[3750]

Section IV. ERRORS ON KNOWLEDGE OF CRIMES IN RELATION TO MARRIAGE

1928. Even before it was properly seised of the facts concerning marriage, the Chamber pronounced in case 002/01 that there was a policy of "arranged" and "involuntary marriages".[3751] Its prejudgement of the facts may explain why it failed to correctly apply the law and impartially examine the evidence, which would have otherwise prevented it from finding that there was a policy of forced marriage advocated by the CPK.[3752]

1929. The Chamber thus relied on the isolated testimony of civil party CHEA Deap who acted under conditions which should have led it to dismiss this evidence. It was thus seen above that[3753], the only reason why the Chamber considered his account to be "reliable and consistent throughout", in particular concerning the meeting at Wat Ounalom supposedly chaired by KHIEU Samphan, is that it was the only evidence allowing the establishment of a link between the Appellant and the alleged policy of arranged marriages.[3754]

1930. The Chamber also erred in its interpretation of the circumstantial evidence in finding that KHIEU Samphan had knowledge, namely his remarks calling for the population "to divest themselves of personal sentiment [...] in favour of *Angkar*," and for a rapid increase in population[3755], the written statement by RUOS Suy and the book by SIHANOUK after DK.[3756] However, it has also been seen above that this evidence did not allow the Chamber to find knowledge of the alleged crimes in the context of marriage.[3757] Nor did his responsibilities in connection with trade and the testimony in

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[3750] See below, §2099-2113.
[3751] Judgement 002/01, 07.04.2014, §130 where the Chamber found "some evidence of arranged and involuntary marriages. The Chamber is therefore able to find that regulation of marriage was a CPK policy" although marriages were excluded from the scope of the proceedings. See for example, EM Oeun: T. 23.08.2012, **E1/113.1**, between 16.05.39 and 16.07.50 (interjections by the Presiding Judge to questions from the lawyer for the civil party: "the inhumane or other inhumane acts [(sic)] have already been excluded from the first phase [...] frame your questions in line with the first segment of the trial, Case 002/1"); CHUON Thy: T. 24.04.2013, **E1/183.1**, before 10.00.32 (intervention of the Presiding Judge "matter of forced 3 marriage is not the subject matter for examination "), around 14.31.24.
[3752] See above, §1189-1280; 1341-1398.
[3753] See above, §1233-1242.
[3754] Reasons for Judgement, §3569. See above, §1233-1242.
[3755] Reasons for Judgement, §4247-4248. See also §3557, 3569-3571, 3581, 3590, 3611, 3635.
[3756] Reasons for Judgement, §4247-4248.
[3757] See above, §1221-1232.

connection with these responsibilities establish either that he was behind the organisation of forced marriages within this ministry, or that he had any knowledge thereof.[3758]

1931. Lastly, it is not possible on the basis of the use of the generic formulation of "Party Centre"[3759] to establish a link between KHIEU Samphan and a policy of forced marriages, as the two reports produced referring to marriages did not either find the committing of crimes or knowledge of their content by the Appellant.[3760] As the Chamber has not established its knowledge of the crimes while they were being committed, all of its findings in this regard should be reversed.[3761]

Chapter IV. KNOWLEDGE THAT CRIMES HAVE BEEN COMMITTED

1932. The Chamber erred in fact by arguing that KHIEU Samphan could not have not been aware of the reports of *Amnesty International* and the Commission on Human Rights on the executions and ill-treatment of the civilian population.[3762] In fact, there was nothing to suggest that he had obtained these.[3763] His "strong connection" to IENG Sary does not constitute proof of this knowledge; it is pure speculation by the Chamber which should be dismissed. Specifically, it erred by finding that the Appellant was aware that crimes had been committed "as part of the establishment and operation of cooperatives and worksites and internal purges".[3764]

1933. The Chamber also erred by taking post-DK statements by KHIEU Samphan as proof that he was aware that crimes had been committed.[3765] Indeed, although he admitted *a posteriori* that people killed during the DK, the Chamber did not demonstrate his knowledge after the fact of the specific crimes for which he was prosecuted in Case 002/02. Such generalities cannot be used to establish the individual criminal responsibility of an accused prosecuted for particular crimes. These statements by KHIEU Samphan cannot therefore be used to support the Chamber's finding.

1934. The Chamber's findings on the study sessions and mass rallies in which criminal behaviour was encouraged against the Vietnamese, the ex-KR officials, the "New People" and detractors of the

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[3758] See above, §1652-1803, especially §1770-1798
[3759] See above, §1618-1632 ("Party Centre"); 1633-1636 ("Angkar"); 1650-1651 ("The principle of secrecy").
[3760] See above, §1244-1280 ("Errors relative to supervision and communication of regulations=");§1618-1632),§1618-1632 ("Party Centre").
[3761] Reasons for Judgement, §4247-4249, §4303-4308, 4326-4327.
[3762] Reasons for Judgement, §4250. This observation is repeated in §4253 referring to the same fn 4048.
[3763] See above, §1697; 1800.
[3764] Reasons for Judgement, §4251. See above, §1816-1848, 1849-1878.
[3765] Reasons for Judgement, §4252.

revolution will be challenged below.[3766] As for KHIEU Samphan's claimed access to RF and RY,[3767] it has already been pointed out that there was no evidence to indicate that he had access to these publications and especially that he read each individual issue.[3768] The Chamber also did not explain how KHIEU Samphan's awareness of the speeches made by senior officials on the implementation of the policies demonstrated that he was aware that crimes had been committed.[3769] It did not specify what policies were involved, much less which crimes he became aware of through these speeches. Such speculation by the Chamber must be rejected.

1935. Finally, it based its findings on an interview with KHIEU Samphan of 26 September 1976 where he allegedly declared that "those traitors who remained in Democratic Kampuchea [have] been executed".[3770] If it is possible to imagine that he was referring to members of the ex-KR, there are no details as to whom he meant, when and where these executions would have taken place. Consequently, apart from generalising about KHIEU Samphan's knowledge that people were executed during the DK period, the Chamber has not established beyond reasonable doubt that he was aware that specific crimes were committed.[3771]

1936. With regard to the regulation of marriage, the Chamber found that KHIEU Samphan became aware of the crimes after they were committed,[3772] thereby making reference to § 4273 referring to the remarks attributed to KHIEU Samphan by CHEA Deap on marriage and to his finding that "this [policy] had indeed been implemented" notably within the Ministry of Commerce.[3773] In reality, the Chamber repeated the same arguments as for its findings on the knowledge of the Accused at the material time. The same criticisms therefore apply to its errors: it did not establish either the knowledge of KHIEU Samphan that crimes in relation to marriages were committed either during or after the material times,[3774] nor did it establish his contribution to these crimes. [3775]

[3766] See below, §2001-2030, see in particular the criticisms of §4271-4273 of Reasons for Judgement.
[3767] Reasons for Judgement, §4253.
[3768] See above, §1641-1643.
[3769] Reasons for Judgement, §4253.
[3770] Reasons for Judgement, §4253, fn 13875.
[3771] Reasons for Judgement, §4254.
[3772] Reasons for Judgement, part *18.1.3. Knowledge Arising After the Commission of the Crimes*.
[3773] Reasons for Judgement, §4273.
[3774] See above, §1233-1242.
[3775] See below, §2025-2028.

1937. The alleged access to revolutionary publications did not permit the Chamber to find that the Appellant had knowledge of specific crimes in light of the CPK's actual policy regarding the consent contained in these publications. In addition, the speeches on the increase in the population were in connection with the objective of improving the living conditions of the population, as is apparent from the official documentation and the official positions of the DK. Nor does any meeting report support the finding that KHIEU Samphan was aware of the organisation of forced marriages or rapes in connection with these marriages. The Chamber's findings are thus unfounded and must be reversed.[3776]

Title IV. ERRORS ON THE JOINT CRIMINAL ENTERPRISE

Chapter I. THE JCE IN LAW

1938. The JCE-1 is a form of responsibility which was defined for the first time by the *ad hoc* Courts on the basis of post-World War II texts and case law.[3777] The constitutive elements of this form of responsibility are grouped around an unequivocal common criminal purpose (Section I) and a direct intention to commit a crime (Section II).

Section I. THE CRIMINAL PURPOSE AT THE HEART OF THE *ACTUS REUS*

1939. The Chamber correctly recalled that the *actus reus* of the JCE included three objective factors: a plurality of persons, a common intent of a criminal nature consisting of committing a crime or which involves the perpetration and participation of the accused in the common purpose which must at least correspond to a significant contribution to the commission of the crime as charged.[3778] At the heart of the *actus reus* is the criminal nature of the common purpose (I) which must specifically address the significant contribution forming the basis for the establishment of guilt (II).

I. COMMON CRIMINAL PURPOSE

1940. The legal criterion on which the JCE is based is correctly recalled by the Chamber (A), but its statement of the applicable law does not sufficiently or correctly clarify the specific legal elements on which the JCE litigation in case file 002 (B) is.

A. A correct but incomplete summary of the relevant law in the abstract

[3776] Reasons for Judgement, §4254, 4303-4308, 4326-4327.
[3777] See CB 002/02, §432-437.
[3778] Reasons for Judgement, §3708.

1941. The Chamber correctly noted that "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) crime(s) as a means to achieve an objective that is not necessarily criminal (i.e. "involves").[3779]

1942. This summary of the law, while certainly correct, is very brief and does not establish a legal framework to clarify the specific and central questions of the JCE in case file 002. In fact, the application of the notion of JCE in the context of Case 002/02 involves three complicating factors that bring this form of responsibility into conflict with the cardinal principle of individual responsibility (1). According to the CO, KHIEU Samphan must answer allegations of participation in a large-scale JCE (2), with a non-criminal purpose *per se* (3) and in which the main perpetrators are not necessarily members of the JCE (4). It is worth recalling the legal elements governing these issues.

1. *Nulla poena sine culpa*

1943. The essential principle of individual criminal responsibility was clearly stated in the two founding judgements of international criminal law. Indeed, the International Military Tribunal at Nuremberg stressed the importance of this principle:

> "Article 9, it should be noted, uses the words 'The Tribunal may declare', so that the Tribunal is vested with discretion as to whether it will declare any organisation criminal. This discretion is a judicial one and does not permit arbitrary action, but should be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided".[3780]

1944. In the same vein, the *Tadić* Appeal Judgement stressed that:

> "The basic assumption [...] in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*)".[3781]

[3779] Reasons for Judgement, §3709 (emphasis added).
[3780] *Trial of the Major War Criminals before the International Criminal Tribunal*, 01.10.1946, TMI, vol. I, p.256 (emphasis added).
[3781] *Tadić* Appeal Judgement (ICTY), 15.07.1999, §186 (emphasis added). See also: *Kordic and Cerkez* Judgement (ICTY), 26.02.2001, §364; *Brima* Appeal Judgement (SCSL), 22.02.2008, §72; *Sesay* Appeal Judgement (SCSL), 26.10.2009, §312; *Taylor* Appeal Judgement (SCSL), 26.09.2013, §387.

1945. The JCE is a form of responsibility favoured by prosecutors but dangerous because it is likely to widen the scope of criminal responsibility to the extent of breaking with the principle of individual responsibility. The risk is immense when the notion of JCE is applied in a material scenario where the crimes are far removed from the individual whose responsibility is claimed. This applies to case file 002 to an exceptional degree. The notion of a JCE as outlined in the CO combines each of the elements that can break the link between a JCE participant and the crimes.

2. The precision required in the event of a large-scale common criminal purpose

1946. The question of the applicability of this form of responsibility in the case of a "large-scale" JCE was raised in the *Brđanin* case at the ICTY. The judges of the Chamber had acquitted the accused, in particular arguing:

> The Trial Chamber is of the view that JCE is not an appropriate mode of liability to describe the individual criminal responsibility of the Accused, given the extraordinarily broad nature of this case, where the Prosecution seeks to include within a JCE a person as structurally remote from the commission of the crimes charged in the Indictment as the Accused. Although JCE is applicable in relation to cases involving ethnic cleansing, as the *Tadić* Appeal Judgement recognises, it appears that, in providing for a definition of JCE, the Appeals Chamber had in mind a somewhat smaller enterprise than the one that is invoked in the present case. An examination of the cases tried before this Tribunal where JCE has been applied confirms this view."[3782]

1947. Although the Appeals Chamber recognised that it was possible to assign responsibility in such cases with extraordinary scope, it stressed the strict conditions for the application of the JCE.[3783] Specifically, "The requirement, in such cases, is that the contours of the common criminal purpose have been properly defined in the indictment and are supported by the evidence beyond reasonable doubt".[3784]

[3782] *Brđanin* Judgement (ICTY), 01.09.2004, §355 (emphasis added). See also fn 890: "ICTY cases have applied JCE to enterprises of a smaller scale, limited to a specific military operation and only to members of the armed forces (*Krstić* Trial Judgement, para. 610); a restricted geographical area (*Simić* Trial Judgement, paras 984-985); a small group of armed men acting jointly to commit a certain crime (Tadić Appeal Judgement, paras 232 et seq.; *Vasiljević* Trial Judgement, para. 208); or, for the second category of JCE, to one detention camp (*Krnojelac* Trial Judgement, para. 84)." (emphasis added).

[3783] *Brđanin* Appeal Judgement (ICTY), 03.04.2007, §429-430.

[3784] *Brđanin* Appeal Judgement (ICTY), 03.04.2007, §424 (emphasis added).

1948. The Appeals Chamber also recalled that "JCE is not an open-ended concept that permits convictions based on guilt by association."[3785] Regarding the qualification of the common criminal purpose, it is necessary to:

> "specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims); make a finding that this criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise; and characterize the contribution of the accused in this common plan."[3786]

1949. The Appeals Chamber ended by emphasising the criminal essence of the JCE:

> "Where all these requirements for JCE liability are met beyond reasonable doubt, the accused has done far more than merely associate with criminal persons. He has the intent to commit a crime, he has joined with others to achieve this goal, and he has made a significant contribution to the crime's commission.".[3787]

3. A purpose that is not criminal *per se* but achieved through the commission of crimes

1950. The criminal intent must be specifically characterised in the case of a common purpose that is not criminal *per se*. In principle, the common criminal purpose is classified as criminal because its **main objective, or one of its main objectives, is the committing of crimes**. Thus, according to the typical example in the *Tadić* judgement: "the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill."[3788]

1951. The criminal intent at the centre of individual responsibility is clear, unequivocal and direct. When the purpose is not criminal *per se*, the criminal aspect must always be at the centre of the common criminal purpose. In this case, the individual can only be classified as criminal if the commissioning of one or more crimes is a means to achieve an objective which is not criminal *per se*. In other words, for JCE-1, the test to determine whether a common purpose is criminal in nature can be summarised with the following equation:

> –either the common purpose = the crime (for example "*JCE to murder*")[3789]

[3785] *Brđanin* Appeal Judgement (ICTY), 03.04.2007, §428 (emphasis added).
[3786] *Brđanin* Appeal Judgement (ICTY), 03.04.2007, §430 (emphasis added).
[3787] *Brđanin* Judgement (ICTY), 03.04.2007, §431.
[3788] *Tadić* Judgement (ICTY), 15.07.1999, §196 (emphasis added).
[3789] *Popović et al.* Judgement (ICTY), 10.06.2010, §805.

– or the common purpose = X by perpetrating the crime (for example, "the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb population, as charged in Counts 10 and 11").[3790]

Criminal purpose: legal criterion (1) or (2)	
(1) Consist of committing a crime e.g. with purpose to murder	(2) Involve the commission of a crime e.g. "establish an ethnically Serb territory through the displacement of the Croat and other non-Serb population, as charged in Counts 10 and 11"

4. <u>Link to the main perpetrators who are not necessarily participants in the JCE</u>

1952. The Chamber stated that participants in a JCE can be held responsible for crimes whose primary perpetrators were not the participants in this enterprise.[3791] It erred in law in defining the applicable legal criterion for assessing whether the link is sufficient between the direct perpetrator and one of the participants in this enterprise. It is incorrect to establish as a criterion to be fulfilled that "one JCE participant and that this participant when using a <u>direct perpetrator</u> acted to further the common purpose".[3792]

1953. The Chamber made recourse to the *Brđanin* and *Krajišnik* judgements to support this claim.[3793] However, 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 ("the principal perpetrator" or "*when using the principal perpetrators*").[3794] Therefore, the link must be established with each of the principal perpetrators if the crime is committed by several principal perpetrators. In addition, in the event that a participant is held responsible for acts committed by another person, the ICTY Appeals Chamber insisted on the need to strictly define the criminal purpose:

[3790] *Martić* Judgement (ICTY), 12.06.2007, §445 confirmed on appeal in the *Martić* Appeal Judgement, (ICTY), 08.10.2008, §112. See also: *Krajišnik* Judgement (ICTY), 27.09.2006, §1097; *Prlić et al.* Judgement (ICTY), 29.05.2013, §41; *Brima* Appeal Judgement (SCSL), 22.02.2008, §76, 81-82, 84.
[3791] Reasons for Judgement, §3711.
[3792] Reasons for Judgement, §3711 (emphasis added).
[3793] Reasons for Judgement, §3711, fn 12369.
[3794] *Brđanin* Appeal Judgement (ICTY), 03.04.2007, §430; *Krajišnik* Appeal Judgement (ICTY), 17.03.2009, §225.

"*The Appeals Chamber holds that using the concept of joint criminal enterprise to define an individual's responsibility for crimes physically committed by others requires a strict definition of common purpose. That principle applies irrespective of the category of joint enterprise alleged*".[3795]

B. Extension of the scope of the joint criminal enterprise over time

1954. The Chamber correctly recalled that "(Thus, the common purpose, plan or design of a JCE can be fluid and change over time to include additional crimes".[3796] However, the standard applicable regarding circumstantial evidence (1) and the requirements in terms of accuracy regarding the order of events (2) must be remembered.

1. Circumstantial evidence

1955. The Chamber recalled that the agreement to contribute to the common criminal purpose for the new crimes can be deduced from circumstantial elements especially in the situation where the participants "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".[3797] The Chamber relied on the *Krajišnik* Judgement from the ICTY which is a declaratory case law judgement. The judges did not provide any legal source to uphold this assertion that forms part of an *in concreto* analysis. It is thus advisable to recall that first and foremost it should be a case of the only reasonable finding possible.

2. Specific factual findings and order of events required

1956. In the *Krajišnik* case, the Appeals Chamber reversed the guilty verdict against *Krajišnik* regarding new crimes by sanctioning the lack of grounds of the Trial Chamber, especially regarding the order of events. It thus sanctioned the estimation of the factual findings of the Trial Chamber, which "*was required to precisely find how and when the scope of the common objective broadened*", and also had to establish "*at which point in time the leading members of the JCE became aware of each of the various expanded crimes*" and "*when the members of the local component became aware of the expanded crimes*".[3798]

II. A NECESSARY SIGNIFICANT CONTRIBUTION TO THE COMMISSION OF THE ALLEGED CRIMES

[3795] *Krnojelac* Appeal Judgement (ICTY), 17.09.2003, §116 (emphasis added).
[3796] Reasons for Judgement, §3709.
[3797] Reasons for Judgement, §3709 fn 12361 referring to the *Krajišnik* Appeal Judgement (ICTY), 27.09.2006, §1098.
[3798] *Krajišnik* Appeal Judgement (ICTY), 17.03.2009, §171, 175-176, 203.

1957. The Chamber erred in law by finding on the existence of a general principle according to which participation in a JCE could take the form of a culpable omission (A). Furthermore, in the context of a common purpose that was not in itself criminal, the contribution to the common purpose should focus on its criminal dimension (B).

A. Participation in the common purpose by culpable omission

Lack of valid legal basis

1958. The Chamber erred in law by not basing its assertion on the existence of a general principle applied by the ICT according to which the commission of a crime may result from a culpable omission from the time when there is a legal duty to act, which particularly applies to the mode of responsibility of the JCE.[3799] It has not provided any solid legal foundation for this general assertion. It merely referred, on the one hand, to its own findings in the Judgement of Case 002/01 and, on the other hand, to clearly erroneous paragraphs of the Reasons for Judgement of Case 002/02 (§ 690 on imprisonment and § 701 on torture).

1959. Regarding its motivation in the Judgement of Case 002/01, the Chamber did not carry out its own evaluation but simply inserted a footnote referring to three items of case law from the ICTY Appeal Chamber and one item of case law from the ICTR Appeal Chamber.[3800] However, the ICTY *Kvočka* Appeal Judgement does not formulate any "general principle". The finding in §663 from the *Blaškić* Appeal Judgement that is referred to is circumscribed to the theory of the hierarchical superior.[3801] Regarding the *Galić* Appeal Judgement, the reference indicated in §168 is clearly erroneous because this paragraph deals with the matter of cumulative convictions and not with the matter of culpable omission. As for § 175, it simply refers to the ICTR *Ntagerura* Appeal Judgement, which states that the parties did not contest the fact that an accused can be held criminally responsible for an omission.[3802] Furthermore, the *Galić* Appeal Judgement concerns

[3799] Reasons for Judgement, §3703.
[3800] Judgement 002/01, 07.08.2014, fn 2159: "*Kvočka et al* Appeal Judgement, §187, 421 and 556. As a matter of general principle, the ICTY and ICTR Appeals Chambers have consistently held that a crime may be committed by culpable omission where there is a duty to act, and that an accused may be held directly responsible for contributing to a crime by omission where an accused had a duty to act (see e.g. *Blaskić* Appeal Judgement, para. 663; *Galić* Appeal Judgement, paras 168, 175; *Ntagerura et al.* Appeal Judgement, para. 334)".
[3801], *Blaškić* Appeal Judgement (ICTY), 29.07.2004, §663.
[3802] *Ntagerura* Appeal Judgement (ICTR), 07.07.2006, §334.

liability as a result of giving orders. In the *Ntagerura* case, it was a question of culpable omission as the main perpetrator and not under JCE.[3803]

B. Participation in the criminal common purpose

1960. The Chamber erred in law by assessing the contribution of the participant in the JCE in the context of a common purpose not in itself criminal in view of his contribution to the common purpose in its non-criminal dimension.[3804] A participant in a JCE must have made a significant contribution to the commission of the crime at the core of the JCE.[3805] This is logical because a causal link must be established between their participation in the JCE and the commission of the crime. Post-war case law in the *Ponzano* Case stated that "the defendant's involvement in the criminal acts must form a link in the chain of causation".[3806]

1961. In its presentation of the applicable law, the Chamber first of all held that "An accused's participation [...] may take the form of assistance in or contribution to the execution of the common purpose". [3807] It therefore did not consider that a contribution to the crime was necessary and added that "Such a contribution need not be an indispensable condition without which the crimes could or would not have been committed."[3808] However, it recalled that "a JCE member's involvement in the crime must form a link in the chain of causation".[3809]

1962. At the time of applying the law to the facts, the Chamber also found that "the appropriate standard is whether the accused participated in the common purpose which amounted to or involved the commission of crimes, and by his or her acts or omissions made a significant contribution to the commission of crimes encompassed by the common purpose".[3810] However, it was in the application of this criterion that the Chamber erred because, far from assessing the Appellant's

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[3803] *Ntagerura* Appeal Judgement (ICTR), 25.02.2004, §659.
[3804] Reasons for Judgement, §4255-4256.
[3805] *Krajišnik* Appeal Judgement (ICTY), 17.03.2009, §696 ("*What matters in terms of law is that the accused lends a significant contribution to the commission of the crimes involved in the JCE.* ", emphasis added), referring to the *Brđanin* Appeal Judgement (ICTY), 03.04.2007, §430.
[3806] See *Tadić* Appeal Judgement (ICTY), 15.07.1999, §190 citing the *Trial of Feurstein and others, Proceedings of a War Crimes Trial held at Hamburg, Germany,* (4 to 24 August 1948), judgement handed down on 24 August 1948 (original transcriptions held at the Public Record Office, Kew, Richmond; copy available from the Library of the International Tribunal).
[3807] Reasons for Judgement, §3710.
[3808] Reasons for Judgement, §3710.
[3809] Reasons for Judgement, §3710.
[3810] Reasons for Judgement, §4255 (emphasis added).

significant contribution to the commission of the crimes, in reality it merely found on the Accused's significant contribution to the common purpose.[3811] We will see in detail how it essentially based the Appellant's contribution to the crimes on his participation in non-criminal aspects of the common purpose. [3812]

Section II. *MENS REA*: THE INTENTION TO COMMIT A DELIBERATE CRIME AT THE CORE OF THE COMMON PURPOSE

1963. The Chamber erred in law by stating that the *mens rea* of the JCE could be characterised by the sole intention of **participating** in the common purpose and the intention to commit the crimes that arose from it.[3813] In reality, the law requires that the accused must therefore have had both the intention of participating in the **execution** of the criminal aspect of the common purpose and that of committing the crime.[3814] In fact, in JCE-1 the purpose is the crime and therefore, logically, the intention of participating in the purpose and the intention of committing the crime are conflated.

1964. To take the example presented in *Tadić*: "the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill".[3815] Even in the case of JCE-1 having a non-criminal purpose in itself, the intention of participating in the execution of the purpose in its criminal dimension is at the core of the *mens rea*. The criterion for JCE-1 is clear: "what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators)".[3816]

1965. In the Appeal Judgement of Case 002/01, the Supreme Court had rejected this means of appeal raised by the Defence by finding that it was not an error of law because the Chamber had required "in the same paragraph that participants in a JCE must share the intent of the direct perpetrator, that is the intent to commit a specific crime".[3817] However, this does not at all change the fact that the intention required as defined by the Chamber in Case 002/01 and Case 002/02 is incorrect. The

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[3811] Reasons for Judgement, §4257-4278.
[3812] See below, §2001-2030.
[3813] Reasons for Judgement, §3712, 4279.
[3814] *Stanišić & Župljanin* Appeal Judgement (ICTY), 30.06.2016, §375; *Popović et al.* Appeal Judgement (ICTY), 30.01.2015, §1369; *Munyakazi* Appeal Judgement (ICTR), 28.09.2011, §160; *Brđanin* Appeal Judgement (ICTY), 03.04.2007, §365.
[3815] *Tadić* Appeal Judgement (ICTY), 15.07.1999, §196.
[3816] *Tadić* Appeal Judgement (ICTY), 15.07.1999, §228.
[3817] Case 002/001 Appeal Judgement, 23.11.2016, §1053.

injury is real because this incorrect formulation of the law introduces a distinction between the purpose and the crimes. Above all, in this case, the Chamber has deduced the intention to commit the crimes from mere participation in the purpose. However, in the matter of JCE-1, the purpose should be the crimes and in the context of a purpose that is non-criminal in itself, the contribution should be to the criminal aspect of the purpose. The distinction made by the Chamber that leads to a dilution of the criminal intention required is incorrect.

Chapter II. ERRORS COMMITTED TO BYPASS THE *ACTUS REUS*

Section I. ORDER OF EVENTS OF THE JCE AND DEFINITION OF THE COMMON PURPOSE

1966. In Case 002/01, the Supreme Court had emphasised the crucial issue of the legal characterisation of the common purpose:

> "shows that the common purpose is at the core of this mode of liability, as it is this element that ties the members of the JCE together and provides the justification for the mutual imputation of the members' conduct that gives rise to criminal responsibility. Nevertheless, to justify such mutual imputation, it is not enough that those who agree to act in concert merely agree to pursue any common purpose. What is required is that they agree to a common purpose of a criminal character".[3818]

1967. It is enlightening that JCE-1 in case file 002 was subjected to extreme distortions throughout the stages of the proceeding. The purpose of all these distortions was to make up for the non-criminal nature *per se* of the CPK's political purpose. These manipulations concerned the formulation of the applicable legal criterion to characterise the common purpose as criminal (I). Throughout the procedure, the common purpose in the facts also changed and mutated by means of the concept of "policy". This concept is alien to law but has been chosen by all the ECCC judges who found on case file 002 to dilute the criminal intention necessary to characterise the criminal nature of the common purpose (II).

I. REPEATED ATTEMPTS TO EXPAND THE SPECTRUM OF THE COMMON PURPOSE IN LAW TO INCLUDE CRIMES UNRELATED TO THIS PURPOSE

1968. The law on JCE has been distorted by the Judges of case file 002. The procedure has been punctuated by alterations made to the criterion applicable to lead to a common purpose that was not criminal *per se* ultimately taking on a criminal nature. These incorrect and dangerous case law creations took place in breach of the fundamental principles of the law. Above all, they expressed

[3818] Case 002/001 Appeal Judgement, 23.11.2016, §789 (emphasis added).

the bias of the Judges of case file 002, who were ready to change, in contempt of the equity of the proceeding, the rules regarding responsibility in order to arrive at conviction. Thus, it was first of all asserted that the purpose was criminal if it resulted in crimes (A), and then if the commission of unintentional and unnecessary crimes was likely (B).

A. Incorrect concept of the CO and in Judgement 002/01: the purpose is criminal if it resulted in crimes

1969. The arguments dedicated to the common purpose can be found at three levels in the CO. First of all, there is a sub-section "Factual Findings Of Joint Criminal Enterprise" in the first section of the CO entitled "Factual Findings".[3819] Then, the section on applicable law restricts itself to mentioning JCE-1 and 2 as forms of commission applicable to the ECCC.[3820] Finally, the section on the legal characterisation of the facts contains a sub-section "Joint Criminal Enterprise".[3821] In the CO, the section related to the applicable law correctly defines joint criminal purpose as that "which resulted in and/or involved the commission of a crime within the ECCC's jurisdiction. ".[3822]

1970. In the Case 002/01 Trial Judgement, the Chamber interpreted the CO as characterising the common purpose as criminal because although it "was not in itself necessarily or entirely criminal", "Targeting Policy" [MOP and measures against specific groups] existed which resulted in and or involved crimes".[3823] In the section on the legal characterisation of the facts, the Chamber had qualified the common purpose as criminal "a JCE existed which resulted in the commission of the crimes".[3824] It thus qualified the purpose as "criminal" because "the policies formulated by the Khmer Rouge involved the commission of a crime as a means of bringing the common plan to fruition".[3825]

1971. The Defence had therefore lodged an appeal against this incorrect legal method, which had permitted the Chamber to criminalise the common purpose outside any legal framework to find on the criminal responsibility of KHIEU Samphan for the crimes that were the subject of Case

[3819] CO, §156-220.
[3820] CO, §1318.
[3821] CO, §1521-1542.
[3822] CO, §1521.
[3823] Judgement 002/01, 07.08.2014, §778.
[3824] Judgement 002/01, 07.08.2014, §813.
[3825] Judgement 002/01, 07.08.2014, §804 (emphasis added). See also §835.

002/01.[3826] The Case 002/01 Appeal Judgemgent sanctioned this interpretation by asserting on this point that "the Trial Chamber has also erred in law in its statement of the applicable standard, stating that crimes that merely resulted from the implementation of the common purpose would be included.".[3827]

B. Incorrect concept in the Case 002/01 Appeal Judgement: the purpose is criminal if the commission of unintentional and/or unnecessary crimes is likely

1972. The Supreme Court in turn rushed into a rescue operation of the Chamber. This operation ended in the formulation of case law radically altering JCE law regarding the criterion determining the criminal nature of the purpose. In fact, the Supreme Court hindered the well-established jurisprudence of ad hoc Tribunals by expanding the legal criterion that applies to determine whether a common purpose is of a criminal nature. In the Case 002/01 Appeal Judgement, it is true that in §807 merely recalls the applicable law not challenged by the Defence as stated in the case law of the ICT. On the other hand, in a radical manner and inconsistent with the law that it had just cited, the Supreme Court stated in a single paragraph (§ 808) a new legal criterion to characterise the criminal purpose of the JCE without any reference of its position.

1973. According to the Supreme Court, the purpose is criminal even when the participants form an agreement to carry out a non-criminal purpose, even without having the intention for the crime to be committed and even without the commission of the unintended crime being certain: an accepted risk is enough to pursue the non-criminal common purpose that may lead to the commission of crimes.[3828] In this incorrect legal construction, the criminal nature of the project essentially depends on the unilateral intention of individuals possibly unrelated to the common purpose of committing crimes to achieve the non-criminal objective. The Supreme Court had even explained:

> "To the extent that those agreeing on the common purpose are not expected to carry out the actus reus of the crime themselves, but rely on others to do so, this may be construed as a form of delegated authority for the direct perpetrator to make a decision as to the ultimate implementation of the actus reus".[3829]

[3826] AB 002/01, §430-516, 2458-2468.
[3827] Case 002/01 Appeal Judgement, 23.11.2016, §849.
[3828] Case 002/01 Appeal Judgement, 23.11.2016, §808.
[3829] Case 002/01 Appeal Judgement, 23.11.2016, §809.

1974. Fortunately, the Chamber in Case 002/02 did not follow this reasoning contrary to the law of JCE and followed the Defence's arguments.[3830] In fact, it returned to the formulation of a correct legal criterion to characterise the criminal common purpose in the context of JCE. However, it made an application of the law to the facts that reveals an alteration of the law of JCE that was just as unacceptable. The introduction of the concept of a "policy" to characterise the purpose as criminal is the foundation of the operation of dilution of criminal intent that was continuously expressed in case file 002.

II. CONSTANT CHANGES TO THE "CRIMINAL" PURPOSE IN CONTEMPT OF THE LAW

1975. In Case 002/02, the Chamber correctly defined the legal criterion applicable to characterise the criminal common purpose in the abstract. However, it committed errors in the application of the law of JCE to the facts of this case. The definition of the common purpose has changed throughout the proceeding. The common purpose was padded out and expanded in the Reasons for Judgement 002/02, making the common purpose even more vague (A). The Chamber reformulated the law of JCE by using the concept of a "policy" unrelated to the law of JCE. The concept of a policy is at the centre of the theory of JCE in case file 002 and the connection of the crimes with policies and then with the shared purpose is at the centre of the vagueness of the JCE in case file 002 (B).

A. A common purpose that was wide and changed throughout the proceeding

1976. In the CO, the purpose on which the JCE is based is the "shared purpose to implement rapid socialist revolution by in Cambodia through a 'great leap forward', and to defend the Party against internal and external enemies, by whatever means necessary".[3831]

1977. In Judgement 002/01, the common purpose is that of:

– "to liberate Cambodia and create a socialist society in four phases";
– "implement rapid socialist revolution through 'a great leap forward' and defend the Party against internal and external enemies, by whatever means necessary" citing the CO;
– "to rapidly build and defend the country through a socialist revolution";
– "to implement a socialist revolution in Cambodia".[3832]

[3830] Reasons for Judgement §3715.
[3831] CO, §156, 1524.
[3832] Judgement 002/01, 07.08.2014, §724, 777, 804,

1978. In Case 002/01 Appeal Judgement, the common purpose is "in the case at hand (as identified by the Chamber) of implementing a socialist revolution".[3833]

1979. In the Reasons for Judgement of Case 002/02, the Judges further modified the content of the purpose by defining it in the following manner: "the 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 homogeneous Khmer society of worker-peasants. ".[3834] The Chamber also considered that:

> "the successful implementation of the common purpose -- and therefore the transformation of the country into a pure, revolutionary society -- 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. In Section 16.3 the Chamber will assess the categories of real or perceived enemies whose elimination was central to the common purpose".[3835]

1980. Therefore, the common purpose as defined by the Chamber in Case 002/02 is unclear. The Chamber now seems to isolate the objective of "eliminating the counter-revolutionary elements" to place it at the core of the common purpose. It also adopted an approach to the common purpose that varies. Thus, depending on the crimes, the common purpose varies between that:

> – "of furthering the common purpose of rapidly implementing socialist revolution through a 'great leap forward' in order to build the country defend it against enemies and radically transform the population into a homogeneous society of worker-peasants. ";[3836]
>
> – "of rapidly implementing socialist revolution through a 'great leap forward' in order to among other things defend the country against enemies and radically transform society. ";[3837]
>
> – "of rapidly implementing socialist revolution through a 'great leap forward' in order to among other things defend the country against enemies and radically transform the population into an atheistic and homogeneous Khmer society";[3838]
>
> – "of rapidly implementing socialist revolution through a 'great leap forward' in order to among other things defend the country against enemies and radically transform the population into a homogeneous Khmer society;[3839]
>
> – "of rapidly implementing socialist revolution through a 'great leap forward' in order to, among

[3833] Case 002/01 Appeal Judgement, 23.11.2016, §815-816.
[3834] Reasons for Judgement, §4068.
[3835] Reasons for Judgement, §3743.
[3836] Reasons for Judgement, §3918, 4005, 4011 (emphasis added).
[3837] Reasons for Judgement, §3976, 3978, 3979, 3981, 3983, 3985, 3986, 4066.
[3838] Reasons for Judgement, §3993, 3994, 3995, 3996, 3997 (emphasis added).
[3839] Reasons for Judgement, §4003, 4004 (emphasis added).

other things, defend the country against enemies and transform the population into an atheistic and homogeneous Khmer society of worker-peasants";[3840]

– "of rapidly implementing socialist revolution through a 'great leap forward' in order to, among other things, defend the country against enemies and transform the population into a homogeneous Khmer society of worker-peasants".[3841]

B. A criminal purpose by means of 'policies'

1. Alteration of the law of JCE with the introduction of "policies" in the legal characterisation of the common purpose

a. Introduction of policies in the CO

1981. According to the CO, to achieve the common purpose, five policies were defined by the CPK leaders. In the "facts" section, the foundations of the theory of JCE in case file 002 are already laid: there is the common purpose **and** five policies to achieve it.[3842] The concept of policy thus appears for the first time in the CO. In the "characterizing the facts" section, the crimes are then attached to the policies because, according to the Co-Investigating Judges, their application consisted in the commission of crimes, or involved their perpetration.[3843] This formulation is vague and does not clarify their legal nature.

1982. Either their application consisted in the commission of crimes, while the policy comes down to crimes. For example, a policy aimed at killing. Or their application involved the perpetration of crime. Here, we have moved away from the common purpose by introducing a supplementary step to arrive at the crimes. The legal test (consisted in or involved) should not be based on policies but on the common purpose. However, the CO never states that the policies are part of the common purpose. The starting point for the legal reasoning is therefore incorrect. The legal status of these policies is problematic. The CO remains silent on the subject and does not give any answers.

b. The policies in Judgement 002/01

1983. Judgement 002/01 gives some clarifications about the theory of JCE in case file 002 and particularly regarding the problematic role of the policies in relation to the law:

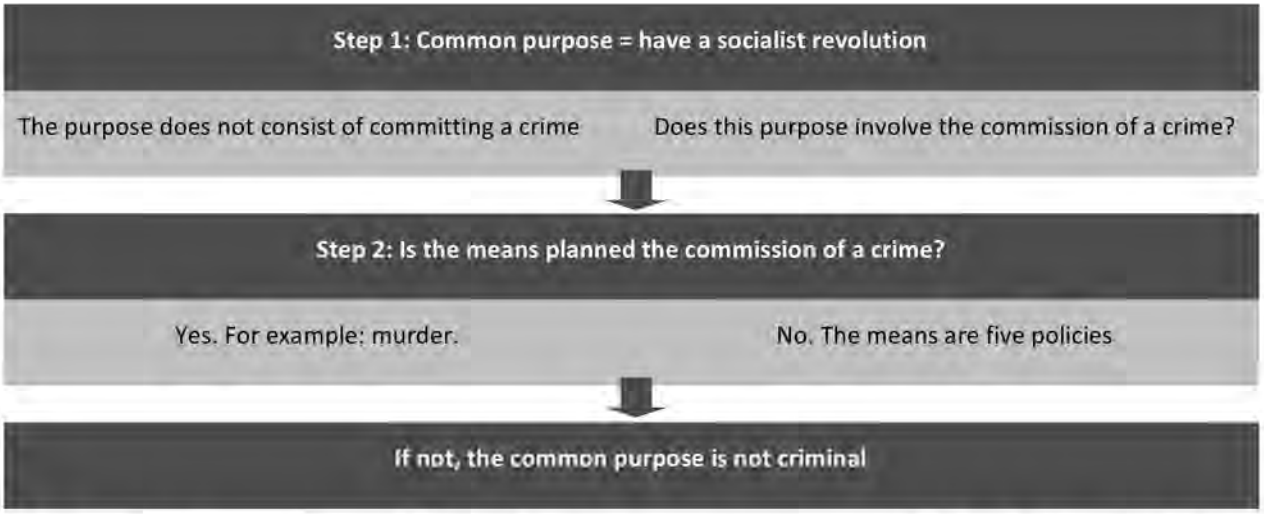
[3840] Reasons for Judgement, §4021 (emphasis added).
[3841] Reasons for Judgement, §4053, 4056, 4060 (emphasis added).
[3842] CO, §156-157.
[3843] CO, §1524-1525.

> "This common purpose was not in itself necessarily or entirely criminal. The Closing Order, however, alleges that participants implemented the common purpose through the Population Movement Policy (Section 14.2) and Targeting Policy (Section 14.3) which resulted in and/or involved crimes".[3844]

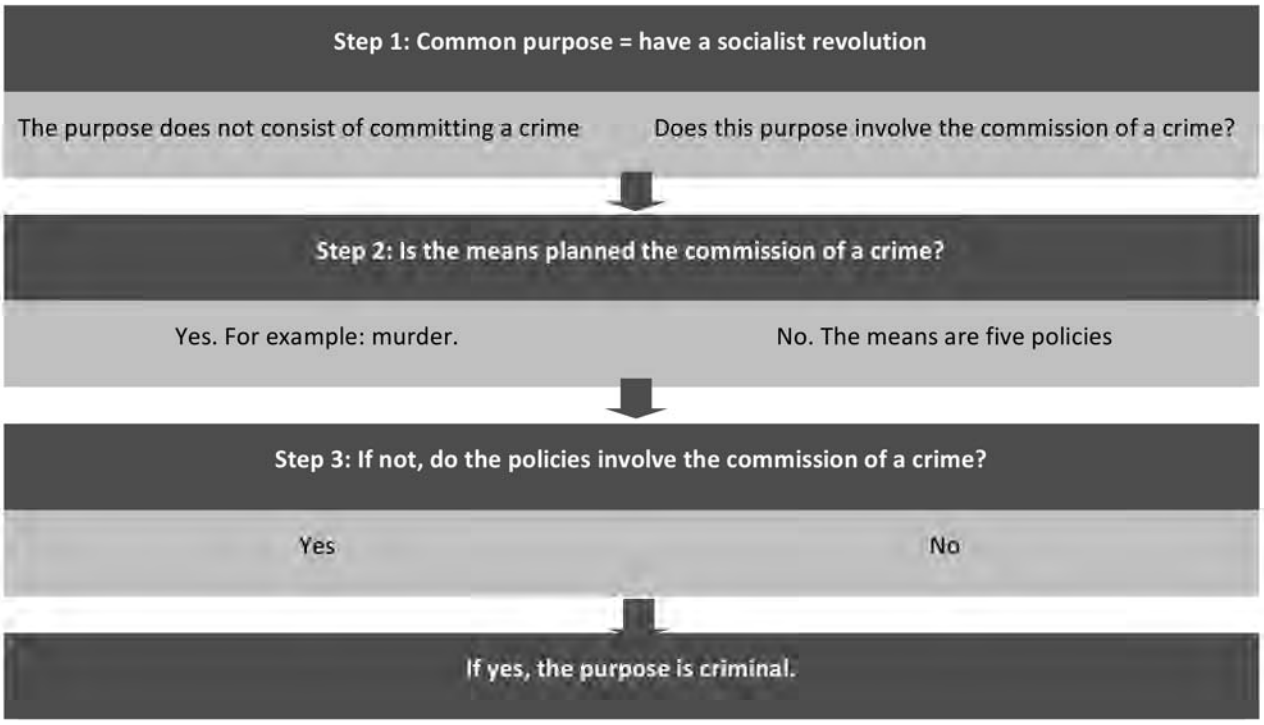
1984. Judgement 002/01 shows that the starting point for the legal reasoning are the policies and not the common purpose. However, the Chamber had correctly recalled the *actus reus* which requires "a common purpose which amounts to or involves the commission of a crime".[3845] In law, it is the common purpose that has to consist in or involve the commission of crimes. However, in the judgement, it is part of the policies. Therefore, it altered the legal criterion applicable by adding a supplementary step moving the common purpose away from the crimes.

1985. The following diagrams illustrate how the addition of a third step not provided for by law makes it possible to characterise the non-criminal common purpose as criminal. The first diagram presents the correct legal reasoning applicable which led to the finding that the purpose was not criminal.

[3844] Judgement 002/01, 07.04.2014, §778.
[3845] Judgement 002/01, 07.04.2014, §692.



1986. The next diagram contains an additional step in the reasoning not provided for by law which allows the judges to characterise the purpose as criminal. This is the reasoning that the Chamber followed.



c. The policies in Case 002/01 Appeal Judgement and Case 002/02

1987. In Case 002/01 Appeal Judgement, the Supreme Court explained that "the common purpose in the case at hand (as identified by the Chamber) of implementing a socialist revolution must be seen in the context of the CPK policies".[3846] It added:

> "While the Trial Chamber did not expressly state that these policies were actually *part of* the common purpose in the sense of the criminal law – rather, they seemingly distinguished between the (non-criminal) common purpose on one hand and the policies on the other hand – it is nevertheless clear that, in the Trial Chamber's understanding, the policies that were at issue at trial were intrinsically linked to the implementation of the socialist revolution in Cambodia".[3847]

1988. The Supreme Court thus created a concept of "policies intrinsically linked" to the implementation of the common purpose. This concept is not defined. In Case 002/02, the Chamber did not find clearly on establishing whether these policies formed part of the common purpose. Having said this, it possible to deduce from its reasoning that the common purpose and the policies are two different concepts that are not confused because the policies are the means of "implementation" of the purpose. In the Case 002/01 Appeal Judgement, the Supreme Court stated that the policies were confused with the legal concept of "means":

> "It is in this context that the Trial Chamber's finding that the common purpose was to be implemented 'by all means necessary' has to be understood – the 'means' at issue in the case at hand were the population movement and targeting policies. Thus, while the Trial Chamber's findings may lack precision, there can be no doubt that it was the criminal aspect of the two policies that was at the core of [Case 002/01] – and not just 'any means necessary' to implement the socialist revolution. Thus understood, the common purpose of implementing a socialist revolution through these policies was indeed criminal. Put differently, given that the common purpose was to be achieved through the commission of crimes, as encompassed by the policies, the objective of implementing a rapid socialist revolution in Cambodia was indeed criminal".[3848]

1989. In this spontaneous legal construction, the Supreme Court considered that the policies had a criminal and a non-criminal aspect. It derived the criminal nature of the purpose from "the criminal aspect of the two policies that was at the core of [Case 002/01]".[3849] According to its reasoning, first of all it had to demonstrate the existence of a policy and then identify the crimes that "were encompassed by the common purpose in the sense that the population movement policy"

[3846] Case 002/01 Appeal Judgement, 23.11.2016, §815 (emphasis added).
[3847] Case 002/01 Appeal Judgement, 23.11.2016, §815 (emphasis added).
[3848] Case 002/01 Appeal Judgement, 23.11.2016, §816 (emphasis added).
[3849] Case 002/01 Appeal Judgement, 23.11.2016, §816.

"amounted to or involved the commission of those crimes, applying the principles set out above"[3850].

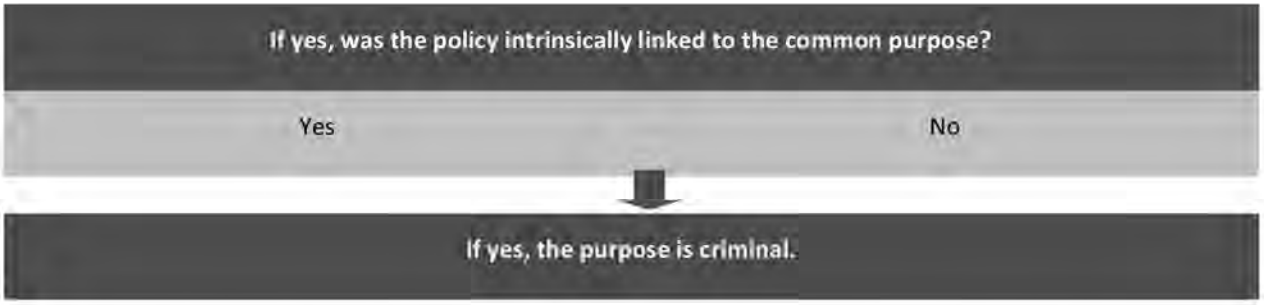
1990. The Supreme Court endorsed the theory of JCE implemented in the CO and then taken up by the Chamber by clarifying the concept of policies "intrinsically linked to the common purpose" to introduce crimes into the common purpose by remodelling the element that constituted the common purpose. This arrangement of law took place outside any legal framework and even changed the framework of the prosecution. It cannot be pursued without breaching the equity of the proceeding.

1991. In the Reasons for Judgement 002/02, the Chamber stated that the ultimate determination of "whether the common purpose involved the commission of crimes, and therefore whether it was criminal in character, will be made upon examination of its implementation through the charged policies (Section 16.4: Implementation of the Common Purpose)".[3851] The Chamber therefore used the incorrect legal reasoning of the Supreme Court to determine whether the common purpose involved the commission of crimes:

> "The Chamber finds that the expression "by whatever means necessary" refers in this case to the policies through which socialist revolution in Cambodia was implemented. The Chamber will examine below whether these policies existed [1], whether they encompassed the commission of crimes [2] and whether they were intrinsically linked to the common purpose [3], thereby rendering it criminal in character.".[3852]

1992. The starting point is therefore explicitly the policies. The purpose is relegated to a secondary role. The new test applied by the Chamber can be outlined as follows:

[3850] Case 002/01 Appeal Judgement, 23.11.2016, §849.
[3851] Reasons for Judgement, §3743 (emphasis added).
[3852] Reasons for Judgement, §3864.



1993. This is reasoning carried out in reverse to that which should prevail on establishing the elements constituting a mode of responsibility in a criminal trial. It is unfounded in law and, above all, it involves a presumption of guilt contrary to the rules of criminal procedure. Furthermore, in this concept of the common purpose viewed solely through the prism of the implementation of a policy (or policies), the Chamber indirectly introduced a concept of probability of commission of crimes unrelated to JCE-1. In fact, the implementation of the policy depends on who is executing it, irrespective of the initial objective of the common purpose. In addition, the Chamber moved the level of contribution to the JCE to a stage that does not exist in the elements that constitute JCE-1 either.

2. <u>Vague policies that are drawn out and full of holes</u>

1994. The "Factual Findings Of Joint Criminal Enterprise" section in the CO starts by stating the common purpose by means of a formulation that is drawn out and leads to confusion: rapid implementation of a socialist revolution in Cambodia, by all means necessary through a "great leap forward", **and** by defending the Party against internal and external enemies.[3853] In addition to the common purpose, according to the CO, there were five policies for achieving the common purpose:

> "To achieve this common purpose, the CPK leaders *inter alia* designed and implemented the five following policies:
> - The repeated movement of the population from towns and cities to rural areas, as well as from one rural area to another;
> - The establishment and operation of cooperatives and worksites;
> - The re-education of 'bad-elements' and killing of 'enemies', both inside and outside the Party ranks;
> - The 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; and

[3853] CO, §156.

- The regulation of marriage".[3854]

1995. First of all, the link between the common purpose and the policies is unclear. The policy of destroying the enemy seems to be have been elevated to the common purpose.[3855] Then, conceptually, the policies have never been clearly defined. For example, the Co-Investigating Judges stated that the policy of creating and operating cooperatives and worksites "was to further the policy relating to detecting, defending against, re-educating and 'smashing' the enemy as set out below".[3856] In addition, they also introduced **objectives** into the policies that are not the common purpose either. For example, they stated in §207 of the CO: "An objective of this policy was to establish an atheistic and homogeneous society without class divisions abolishing all ethnic national religious racial class and cultural differences". They also introduced another policy as an objective of this policy: "Another objective of this policy was to eliminate enemies and to destroy certain groups as such in whole or in part". The confusion is extreme between policy, objective and common purpose.

1996. In Judgement 002/01, the Chamber also mentioned "objectives for the common purpose" in addition to the policies: "this common purpose was to rapidly build and defend the country through a socialist revolution".[3857]

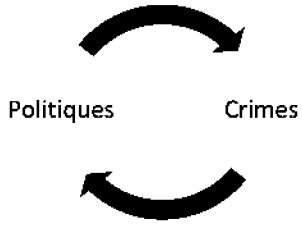
1997. In the Case 002/01 Appeal Judgement, the Supreme Court also found on the objective of the project in these terms: "the enslavement of population was one of the principal objectives of the Khmer Rouge regime".[3858]

1998. In the Reasons for Judgement 002/02, the Chamber raised the policy on enemies to place it at the core of the common purpose.[3859] It would seem that it has mixed together all these "concepts" of common purpose, policies and objectives to make the common purpose even less clear.

3. Circular reasoning leading to syllogism

1999. Finally, the Chamber committed errors by outrageously using a syllogism: as there were crimes, there was a policy; as there was a policy, there were crimes.

[3854] CO, §157.
[3855] See above, §1979-1980.
[3856] CO, §169.
[3857] Judgement 002/01, 07.08.2014, §777.
[3858] Case 002/01 Appeal Judgement, 23.11.2016, §828.
[3859] Reasons for Judgement, §3743.



2000. This extreme confusion and these incessant shifts in meaning of the common purpose illustrate the extent to which it was difficult to connect the crimes with KHIEU Samphan, which led to errors in characterising the *actus reus* and the *mens rea* necessary to find on his responsibility under JCE.

Section II. ERRORS REGARDING THE CONTRIBUTION OF KHIEU SAMPHAN

2001. The reminder of the conditions in which it is possible to find on the responsibility of an accused under JCE highlights the errors committed by the Chamber to bypass the *actus reus* in its application of this mode of responsibility to the Appellant. In fact, it had to establish the *actus reus* in the case of KHIEU Samphan by determining: 1) the common purpose of a criminal nature consisting of committing the crimes or that involved their perpetration, 2) the group of people with whom the criminal purpose had been implemented, 3) the significant contribution of the Appellant to the commission of the alleged crimes. However, it committed errors in the examination on these three levels.

2002. At the end of its reasoning, it seemed in fact that the Chamber made a shift in meaning that led it to commit errors of fact and of law. Having introduced a supplementary stage through the policies, it wrongfully found that the support and contribution to the non-criminal common purpose of "implementing a socialist revolution in Cambodia 'by whatever means necessary'"[3860] were sufficient to find on KHIEU Samphan's significant support and contribution to the criminal policies that it determined. As seen above,[3861] its errors on the role of the Appellant are the result of its desire to artificially connect them with these criminal policies. This reasoning provoked in its legal characterisation several difficulties that were at the origin of the errors committed.

[3860] Reasons for Judgement, §3864.
[3861] See above, §1604-1803.

2003. First of all, the Chamber did not establish beyond reasonable doubt the existence of the policies which it said were criminal or the planned criminal aim of the CPK's political purpose.[3862] It tried to do so by introducing the polymorphous and shifting concept of "eliminating the enemy", but at the cost of basic factual errors, particularly by neglecting the armed hostility.[3863] Then, it did not determine the precise link between the members of the common purpose and all the perpetrators of the crimes. Finally, it erred by creating confusion between participation in the common purpose and contribution to the crimes.

A common purpose that was incorrectly defined because it was based on the crimes

2004. As we have seen by examining the law, since this is a case file on such a wide-reaching case, the Chamber should have defined "the contours of the common criminal purpose...properly" and established it "beyond reasonable doubt"[3864] to determine how KHIEU Samphan had personally contributed to it. The multitude of variations of the common purpose throughout the Reasons for Judgement attests to the Chamber's failings on this point.[3865] It also reveals the impossibility of characterising the socialist revolution as criminal in itself.

2005. The reason why the Chamber was unable to give a clear and precise definition of the common purpose is that it did not start with the political purpose of the CPK to define it but with the occurrence of the crimes to deduce the five criminal policies from it. This reverse reasoning is the incorrect foundation of these policies created from all the documents for the purposes of securing a conviction. In this case, as the Chamber had considered that these were policies implementing the common purpose that was of a criminal nature, it should, in order to follow its logic, have indicated how KHIEU Samphan had contributed to the criminal aspects and therefore to the crimes which, according to it, these policies involved.

2006. However, when it was not implementing incorrect constructions to find on the existence of these policies, the Chamber found on the criminal nature of aspects of the political purpose of the CPK by misrepresenting this purpose and distorting the evidence regarding it.[3866] In fact, it was not a question for it to see how the common purpose involved crimes but how it had to shape the alleged

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[3862] See above, §1438-1603.
[3863] See above, §1451-1488.
[3864] *Brđanin* Appeal Judgement (ICTY), 03.04.2007, §424.
[3865] See above, §1976-2000.
[3866] See above, §1438-1603.

policy in order to include the crimes in it. This is the basic starting error that it committed, which invalidates its entire reasoning and its findings on the existence of the different policies.

2007. The Chamber also committed errors in its findings on the links between the perpetrators of the crimes and the members of the JCE. As we have seen above, in terms of case law, it had to establish that one of the participants in the enterprise had made use of all the main perpetrators of the specific crimes. However, regarding the crimes in the cooperatives, those concerning the Cham and the Vietnamese, which took place in different geographical areas without the main perpetrators having been identified, the Chamber did not establish these links. In doing so, it did not give any grounds for its decision and its findings on the Appellant's responsibility under JCE for these crimes are invalid.

The Appellant's participation in the common purpose as other than a contribution to the crimes

2008. It should be remembered to paraphrase the *Brđanin* Appeal Judgement that the Chamber could not simply find that the Appellant had "associated with criminal persons"; it had to establish that he "had the intent to commit a crime" and "that he joined with others to achieve this goal, and he has made a significant contribution to the crime's commission".[3867] However, in its findings about the role and the alleged contributions, the Chamber essentially found on KHIEU Samphan's support for the criminal aspects of the policy due to his association with members of the Standing Committee[3868] and his intent to commit the crimes and to contribute to them through his official speeches during DK or statements made long after the facts and his functions nonetheless in relation to non-criminal aspects of the common purpose.[3869] This reasoning from the Chamber has of course led to numerous errors in its findings regarding KHIEU Samphan's contribution to the JCE. Failing to be able to determine a specific action of KHIEU Samphan characterising his contribution to criminal aspects of the common purpose, the Chamber had recourse to ruses to include KHIEU Samphan in collective responsibility contrary to the need to determine his individual responsibility.

2009. Apart from the general errors regarding the Appellant's alleged contribution (I), the Chamber also committed errors by considering that his support for the common purpose (II) and his promotion of said purpose (III) would be sufficient to establish his contribution to the crimes, whereas his role

[3867] *Brđanin* Appeal Judgement (ICTY), 03.04.2007, §431. See above, §1946-1949, 1960-1962.
[3868] See above, §1730-1748.
[3869] See above, §1652-1803.

in the CPK and DK in general did not allow it to reach this finding. Similarly, his promotion of the political purpose of the CPK did not allow it to find that he had promoted criminal aspects of the shared purpose (IV) nor that he had encouraged, incited, legitimised, (IV) facilitated and even less so controlled these criminal aspects (V).

I. GENERAL ERRORS

2010. As has been stated above, the Chamber erred in fact and of law by recalling its erroneous findings on the common purpose, particularly its criminal nature and regarding KHIEU Samphan's support for it.[3870] Furthermore, it erred by systematically assessing KHIEU Samphan's contribution in view of the non-criminal common purpose in itself and not in view of the commission of the crimes of which he is accused under the JCE.

2011. As has been stated above, at the time of its presentation of the law, the Chamber did not correctly define the element of the contribution required to find on the individual criminal responsibility under JCE.[3871] At the time of applying the law to the facts, the Chamber nonetheless correctly stated that "the appropriate standard is whether the accused made a significant contribution to the commission of crimes encompassed by the common purpose".[3872] However, it erred in law by then specifying its approach in these terms: "The Chamber now turns to assess whether KHIEU Samphan made a significant contribution to the common purpose".[3873] In 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) common purpose but to the commission of the crime. As we will see in detail below, the Chamber merely found on the Accused's significant contribution to the common purpose.[3874]

II. ALLEGED SUPPORT

2012. The Chamber erred by considering that KHIEU Samphan's support "of the CPK and its policies" traces back to at least 1967.[3875] It has already been said that at this time, he had only just joined the *maquis*. As an intellectual, he did not have the leaders' trust and was kept aside. He only became an alternate member of the CC in 1971, in other words he had no power in this institution which

[3870] See above, §1399-1603.
[3871] See above, §1957-1962.
[3872] Reasons for Judgement, §4255.
[3873] Reasons for Judgement, §4256.
[3874] Reasons for Judgement, §4257-4278. See below, §2012-2030.
[3875] Reasons for Judgement, §4257.

itself did not have any power of decision.[3876] Above all, the Chamber did not specify which policies were supported by KHIEU Samphan from 1967.

2013. It also erred by considering that even though "the objective of socialist revolution was not itself criminal in character, [...] through his continued occupation of positions within the CPK and DK throughout the indictment period, KHIEU Samphan supported, tacitly encouraged, legitimised by his presence and therefore facilitated the overarching common purpose which involved the commission of crimes".[3877] Although we cannot prevent ourselves from noting the Chamber's rhetoric in describing all the possible variants of KHIEU Samphan's support for the common purpose, it has nonetheless been seen above that it did not involve the commission of crimes. The demonstration of KHIEU Samphan's support for the "Party's revolutionary goals",[3878] which was not criminal in itself, did not make it possible to find on his support for the commission of a common purpose involving the commission of crimes. This finding lacking grounds should be reversed.

2014. The Chamber also erred by finding that the Appellant "participated in discussions concerning the identification and purge of enemies, including West Zone Secretary CHOU Chet *alias* Sy".[3879] It has been seen above that this finding was incorrect.[3880] The Chamber also erred by asserting that KHIEU Samphan's presence when the Standing Committee members presented reports on the cooperatives, worksites and zones under their control led to it finding on his support for the crimes.[3881] As nor too did his alleged presence at a meeting of the Standing Committee in October 1975 during which the construction project for the KCA had been discussed.[3882] The Chamber did not provide any grounds for its finding that "in his capacity as a member of the Central Committee, 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".[3883] Indeed, nothing was specified in this finding. What were the policies

[3876] See above, §1660-1664, 1704-1753.
[3877] Reasons for Judgement, §4257.
[3878] Reasons for Judgement, §4257.
[3879] Reasons for Judgement, §4258.
[3880] See above, §1867-1868.
[3881] Reasons for Judgement, §4258. See above, §1816-1848.
[3882] Reasons for Judgement, §4258. See above, §1846-1848.
[3883] Reasons for Judgement, §4259.

adopted and how were they adopted? What was the Party's general policy? With so many general matters, it becomes difficult to understand what the Chamber is trying to demonstrate and therefore what it is basing its findings on. In any case, the Chamber's findings on the Party Congresses and DC are incorrect.[3884]

2015. It again wrongfully found that the fact that KHIEU Samphan had agreed to the directive to encourage the districts to produce three tonnes of rice per hectare, and that of having "publicly endorsed the DK Constitution" or of transforming the entire population "into a society of worker-peasants" constituted his support for the crimes.[3885] In fact, these policies did not involve the commission of crimes[3886] and therefore could not establish KHIEU Samphan's support for a criminal aspect of the common purpose.

2016. The Chamber also committed an error by relying on the decision of 30 March 1976[3887] to consider that KHIEU Samphan, as a member of the Standing Committee, approved the delegation of the "right to smash" down the ranks of the CPK.[3888] In the same way, it has been seen above that the plan to subject the Vietnamese to harsher treatment than the Khmers at S-21 was aborted.[3889] Above all, the Chamber has not established that KHIEU Samphan was aware of such a policy,[3890] since he did not know of the existence of S-21 during DK.[3891] Finally, it has also been seen above that the findings on the Appellant's presence at the arrest of VORN Vet are incorrect.[3892]

2017. In view of all of these elements, apart from the functions of KHIEU Samphan in the CPK and his support for the farming policies and for the "overall political line of the Party", which are not criminal, the Chamber did not have any element to allow it to find that KHIEU Samphan shared and supported a common purpose involving the commission of crimes and, more specifically, that he supported the criminal aspects of the policies that it defined. All of its findings in this respect should therefore be reversed.[3893]

[3884] See above, §1749-1753, 1690-1803.
[3885] Reasons for Judgement, §4259.
[3886] See above, §1489-1522.
[3887] See above, §1704-1753.
[3888] Reasons for Judgement, §4260.
[3889] See above, §828-835.
[3890] Reasons for Judgement, §4260.
[3891] See above, §1851-1853.
[3892] See above, §1869-1871.
[3893] Reasons for Judgement, §4257-4308 and 4306.

III. ALLEGED PROMOTION

2018. According to the Reasons for Judgement being challenged, the Appellant, throughout the DK period, "promoted, confirmed and endorsed the common purpose".[3894] In support of this finding, the Chamber talked about "Reports" naming KHIEU Samphan as the chairman of a Special National Congress held in the aftermath of the events of 17 April 1975.[3895] As indicated above, this assertion is based on errors of fact and should therefore be reversed.[3896]

2019. The Chamber then stated that KHIEU Samphan participated in meetings in May 1975 over the course of about 10 days at the Silver Pagoda in Phnom Penh "laying the groundwork for rapid socialist revolution through the displacement of populations, the establishment of cooperatives, the construction of irrigation infrastructure and the initiation of defence projects".[3897] Not only did the evidence not make it possible to find on the content and the exact participants in this meeting, but the Chamber was unable to find that the purpose of socialist revolution was criminal by nature.[3898]

2020. Furthermore, the Chamber considered that "in his capacity as newly-appointed President of the State Presidium, KHIEU Samphan endorsed and promoted the objective of achieving a 'great and magnificent leap' while building and defending an independent and self-reliant country".[3899] To do this, it relied on a reference to section 16 of the Reasons for Judgement that are being challenged relating to the common purpose in which the numerous factual errors have been pointed out above.[3900] Finally, the Chamber relied on the Appellant's speeches, the content of which it has distorted.[3901] Therefore, the deliberately exaggerated finding in which the Chamber said that it was satisfied that KHIEU Samphan "not only shared support for the common purpose, but that as a senior leader he actively, vocally and publicly promoted, confirmed and endorsed it domestically and on the international stage" is based on multiple errors of fact and therefore it should be reversed.[3902]

[3894] Reasons for Judgement, §4262.
[3895] Reasons for Judgement, §4262.
[3896] See above, §1690-1691.
[3897] Reasons for Judgement, §4262.
[3898] See above, §1754-1803, 1490-1522.
[3899] Reasons for Judgement, §4262.
[3900] See above, §1408-1437. See also above §1754-1803 and §1490-1522.
[3901] Reasons for Judgement, §4263; above, §1754-1803.
[3902] Reasons for Judgement, §4264.

IV. ALLEGED ENCOURAGING, INCITING AND LEGITIMISING

2021. According to the Reasons for Judgement being challenged, KHIEU Samphan "used his positions to support and therefore legitimise the implementation of the common purpose both domestically and internationally".[3903] In particular, that he called on the masses to work collectively in the fields and factories in order to increase production and defend the country.[3904] As indicated above, such an assertion is based on an incorrect understanding of the policy and improper assessment of the evidence.[3905] The Chamber also used a large number of statements made by the Appellant after the DK period in which he describes the work carried out by the workers in the worksites and cooperatives.[3906] These findings are solely based on personal assessments made by KHIEU Samphan after the facts and which do not attest to any knowledge at the time of the facts. Thus, they are not relevant in a section relating to the qualification of the JCE. The Defence has already demonstrated above this incorrect assessment of the evidence.[3907] The Chamber also relied on statements from SIHANOUK although, as already indicated above, he contradicted himself several times in his statements to the extent that his credibility is marred and the Defence never had the possibility of questioning him before his death. In these conditions, the use of this "evidence" should be dismissed as being in breach of the standards of evidence.[3908]

2022. The Chamber relied on public statements from KHIEU Samphan regarding the cooperatives and certain major works.[3909] The Defence has already demonstrated that the assessment of these statements by the Chamber relies on incorrect interpretation of the evidence, and therefore all the findings made on these foundations should be dismissed.[3910] According to the Reasons for Judgement being challenged, the Appellant also called on the population "to divest themselves of personal sentiment toward their parents in favour of *Angkar*, which was now to supplant the role of parents" and to increase DK's population.[3911] The Defence has demonstrated on several

[3903] Reasons for Judgement, §4265.
[3904] Reasons for Judgement, §4265.
[3905] See above, §1399-1603.
[3906] Reasons for Judgement, §4265.
[3907] See above, §1489-1522, 1816-1840.
[3908] Reasons for Judgement, §4265; See above, §293-305.
[3909] Reasons for Judgement, §4267.
[3910] See above, §1408-1414, 1489-1522, 1408-1437.
[3911] Reasons for Judgement,4268.

occasions that this finding repeated numerous times in the Reasons for Judgement is based on a lack of understanding of the facts and an incorrect assessment of the evidence by the Chamber.[3912]

2023. Regarding the Buddhists, the Chamber stated that KHIEU Samphan "deceptively maintained the image of normalcy in public while actively encouraging the arrangement of marriages contrary to Buddhist traditions".[3913] First of all, we should point out the word "deceptively" chosen to characterise the alleged attitude of the Appellant. This choice is questionable in that it is based on a personal opinion that is not given in support of any element. This is therefore an interpretation and a moral opinion of the Chamber that should not be of any consequence in the context of a criminal judgement.[3914] Furthermore, no item of evidence allows such a finding to be reached.[3915] The finding that the Appellant publicly denied the crimes of DK against the former Khmer Rouge officials should be invalidated for the same reasons.[3916] Finally, the Chamber used a number of KHIEU Samphan's speeches to say that he had incited hatred of the Vietnamese.[3917] The Defence has taken each of these items of evidence and demonstrated the Chamber's errors in the relevant parts of this brief.[3918]

2024. Therefore, the finding by which the Chamber said that it was satisfied that the Appellant "not only shared support for the common purpose, but that he encouraged and incited its implementation through the CPK's policies" should be invalidated insofar as it is based on an incorrect assessment of the evidence.[3919]

V. ALLEGED INSTRUCTIONS

2025. The Chamber committed numerous errors of fact by finding that "KHIEU Samphan not only shared support for the common purpose, but that he actively instructed on its implementation through the various policies".[3920] In fact, it erred by citing the contents of an interview with NEOU Sarem to

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[3912] See above, §1098-1398.
[3913] Reasons for Judgement,4268.
[3914] Elsewhere in the Judgement, the Chamber also made use of surprising terms to talk about the Appellant in the parts relating to the Buddhists, see §4241 of the Reasons for Judgement: "Khieu Samphan nevertheless continued publicly supporting the *charade of normalcy*".
[3915] See above, §1910-1920, 2094.
[3916] Reasons for Judgement, §426. See above, §1921-1927, 2099-2113.
[3917] Reasons for Judgement, §4269.
[3918] See above, §1058-1097, 1551-1560, 1886-1909, 2075-2090.
[3919] Reasons for Judgement, §4270.
[3920] Reasons for Judgement, §4274.

consider that "KHIEU Samphan vocally supported the CPK's policies concerning the deportation of the Vietnamese".[3921] It has already been explained that this is a written statement outside the legal framework.[3922] It therefore has a very low probative value and could not in any case be used to report the Appellant's acts and behaviour.[3923] The Chamber also erred by referring to a speech by KHIEU Samphan reproduced in the collection of documents disseminated by "le comité des patriotes du Kampuchéa Démocratique" [Committee of Patriots of Democratic Kampuchea] in France,[3924] the reliability of which has been criticised.[3925] In any case, the extract cited by the Chamber does not in any way talk about any deportation of Vietnamese people or any other policy of destruction.

2026. Several factual findings on what KHIEU Samphan said about the Vietnamese[3926] and about Pang[3927] are based on EK Hen's testimony, about which it has already been highlighted that the Chamber could not give him any credibility in view of the many contradictions in his statements.[3928] Furthermore, it has not given any reasons how the fact that KHIEU Samphan "attended" a rally in May 1975, during which he spoke about the need to screen internal enemies from the previous regime, demonstrated that he had actively "instructed".[3929] As for the factual finding according to which in 1977, KHIEU Samphan informed the population that the object of the revolution was to eliminate the LON Nol regime, the feudalists and the capitalists, is not

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[3921] Reasons for Judgement, §4271, fn 11935 referring to fn 11437 citing EK Hen but especially the contents of NEOU Sarem's interview by *Voice of America*: "*Transcript of NEOU Sarem's Interview by VOA Khmer Service*, E3/6934, p. 7, 11 and 113, ERN (EN) 01003407-01003411-01003513 (NEOU Sarem returned from France to Cambodia at the beginning of 1976. Upon her arrival, she attended training sessions at the Khmer Soviet Institute in Phnom Penh together with other returnees. Khieu Samphan came to teach them and told them: 'that all people in Kampuchea had to do farming. Those who did not know how to do farming, especially the Vietnamese would be sent back to Vietnam. So the Khmer Rouge had prepared a plan to send the Vietnamese back to Vietnam'." (emphasis added).
[3922] See above, §1894.
[3923] Reasons for Judgement, §69.
[3924] Reasons for Judgement, §4271 referring to §3400.
[3925] See above, §1080-1082, 1898-1902.
[3926] Reasons for Judgement, §4271, fn 13938 referring to §3390; §4271, fn 13939 referring to §3517, referring to §3385, 3390, 3391 and 3396. The Chamber's citation in §4271 comes from §3391 referring to fn 11436 which cites numerous items of evidence on the speeches by several leaders. Regarding what was said by KHIEU Samphan, the only source is EK Hen.
[3927] Reasons for Judgement, §4272, fn 13946.
[3928] See above, §1075, 1759, 1892-1894. See also KHIEU Samphan's Request for Admission of Additional Evidence, 08.10.2019, **F51**, §20-28.
[3929] Reasons for Judgement, §4272.

sourced. In fact, reference to the same § 4272 does not make it possible to know which source was used as the foundation of this assertion.[3930]

2027. The Chamber erred by systematically relying on civil party EM Oeun to consider that KHIEU Samphan had supported the common purpose.[3931] His widely demonstrated lack of credibility should have prevented the Chamber from using this as a foundation.[3932] The same applies regarding civil party PREAP Chhon,[3933] cited by the Chamber for stating that KHIEU Samphan made the following comments: "those who were kept are no gain and those who were 'pulled out' were no loss".[3934] In the same vein, the Chamber cited BIT Na as considering that KHIEU Samphan instructed the commerce cadres on leadership and denounced "those who were lazy to work" as enemies.[3935] It has nonetheless been stated that this finding was incorrect because the comments had been distorted.[3936]

2028. The Chamber also erred by relying solely on the FBIS and SWB collections to find that KHIEU Samphan lectured cadres on the "necessity of meeting production targets".[3937] The reliability of these collections has been challenged.[3938] This is why the Chamber should not have relied on them. Finally, on the question of the marriages in the Ministry of Commerce,[3939] the Chamber should not have relied on civil party CHEA Deap to consider that KHIEU Samphan had instructed that all ministries were to arrange marriages.[3940] In view of these numerous errors of fact, it was not possible for the Chamber to find that the Appellant had "actively instructed on its implementation [of the common purpose] through the various policies".[3941] This finding should therefore be reversed and the Chamber was unable to consider that KHIEU Samphan had contributed to the

[3930] Reasons for Judgement, §4272, fn 13941 referring to §4272.
[3931] Reasons for Judgement, §4272, fn 13942, referring to §3942 and 3943; §4272, fn 13946 referring to §4226 fn 13788; §4273, fn 13948 referring to §3942; §4273, fn 13949 referring to §3967, fn 13204.
[3932] See above, §1757-1758, 1864.
[3933] See above, §1534-1535.
[3934] Reasons for Judgement, §4272, fn 13943, referring to §3961.
[3935] Reasons for Judgement, §4272, fn 13944 referring to §620.
[3936] See above, §1794-1797.
[3937] Reasons for Judgement, §4273, fn 13947 referring to §3916, fn 13067.
[3938] See above, §1898-1902.
[3939] Reasons for Judgement, §4273, fn 13950 and 13951.
[3940] See above, §1233-1242, 1815, 1929, 1936, 2028, 2117.
[3941] Reasons for Judgement, §4274.

common purpose and that he could be held responsible for the crimes due to his participation in the JCE.[3942]

VI. ALLEGED FACILITATION AND CONTROL

2029. According to the terms of the Reasons for Judgement being challenged, the Appellant, in his capacity as a member of Office 870 and overseer of DK trade and commerce "personally enabled the smooth functioning of the DK administration to the detriment of its population".[3943] This finding was made on the basis of an incorrect interpretation of KHIEU Samphan's functions in relation to Office 870 and Commerce.[3944] Its findings on his capacity as "supervisor of commerce-related matters" due to the fact that he "personally" ensured that Doeun's responsibilities remained fulfilled are incorrect.[3945] The Chamber's numerous errors that marred its decision have been seen above.[3946] Furthermore, it also erred by finding that the Appellant "ensured that cooperatives handed over communally harvested rice for export" under mandatory rice requisition policies despite the drought, food shortages and working conditions of the cooperative and construction workers in his role of "supervising the import and export of goods in and out of DK".[3947] As indicated above, these allegations are based on numerous errors of fact committed by the Chamber, which should be invalidated and not allowed to uphold such a finding.[3948]

2030. Furthermore, according to the Reasons for Judgement being challenged, "the position of unique standing" of the Appellant in the CPK and his presence at the meetings of the Standing Committee gave him insight into the Party's operations.[3949] KHIEU Samphan took part in meetings involving decisions about purges including that of KANG Chap.[3950] As stated above, this finding is based on errors of facts and an incorrect assessment of the evidence.[3951] The Appellant also, according to the Chamber, gave his "silent assent" to the mistreatment of civilians.[3952] First of all, the incongruous nature of this expression "silent assent" should be highlighted. It is an illustration of the lack of

[3942] Reasons for Judgement, §4306.
[3943] Reasons for Judgement, §4276.
[3944] See above, §1763-1798.
[3945] See above, §1768-1769, 1770-1798.
[3946] Reasons for Judgement, §4276. See above, §1763-1769.
[3947] Reasons for Judgement, §4276.
[3948] See above, §1506-1510, 1490-1522, 1770-1798.
[3949] Reasons for Judgement, §4277.
[3950] Reasons for Judgement, §4277.
[3951] See above, §1851-1853, 1857-1878.
[3952] Reasons for Judgement, §4277.

inculpatory elements existing against KHIEU Samphan. Assent, in other words, the expression of consent characterising the intention and will of a person cannot be proved by silence. This finding is based on an incorrect assessment of the evidence and the errors of fact and law discussed above.[3953] Finally, the Chamber stated that the Appellant "obscured the events inside DK (*sic*) and denied the perpetration of large-scale crimes".[3954] This finding is also based on errors of fact and law on the alleged knowledge of the crimes at the time of the facts.[3955] As a result, the final finding of the Chamber, according to which KHIEU Samphan "not only shared support for the common purpose, but that he personally enabled and controlled its implementation through the various policies" is based on errors of fact and law and an incorrect assessment of the evidence and should therefore be invalidated.[3956]

Chapter III. ERRORS COMMITTED REGARDING THE *MENS REA*

Section I. GENERAL ERRORS REGARDING INTENT

I. REMINDER OF THE ERRORS REGARDING THE INTENT TO SHARE SUPPORT FOR A CRIMINAL COMMON PURPOSE

2031. The Chamber found that KHIEU Samphan's intent to share support for the common purpose was proved by the fact that he "formed part of a plurality of persons who acted in unison to put into effect the common purpose".[3957] Apart from the fact that it committed errors in the definition of the common purpose, it should be remembered that it particularly erred by finding that this common purpose involved criminal policies.[3958]

2032. The Chamber also erred by considering that sharing[3959] and contributing[3960] 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.[3961]

II. INCORRECT REASONING TO DEDUCE CRIMINAL INTENT

[3953] See above, §1849-1878.
[3954] Reasons for Judgement, §4277.
[3955] See above, §1804-1937.
[3956] Reasons for Judgement, §4278.
[3957] Reasons for Judgement, §4279, fn 13965 referring to Section 16.4.5.
[3958] See above, §1438-1603.
[3959] See above, §1593-1603.
[3960] See above, §2001-2030.
[3961] See above, §1963-1965.

2033. The Chamber's reasoning is incorrect because it considered that the commission of crimes by the main perpetrators integrated artificially in a non-criminal common purpose was sufficient to deduce KHIEU Samphan's criminal intent to commit these crimes (A). In doing so, the Chamber erred in law by never addressing the question of intention with regard to the required *mens rea* specific to each alleged crime (B).

A. Lack of intent to commit crimes in a common purpose not criminal in itself

2034. The incorrect reasoning of the Chamber to characterise the common purpose, on the face of it of a non-criminal nature, into a criminal enterprise should be recalled. The first stage was as follows: – there were crimes **and** these crimes resulted from the implementation of a "policy'.[3962] These crimes integrated artificially in a "policy" form part of the common purpose because the policy was intrinsically linked to the common purpose that was non-criminal in itself.

2035. The Chamber therefore erred in beginning each of the sections relating to KHIEU Samphan's intent by first recalling that it considered that "the crimes [X, Y, Z] were established as part of the policy [X]" and that "these crimes were encompassed by the common purpose as part of the policy [X]".[3963] This reasoning is erroneous and must be invalidated. Indeed, it could not serve as a starting point for the Chamber's reasoning on the intention of KHIEU Samphan to commit specific crimes which should have been characterised by a specific conduct or act of the Appellant in relation to those crimes.

2036. The second erroneous step of the Chamber was to find without reasoning that the implementation of the "policy" proved KHIEU Samphan's intention for crimes to be committed.

2037. Finally, in the third and final stage of its reasoning, the Chamber erred in law by systematically finding that KHIEU Samphan's participation "in the JCE" (joint non-criminal enterprise) was sufficient to demonstrate his shared intent with the other participants in the JCE to commit crimes X, Y and Z when it had to establish his participation in the criminal aspect of this purpose. By failing to do so, the Chamber has created, by this dilution of criminal intent, a vicarious criminal responsibility.

B. Required culpable intent for specific crimes and not "crimes" in general

[3962] It has been seen that the Chamber has operated on a circular reasoning that makes crimes flow from policy and policy from crimes. See above, §1981-2000.
[3963] Reasons for Judgement, §4280, 4283, 4288, 4291, 4296, 4299, 4303.

2038. The Chamber erred in law by assessing KHIEU Samphan's intent systematically in relation to "crimes" in general without specifically assessing the intent required for each alleged crime, whereas no characterisation as a crime could be made without such an assessment. It is an error that taints its overall findings.

Section II. COOPERATIVES AND WORKSITES

2039. The Chamber erred in law and in fact in finding that KHIEU Samphan was motivated by the intent to commit the CAHs of murder, enslavement, OIA/attacks against human dignity and enforced disappearance and persecution on political grounds at TK, 1JD, TTD and KCA.[3964] It also erred by finding that these crimes were within the scope of the common purpose.[3965] It has also erred in fact and in law by listing elements that are not capable of proving any criminal intent (I) and by failing to provide any motivation for proving intent to commit specific crimes (II).

I. LACK OF ESTABLISHED CRIMINAL INTENT

2040. The Chamber listed items that are not linked to any criminal intent (A). It erroneously relied on KHIEU Samphan's supposed knowledge of the working and living conditions imposed on these sites (B) by failing to draw the consequences of the lack of evidence of encouragement of unequal treatment of NP (C). It also extrapolated as to the intention that the fate of the enemies be settled in secret (D).

A. Absence of connection with any criminal intent

1. Lack of criminal intent in support of the non-criminal common purpose

2041. The Chamber erred in law and in fact by finding that KHIEU Samphan had culpable intent due to the fact that he "maintained his support of the [non-criminal] common purpose throughout the DK period as it concerned the establishment and operations of cooperatives and worksites".[3966] However, the creation and operation of cooperatives and worksites is not a crime. The fact that KHIEU Samphan supported this economic model did not allow the finding to be made as to the requisite intent for each of the alleged crimes within the cooperatives and worksites, crimes which the Appellant's knowledge of their commission by the principal perpetrators has moreover not been

[3964] Reasons for Judgement §4282.
[3965] Reasons for Judgement §4280.
[3966] Reasons for Judgement §4281, fn 13968 referring to §4210 (Knowledge – cooperatives and worksites).

established by the Chamber.[3967] Thus, it is once again KHIEU Samphan's alleged contribution to the common (non-criminal) common purpose that is put forward and it "finds" his criminal intent.[3968]

2. Lack of criminal intent in the aspiration for economic development

2042. The Chamber erroneously found that KHIEU Samphan intended to commit specific crimes by his participation "in meetings at which plans for achieving three tonnes of rice per hectare were devised and discussed"[3969] and that he "publicly promoted the objective of achieving a 'great leap forward ' at a 'pace never before attained' in order to transform the country into a 'construction site".[3970] The setting of economic targets and quotas[3971] made it all the more difficult to make a connection with the crimes of which KHIEU Samphan was accused, since the very purpose of this agricultural development was to solve the population's problems quickly.[3972]

3. Lack of criminal intent through knowledge of social change

2043. The Chamber erred in fact and in law in finding that KHIEU Samphan intended to commit specific crimes because he knew that the population was "being converted into a society of worker-peasants which was being forced to work communally".[3973] The knowledge of a social change towards a socialist collectivist economic model did not lead to the finding that there was an intention to commit crimes.

4. Lack of criminal intent in supervising the "distribution" of rice abroad

2044. The Chamber erroneously found that KHIEU Samphan intended to commit specific crimes by allegedly supervising the requisition and distribution of rice internationally.[3974] Firstly, the Chamber made an inaccurate shortcut on the role of KHIEU Samphan, [3975] and secondly, the

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[3967] See above, §1816-1848.
[3968] Reasons for Judgement §4281, fn 13968 referring to §4210 (Knowledge – cooperatives and worksites) which in turn refers in fn 13740 to section 18.2.2.1: promoting the common purpose.
[3969] Reasons for Judgement, §4281, fn 13969 referring to §4258
[3970] Reasons for Judgement, §4281, fn 13970 and 13971 referring to §4262, 4265-4266
[3971] Reasons for Judgement §4281, fn 13972 referring to §4214 and 4267
[3972] See above, §1490-1510.
[3973] Reasons for Judgement §4281, fn 13973 referring to §4210 which in turn refers in fn 13740 in section 18.2.2.1: promoting the common purpose.
[3974] Reasons for Judgement §4281, fn 13976 referring to §4275. The paragraph in the fn on the treatment of Buddhists is clearly wrong. It would appear that the Chamber wished instead to indicate §4276.
[3975] See above, §1652-1803.

Chamber ignored the exculpatory evidence on the concealment of food shortages by co-operative managers and work sites.[3976]

B. Lack of knowledge of the working and living conditions imposed

2045. The Chamber erred in fact and in law by stating that KHIEU Samphan knew that "appalling working and living conditions" "were intentionally imposed at cooperatives and work sites throughout the country".[3977] Not only did it fail to establish this knowledge, but the imposition of such measures was contrary to the objectives of the cooperatives set by the CPK.[3978]

C. Lack of evidence of encouragement of unequal treatment of NP

2046. The Chamber erred in fact by stating that KHIEU Samphan had "encouraged 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".[3979] However, as noted above, he was not aware of the discrimination between Base People and NP and his 2004 statements were misrepresented.[3980]

D. Lack of common intent for the CAH of persecution on political grounds

2047. The Chamber have any evidence to find that KHIEU Samphan intended to discriminate against enemies of the Party on political grounds, [3981]nor was there any common intention with the other participants in the JCE to commit the CAH of persecution on political grounds.[3982]

E. Lack of evidence of the intention "that the fate of the enemies should be settled in secret".

2048. The Chamber also erred in fact in finding that KHIEU Samphan intended the fate of the enemies to be settled in secret by referring in a footnote not to a specific reference enabling KHIEU

[3976] See above, §1506-1510.
[3977] Reasons for Judgement §4281, fn 13975 referring to §4215 (Knowledge – Cooperatives and worksites), 4231 (Knowledge – Security centres, execution sites and internal purges) and 4234 (Knowledge – Security centres, execution sites and internal purges).
[3978] See above, §1503-1505.
[3979] Reasons for Judgement §4281, fn 13977 referring to §4217 (Knowledge – Cooperatives and worksites), and 4273 (Contribution – Instruction as to the implementation of the common purpose by means of the related policies).
[3980] See above, §1836-1838.
[3981] Reasons for Judgement, §4281.
[3982] Reasons for Judgement §4282.

Samphan to be aware of the concrete charges against him, but to entire sections. [3983] This lack of detailed reasoning illustrates the lack of evidence to support the Chamber's finding.

II. LACK OF REASONING ON INTENT TO COMMIT SPECIFIC CRIMES

2049. The Chamber erred in fact and in law by finding on the basis of the above that it was established that "KHIEU Samphan intended the commission of crimes at cooperatives and worksites".[3984] It continued to err by finding that "[he] shared the intent of other JCE members to commit, through a joint criminal enterprise, the crimes against humanity of murder, enslavement and the other inhumane act through attacks against human dignity and conduct characterised as enforced disappearances" and "to commit through a joint criminal enterprise, the crime against humanity of persecution on political grounds".[3985]

2050. In fact, the Chamber erred in fact and in law generally by failing to assess specific intent in relation to each alleged crime. However, an impartial examination of the evidence should have led it to find that it could not find that KHIEU Samphan had the culpable intent required for each of the crimes charged.

2051. The Chamber should have drawn the consequences of the lack of direct or indirect evidence of KHIEU Samphan's intention to kill at 1JD and TTD, as well as the lack of evidence of KHIEU Samphan's intent to exercise over a person "any or all of the attributes of the right of ownership" at TK, 1JD and KCA. Nor did it have any evidence of its intention to discriminate against NP and the former Khmer Republic soldiers and officials with the "specific intent" to exclude these individuals from society or cause "serious mental or physical suffering or injury, or intentional acts constituting a serious attack on human dignity".

2052. The Chamber should thus have found that it lacked the evidence to find that KHIEU Samphan had the requisite criminal intent for each of the crimes with which he was charged: – CAH of murder at 1JD and TTD; – CAH of enslavement at TK, TTD, 1JD and KCA; – politically motivated persecution of NP and ex-KR at TK, TTD, 1JD and KCA;– CAH of OIA through violation of human dignity at TK, TTD, 1JD and KCA; and through enforced disappearances at TK, TTD, 1JD

[3983] Reasons for Judgement, §4281, fn 13978 referring to section 16.4.2.1.2.
[3984] Reasons for Judgement, §4282 (emphasis added).
[3985] Reasons for Judgement §4282.

and KCA. By failing to do so, it erred in fact and in law. Any findings to the contrary must be reversed, as well as the conviction for these crimes under the JCE.[3986]

Section III. SECURITY CENTRES, EXECUTION SITES AND PURGES

2053. The Chamber erred by finding that KHIEU Samphan intended to commit the CAH of murder, extermination, enslavement, imprisonment, torture, persecution on political grounds and OIA through attacks upon human dignity and acts qualified as enforced disappearances.[3987] In reaching this finding, it made several errors of fact. Indeed, it was seen above that it was erroneous to assert that KHIEU Samphan had contributed to the purges throughout the country, [3988]and to assert that he had knowledge of the arrests of high-ranking CPK leaders is another error.[3989]

2054. Furthermore, 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.[3990] It never sought to establish whether KHIEU Samphan was aware of the existence of the security centres of S-21, KTC, AuKg and PK. With regard to S-21, it has been seen above that the alleged meeting of 6 January 1979 during which Duch allegedly saw KHIEU Samphan for the first time did not make it possible to find that he was aware of the existence of S-21.[3991]

2055. Even if KHIEU Samphan had knowledge of the arrest of certain high-ranking and lower-ranking KPC cadres, it cannot be established that he intended to commit the crimes of murder, extermination or torture at S-21, for example. This was a particularly unreasonable finding given that the crimes established in the security centres were not aimed solely at high-ranking cadres. What about KHIEU Samphan's knowledge of the existence of other detainees in the security centres? Moving from knowledge of certain arrests to the intention to commit all the crimes that were committed in the security centres is a finding that is based on a more than unreasonable extrapolation. This finding should be annulled.

2056. The same is true of the Chamber's assertions that:

[3986] Reasons for Judgement, §4306.
[3987] Reasons for Judgement, §4287.
[3988] See above, §1857-1878.
[3989] See above, §1862-1873.
[3990] Reasons for Judgement, §4284.
[3991] See above, §1851-1853, 1857-1878.

> "KHIEU Samphan urged cadres to identify enemies obstructing the work of the Party, urged seething anger and 'vigilance' against them, and warned that traitors would be killed.";
>
> "He supported the principle of secrecy, knew about the widespread arrests of people at bases on the basis for 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 this relatives therefrom.";
>
> "Twenty-five years after the fall of Democratic Kampuchea, KHIEU Samphan still supported as 'ever legitimate and necessary" the defence of revolutionary objectives ahead of individual human rights principles".[3992]

2057. These assertions do not in any way support any intention to commit crimes at S-21, KTC, AuKg and PK. The Chamber misrepresented his words by saying that he had urged cadres to identify enemies and incited hatred toward them.[3993]

2058. As far as the events in Preah Vihear are concerned, they do not fall within the scope of Case 002/02 and in any case do not support the contention that KHIEU Samphan was aware of the arrests and detention conditions of the entire civilian population.[3994] As for the fact that he still supports the defence of revolutionary objectives twenty-five years after the events, the Chamber's reference to KHIEU Samphan's book is false, which prevents the Defence from verifying its source.[3995] Above all, relying on a book which is essentially an analysis of the events in DK through the work of researchers, it did not explain what would have constituted evidence of KHIEU Samphan's intention at the time of the events.

2059. The Chamber also erred in considering that KHIEU Samphan's statements were contradictory regarding his knowledge of the arrests,[3996] although they are perfectly consistent. He said he had never been aware of any arrests during the regime, except once, by chance, for his in-laws in Preah Vihear. For the rest, the Chamber has used post-DK statements that are consistent with its analysis of what it understood after the regime. Not only could it not say that these statements were contradictory, but they did not in any way support an intent to commit the crimes at the time.

2060. Finally, the Chamber erred in inferring from KHIEU Samphan's participation in the common purpose and the policy on enemies that he had an intention to commit crimes.[3997] Participation in

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[3992] Reasons for Judgement, §4285.
[3993] See above, §2025-2028.
[3994] See above, §1874-1878.
[3995] Reasons for Judgement, §4285, fn 13992.
[3996] Reasons for Judgement, §4286.
[3997] Reasons for Judgement, §4287.

the common purpose and intent are distinct components of criminal responsibility under the JCE. The Chamber should not have inferred from the participation in the common purpose – otherwise non-criminal per se – that KHIEU Samphan intended to commit crimes.

2061. In conclusion, the Chamber's legal characterisation of the element of intent is problematic and erroneous in more than one respect. These errors are symptomatic of the absence of elements relating to KHIEU Samphan's knowledge of the existence of the security centres and the crimes committed there. In light of these elements, no reasonable judge could have found that the Appellant intended to commit the CAH of murder, extermination, enslavement, imprisonment, torture, persecution on political grounds and OIA through an attack against human dignity and acts characterised as enforced disappearances.[3998] This finding must therefore be reversed and KHIEU Samphan must be acquitted.[3999]

Section IV. PARTICULAR GROUPS

I. CHAM

2062. The Chamber erred in fact and in law by finding that KHIEU Samphan had the requisite intent with respect to the alleged crimes against the Cham.[4000] The Chamber's (lack of) reasoning is symptomatic of a lack of direct or indirect evidence of the Appellant's criminal intent with respect to the crimes committed against the Cham. This statement of reasons is contained in a single paragraph and does not contain any chronological reference. The Chamber thus committed errors of fact and law by listing elements that are not capable of proving any criminal intent (A) and by failing to provide any reasoning for proving intent to commit specific crimes (B).

A. Lack of established criminal intent

1. Existence of a policy against enemies insufficient to demonstrate intent

2063. The Chamber erred in fact and in law by finding KHIEU Samphan's criminal intent on the sole basis of linking the treatment of the Cham at the Trakuon pagoda and the Trea security centre to a "policy" on enemies.[4001]

[3998] Reasons for Judgement, §4287.
[3999] Reasons for Judgement, §4306.
[4000] Reasons for Judgement, §4289.
[4001] Reasons for Judgement, §4289.

a. Specific intention of KHIEU Samphan against the "enemies".

2064. The Chamber erred in law and in fact by recalling its erroneous finding that KHIEU Samphan was motivated by the specific intent to discriminate against enemies.[4002] It merely referred in a footnote to its findings with regard to the security centres, execution sites and internal purges.[4003] First of all, the Chamber should have drawn the consequences of the lack of any mention of the Cham, which demonstrates the lack of any specific intention to target the Cham group as such. Secondly, as noted above, the evidence adduced by the Chamber did not establish KHIEU Samphan's intention to discriminate against "enemies".[4004]

b. Alleged support for policy on enemies

2065. The Chamber seems to have claimed that KHIEU Samphan had supported the policy on enemies, including the CAH of imprisonment, torture, murder and extermination.[4005] However, it did not provide any indication as to where or when these crimes were allegedly committed. Second, as noted above, the evidence put forward by the Chamber did not establish its "support" for the "policy on enemies", in particular the CAH of imprisonment, torture, murder and extermination.[4006]

2. "Discriminatory policies" insufficient to establish culpable intent

2066. The Chamber erred in fact and in law by making an unreasonable finding that KHIEU Samphan intended that the crimes against the Cham be committed.[4007] The use of the conjunction "accordingly" confirms that the Chamber infers KHIEU Samphan's intent to commit crimes from the existence of **discriminatory** policies (plural for the first time) in order to "disperse this group", "restrict their religious and cultural practices", and "kill those members who opposed assimilation".[4008]

3. Participation in JCE insufficient to prove intent to commit crimes

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[4002] Reasons for Judgement, §4289.
[4003] Reasons for Judgement, §4289, fn 13996, referring to section 18.2.2.
[4004] See above, §2053-2061.
[4005] Reasons for Judgement, §4289, fn 13996, referring to section 18.2.2.
[4006] See above, §2012-2017.
[4007] Reasons for Judgement, §4289.
[4008] Reasons for Judgement, §4289.

2067. The Chamber erred in fact and in law by finding that KHIEU Samphan's participation in the JCE proved a shared intent to commit the crimes of murder, extermination, imprisonment, torture, persecution on political and religious grounds and OIA through forcible transfers against the Cham.[4009] However, it did not explain its reasoning or provide any grounds. In any event, it has not established the existence of a specific policy towards the Cham to which KHIEU Samphan adhered.

4. Lack of intent for the CAH of persecution on political grounds during MOP2

2068. As noted above, the Chamber's approach of linking crimes to policies and then inferring criminal intent from the existence of the policy is flawed. Moreover, apart from being erroneous, this approach could not relate to persecution on political grounds with regard to the Cham. Indeed, the alleged persecution on political grounds of the Cham was limited to acts of forcible transfer in the framework of MOP2, a crime which is not related to the policy on enemies or the discriminatory policy on religious grounds. This should have led the Chamber to find res judicata on the facts of MOP2.[4010]

B. Total lack of reasoning on intent to commit specific crimes

2069. The Chamber erred in fact and in law by finding, on the basis of the elements detailed above, that KHIEU Samphan was driven by a "a specific intent to discriminate against enemies on the basis of their real or perceived political affiliations, as well as his support of the policy to identify, arrest, isolate and 'smash' enemies, including the crimes against humanity of imprisonment, torture, murder and extermination". [4011]

2070. The Chamber erred in fact and in law by adding that "the evidence establishes that KHIEU Samphan shared the intent of other JCE members to commit, through a joint criminal enterprise, the crimes against humanity of murder, extermination, imprisonment, torture, persecution on political and religious grounds and the other inhumane act of conduct characterised as forced transfer against the Cham".[4012] In fact, it erred in law and in fact by reaching such a finding, generally speaking, without assessing the specific intent with respect to each alleged crime.

[4009] Reasons for Judgement, §4289.
[4010] See above, §964-965.
[4011] Reasons for Judgement, §4289 (emphasis added).
[4012] Reasons for Judgement, §4289.

2071. Thus, the Chamber should have made the findings of the lack of direct or indirect evidence of KHIEU Samphan's intention to kill Cham at the Wat Au Trakuon in 1977 and in Trea village in 1978, and to kill Cham on a large scale. So it erred in fact and in law.

2072. The Chamber should also have made the findings from the absence of direct or indirect evidence of KHIEU Samphan's intention to arbitrarily deprive the Cham in Trea village of their freedom in 1978, or or having reason to know that his act was likely to result in this. No act of the Appellant has been established regarding these facts and places, nor on his intention to inflict acts of torture in Trea village in 1978 on the day of IT SEN's arrest. The Chamber therefore erred in fact and in law in finding against the Appellant.

2073. Nor did it draw the findings of the lack of direct or indirect evidence of KHIEU Samphan's intention to discriminate against the Cham "on political grounds" in order to exclude these individuals from society during MOP2, nor that of discriminating against the Cham "on religious grounds" with the aim of excluding these individuals from society during the DK, nor that of causing "serious mental or physical suffering or injury, or intentional acts constituting a serious attack on human dignity" at the end of 1975. By failing to do so, it erred in fact and in law.

2074. Accordingly, the Chamber erred in fact and in law by finding that KHIEU Samphan had the criminal intent required for: – the crimes of murder and extermination alleged at Wat Au Trakuon in 1977 and at Trea village in 1978; – the crimes of imprisonment in 1978 and torture on the day of IT Sen's arrest in 1978 at Trea village; – the crime of persecution on political grounds during MOP2; – the crime of persecution on religious grounds during DK; and–- the crime of OIA through forcible transfers in late 1975. All the Chamber's findings that there was such intent and convicting him for these crimes must therefore be reversed.[4013]

II. VIETNAMESE

A. Lack of intent to deport

2075. The Chamber erred in fact and in law by finding that "KHIEU Samphan shared the intent of other JCE participants to deport Vietnamese populations to Vietnam".[4014] According to it, this intention stems from the appellant's calls "to remove Vietnamese populations from Cambodia back to

[4013] Reasons for Judgement, §4289.
[4014] Reasons for Judgement, §4292.

Vietnam in the early days of DK". For this purpose, the Chamber referred to exactly the same elements as in establishing KHIEU Samphan's knowledge that crimes were being committed.[4015] With regard to the removal of the Vietnamese, this is EK Hen's statement and, for "corroboration", a transcript of a NEOU Sarem interview with *Voice of America*.[4016] However, we have seen above that the Chamber could not rely on these elements because of the lack of credibility of EK Hen on the one hand and the low probative value of the NEOU Sarem transcript on the other.[4017]

2076. Moreover, these elements did not make it possible to establish KHIEU Samphan's knowledge of the deportation of Vietnamese from TK and Prey Veng in late 1975, early 1976. Therefore, they were particularly insufficient to establish KHIEU Samphan's intention to deport the Vietnamese from Cambodia to Vietnam. Without further evidence on KHIEU Samphan's intention to deport the Vietnamese from TK and Prey Veng to Vietnam, the Chamber could not hold him responsible for the CAH of deportation of Vietnamese. He must therefore be acquitted of this crime.

B. <u>Lack of intent to commit the crimes of murder and extermination</u>

2077. The Chamber erred in fact and in law by finding that KHIEU Samphan had the "direct intent to kill, on a large scale, the Vietnamese in Cambodia from April 1977 through 6 January 1979".[4018] It wrongly held that "KHIEU Samphan's words and actions during the DK period evince his contempt for the Vietnamese and direct intent to kill". First of all, "contempt" for people does not mean you intend to kill them. In addition, it should be recalled that the Chamber found that murders of Vietnamese in Svay Rieng, DK territorial waters, Ksach pagoda, Kampong Chhnang province and Kratie province. However, it never explained how the statements attributed to KHIEU Samphan showed that he intended to kill ethnic Vietnamese in the places where the crimes were committed. In the absence of direct evidence, no reasonable judge could have found that KHIEU Samphan intended to kill these Vietnamese.

2078. As a basis for its finding, the Chamber simply referred to KHIEU Samphan's knowledge that he and other CPK leaders had requested "that the Vietnamese be 'exterminate[d] resolutely' and

[4015] Reasons for Judgement, §4292 "The Chamber refers to KHIEU Samphan's statements about the Vietnamese examined above in section 18.1.2.3.2. ".
[4016] See above, §1890-1909.
[4017] See above, §1892-1894.
[4018] Reasons for Judgement, §4293.

'destroy[ed] forever'".[4019] While no direct source is cited in the footnote, these quotations actually come from a SWB file which contains transcribed excerpts from a speech allegedly given by KHIEU Samphan at a mass rally in Phnom Penh on 15 April 1978.[4020] However, these "transcripts" of KHIEU Samphan's speeches are not reliable enough to affirm that these are the words he actually said.[4021] Moreover, these remarks have not been transcribed in the collection of documents distributed by the Committee of Patriots of Democratic Kampuchea in France, which nevertheless contains the same speech.[4022] Thus, the Chamber could not find beyond reasonable doubt that KHIEU Samphan made such remarks.

2079. Moreover, it is clear that the Chamber has distorted the statements in the SWB document. Indeed, it states that those targeted are literally "agents of the expansionist, annexationist Vietnamese aggressors" or "the expansionist, annexationist Vietnamese enemy".[4023] Yet the Chamber had agreed that the "Vietnamese agents" were targeting Khmers accused of being affiliated with Vietnam.[4024] [4025]Therefore, it was not reasonable to find that these remarks were directed "at the ethnic Vietnamese population in general". Therefore, this element could not serve as a basis for establishing KHIEU Samphan's intention to kill ethnic Vietnamese.

[4019] Reasons for Judgement, §4238.

[4020] Reasons for Judgement, §3399 referring to the Phnom Penh Rally Marks 17th April Anniversary (in SWB/FE/5791/B Collection), **E3/562**, 16 April 1978, ERN (EN) S 00010563: "To expel resolutely from Cambodian territory and destroy forever all the expansionist, annexationist Vietnamese aggressors" (emphasis added), "To exterminate resolutely all agents of the expansionist, annexationist Vietnamese aggressors from our units and from Cambodian territory forever" (emphasis added), "[T]o exterminate the enemies of all stripes, particularly the expansionist, annexationist Vietnamese enemy".

[4021] See above, §1898-1902.

[4022] Collection of documents distributed by the Committee of Patriots of Democratic Kampuchea in France: "Vive le 3ème anniversaire de la grandiose victoire du 17 Avril et de la fondation du Kampuchéa démocratique – Discours du Comrade KHIEU Samphan, Président du Présidium de l'Etat du Kampuchéa démocratique ", 17.04.1978, **E3/169**, ERN (EN) 00280395-00280396

[4023] Phnom Penh Rally Marks 17th April Anniversary (in SWB/FE/5791/B Collection), **E3/562**, 16 April 1978, ERN (EN) S 00010563

[4024] Reasons for Judgement, §3404 "Concerning the June 1978 Central Committee Guidance, although persons who ceased their "traitorous activity" were nominally subject to re-education under this policy, the Chamber finds that, while it was nominally applicable to those who *inter alia* were "serving as Yuon (Vietnamese) agents", it is unclear whether this category extended beyond Khmer people who colluded with Vietnam to encompass people who were ethnic Vietnamese themselves" (emphasis added). See also Revolutionary flag, May-June 1978, **E3/727**, ERN EN 00185333 which expressly names Chakrey, Chhouk, Thuch, Doeun, SAO Phim, Si, KEO Meas and Chey as agents of the CIA and of Vietnam.

[4025] Reasons for Judgement, §4238.

2080. The Chamber's assertion that "KHIEU Samphan urged DK to "permanently clean" in order to "be free" from the Vietnamese"[4026] is also erroneous and must be dismissed.[4027] In the absence of any evidence to establish that KHIEU Samphan intended to kill Vietnamese in Svay Rieng, in the territorial waters, in Kampong Chhnang province, in Kratie province and at Ksach pagoda, it could not find that KHIEU Samphan was responsible, on the basis of his participation in a JCE, of the CAH of the murder and extermination of Vietnamese.[4028]

C. Lack of intent to commit the crime of racial persecution

2081. The Chamber erred by finding that KHIEU Samphan shared with the other participants in the JCE the specific intent to discriminate against Vietnamese on the basis of race. To reach this finding, it merely stated that it was "satisfied that the intent to kill was the result of KHIEU Samphan's specific intent to discriminate against the Vietnamese on racial grounds".[4029] However, the Chamber had no evidence to establish that KHIEU Samphan intended to kill ethnic Vietnamese.[4030]

2082. Furthermore, there is no source to support the finding regarding specific intent. The Chamber identified no evidence that KHIEU Samphan specifically intended to discriminate against Vietnamese murder victims on racial grounds. It found that the CAH of persecution on racial grounds was committed in relation to the murders of Vietnamese at AuKg, S-21 and Svay Rieng. Without evidence of specific intent in relation to these murders, KHIEU Samphan could not be held responsible.

2083. KHIEU Samphan's alleged statements, cited by the Chamber to establish his knowledge of the crimes, are based on transcripts of speeches contained in unreliable foreign journals.[4031] The Chamber has also distorted the rhetoric when it comes to the Vietnamese by considering that the ethnic Vietnamese were targeted. Indeed, there are systematic mentions of Vietnam, the Vietnamese invaders and annexationists or agents of the Vietnamese invaders and annexationists. In a framework of armed hostility, no reasonable judge could have found that KHIEU Samphan targeted ethnic Vietnamese.

[4026] Reasons for Judgement, §4238.
[4027] See above, §1895.
[4028] Reasons for Judgement, §4293.
[4029] Reasons for Judgement, §4293.
[4030] See above, §2077-2080.
[4031] See above, §1886-1909.

2084. Moreover, if KHIEU Samphan had a discriminatory intent, the Chamber has never explained how this discrimination was on racial grounds. In the absence of evidence supporting a specific intent on the part of the Appellant to kill the Vietnamese on racial grounds, the Chamber's finding must be reversed and KHIEU Samphan must be acquitted of the CAH of persecuting Vietnamese on racial grounds.[4032]

2085. Moreover, in finding that KHIEU Samphan's intent to kill stemmed from a specific intent to discriminate on racial grounds, the Chamber failed to establish KHIEU Samphan's intent to discriminate on racial grounds in the deportation and arrest of Vietnamese. However, in TK and Prey Veng, the Chamber found for the CAH of persecution on racial grounds on the basis of deportation acts only. Thus, the Chamber failed to establish KHIEU Samphan's intention to commit the CAH of racial persecution in TK and Prey Veng. He could therefore not be held responsible for these crimes.[4033]

D. Lack of intent to commit the crime of genocide by murder

2086. The Chamber erred by finding that KHIEU Samphan shared with other JCE members the "genocidal intent [...] to commit [...] the crime of genocide by killing members of the Vietnamese racial, national and ethnic group".[4034] For the Chamber, "KHIEU Samphan's words and actions throughout the DK period demonstrate his genocidal intent to destroy the Vietnamese as a [...] group, as such". The Chamber has never specified what actions were taken. Furthermore, it was repeatedly pointed out that, although KHIEU Samphan had indeed made the statements cited by the Chamber, they were not directed at the ethnic Vietnamese, the only group identified. Therefore, he could not have intended to destroy this group.

2087. The Chamber has found no evidence that KHIEU Samphan intended to destroy, in whole or in part, the Vietnamese who lived in Cambodia between April 1977 and the end of the regime. The "in whole or in part" element is also completely ignored by the Chamber. In the absence of any evidence, the Chamber found no better way than to refer to an excerpt from a documentary in which KHIEU Samphan was questioned in 2007, more than 25 years after the events. It did not even bother to transcribe KHIEU Samphan's words as they stand, which it felt demonstrated an intent

[4032] Reasons for Judgement, §4306.
[4033] Reasons for Judgement, §4306.
[4034] Reasons for Judgement, §4294.

to destroy the group of ethnic Vietnamese from April 1977 onwards. It says in a footnote: "KHIEU Samphan's lasting ire at the group is emphatically demonstrated in a 2007 interview wherein he lambasts the Vietnamese as aggressors and Vietnam a 'gigantic S-21' while nonchalantly dismissing the 'little S-21 over here'". ".[4035]

2088. In addition to the effect of style, the question arises as to how "KHIEU Samphan's lasting ire at the group" in 2007 could be used to classify an intention to destroy it as an illegal act. Second, the Chamber did not explain how the fact that he "lambasts" the Vietnamese as aggressors and Vietnam could be used to argue that KHIEU Samphan was harbouring anger against the group of Vietnamese living in Cambodia. Finally, KHIEU Samphan's views expressed in 2007 on the suffering that Vietnam was inflicting on Cambodians in Kampuchea Krom have no connection with the alleged murders of ethnic Vietnamese between April 1977 and the end of the regime. This documentary excerpt could not establish any intent to destroy the group of ethnic Vietnamese at the time of the events. Therefore, KHIEU Samphan must be acquitted of the crime of genocide of the Vietnamese.

E. Lack of intent to commit grave breaches of the Geneva Conventions

2089. The Chamber erred by finding that KHIEU Samphan shared with the other participants in the JCE the intent to commit serious violations of the GC.[4036] It considered that KHIEU Samphan "knew of the protected status of Vietnamese prisoners at S-21 Security Centre ". However, this element did not support the contention that he intended to commit murder, torture, inhuman treatment and other serious violations of the GC against these protected persons.

2090. The existence of support for a revolutionary enemy plan did not absolve the Chamber from establishing a direct intent to commit serious violations of the GC against the Vietnamese detainees at S-21. Nor could it infer from KHIEU Samphan's participation in the JCE his intention to commit crimes. These are separate elements of criminal responsibility. The Chamber did not mention any evidence that KHIEU Samphan intended to commit crimes at S-21 against the Vietnamese. Therefore, without intent, KHIEU Samphan could not be held responsible for these crimes and his conviction must be reversed.[4037]

[4035] Reasons for Judgement, §4294, fn 14002.
[4036] Reasons for Judgement, §4295.
[4037] Reasons for Judgement, §4306.

III. BUDDHISTS

2091. The Chamber erred in fact and in law by listing elements that could not prove specific intent to discriminate on religious grounds against Buddhists and Buddhist monks (A) without making the only reasonable finding that there was no criminal intent on the part of KHIEU Samphan (B).

A. Lack of established criminal intent

2092. The Chamber erred in law and in fact by finding that "KHIEU Samphan's actions demonstrate his specific intent to discriminate against Buddhists on the basis of their membership of that religious group".[4038]

1. The alleged strong support for "CPK policies"

2093. The Chamber erred in failing to give reasons for this vague and unsubstantiated assertion of "[KHIEU Samphan's] steadfast support of the CPK's policies", [4039] which in any event did not lead to a finding of specific intent to discriminate against Buddhists.

2. Intrinsic flaws in the thesis of supporting a masquerade of normality

2094. It also erred in fact in asserting that KHIEU Samphan was acting in bad faith in saluting the *Sangha* for his contributions to the revolution. [4040]The thesis of a "masquerade of normality" is not supported by any direct or indirect evidence as demonstrated above.[4041]

3. Intent to eradicate Buddhism in Cambodia

2095. The Chamber erred in law and in fact by failing to explain how "steadfast support of the CPK's policies" supported its finding of a specific intent to eliminate Buddhism.[4042] or "discriminate against Buddhists on the basis of their membership of that religious group" with the aim of excluding these individuals from society".

4. Alleged participation in JCE insufficient to prove intent

[4038] Reasons for Judgement, §4298.
[4039] Reasons for Judgement, §4298.
[4040] Reasons for Judgement, §4297.
[4041] See above, §1914-1920.
[4042] Reasons for Judgement, §4298.

2096. The Chamber erred in fact and in law by finding that KHIEU Samphan's participation in the JCE demonstrated a shared intent "of other JCE members to commit [...] the crime against humanity of persecution on religious grounds".[4043] It failed to explain its reasoning or provide any grounds.

B. Only reasonable finding possible: lack of criminal intent

2097. With respect to the CAH of persecution on religious grounds, the required criminal intent is that to "discriminate against Buddhists on the basis of their membership of that religious group" in order to exclude these individuals from society. However, the Chamber has not established by any factual evidence that KHIEU Samphan intended to discriminate against Buddhists and Buddhist monks at TK "on the basis of their membership of that religious group" in order to exclude these individuals from society at TK.

2098. The Chamber should have made the findings of the lack of direct or indirect evidence of KHIEU Samphan's intention to discriminate in any way against Buddhists and Buddhist monks at TK. Therefore, the only reasonable finding that any impartial judge would have made is that KHIEU Samphan lacked the requisite criminal intent with regard to the CAH persecution on religious grounds of Buddhists and Buddhist monks at TK in 1975. Any finding to the contrary must be reversed.[4044]

IV. FORMER KHMER REPUBLIC SOLDIERS AND OFFICIALS

2099. The Chamber erred in fact and in law by listing elements that are not capable of proving the specific intent of KHIEU Samphan to discriminate on political grounds against ex-KR (A) or to commit murders of ex-KR soldiers and officials (B).

A. Lack of intent to commit the crime of persecution on political grounds

2100. [*paragraph deleted after correcrion, but retained for numbering*]

1. KHIEU Samphan's leading role in the victory of 17 April 1975

2101. As stated above, the Chamber erred in fact by considering that KHIEU Samphan had played a leading role in securing the victory of the CPK on 17 April 1975.[4045] Whatever the case, it could

[4043] Reasons for Judgement, §4298.
[4044] Reasons for Judgement, §4297-4298.
[4045] Reasons for Judgement, §4300, fn 14010 referring to §4244 and 4245 (Knowledge – Former officials of the Khmer Republic).

not in itself make any finding from this alleged role, which was confined to the civil war of the period before 17 April 1975, as to whether KHIEU Samphan intended to discriminate against the ex-KR soldiers and officials at TK between 20 April and the end of May 1975 and at 1JD, S-21 and KTC between the beginning of 1977 and 6 January 1979.[4046]

2. Call for the execution of the leaders of the Khmer Republic

2102. The Chamber erred in fact and in law by relying on KHIEU Samphan's appeals from before 17 April 1975 to the execution of the leaders of the Khmer Republic as a basis for the requisite intent with respect to the CAH of persecution on political grounds.[4047] These appeals limited to the pre-April 1975 civil war period could not reasonably be used by the Chamber to infer an intention to discriminate against all ex-KR soldiers and officials at TK between 20 April and the end of May 1975 and at 1JD, S-21 and KTC between early 1977 and 6 January 1979.

2103. Let alone because these murders of KR leaders have already been definitively judged in the 002/01 trial, the Supreme Court having considered that "the killing of high-ranking Khmer Republic officials was part of the common purpose, in relation to the evacuation of Phnom Penh" and confirmed the conviction of KHIEU Samphan on these facts on appeal.[4048] The Chamber could not therefore retry the same facts without violating the principle of *non bis in idem*.[4049]

3. Lack of evidence of intent to discriminate against ex-KR soldiers and officials

2104. The Chamber erred in fact and in law by stating without any motivation or reference that KHIEU Samphan was a "staunch supporter of the Party's discriminatory policies throughout the DK period".[4050]

2105. Its assertion that it is found "that KHIEU Samphan shared the specific intent of other JCE participants to discriminate against all officials of the former Khmer Republic on the basis of their political status, in particular their perceived ability to stage a counter-revolution" was not a demonstration.[4051] Indeed, the Chamber's starting point is the alleged perception of the ex-KR

[4046] See above, §1451-1456.
[4047] Reasons for Judgement, §4300.
[4048] Case 002/001 Appeal Judgement, 23.11.2016, §859(emphasis added), in which the Supreme Court found that the evidence opposes "the existence of any generalised policy as of 4 June 1975". See also, §466.
[4049] See above, §545, 134.
[4050] Reasons for Judgement, §4300.
[4051] Reasons for Judgement, §4300.

officials without citing the evidence in support of its assertion. On this basis alone, it found that KHIEU Samphan was motivated by the specific intention to discriminate against all ex-KR soldiers and officials. This unreasonable and unjustified finding must be reversed.

2106. Furthermore, the Chamber erred in fact by expressing without any tangible factual basis a belief "that, in line with his disposition toward the revolutionary framework, KHIEU Samphan specifically intended that all former Khmer Republic officials be subjected to adverse treatment".[4052] Nor does this peremptory assertion constitute a reasoned finding.

4. Participation in the JCE insufficient to establish intent

2107. The Chamber erred in law by finding that "KHIEU Samphan shared the specific intent of other JCE members to commit, through a joint criminal enterprise, the crime against humanity of persecution on political grounds against former officials of the Khmer Republic throughout the DK period"[4053]. The non-criminal common purpose itself in which KHIEU Samphan participated could not suddenly become the JCE. The Chamber had to establish what his significant contribution was to the criminal aspect of the project involving the crime of persecution on political grounds. In the case at hand, the Appellant's speeches cited by the Chamber were not sufficient to establish this intent.

B. Lack of evidence of intent to commit the crime of murder

2108. The Chamber erred in its assessment of the evidence by finding that KHIEU Samphan intended to commit the crime of murder targeting the ex-KR officials between 20 April 1975 and the end of May 1975 and between October 1975 and the end of DK at S-21 and KTC.[4054]

2109. It erred in fact by invoking against it the alleged appeals made in 1972 against high-ranking officials of the KR and their subordinates.[4055] However, these appeals occurred in a context of war before the DK period and were aimed only at "high-ranking" officials. Moreover, as seen above, these facts have already been definitively determined.[4056]

[4052] Reasons for Judgement, §4300.
[4053] Reasons for Judgement, §4300.
[4054] Reasons for Judgement, §4301-4302.
[4055] Reasons for Judgement, §4302.
[4056] See above, §2103.

2110. As noted above, the Chamber also erred in fact on the basis of a statement allegedly made by KHIEU Samphan that "the object of the revolution was 'eliminate the Lon Nol regime' – including the capitalists, feudalists and intellectuals who occupied its ranks – and that those who betrayed the Party or the revolution would be killed".[4057] In a footnote, it referred to § 4244 and 4272, which do not provide information on the source of this assertion.[4058] In reality, the source of this "statement" is civil party PREAP Chhon, who, as we have seen above, was not credible. [4059]

2111. The Chamber also erred in creating an artificial link between "these calls" and the facts that took place at S-21 and at KTC when there was nothing in its factual findings on these security centres to establish this.[4060] It therefore erred in fact and in law by stating that it was "satisfied that former Khmer Republic officials (including soldiers and civil servants) and their families were subject to the CPK's policy to identify, arrest, isolate and 'smash' the most serious category of enemy, and that in this regard, KHIEU Samphan shared the intent of other JCE members to commit, through a joint criminal enterprise, the crime against humanity of murder".[4061]

2112. **Conclusion.** There is no direct or indirect evidence of KHIEU Samphan's intention to discriminate against all ex-KR officials in TK between 20 April and the end of May 1975 and in 1JD, S-21 and KTC between early 1977 and 6 January 1979 "on political grounds" in order to exclude these individuals from society. Similarly, there is no direct or indirect evidence of KHIEU Samphan's intention to kill the ex-KR officials between 20 April 1975 and the end of May 1975 and between October 1975 and the end of DK at S-21 and KTC.

2113. The Chamber should have drawn the findings of this lack of evidence instead of extrapolating on insufficient evidence or facts already finally judged. The only reasonable finding was that KHIEU

[4057] Reasons for Judgement, §4302, fn 14013 referring to §4244 and 4272. See also above, §1451-1456.
[4058] §4244 is in the "knowledge" section which seems to refer to the announcement attributed to KHIEU Samphan dated 26 February 1975 in the FBIS case file and to the intrinsically weak probative value which is in this instance not corroborated. The Chamber also referred to §4272 of the Reasons for Judgement which is in the contribution section. This alleged speech by KHIEU Samphan is said to have been made in 1977. However, the reference is manifestly erroneous because reference is made...to §4272.
[4059] See Reasons for Judgement, §3961, fn 13185 referring to the testimony of PREAP Chhon evoking a supposed speech by KHIEU Samphan in 1977. See above, §1534-1535.
[4060] Reasons for Judgement, §4302.
[4061] Reasons for Judgement, §4302.

Samphan lacked the requisite criminal intent with respect to the CAH of persecution on political grounds and the CAH of murder. Any findings to the contrary by the Chamber shall be reversed.[4062]

Section V. MARRIAGES

2114. The Chamber found that "KHIEU Samphan intended the commission of crimes as part of the CPK's nationwide policy regulating marriage" and that he "shared the intent of other JCE members to commit [...] the crime against humanity of other inhumane acts through conduct characterised as forced conduct and rape in the context of forced marriage". [4063]

2115. In particular, it referred to its factual findings on the regulation of marriage,[4064] which were discussed above and which, in addition to being based on errors of law,[4065] resulted from a biased and erroneous assessment of the evidence. Indeed, the Chamber erroneously found that the CAH of OIA of forced marriages and rape within marriages were established. It could therefore not find that KHIEU Samphan intended to commit them. According to the Chamber, this intention is established by his participation in the CPK policy of organising forced marriages in order to increase the population through the regulation of marriage. However, as discussed above, the errors made with respect to the content of the regulations, their implementation and the alleged monitoring of the consummation of marriages did not support the finding that such a policy existed.[4066]

2116. Indeed, as set out above, the Chamber erroneously found that forced marriages and rape in the context of forced marriages fell within the national policy of the CPK.[4067] On the contrary, an impartial examination of the evidence should have led the Chamber to find that the regulation of marriage as advocated by the CPK required the consent of the spouses and that the moral principles, particularly with regard to male-female relations, which were characteristic of the KR movement, made any sexual abuse contrary to their policy.[4068]

[4062] Reasons for Judgement, §4302.
[4063] Reasons for Judgement, §4305.
[4064] Reasons for Judgement, §4303 and fn 14015-14016, §4304 and fn 14017.
[4065] See above, §1098-1116, 1281-1287.
[4066] See above, §1117-1280, 1288-1398.
[4067] See above, §1189-1280, 1341-1398.
[4068] See above, §1192-1195, 1395-1398.

2117. In any event, the allegation that the Appellant "openly advocated for the rapid increase of DK's population and concomitantly encourage encouraged the population to divest themselves of personal sentiment toward their parents in favour of *Angkar*" is based on statements and speeches taken out of context that have nothing to do with marriage.[4069] Similarly, it was only on the basis of the isolated and late testimony of civil party CHEA Deap that the Chamber considered that he "personally instructed that all ministries" were to arrange marriages. However, the lack of credibility of this civil party and the contradictions of her testimony with the rest of the evidence should have led the Chamber to dismiss it.

2118. Accordingly, the Chamber erred in fact and in law by holding that it is proven that KHIEU Samphan acted with intent that the crimes be committed within the framework of a policy of regulating marriage of a criminal nature. These findings will be reversed.[4070]

Title V. ERRORS ON AIDING AND ABETTING

2119. It should be recalled that the Chamber was not duly seized of deaths with *dolus eventualis* at TK[4071], 1JD[4072] and KTC.[4073] Moreover, the principle of legality precluded the application of a lesser standard of intent than direct intent to kill.[4074] Secondly, recharacterisation was illegal at TK,[4075] TTD,[4076] 1JD,[4077] KCA.[4078] Moreover, in any event, the constitutive elements were not present at TK,[4079] TTD,[4080] 1JD [4081] and KCA.[4082] With regard to KHIEU Samphan's liability for aiding and abetting, the Chamber erred in law (Chapter I), and in fact and law in its assessment of the *actus reus* (Chapter II) and *mens rea* (Chapter III) necessary to constitute this mode of liability.

[4069] Reasons for Judgement, §4304, 4248, See above, §1221-1232.
[4070] Reasons for Judgement, §4303-4306.
[4071] See above, §367-371, 378-379, 445-447, 465-474.
[4072] See above, §391-392, 487-489.
[4073] See above, §404-407.
[4074] See above, §575-640.
[4075] See above, §135-157, 672.
[4076] See above, §758.
[4077] See above, §768.
[4078] See above, §814-821.
[4079] See above, §672-685.
[4080] See above, §759-762.
[4081] See above, §768-786.
[4082] See above, §820-824.

Chapter I. AIDING AND ABETTING IN LAW

2120. The Chamber erred in law in its definition of the mental element of aiding and abetting by finding that the accused must "know that a crime would likely be committed".[4083] However, this lesser degree of intent did not exist at the time of the incriminated acts.

2121. The Chamber relied on the same sources as in Judgement 002/01, i.e. the ICTY *Blaškić* Appeal Judgement and the Nuremberg case law, the *Einsatzgruppen* case.[4084] The Defence had appealed this definition, arguing that the *Blaškić* case law was subsequent to the facts in question and that it had not been followed by the other judgements of the Appeals Chamber of the *ad hoc* Tribunals, which instead enshrined "knowledge that the acts performed [...] assist [in] the commission of the specific crime of the principal".[4085] In addition, the Defence had argued that the Statute of the ICC sanctions the intent to facilitate the commission of the crime in addition to knowledge.

2122. As regards the *Einsatzgruppen* case, the Chamber's interpretation does not support a lesser *mens rea*. Indeed, the court had indicated that the accused were members of the *Einsatzgruppen* and that the mission, known to the accused, was to carry out a large-scale programme of murders.[4086] The Defence had also argued that in the *Hechingen Deportation* case and the *Zyklon B* case, the defendants had been convicted of complicity because they were aware that they were contributing to a specific crime.[4087] In the absence of a response from the Supreme Court on the issue in Judgement 002/01, the Defence reiterates the arguments summarised and set out in its appeal from Judgement 002/01.[4088]

2123. The Chamber's error of law invalidates all of its findings on the Appellant's liability for aiding and abetting.[4089]

Chapter II. MISTAKES MADE ON THE *ACTUS REUS*

2124. The Chamber erred in fact and in law by finding that the *actus reus* of the mode of liability for aiding and abetting was met in respect of the alleged murders with *dolus eventualis* at TK, 1JD, TTD and KCA (I), as well as at S-21, KTC and PK (II).

[4083] Reasons for Judgement, §3722.
[4084] Reasons for Judgement, fn 12417.
[4085] AB 002/01, §88.
[4086] AB 002/01, §89.
[4087] AB 002/01, §90.
[4088] AB 002/01, §87-92.
[4089] Reasons for Judgement, §4318, 4328.

I. LACK OF *ACTUS REUS* REQUIRED FOR MURDERS WITH *DOLUS EVENTUALIS* IN TK, 1JD, TTD AND KCA

2125. The Chamber erred in retaining as the basis for the *actus reus* of KHIEU Samphan's liability for aiding and abetting the moral support and implicit encouragement to the decision-making bodies (A), the moral support and active encouragement to the cadres of the CPK (B). All this without substantiating its crucial finding on the significant impact of this alleged practical assistance and moral support on the death of workers working in cooperatives (C).

A. Moral support and implicit encouragement to decision-making bodies

1. Confusion between "policies", crimes and criminal enterprises

2126. The Chamber erred in fact and in law in holding against KHIEU Samphan's alleged attendance and participation "in various meetings of the CPK leadership at which economic plans, irrigation initiatives and the implementation of the CPK's policies were planned and discussed", in particular "the implementation of the policy relating to cooperatives and worksites".[4090] First of all, it failed to explain why all of a sudden it referred to policies in the plural. Second, it failed to explain the implicit link it made between the policies and the crimes of murder with *dolus eventualis* in TK, 1JD, TTD and KCA.

2127. The Chamber erred in fact and in law by finding that KHIEU Samphan "morally supported and implicitly encouraged the decision-making apparatus which continued to push forth with the planning and implementation of criminal initiatives"[4091] without explaining which criminal initiatives were involved.

2. Implicit encouragement requires physical presence at the scene of the crime.

2128. The Chamber erred in law and in fact by retaining "implicitly encouraged" as an act founding the *actus reus* of aiding and encouraging.[4092] In law, however, it is only the case that "[u]nder certain circumstances, even the act of being present on the crime scene (or in its vicinity) as a 'silent spectator' can be construed as the tacit approval or encouragement of the crime.[4093] Therefore, the Chamber erred by finding the implicit encouragement of KHIEU Samphan when it failed to

[4090] Reasons for Judgement, §4313 (emphasis added).
[4091] Reasons for Judgement, §4313 (emphasis added).
[4092] Reasons for Judgement, §4313.
[4093] Judgement *Brđanin* (ICTY), 03.04.2007, §277.

establish that KHIEU Samphan was present at the scene of the crimes of murder with *dolus eventualis* at TK, 1JD, TTD and KCA at the time the crimes were committed.

B. Moral support, moral guarantor and active encouragement to CPK cadres

1. Praise for a sustained pace of work in "his speeches, pronouncements, instructions and lectures".

2129. As noted above,[4094] the Chamber failed to substantiate its assertion that KHIEU Samphan's praise "encouraged cadres to continue implementing conditions which would active the Party's objectives regardless of the impact upon the newly-forged worker-peasants".[4095]

2. Alleged visits by KHIEU Samphan "at cooperatives and worksites".

2130. As noted above,[4096] the Chamber erred in fact and in law by relying on alleged visits "at cooperatives and worksites" to find that "KHIEU Samphan's presence at cooperatives and worksites legitimised the absolute implementation of criminal policies.[4097] The Chamber erred in using the non-legal concept of "policies" which it characterises in the context of aiding and abetting as "criminal" without any reasoning. It did not establish that the Appellant's alleged visits contributed to the commission of the crimes. This was particularly impossible because, as it acknowledged in relation to the TTD site, during visits by officials, the managers of cooperatives and worksites were taking steps to conceal problems.[4098] This is also confirmed by SIHANOUK who accompanied KHIEU Samphan on these rare trips and testified on French television that people "were not unhappy, they didn't look terrorized, they didn't look famished".[4099] HEDER also insisted that "there are many accounts given of a false facade on those occasions when people from the Centre or people from the top, if you will, visited the grassroots".[4100]

[4094] See above, §2021-2022.
[4095] Reasons for Judgement, §4314. There is no reference in fn.
[4096] See above, §1816-1848.
[4097] Reasons for Judgement, §4314 (emphasis added).
[4098] See Reasons for Judgement, §1260. See fn 4303: "T., 25 August 2015 (NHIP Horl), **E1/336.1**, p. 32-33, 35; T., 18 August 2015 (CHHUM Seng), **E1/332.1**, p. 39 (testifying that when the Dam was inaugurated *Ta* Val ordered that the "well-built and healthy people" be invited to stand in the front line to welcome the Chinese delegation)".
[4099] T. 25.10.2013, **E1/234.1**, between 11.00.32 and 11.01.47; Video entitled "Norodom SIHANOUK talks about his life under the Khmer Rouge", 05.02.1979, **E3/2897R**.
[4100] Stephen HEDER T. 17.07.2013, **E1/225.1**, around 14.14.48.

C. Lack of reasoning on the significant impact on the death of workers working in cooperatives

2131. The Chamber erred in law and in fact by finding without reason that the "encouragement" and "moral support" provided by KHIEU Samphan "had a substantial effect on the deaths of workers at cooperatives and worksites".[4101] There is no proven causal link. No co-op manager, no unit head, no former executive interviewed at the hearing mentioned KHIEU Samphan's alleged encouragement. Even if the connection had been demonstrated, the Chamber would have had to explain why the effect was significant. In this case, there is no reasoning on this point.

II. LACK OF *ACTUS REUS* FOR MURDERS WITH *DOLUS EVENTUALIS* AT S-21, KTC AND PK

2132. The Chamber erred in adopting practical assistance (A) and moral support (B) to the Party Centre as the basis for the material element of KHIEU Samphan's responsibility for aiding and abetting. The Chamber failed to explain how these alleged acts had a significant impact on the commission of murder with *dolus eventualis* at S-21, KTC and PK (C).

A. Alleged practical assistance to the Party Centre

2133. The Chamber erred in fact and in law by generally withholding "practical assistance...to the Party Centre in the development and implementation of this policy".[4102] It failed to provide clear and precise references or cross-references to other paragraphs of the Reasons for Judgement. However, practical assistance must be provided for the actual commission of the crime of murder with *dolus eventualis* and not for the development and implementation of a "policy".

2134. The Chamber affirmed in the previous paragraph that KHIEU Samphan had "attended and supported meetings of decision-making bodies where the fates of the enemies were discussed, and participated in the CPK's decision-making processes".[4103] In a footnote, it merely referred to the section on the "knowledge" of KHIEU Samphan. Therefore, the Chamber failed to explain what acts by KHIEU Samphan allegedly constituted assistance in the commission of the crimes. The mere alleged presence of KHIEU Samphan at meetings could not suffice to establish practical assistance in the commission of specific crimes.

[4101] Reasons for Judgement, §4315.
[4102] Reasons for Judgement, §4317.
[4103] Reasons for Judgement, §4316, §fn 14030 referring to §4221-4234.

B. Alleged moral support for the Party Centre

2135. The Chamber erred in fact and of law by basing its finding that KHIEU Samphan provided "moral support to the Party Centre in the formulation and execution of this policy".[4104] There is no reference, footnote or explanation to support this finding. The mere mention of KHIEU Samphan's attendance at meetings could not be enough to characterise in law moral support as grounds for responsibility for aiding and abetting. Once again, moral support should be related to the commission of the crime and not to general support for "a policy".

C. Lack of motivation on the substantial effect on the commission of murder with *dolus eventualis*

2136. The Chamber erred in law and in fact by finding without reason that the "practical assistance […] to the Party Centre" and the "moral support to the Party Centre" had a "substantial effect on the commission of crimes by CPK cadres".[4105] No connection has been established between KHIEU Samphan and the CPK cadres who were the perpetrators of crimes of murder through *dolus eventualis* at S-21, KTC and PK. Even when a connection had been established, the Chamber committed an error by not demonstrating how this effect satisfied the criterion for qualification requiring a substantial effect on the commission of the crime.

Chapter III. ERRORS COMMITTED REGARDING THE *MENS REA*

I. LACK OF *MENS REA* FOR MURDERS WITH *DOLUS EVENTUALIS* AT TK, THE 1JD, THE TTD AND KCA

2137. The *mens rea* of responsibility for aiding and abetting is not constituted because there is no evidence at the required level that KHIEU Samphan was aware of the real likelihood that deaths would result from the conditions imposed at the cooperatives and worksites and no reasoning has been put forward to support the finding that he was at all times aware of the essential elements of the crimes committed by direct perpetrators.

2138. The Chamber erred in fact by relying on the findings appearing in section 18.1.1 of the Reasons for Judgement.[4106] As has been seen above, there is no evidence to support the finding that KHIEU

[4104] Reasons for Judgement, §4317.
[4105] Reasons for Judgement, §4317.
[4106] Reasons for Judgement, §4315, fn 14028 referring to section 18.1.1.

Samphan was aware of the likelihood that deaths would result from the conditions imposed at the cooperatives and worksites.[4107]

2139. The Chamber erred in law and in fact by finding without any reasoning that KHIEU Samphan "was at all times aware of the essential elements of the crimes committed by direct perpetrators".[4108] On the contrary, there is no item of direct or indirect evidence to prove this assertion at the required level.

II. LACK OF *MENS REA* FOR MURDERS THROUGH *DOLUS EVENTUALIS* AT S-21, KTC AND PK

2140. The Chamber erred by relying on incorrect findings relating to KHIEU Samphan's knowledge that the crime of murder with *dolus eventualis* had been committed at S-21, KTC and PK. First of all, the Chamber erred by recalling its incorrect findings regarding KHIEU Samphan's alleged knowledge of the various purges.[4109] The Chamber then erred in fact by relying on the findings appearing in section 18.1.1 of the Reasons for Judgement.[4110] As has been seen above, there is no evidence to support the finding that KHIEU Samphan was aware that the practices relating to treatment of enemies would most likely result in deaths in the security centres.[4111] Finally, the Chamber erred by finding without any reasoning that KHIEU Samphan "was at all times aware of the essential elements of the crimes committed by direct perpetrators".[4112] On the contrary, there is no direct or indirect evidence to prove this assertion at the required level. Thus, neither the *actus reus* nor the *mens rea* of aiding and abetting is constituted regarding these facts. The Chamber erred by finding otherwise. However, KHIEU Samphan should be acquitted of the alleged crimes of murder with *dolus eventualis* at TK, the 1JD, the TTD and KCA and at S-21, KTC and PK.[4113]

GENERAL CONCLUSION

2141. The volume and the number of pages of the Reasons for Judgement 002/02 do not attest to the strength of the reasoning behind this very long decision. Multiple errors of law and fact have been scattered throughout the pages, which invalidate the findings as a whole. Apart from the initial error concerning the delivery of the Judgement, the Chamber in fact accumulated errors of law on

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[4107] See above, §1808-1810.
[4108] Reasons for Judgement, §4315.
[4109] Reasons for Judgement, §4316, fn 14029 referring to section 18.1.2.2. See also above §1857-1878.
[4110] Reasons for Judgement, §4315 fn 14028 referring to section 18.1.1.
[4111] See above, §1808-1815 ("Awareness that crimes would be committed").
[4112] Reasons for Judgement, §4317.
[4113] Reasons for Judgement §4315, 4318 and 4328.

the matter of which it was seised, the principle of legality, the guarantees of a fair trial, the errors of fact and law on the constitution of the crimes and the alleged policies. Its biased approach to the law and the evidence marred all of its findings on responsibility. The perfect illustration of its incorrect approach throughout its Reasons is its error of law in convicting KHIEU Samphan for extermination at PK although it had considered "that the crime [was] therefore not established at Phnom Kraol Security Centre".[4114] Its finding can only be reversed, like the others.

2142. Finally, the Chamber fundamentally erred regarding the Appellant's role and the consequences that it reached regarding it. In fact, it has not established his participation or his substantial contribution to a JCE to commit crimes, nor has it established that he aided and abetted the commission of crimes.[4115]

2143. **For all of these reasons**, the Supreme Court is requested to apply the law correctly, to reform the Reasons for Judgement as a whole, and to purely and simply acquit KHIEU Samphan of the facts that are the subject of Case 002/02.

[4114] Reasons for Judgement, §3118 then 4306 and 4341. It then incorrectly combined this declaration of guilt with the others in §4337.
[4115] Reasons for Judgement, §4306-4307, 4311, 4313-4318, 4326-4328.

IN THE FURTHER ALTERNATIVE

2144. If, exceptionally, the Supreme Court were to confirm KHIEU Samphan's conviction on appeal, it could not sentence him to life imprisonment and should oblige itself to use the utmost rigour in determining the *quantum* of the sentence.

I. DEMONSTRATION OF BIAS REGARDING THE OBJECTIVES OF THE SENTENCE

2145. Under the case law of the ICTY, "to determine and set an appropriate sentence, a Trial Chamber must take into account the purpose of the sentence".[4116] The case law "is established and indicates two primary purposes of sentencing, namely retribution and deterrence".[4117] There are "other less dominant objectives, notably public reprobation, the understanding by the accused, the victims and the public that the law has been enforced, and amendment".[4118] In the case at hand, the Chamber unequivocally asserted what it considers to be its primary duty, namely: "to reassure the surviving victims, their families, the witnesses and the general public that the law is effectively implemented and enforced".[4119]

2146. This approach is symptomatic of the bias of the Chamber, which set itself up as a standard bearer for the civil parties to the detriment of an adequate application of criminal law with respect to the accused, the central figure of the trial. Thus, the secondary objective of general prevention constituted the cornerstone of its reflection in disdain of the primordial requirements of retribution.[4120] As emphasised by the Trial Chamber of the ICTY, "unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more." (underlined in the original).[4121]

2147. In its 1987 Report, the Canadian Sentencing Commission also emphasised the fact that according to the principles of sentencing:

> "According to these principles, all exemplary sentences (i.e. the imposition of a harsher sanction on an individual offender so that he or she may be made an example to the community) are unjustified,

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[4116] *Prlić et al.* Judgement (ICTY), 29.05.2013, §1274 (volume 4).
[4117] *Prlić et al.* Judgement (ICTY), 29.05.2013, §1275 (volume 4).
[4118] *Prlić et al.* Judgement (ICTY), 29.05.2013, fn 2357 (of §1275, volume 4).
[4119] Reasons for Judgement, §4348.
[4120] *D. Nikolić* Judgement (ICTY), 18.12.2003, §132; *Kordić & Čerkez* Appeal Judgement (ICTY), 17.12.2004, §1074 referring to *Delalić* et al. Appeal Judgement (ICTY), 20.02.2001, §806.
[4121] *Kordić & Čerkez* Appeal Judgement (ICTY), 17.12.2004, §1075 referring to Judgement R. v. M. (C.A), 1 SCR 500, Judgement of the Supreme Court of Canada, 21.03.1996, §80; *D. Nikolić* Judgement (ICTY), 18.12.2003, §140.

> because they imply that an offender's plight may be used as a means or as a resource to deter potential offenders".[4122]

2148. However, the Chamber precisely lent itself to this excess by sentencing KHIEU Samphan beyond his criminal responsibility. In the name of its capacity to sovereignly assess the sentence, the Chamber has confused power of decision and power of arbitration, to the detriment of KHIEU Samphan.[4123] Consequently, his sentence should be reduced.

II. ERRORS REGARDING THE GRAVITY OF THE CRIMES COMMITTED

A. Error regarding the inclusion of out-of-scope evidence

2149. The Chamber listed the factors "it has identified as being relevant to determine the gravity of the crimes" among which is a set of factual considerations relating to their consequences on the victims.[4124] In this respect, the Chamber has taken into consideration the rape of prisoners in the security centres.[4125] However, the CIJ had explicitly decided not to judge the Accused for the facts of rape committed outside marriage on the grounds that:

> "the official CPK policy regarding rape was to prevent its occurrence and to punish the perpetrators. Despite the fact that this policy did not manage to prevent rape, it cannot be considered that rape was one of the crimes used by the CPK leaders to implement the common purpose".[4126]

2150. Thus, for these facts of rape, the accused benefited from a dismissal order that had acquired the authority of *res judicata*.[4127] Furthermore, the Chamber acknowledged on several occasions in 2014, 2015, 2016 and even in 2019 in the Reasons for Judgement that it had not been seised of the facts in question.[4128] In addition, it recalled that in determining the appropriate sentence the gravity of the crime committed requires "consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime".[4129] Notwithstanding, on

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[4122] Report of the Canadian Sentencing Commission, *Sentencing Reform: a Canadian Approach*, February 1987, p. 146, 147, cited in Judgement *R. v. M. (C.A),* 1 SCR 500, Judgement of the Supreme Court of Canada, 21.03.1996, §78.
[4123] Reasons for Judgement, §4347 *et seq*.
[4124] Reasons for Judgement, §4361.
[4125] Reasons for Judgement, §4365.
[4126] CO, §1429.
[4127] CB 002/02, §174-175.
[4128] Trial Chamber memorandum entitled "Further Information Regarding Remaining Preliminary Objections", 25.04.2014, **E306**, §3; Decision on Khieu Samphan's request for confrontation among witness Srey Than and civil parties Say Sen and Saut Saing and disclosure of audio recording of interviews of Say Sen, 12.06.2015, **E348/4**, §11; Decision on lead co-lawyers' rule 92 submission on the confirmation of the scope of case 002/02 concerning the charges of rape outside the context of forced marriage, 30.08.2016, **E306/7/3**, §17-19; Reasons for Judgement, §187-188.
[4129] Reasons for Judgement, §4349.

considering the rapes in the security centres as established facts and evidence of the gravity of the crimes committed to determine KHIEU Samphan's sentence,[4130] the Chamber *de facto* attributed responsibility to him for crimes of which he was never accused.

2151. However, as it has already been recalled in the ICTR, there is a "general principle that only matters proved beyond reasonable doubt against the Accused are to be considered against him at the sentencing stage".[4131] *A fortiori*, the court may only use against the accused the accusations with which he is charged. Consequently, the Chamber committed an error that invalidates the judgement. The sentence should therefore be reduced.

B. Error regarding KHIEU Samphan's role in the commission of the crimes

2152. The Chamber assessed the gravity of the crimes based on the erroneous finding "KHIEU Samphan's involvement in the crimes to be extensive and substantial".[4132] It relied on elements relating to the nature of his alleged participation without taking into account the form and degree of this participation, contrary to what it recalled and what is recommended by the ICT case law.[4133] In fact, it results from their practice that secondary or indirect forms of participation usually lead to lighter sentences.[4134]

2153. For example, at the ICTR, the judges handed down different sentences to the two accused due to the difference in their participation in the crimes. Gérard NTAKIRUTIMANA was handed down a sentence of 25 years' imprisonment for his direct participation in the execution of the genocide, while Élizaphan NTAKIRUTIMANA was sentenced to 10 years' imprisonment for aiding and abetting others to commit genocide, the court also having taken into account his advanced age and his good moral character before the facts.[4135]

[4130] Reasons for Judgement, §4361.
[4131] For example: *Muhimana* Trial Chamber Judgement (ICTR), 28.04.2005, §590.
[4132] Reasons for Judgement, §4385.
[4133] Reasons for Judgement, §4349; *Aleksovski* Appeal Judgement (ICTY), 24.03.2000, §182 referring to *Kupreškić* Judgement (ICTY), 14.01.2000, §852: "The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime. " (emphasis added); *Ntaganda* Sentencing Judgement (ICC), 07.11.2019, §16.
[4134] *Gacumbitsi* Appeal Judgement (ICTR), 07.07.2006, §201; *Semanza* Judgement (ICTR), 15.05.2003, §562-563; *Ntagerura et al.* Trial Judgement. (ICTR), 25.02.2004, §813; *Muhimana* Judgement (ICTR), 28.04.2005, §593; *Kalimanzira* Judgement (ICTR), 22.06.2009, §744.
[4135] *Ntakirutimana* Judgement (ICTR), 21.02.2003, §894-916 (§897: "Elizaphan Ntakirutimana did not play a leading role in the attacks. He did not personally participate in these killings, nor was he found to have fired on refugees or even to have carried a weapon. ").

2154. In the *Mucić* Judgement in 1998, the Trial Chamber of the ICTY: "has taken into account the fact that the accused has not been named by any of the witnesses as an active participant in any of the murders or tortures for which he was charged with responsibility as a superior".[4136] The ICTY case law also acknowledged that "indirect participation is one circumstance that may go to mitigating a sentence" because it is "less serious than [...] that imposed for direct commission".[4137] In addition, in the *Aleksovski* Judgement, the Chamber pointed out that despite his characterisation as a direct perpetrator, the accused's direct participation in the commission of acts of violence was relatively limited and therefore sentenced him to two and a half years' imprisonment.[4138]

2155. In the case at hand, the Chamber specified that KHIEU Samphan had "provided encouragement, support" to the Khmer Rouge, regarding his conviction for aiding and abetting.[4139] However, it did not emphasise the indirect nature of this mode of participation and did not draw the consequences of it required in view of the *quantum* of the sentence. Furthermore, the Chamber stated that KHIEU Samphan "was involved in the common purpose" and "confirmed, supported and endorsed the Party line" without considering his limited level of contribution to the joint criminal enterprise.[4140]

2156. Finally, analysis of the sentences handed down at Nuremberg demonstrates that KHIEU Samphan's sentence is excessive. Before the IMT, only those with the most significant roles and responsibilities were handed down the maximum sentence.[4141] The example of the accused FUNK is revealing. Convicted for war crimes, crimes against peace and CAH, he publicly justified the discriminations to which the Jews were subjected and was a member of an organisation that ordered the supply, by deportation, of a workforce for the execution of forced labour. However, he never played a dominant role in the different programmes in which he took part. This explains why the military tribunal only handed down a prison sentence exactly in line with his role. In an exemplary manner, faced with crimes commonly acknowledged as the worst known to humanity, the Nuremberg judges never deviated from the obligation to hand down a sentence proportionate to the accused parties' participation in the crimes. This principle should also be respected here.

[4136] *Mucić* Judgement (ICTY), 16.11.1998, §1248 (emphasis added).
[4137] *Krstić* Judgement (ICTY), 02.08.2001, §714.
[4138] *Aleksovski* Judgement (ICTY), 25.06.1999, §236, 244.
[4139] Reasons for Judgement, §4382.
[4140] Reasons for Judgement, §4382, 4383.
[4141] Trial of the Major War Criminals, International Military Tribunal, Nuremberg, 1947.

2157. Thus, the Chamber did not manage to assess all of the relevant factors in determining the gravity of the crimes. Consequently, the sentence handed down against KHIEU Samphan is disproportionate and its length should be reduced.

III. ERRORS REGARDING THE AGGRAVATING FACTORS

A. Error regarding the abuse of his position of authority and influence

2158. The Chamber asserted that KHIEU Samphan had abused his position of authority and influence by contributing to the crimes of which he was accused in the exercising of his official functions and considered this an aggravating factor.[4142] However, on multiple occasions it pointed out KHIEU Samphan's lack of effective power. It thus stated that he "did not have sufficient authority to directly order the perpetration of crimes",[4143] that he exercised "neither responsibility nor military power during DK"[4144] and even that he merely had a largely symbolic role in the context of his functions as President of the State Presidium.[4145]

2159. It should be noted that in the *Kayishema & Ruzindana* Judgement the Trial Chamber of the ICTR acknowledged the lack of *de jure* authority of Obed RUZINDANA under mitigating factors.[4146] In the case at hand, the Chamber has drawn consequences in complete opposition to its observations even though no reasonable trier of fact would have characterised an abuse of position by KHIEU Samphan. KHIEU Samphan's sentence should therefore be reduced.

2160. If, exceptionally, the Supreme Court were to confirm the Chamber's approach in characterising such an abuse, it could not consider it an aggravating factor. It must be stated that the Chamber already took this into account when it assessed the gravity of the crimes. In fact, the Chamber considered that KHIEU Samphan "was privy to important matters and crucial decisions" as a Central Committee member and an attendee at Standing Committee meetings.[4147]

2161. It also stated that he "used his position of influence to support and therefore legitimise the implementation of CPK policies".[4148] In support of this reasoning, the Chamber referred to section

[4142] Reasons for Judgement, §4389.
[4143] Reasons for Judgement, §4320.
[4144] Reasons for Judgement, §593.
[4145] Reasons for Judgement, §596-599.
[4146] *Kayishema & Ruzindana* Judgement (ICTR), 21.05.1999, p. 5 of the section on sentencing, last §.
[4147] Reasons for Judgement, §4382.
[4148] Reasons for Judgement, §4383.

18 of the Reasons for Judgement which talks about his alleged contributions to the crimes in the context of his functions as "Deputy Prime Minister", "President of the State Presidium" and "senior leader of the GRUNK and DK". However, as the ICC judges confirmed in the *Lubanga* case, "any factors that are to be taken into account when assessing the gravity of the crime will not additionally be taken into account as aggravating circumstances, and vice versa".[4149]

2162. In this respect, the ICTY Appeals Chamber acknowledged the error of a Trial Chamber that had counted the role of the accused in the commission of the crimes twice in order to assess their gravity, on the one hand, and as an aggravating factor, on the other. It therefore revised his sentence.[4150] For these reasons, the abuse of position of authority and influence characterised by the Chamber cannot be used as aggravating factors. The sentence handed down against KHIEU Samphan should therefore be reduced accordingly.

B. Error regarding the consideration of level of education

2163. The Chamber considered the fact that KHIEU Samphan is "well-educated" and the fact that he "studied [...] successfully at the tertiary level" constituted an aggravating factor.[4151]The choice of this element is devoid of motivation and relevance. In fact, in the *Stakić* Appeal Judgement, the Appeals Chamber of the ICTY acknowledged the error of the Trial Chamber, which had considered the professional background of the accused as an aggravating factor without giving reasons for its decision:

> "While the Trial Chamber has discretion in determining factors in aggravation, the Trial Chamber must provide convincing reasons for its choice of factors. As the basis on which the Trial Chamber found the existence of this aggravating factor is rather tenuous, the Appeals Chamber finds that the Trial Chamber committed a discernible error in identifying the professional background of the Appellant as an aggravating factor. ".[4152]

2164. Furthermore, in the case of *Hadžihasanović & Kubura*, the Appeals Chamber of the ICTY asserted that the choice of aggravating factors should be made in view of the circumstances of the case at hand.[4153] According to this same reasoning, in the *Simić* Appeal Judgement, the ICTY Appeals

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[4149] *Lubanga* Sentencing Judgement (ICC), 10.07.2012, §35 referring to *M. Nikolić* Judgement on Sentencing Appeal (ICTY), 08.03.2006, §58.
[4150] *M. Nikolić* Judgement on Sentencing Appeal (ICTY), 08.03.2006, §61, 62.
[4151] Reasons for Judgement, §4390.
[4152] *Stakić* Appeal Judgement (ICTY), 22.03.2006, §416.
[4153] *Hadžihasanović & Kubura* Appeal Judgement (ICTY), 22.04.2008, §328: "*The Appeals Chamber reiterates that whether certain factors going to a convicted person's character constitute mitigating or aggravating factors depends*

Chamber reversed the Trial Chamber's approach based on the *Ntakirutimana* case to use the accused's profession as an aggravating factor.

2165. Therefore, and despite the fact that Blagoje SIMIĆ and Gérard NTAKIRUTIMANA both exercised the profession of doctor, the Appeals Chamber emphasised the lack of relevance in using this aggravating factor in view of the facts of the case.[4154] Apart from the fact that NTAKIRUTIMANA did not respect the rules of conduct inherent to his profession, it was established that he had taken part in an armed attack on the civilian population in his place of work.[4155] He was thus accused of having "purely and simply abandoned the Tutsi patients"[4156] and of having killed the hospital accountant in the hospital courtyard. The context is therefore out of proportion with that in which KHIEU Samphan is judged.

2166. In the case at hand, the path followed by the Chamber is conspicuous due to its lack of clarity. The judges of the case weave a tenuous link between the fact that KHIEU Samphan "studied both law and economics [...] at the tertiary level" and his alleged capacity "to know the import and consequences of his actions" without specifying this any further.[4157] This element is not in any way correlated with the imputed act and could be applied to any individual in full possession of their mental faculties, irrespective of their academic background. This general and vague justification therefore falls far below the standards of motivation applied in the other international courts.

2167. For these reasons, KHIEU Samphan's level of education cannot constitute an aggravating factor. The sentence handed down should therefore be revised.

IV. ERRORS REGARDING THE MITIGATING FACTORS

A. Error regarding KHIEU Samphan's cooperation with the ECCC

2168. The Chamber has not allowed the sentence to be reduced due to KHIEU Samphan's cooperation with the ECCC on the grounds that it "did not exceed the legally required minimum participation in court hearings".[4158] This assertion is false and does not reflect the efforts made by him. In fact,

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largely on the particular circumstances of each case. " (this part has not been translated into French).
[4154] *Simić* et al. Appeal Judgement (ICTY), 28.11.2006, §272.
[4155] *Ntakirutimana* Judgement (ICTR), 21.02.2003, §791.
[4156] *Ntakirutimana* Judgement (ICTR), 21.02.2003, §364, 791.
[4157] Reasons for Judgement, §4390.
[4158] Reasons for Judgement, §4397.

it is advisable to make a distinction between the legal obligations imposed on KHIEU Samphan in the context of his judgement and the manner in which he complied with them.

2169. He thus demonstrated a firm and unequivocal intention to participate in each of the hearings whenever his state of health allowed him to. He also showed an exemplary attitude throughout his detention despite the conditions of his imprisonment. Furthermore, the fact that KHIEU Samphan actively participated in his defence, even when he had lost all trust in the ECCC, should be added to his credit. Already sentenced to life imprisonment after Case 002/01, he nonetheless continued to cooperate with the Chamber in order to contribute to the demonstration of the truth rather than impede the work of the court. In this respect, KHIEU Samphan answered the questions from the civil parties within the limit of his knowledge at the time of the facts not only in Case 002/01,[4159] but also at the time of his final statement in Case 002/02.[4160]

2170. Finally, the Chamber found that KHIEU Samphan had "acknowledged the suffering of the Civil Parties and bowed in memory of all innocent victims".[4161] However, rather than using this factor as a mitigating factor, it preferred to openly contradict itself by stating that he had not expressed any sympathy towards the victims.[4162]

2171. In view of these elements, KHIEU Samphan could not have cooperated more with the ECCC without undermining his right to an effective defence. It is clear from the Chamber's reasoning that it was only prepared to allow a reduction of his sentence on the condition that he incriminated himself, in breach of his most basic rights. This reasoning is incorrect. The sentence handed down should therefore be reduced in correlation with his cooperation with the ECCC authorities.

B. Errors regarding the consideration of age and state of health

2172. The Chamber decided to only accord "some minimal weight" to the advanced age of KHIEU Samphan without giving any reasons for its decision.[4163] *A contrario*, it used his advanced age and his declining state of health in order to legitimise the severance of the Case.[4164] This argument

[4159] Reasons for Judgement, §4345.
[4160] T. 23.06.2017, **E1/528.1**, around 10.33.38: "This is an opportunity for me to answer the questions posed by civil parties in this case. ", p. 34 around 10.37.36, p. 36 around 10.48.33, around 10.50.47, p. 40.
[4161] Reasons for Judgement, §4345 referring to T. 23.06.2017, **E1/528.1**, around 11.00.14.
[4162] Reasons for Judgement, §4396.
[4163] Reasons for Judgement, §4398.
[4164] Reasons for Judgement, §4 and fn 8 (referring to the Severance Order, 13.01.2011, **E124**); Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26.04.2013, **E284**, §31, 87; Decision

invoked from 2011 to 2014 is all the more justified in 2019 in order to reduce the sentence. Furthermore, this factor has been raised as a mitigating factor before the international tribunals on multiple occasions, by turns due to the young age or the advanced age of the accused.[4165]

2173. In the *Krajišnik* Case, the Trial Chamber justified the consideration of the advanced age of the accused "on the fact that physical deterioration associated with advanced years makes serving the same sentence harder for an older person".[4166] Thus, the courts took account of this factor *ad hoc* for individuals over 60 years of age.[4167] In particular, the judges took account of the advanced age and fragile state of health of Élizaphan NTAKIRUTIMANA, who was 78 years of age and had already spent more than four years in prison.[4168] Furthermore, in the *Đorđević* Appeal Judgement, the ICTY Appeals Chamber also took into consideration the age of the accused on leaving prison to make the best assessment of his state of health while serving his sentence.[4169]

2174. In the case at hand, KHIEU Samphan is 88 years old and has already spent 12 years in detention. This element has not been taken into account even though he is older than the above-mentioned accused were on the day of their sentencing and at the end of their term of imprisonment. In fact, KRAJIŠNIK was 68 years of age at the time of his early release.[4170] Meanwhile, ĐORĐEVIĆ will be 76 years old.[4171] In addition, and as stated by the ICTY Appeals Chamber in the *Krajišnik* Appeal Judgement: "*A sentence of imprisonment of 27 years is a very serious sentence, especially when the advanced age of Krajisnik is taken into account.* ".[4172] *A fortiori*, this finding illustrates the disproportionate nature of the life sentence handed down and its considerable impact on KHIEU

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on Additional Severance of Case 002 and Scope of Case 002/02, 04.04.2014, **E301/9/1**, §27.

[4165] *Jelisić* Appeal Judgement (ICTY), 05.07.2001, §129-130: for an accused of 23 years of age; *Blaskić* Judgement (ICTY), 29.07.2004, §778: for an accused of 32 years of age; *Erdemović* Sentencing Judgement (ICTY), 05.03.1998, §16: for an accused of 23 years of age.

[4166] *Krajišnik* Judgement (ICTY), 27.09.2006, §1162.

[4167] *Krajišnik* Judgement (ICTY), 27.09.2006, §1162; *Đorđević* Appeal Judgement (ICTY), 27.01.2014, §974, 980; *Krnojelac* Appeal Judgement (ICTY), 17.09.2003, §251; *Simić* Appeal Judgement (ICTY), 17.10.2003, §1099.

[4168] *Ntakirutimana* Judgement (ICTR), 21.02.2003, §898 and 906.

[4169] *Đorđević* Appeal Judgement (ICTY), 27.01.2014, fn 2868: "If he serves his entire term, and taking into consideration his time served, he will be 85 years old upon release".

[4170] *Krajišnik* Judgement (ICTY), 27.09.2006, §1183: his sentence was reduced to 20 years' imprisonment on appeal and he was subject to early release on 30 August 2013.

[4171] *Đorđević* Appeal Judgement (ICTY), 27.01.2014, fn 2868 (of §974) and §980. The Defence recalls that Vlastimir ĐORĐEVIĆ was 65 years of age when he was sentenced on appeal to 18 years' imprisonment in 2014. After deduction of the 7 years spent in detention, he will be 76 years old on his release.

[4172] *Krajišnik* Appeal Judgement (ICTY), 17.03.2009, §782.

Samphan. For all these reasons, the Chamber could not reasonably dismiss his age as a mitigating factor and should hand down a sentence with a time limit.

2175. Similarly, the Chamber "decline[d]" to consider KHIEU Samphan's ill health. To do this, it invoked a decision on KHIEU Samphan's fitness to stand trial.[4173] The Chamber relied on this sole document without explaining the information in it that determined its choice. In addition, it should be highlighted that this assessment was not made for the purpose of exhaustively determining KHIEU Samphan's state of health but simply, as its name states, his fitness to stand trial.

2176. In fact, "the Experts" conducted their examination in the light of the criterion defined in the *Strugar* Appeal Judgement from the ICTY, i.e.: "the Accused must be capable of meaningful participation which allows him to exercise his fair trials rights to such a degree that he is able to participate effectively in his trial and has an understanding of the essentials of the proceedings".[4174] According to the wording held by the Chamber, it is therefore a question of determining whether KHIEU Samphan is able to demonstrate a "minimum standard of overall capacity".[4175] The findings that arise from it are therefore devoid of any relevance in respect of KHIEU Samphan's ability to withstand a long term of imprisonment.

2177. Nonetheless, aware of the gradual decline in his state of health, "the Experts" of the ECCC noted that "KHIEU Samphan's memory and cognitive function will likely gradually deteriorate with age" and recommended "regular reviews of his cognitive function" and that "his blood pressure and weight be closely monitored".[4176] The Chamber deliberately concealed this primordial aspect in determining his sentence. Due to this, the Chamber committed an obvious error in the manner in which it assessed KHIEU Samphan's state of health, which should be included as a mitigating factor. Consequently, the length of his sentence should be reduced.

[4173] Reasons for Judgement, §4398, fn 14189.
[4174] Fourth decision on fitness of the accused Khieu Samphan to stand trial, 27.02.2018, **E460/5**, §9 referring to the *Strugar* Appeal Judgement (ICTY), 17.07.2008, §55 (emphasis added).
[4175] *Prosecutor v. Pavle Strugar*, IT-01-42-A, Decision on the request from the Defence asking for the proceedings to be closed, 26 May 2004, §37.
[4176] Fourth decision on fitness of the accused Khieu Samphan to stand trial, 27.02.2018, **E460/5**, §8.

C. Error regarding good moral character

2178. The Chamber stated that "no character witnesses were heard" in respect of KHIEU Samphan.[4177] Although it referred to the character witnesses heard in Case 002/01, it did not bother to determine the weight to be given to KHIEU Samphan's personal qualities on the grounds that they had been dismissed in the first proceeding.[4178] The Chamber thus validated the incorrect examination made previously rather than apply itself to a more thorough assessment of the value to be given to these testimonies.[4179]

2179. In this respect, it insisted on using statements from witnesses heard in Case 002/01 whenever they might contain elements relevant for KHIEU Samphan's accusation.[4180] However, it did not consider it relevant to examine the statements of additional witnesses who came to testify on the facts that unanimously proved his good character[4181] on the grounds that it was of little significance that he had "been kind to people in specific instances".[4182]

2180. However, the good character of an accused person can only be determined by a succession of testimonies regarding his attitude at specific times in their life. Furthermore, this position is in complete breach of the obligation incumbent upon a reasonable judge to take account of all the elements of personality.[4183] The Chamber never doubted the credibility of these witnesses. There

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[4177] Reasons for Judgement, §4399.
[4178] Reasons for Judgement, fn 14190 (from §4399).
[4179] SO Socheat: T. 10.06.2013, **E1/204.1**; T. 12.06.2013, **E1/206.1**. TUN Soeun: T. 10.06.2013, **E3/204.1 [error E1/204.1],** p. 13 around 09.41.12, p. 14 around 09.44.20, p. 39-40 around 11.22.00. SOK Roeu: T. 07.06.2013, **E3/203.11 [error E1/203.1]**, around 13.39.04. Philippe JULLIAN-GAUFRES: T. 21.05.2013, **E1/194.1**. CHAU Soc Kon: T. 22.05.2013, **E1/195.1**, p. 65-66 around 14.10.47, p. 71-72 around 14.28.26, p. 78-79 around 14.46.19.
[4180] See above, §161-164.
[4181] LENG Chhoeung: T. 17.06.2013, **E1/208.1**, p. 42 around 11.36.23. SUONG Sikoeun: T. 14.08.2012, **E1/107.1**, p. 96 around 15.22.03. KIM Vun: T. 22.08.2012, **E1/112.1**; SA Vi: T. 09.01.2013, **E1/157.1**, around 09.29.45; ROS Suy: T. 25.04.2013, **E1/184.1**, p. 39, around 11.14.32, p. 40-41 around 11.17.52. ROCHOEM Ton: T. 01.08.2012, **E1/100.1**, around 15.39.46. *DUCH*: T. 28.03.2012, **E1/55.1**. François PONCHAUD: T. 09.04.2013, **E1/178.1**. ONG Thong Hoeung: T. 07.08.2012, **E1/103.1**, around 13.53.28. HUN Chhunly: T. 07.12.2012, **E1/150.1**, p. 3-4 around 09.11.56, p. 97 around 15.26.22, p. 109-110 around 15.59.36. CHHOUK Rin: T. 22.04.2013, **E1/181.1**, p. 44 around 11.39.56, p. 58 around 13.55.04; T. 23.04.2013, **E1/182.1**, p. 81-82 around 15.08.22, around 15.09.53; PRUM Sou: T. 21.05.2013, **E1/194.1**, around 09.32.23; NOU Hoan: T. 30.05.2013, **E1/199.1**, p. 22 around 09.56.11, p. 33-34 around 10.24.23; Philip SHORT: T. 06.05.2013, **E1/189.1**. David CHANDLER: T. 20.07.2012, **E1/93.1**; T. 24.07.2012, **E1/95.1**.
[4182] Reasons for Judgement, fn 14190 (from §4399) referring to Judgement 002/01, 07.08.2014, §1103.
[4183] *Tadić* Sentencing Judgement (ICTY), 11.11.1999, §61. For an example of consideration of good character before the facts, see *Ntakirutimana* Judgement (ICTR), 21.02.2003, §895 and 906.

was therefore no reason for it to keep quiet and ignore their unanimously laudatory accounts in determining the sentence.

2181. Throughout his life, KHIEU Samphan therefore demonstrated genuine personal qualities. He was qualified as "clean" by almost all the people who had contact with him, mainly due to his honesty, his modesty and the strength of his commitment to the Cambodians.[4184] He ardently wished to reform his country peacefully and from the top. In this respect, he remained incorruptible[4185] and constantly opposed the injustices that his people suffered.[4186] Each of his actions was motivated by the aim of "improving the living conditions of the people of Cambodia through an economic revolution" so that "Cambodia would develop gradually and not in a brutal way".[4187]

2182. Thus, contrary to what the Chamber stated at the end of the first trial, the elements of KHIEU Samphan's personality made known to the Court attest to his moral values and are not limited to his marital relationship[4188] or to "specific instances".[4189]

2183. The Chamber committed an obvious error of assessment by not granting more weight to these statements, regarding which it must be further emphasised that they came from a variety of witnesses on the facts. KHIEU Samphan's sentence should therefore be reduced in view of these considerations.

2184. **In conclusion**, the errors made by the Chamber invalidate its decision on the sentence.

[4184] SOK Roeu: T. 07.06.2013, **E1/203.1**, around 13.40.51 ("he never looked down on poor people or peasants"), around 13.42.51 ("he never put any blame on subordinates; he only guided us on our work. He advised us […]").
[4185] François PONCHAUD: T. 09.04.2013, **E1/178.1**, p. 9-10, around 09.36.19; T. 10.04.2013, **E1/179.1**, around 13.56.20. CHHOUK Rin: T. 23.04.2013, **E1/182.1**, around 15.23.30. HUN Chhunly: T. 07.12.2012, **E1/150.1**, around 15.26.22, p. 120, 121, around 15.59.36. NOU Hoan: T. 30.05.2013, **E1/199.1**, p. 22, around 09.56.11, p. 33-24, around 10.24.23. *DUCH*: T. 28.03.2012, **E1/55.1**, around 11.47.11. David CHANDLER: T. 20.07.2012, **E1/93.1**, around 14.42.04; T. 24.07.2012, **E1/95.1**, around 14.19.22. Philip SHORT: T. 06.05.2013, **E1/189.1**, around 11.34.16.
[4186] KHIEU Samphan's Closing Brief (002/01), 26.09.2013, **E295/6/4**, §210 ("On his return to Cambodia, KHIEU Samphan started an independent newspaper in which he peacefully and courageously denounced the social injustices of SIHANOUK's regime") referring to François PONCHAUD: T. 09.04.2013, **E1/178.1**, around 09.38.49. HUN Chhunly: T. 06.12.2012, **E1/149.1**, around 11.50.25; T. 07.12.2012, **E1/150.1**, p. 97-98, around 15.27.50, p. 108, around 15.56.16, p. 109, around 15.58.25. NOU Hoan: T. 30.05.2013, **E1/199.1**, around 10.24.23. Philip SHORT: T. 06.05.2013, **E1/189.1**, around 11.26.44, p. 51-52 around 11.34.16. David CHANDLER: T. 20.07.2012, **E1/93.1**, p. 115-116 around 14.42.04; CHAU Soc Kon: T. 22.05.2013, **E1/195.1**, around 14.17.32.
[4187] Philippe JULLIAN-GAUFRES: T. 21.05.2013, **E1/194.1** before 14.23.19; Testimony by Philippe JULLIAN-GAUFRES in defence of Mr KHIEU Samphan, 15.10.2010, **E3/4077**, ERN EN 00911415, ("In his opinion, this should have been a gradual process and not the Chinese-style "great leap forward" that the Khmer Rouge leaders implemented when they seized power. ").
[4188] SO Socheat: T. 10.06.2013, around 14.19.56, ("He is a very patient person, very gentle. […] He […] has helped me greatly during the difficult time".).
[4189] Reasons for Judgement, fn 14190 (from §4399) referring to Judgement 002/01, 07.08.2014, §1103.

ON THESE GROUNDS

2185. KHIEU Samphan's Defence hereby asks the Supreme Court Chamber:

- ***primarily***, to FIND on the nullity of the Judgement handed down on 16 November 2018 and the Reasons notified to the parties on 28 March 2019 in breach of the IR;
- ***secondarily***, to OVERTURN the Judgement and its Reasons and to DELIVER not guilty verdicts on each charge;
- ***in the further alternative***, to REVISE the sentence and DELIVER a prison sentence with a time limit.

Without prejudice,

KONG Sam Onn	Phnom Penh	
Anta GUISSÉ	Phnom Penh	