



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

ព្រះរាជាណាចក្រកម្ពុជា
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Nation Religion King
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Nation Religion Roi

អង្គជំនុំជម្រះតុលាការកំពូល
Supreme Court Chamber
Chambre de la Cour suprême

ឯកសារដើម
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TRANSCRIPT OF APPEAL JUDGMENT

PUBLIC

Case File N° 002/19-09-2007-ECCC/SC

23 November 2016

Before the Judges: KONG Srim, Presiding
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Florence N. MWACHANDE-MUMBA
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Language used unless specified otherwise in the transcript

Speaker	Language
The GREFFIER	Khmer
The President (KONG Srim)	Khmer

1

1 PROCEEDINGS

2 (Court opens at 0907H)

3 MR. PRESIDENT:

4 Today, the Supreme Court Chamber of the ECCC continues its
5 proceeding in order to announce the final judgment on the appeals
6 by Nuon Chea and Khieu Samphan and the Co-Prosecutors in Case
7 002/01, dated 19 September 2007, with the Co-Accused Nuon Chea
8 and Khieu Samphan.

9 Greffier, please report the attendance of the parties and the
10 counsels.

11 Please turn on the microphone.

12 THE GREFFIER:

13 Mr. President, for today's proceedings on the final judgment
14 delivery in Case 002, all parties are present and the two Accused
15 are also present. We have the Co-Prosecutors and the Lead
16 Co-Lawyers and all the Defence Counsel.

17 We also have more than 100 civil parties who are attending the
18 pronouncement. However, due to the limited seats available in the
19 courtroom, we only have 10 civil parties who are selected to be
20 present in the courtroom. They are Sut Ny, Sou Sotheavy, Chau Ny,
21 Kim Hounn, Sophan Sovany, Yim Sovann, Neang Sakhan, Toeng Sokha,
22 Seng Sivutha, and Yim Roudoul.

23 Thank you.

24 [09.10.53]

25 MR. PRESIDENT:

2

1 I would also like to make an announcement, that on the
2 pronouncement of the summary of the Supreme Court Chamber
3 judgment, the Accused may use the restroom without informing the
4 Chamber in advance.

5 Summary of Supreme Court Chamber judgment on appeals in Case
6 002/01.

7 On 7 August 2014, the Trial Chamber of the ECCC rendered its
8 judgment in Case 002/01, finding the Accused, Nuon Chea and Khieu
9 Samphan, guilty of the crimes against humanity of extermination,
10 encompassing murder, persecution on political grounds; and other
11 inhumane acts, comprising forced transfer, enforced
12 disappearances and attacks against human dignity.

13 The Trial Chamber found that these crimes had been committed in
14 the course of three sets of events, which were the subject of
15 Case 002/01, namely: during the evacuation of Phnom Penh
16 immediately after the fall of the city on 17 April 1975,
17 so-called Population Movement Phase One; during population
18 transfers that had occurred between 1975 and 1977, so-called
19 Population Movement Phase Two; and the execution of former Lon
20 Nol soldiers and officials at a locality called Tuol Po Chrey, in
21 Pursat province, in late April 1975.

22 [09.13.03]

23 The Trial Chamber found that although neither of the accused had
24 committed any of these crimes with their own hands they were,
25 nevertheless, criminally responsible for them based upon the mode

1 of liability called joint criminal enterprise, as well as because
2 they had planned, instigated, aided and abetted and, in the case
3 of Nuon Chea, ordered these crimes.

4 The Trial Chamber sentenced both Accused to life imprisonment.
5 The Trial Chamber also granted, in part, the request for moral
6 and collective reparations of the civil parties and endorsed 11
7 projects in this regard.

8 Nuon Chea and Khieu Samphan, as well as the Co-Prosecutors, filed
9 appeal briefs and separate responses thereto. The civil parties
10 also made written submissions.

11 [09.14.15]

12 The Supreme Court Chamber held a hearing on 2nd, 3rd and 6th July
13 2015, to examine three additional witnesses. On 17 November 2015
14 and from 16 to 18 February 2016, it held hearings to hear the
15 oral submissions on the appeals. The Supreme Court Chamber then
16 retired to deliberate on the appeals.

17 Today, the Supreme Court Chamber is delivering its judgment on
18 the three appeals. At this hearing, I shall summarize the reasons
19 of the Supreme Court Chamber and read out Supreme Court Chamber's
20 disposition. The summary is provided to assist in understanding
21 the Court's decision. It does not form part of the reasons for
22 the decision. The full judgment of the Court is the only
23 authoritative document.

24 The appeals brought by Nuon Chea and Khieu Samphan comprise 223
25 and 148 grounds of appeal, respectively, which often overlap. For

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1 that reason, I shall address the two appeals together, as is done
2 in the written judgment. The Co-Prosecutor's appeal will be
3 addressed separately.

4 I would like to emphasize that because of the large number of
5 grounds of appeal that have been raised, I shall, at this
6 hearing, summarize only the findings in relation to those grounds
7 that were particularly contentious or significant or of
8 particular interest to the public at large. Of course, the
9 Supreme Court Chamber has also analyzed all other grounds of
10 appeal that have been raised.

11 [09.16.18]

12 The Supreme Court Chamber's findings in respect of all these
13 grounds are set out in written judgment. The full written
14 judgment will be notified to the parties shortly after the
15 hearing is closed. It is the full written judgment and not my
16 summary that is authentic.

17 Appeals of Nuon Chea and Khieu Samphan.

18 The grounds of appeal raised by Nuon Chea and Khieu Samphan may
19 be divided into five thematic groups. I shall address each of
20 them in turn.

21 Fairness of the proceedings.

22 The Accused raised several arguments challenging the fairness of
23 the proceedings against them. I shall limit my summary to two
24 sets of arguments.

25 [09.17.07]

5

1 Right to an independent and impartial tribunal.

2 Notably, the Accused submit that their right to be tried before

3 an independent and impartial tribunal has been violated. The

4 Supreme Court Chamber is not persuaded by the argument that the

5 Trial Chamber's purported bias is demonstrated by what are

6 alleged to have been erroneous and illogical findings, nor is the

7 Supreme Court Chamber of the view that the interview Judge

8 Cartwright gave in 2013 discloses bias on her part.

9 As to the argument of a lack of independence based on the

10 statements made by former Co-Investigating Judge Marcel Lemonde

11 in his book, the Chamber notes that those comments are of a

12 general nature and were not stated in relation to Case 002.

13 Turning to the allegation by Thet Sambath that potential

14 witnesses did not testify due to security concerns, the Supreme

15 Court Chamber notes that, while this is a serious allegation, it

16 is unrelated to the question of whether the Trial Chamber lacked

17 independence. With reference to the arguments that the reasoning

18 of the Cambodian Judges, for not calling Heng Samrin as a

19 witness, disclosed that their lack of independence, the Supreme

20 Court Chamber considers that it is not obvious that this could be

21 the only possible conclusion since it could have been genuinely

22 motivated by the apprehension of the irrelevance of his expected

23 testimony.

24 [09.19.16]

25 Rights to an effective defence.

1 Nuon Chea and Khieu Samphan raised several arguments in support
2 of their claims that their rights to an effective defence was
3 violated, for example, by the Trial Chamber's failure to summons
4 certain witnesses. With regards to Heng Samrin, Nuon Chea has
5 requested several times that he be summonsed to testify,
6 including before the Trial Chamber.

7 The Trial Chamber could not reach the requisite majority for
8 calling Heng Samrin as a witness . While three Judges considered
9 that summoning him was not warranted, two Judges were of the view
10 that Heng Samrin was a relevant witness and should be called.

11 [09.20.12]

12 The Supreme Court Chamber considers that the Trial Chamber's
13 exercise of discretion regarding Heng Samrin was unreasonable.
14 Notably, the three Judges who did not consider that he should be
15 called stated that calling him to testify might cause
16 considerable delays. In the view of the Supreme Court Chamber,
17 this was erroneous because there was no indication on the record
18 that Heng Samrin would not appear if asked to do so.

19 Furthermore, the request to call Heng Samrin had been made early
20 in the proceedings and there is no indication that, whatever
21 issues may have arisen, they could not have been resolved in the
22 course of the proceedings before the Trial Chamber.

23 The Supreme Court Chamber reaches the same conclusion in respect
24 of Ouk Bunchhoeun, whose appearance as a witness Nuon Chea had
25 also requested.

1 [09.21.32]

2 The next question for the Supreme Court Chamber to address is
3 whether the Accused were actually prejudiced by the Trial
4 Chamber's error. In this regard, the Supreme Court Chamber notes
5 that neither of the two witnesses appeared to be in the
6 possession of potentially exonerating information that other
7 witnesses did not have.

8 To the extent that Heng Samrin, in a previous interview, had made
9 statements regarding the Khmer Rouge policy toward Lon Nol
10 soldiers, the Supreme Court Chamber considers that the notes of
11 this interview, indeed, raised issues that could have been
12 clarified through testimony. Nevertheless, the interview notes
13 were before the Trial Chamber and could be taken into account.

14 [09.22.35]

15 In sum, the Supreme Court Chamber considers that it has not been
16 established that the Trial Chamber's failure to call Heng Samrin
17 and Ouk Bunchhoeun resulted in a grossly unfair outcome in the
18 judicial proceedings warranting a reversal of the Accused
19 conviction.

20 The Accused have raised numerous other issues in relation to the
21 fairness of the proceedings and have also argued that the
22 Internal Rules were unconstitutional. Having considered the
23 parties' submissions, the Supreme Court Chamber has rejected all
24 these arguments for the reasons set out within the written
25 judgment.

1 Trial Chamber's approach to the evidence.

2 The second thematic area concerned the grounds appeal relating to
3 the Trial Chamber's approach to the evidence, limiting
4 opportunities for investigations at trial.

5 The Accused argue that the Trial Chamber erred by limiting their
6 opportunities for investigations at trial. The first issue is
7 whether the Trial Chamber erred when confirming that the Defence
8 was not entitled to investigate.

9 The Supreme Court Chamber finds that, while the ECCC's procedural
10 framework does not envisage fully fledged party driven
11 investigations, there is no statutory basis or compelling
12 practical reason for prohibiting the Defence from undertaking --
13 subject to certain conditions -- actions aimed at discovering
14 relevant evidence, in particular to allow the Defence to make
15 substantiated request for investigative action by the relevant
16 organ of the ECCC.

17 [09.25.00]

18 The second issue is whether the Trial Chamber erred in its
19 disposal of request for investigative action. The Supreme Court
20 Chamber sees no unreasonableness in the Trial Chamber's overall
21 approach, considering also that any procedural defects during the
22 investigation were cured by the Closing Order.

23 Permitting witnesses to review prior statements and to confirm
24 their contents.

25 The next issue concerns the Trial Chamber's decision to allow

1 witnesses to review their prior statements before they appear to
2 give testimony. The Supreme Court Chamber considers that it would
3 have been more consistent with the Cambodian practice not to
4 adopt such a procedure. Nevertheless, the Supreme Court Chamber
5 does not find that the Trial Chamber abused its discretion given
6 the circumstances of the case.

7 [09.26.11]

8 Admission and use of written evidence in lieu of oral testimony.
9 The Accused also challenged the Trial Chamber's approach to the
10 use of written statements in lieu of oral testimony. In
11 particular, the Trial Chamber decided that, under certain
12 conditions, evidence in the form of written statements or
13 transcripts is admissible even if the Defence did not have the
14 opportunity to examine their authors. The Trial Chamber
15 consequently admitted 1,124 written statements and transcripts.
16 Firstly, the Supreme Court Chamber considered that the right to
17 confront witnesses is not absolute. An entirely unfettered right
18 to examine witnesses against the Accused would be at the risk of
19 compromising a court's ability to render justice in a case with
20 the size and complexity as the case at hand.

21 [09.27.24]

22 Secondly, the Accused contest the weight that the Trial Chamber
23 assigned to the written statements. The Supreme Court Chamber
24 notes that the written statements must generally be afforded
25 lower probative value since the parties could not examine the

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1 witnesses who provided them.

2 The Trial Chamber (sic) did, indeed, state that the Trial Chamber
3 took this principle into consideration in the evaluation of
4 evidence and, therefore, no error was made in this respect.

5 However, a more complex issue is whether the Trial Chamber relied
6 too heavily on out-of-court written statements in respect of
7 certain findings it made. The Supreme Court Chamber will analyze
8 this question in respect of the specific findings.

9 [09.28.25]

10 Reliance on civil party evidence.

11 As to the next set of grounds of appeal concerning the Trial
12 Chamber's reliance on evidence provided by the civil parties, the
13 Supreme Court Chamber is not persuaded by the arguments put
14 forward by the Accused in this respect.

15 Firstly, while civil parties have a special status in the
16 proceedings, this does not mean that they cannot testify. The
17 weight given to their testimony will be assessed on a
18 case-by-case basis, also taking into account the fact that they
19 were not required to swear an oath.

20 Additionally, the Trial Chamber did not err by relying on
21 so-called statements of suffering or victim impact testimony,
22 since it was clear that they could contain information relevant
23 to the guilt of the Accused.

24 The Accused have raised several other arguments in relation to
25 the Trial Chamber's approach to the evidence; for instance, its

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1 reliance on expert witnesses and certain practices in the
2 courtroom when witnesses were asked to comment on documents.
3 These and all other arguments have been carefully assessed by the
4 Supreme Court Chamber and its findings are set out in the written
5 judgment.

6 [09.30.21]

7 I have now completed the summary relating to the topic of the
8 Trial Chamber's approach to the evidence. I will move on to set
9 out the findings relevant to the substance of the case, namely,
10 the crimes for which the Accused were convicted.

11 Findings relevant to the crimes for which the Accused were
12 convicted.

13 As mentioned at the beginning of today's hearing, the charges in
14 Case 002/01 concerned alleged crimes in the course of three sets
15 of events. They are: evacuation of Phnom Penh, also referred to
16 as Population Movement Phase One; the transfers of people
17 starting in the second half of 1975 and extended into --
18 extending into 1977, the so-called Population Movement Phase Two;
19 and, finally, the alleged killing of Lon Nol soldiers and
20 officials at Tuol Po Chrey.

21 [09.31.23]

22 The Trial Chamber found that, in the course of these events,
23 several crimes against humanity had been committed. As stated,
24 the two Accused did not commit these crimes directly. Rather,
25 according to the Trial Chamber, those crimes had been carried out

12

1 by other Khmer Rouge, but they could be imputed to the Accused.

2 As a result, the analysis of the Accused's criminal

3 responsibility may be divided into two broad elements: first, the

4 actual crimes that were committed by the Khmer Rouge; and,

5 second, the question of whether the Accused can be held

6 criminally responsible for these crimes.

7 Murder. Definition of mental element of murder.

8 In relation to the crime of murder, the first issue that I would

9 like to address relates to a legal question, the definition of

10 the mental element.

11 The Accused submit that murder as a crime against humanity

12 requires that the perpetrator acted with direct intent to kill in

13 the sense that it was his or her objective to cause the death of

14 another person. It is argued that the Trial Chamber erroneously

15 defined the mental element as encompassing reckless murder or, to

16 use the civil law terminology, murder with *dolus eventualis*.

17 [09.33.11]

18 The Supreme Court Chamber, after reviewing -- after having

19 reviewed the relevant case law, finds that the Trial Chamber did

20 not make an error in this regard. Criminal responsibility for

21 murder, therefore, may arise even if the perpetrator acts with

22 less than direct intent.

23 Factual errors regarding murder.

24 The remainder of the grounds of appeal relates primarily to the

25 Trial Chamber's factual findings as to the incidents of murder

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1 committed in the course of Population Movement Phase One, that
2 is, the evacuation of Phnom Penh and at Tuol Po Chrey.

3 [09.34.00]

4 However, first the Supreme Court Chamber has to address the
5 question of whether the Trial Chamber was obliged to establish
6 individual incidents of killings beyond reasonable doubt -- a
7 question the Supreme Court Chamber answers in the affirmative.
8 Accordingly, in order to establish that the Khmer Rouge committed
9 murder, individual instances of killing must be established
10 beyond reasonable doubt.

11 On this basis, the Supreme Court Chamber has carefully reviewed
12 the factual findings that the accused have challenged. The
13 Supreme Court Chamber concludes that some of the individual
14 findings of murder were not reasonably established, primarily
15 because they were based on out-of-court evidence or evidence of
16 insufficient probative value. Nevertheless, a sufficient number
17 of killings were reasonably established, based on the evidence
18 that was before the Trial Chamber. Therefore, it was reasonable
19 to conclude that the crime against humanity of murder was
20 committed during the evacuation of Phnom Penh and at Tuol Po
21 Chrey.

22 Extermination.

23 Turning to the crime of extermination, several grounds of appeal
24 relates to the precise definition of this crime.

25 [09.35.42]

14

1 First, the Accused challenged the Trial Chamber's finding that,
2 for this crime's mental element, a showing of *dolus eventualis* is
3 sufficient. There is merit in this argument.

4 Upon a detailed review of the relevant case law, the Supreme
5 Court Chamber concludes that, unlike for murder, extermination
6 requires a demonstration of direct intent to kill on a large
7 scale. Thus, the Trial Chamber's definition of the mental element
8 of extermination was in part incorrect.

9 The Accused also submit that a large number of people would have
10 died in any event and that there was no indication that, during
11 the evacuation of Phnom Penh, the number of deaths exceeded the
12 normal mortality rate. The Supreme Court Chamber rejects this
13 argument given that, as held by the ICTY, a wrongdoer must take
14 the victim as he finds him.

15 [09.37.09]

16 That said, the Supreme Court Chamber considers that it was
17 unreasonable to conclude that the mass element of crime -- of the
18 crime of extermination had been established in relation to the
19 evacuation of Phnom Penh. Based on the evidence that was before
20 the Trial Chamber, only a relatively small number of deaths may
21 be considered as having been established beyond reasonable doubt.
22 Due to the weakness of the evidence before the Trial Chamber, it
23 was not possible to extrapolate that killings had occurred on a
24 massive scale.

25 In addition, the Trial Chamber relied on a *dolus eventualis*

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1 standard, which is, as explained before, insufficient for the
2 crime of extermination.

3 As for Population Movement Phase Two, the Supreme Court Chamber
4 considers that several instances of death were reasonably
5 established. Nevertheless, the evidence was insufficient to allow
6 the Trial Chamber to reasonably extrapolate that killings
7 occurred on such a large scale as is required for extermination.
8 In addition, the Trial Chamber's findings could not establish
9 that the perpetrators acted with direct intent to kill on a large
10 scale, but imply that they acted with *dolus eventualis*, which, as
11 noted before, is insufficient for the crime of extermination.

12 [09.39.00]

13 For these reasons, the Supreme Court Chamber concludes that the
14 Trial Chamber erred when it found that the crime of extermination
15 was committed during Population Movement Phase One and Population
16 Movement Phase Two. However, the Supreme Court Chamber recalls
17 that in relation to Phase One of the Population Movement, it has
18 confirmed that the crime of murder was committed.

19 In relation to Phase Two, although the crime of extermination was
20 not established, the facts found to have existed by the Trial
21 Chamber and confirmed on appeal, fulfils all ingredients of the
22 crime of murder, and the Supreme Court Chamber therefore has
23 decided to enter a conviction on that basis.

24 [09.40.00]

25 Turning to Tuol Po Chrey, the Accused challenge the Trial

1 Chamber's finding that at least 250 Lon Nol soldiers were killed
2 in April 1975. The Supreme Court Chamber is not persuaded by
3 these arguments, as the Trial Chamber established the minimum
4 number of deaths in keeping with the principle of in dubio pro
5 reo.

6 Also, there can also be no doubt that the perpetrators acted in
7 this case with direct intent to kill on a large scale. In sum,
8 the deaths and the killings occurred during Population Movement
9 Phases One and Two must be classified as the crime against
10 humanity of murder. The killings carried out at Tuol Po Chrey
11 amount to extermination.

12 Other inhumane acts.

13 The Trial Chamber found that, during Population Movement Phases
14 One and Two, the crime against humanity of other inhuman acts in
15 the form of forced transfer and attacks against human dignity had
16 been committed. In addition, the Trial Chamber found that, during
17 Population Movement Phase Two, the crime was committed in the
18 form of enforced disappearances.

19 The Trial Chamber's approach to the crime of other inhumane acts.

20 At the outset, the Supreme Court Chamber notes that the Trial
21 Chamber's approach to the crime against humanity of other
22 inhumane acts discloses confusion, in that the Trial Chamber
23 defined elements of forced transfer and enforced disappearances
24 as though they existed as separate categories of crimes. Instead,
25 the Trial Chamber should have focused on whether, taken as a

1 whole, the conduct in question was similar in nature and gravity
2 to other recognized crimes against humanity.

3 [09.42.36]

4 This requires a holistic and case-specific analysis, which the
5 Supreme Court Chamber has carried out on appeal.

6 Circumstances during Population Movement Phase One and its
7 unlawfulness.

8 The Accused disputed the Trial Chamber's findings regarding the
9 conditions and the use of force during the evacuation of Phnom
10 Penh. The Supreme Court Chamber considers that, overall, the
11 findings were reasonably made, although certain generalized
12 findings were unreasonable and not sufficiently backed up by the
13 evidence before the Trial Chamber.

14 [09.43.35]

15 The Supreme Court Chamber is not persuaded that the Trial Chamber
16 erred in its determinations regarding the purported
17 justifications for the evacuation of Phnom Penh. To a large
18 extent, the Accused's arguments merely present an alternative
19 interpretation of the evidence, which was short -- falls short of
20 establishing unreasonableness.

21 Circumstances during Population Movement Phase Two and its
22 unlawfulness.

23 The Accused also challenge the Trial Chamber's finding with
24 reference to Population Movement Phase Two. The Supreme Court
25 Chamber recalls, in this regard, that Population Movement Phase

1 Two comprised the transfer of people in various parts of the
2 country and over a long period of time. In light of this fact,
3 certain generalized findings of the Trial Chamber were
4 unreasonable because they were based upon an evidentiary basis
5 that was too narrow.

6 [09.44.49]

7 Nevertheless, it was not unreasonable to find that there was
8 general lack of food, water and hygiene facilities as well as a
9 lack of medicine and medical assistance. There was also
10 sufficient evidence before the Trial Chamber to find that some
11 people disappeared and others died because of the conditions of
12 the transfer.

13 In contrast, it was unreasonable to find that the overwhelming
14 majority of the transferees were so-called New People, that is,
15 former city dwellers, as there was also evidence referring to the
16 transfer of so-called Old People.

17 Whether Population Movement Phases One and Two, amounted to
18 inhumane acts in the circumstances.

19 As mentioned before, it falls upon the Supreme Court Chamber to
20 assess whether Population Movements Phases One and Two amounted
21 to the crime against humanity of other human -- inhumane acts.

22 [09.46.06]

23 In relation to Population Movement Phase One, the Supreme Court
24 Chamber recalls that it was established that at least two million
25 people were forcibly evicted from Phnom Penh in terrifying and

19

1 violent circumstances, and without prior warning.

2 It was also established that in the course of the evacuation,
3 people were killed and died because of the conditions that were
4 inflicted upon the population.

5 The Supreme Court Chamber considers that, in these circumstances,
6 the evacuation of Phnom Penh caused serious mental and physical
7 suffering and injury, and affected a large number of individuals.

8 It therefore amounts to the crime against humanity of other
9 inhumane acts.

10 During Population Movement Phase Two, at least 300,000 to 400,000
11 people were forced to move. This finding was not disturbed on
12 appeal. Further, the Supreme Court Chamber upheld the findings
13 that those people who were displaced endure poor conditions
14 resulting from lack of food, water and hygiene facilities. Some
15 families were separated. Some deaths occurred during the
16 transfers.

17 The Supreme Court Chamber considers that these circumstances,
18 which affected a large number of people, are sufficient to amount
19 to the crime of other inhumane acts.

20 [09.48.00]

21 Persecution.

22 The Trial Chamber found that the crime against humanity of
23 persecution was committed in the course of Population Movement
24 Phases One and Two as well as at Tuol Po Chrey. The victims of
25 persecution were Lon Nol soldiers and officials as well as

1 civilian -- the civilians living in the city of Phnom Penh at the
2 time of its evacuation, so-called 17 April People or New People.
3 Definition of persecution.

4 The Accused challenge the Trial Chamber's definition of
5 persecution. According to the Trial Chamber, the group that is
6 the object of political persecution may also include groups whose
7 members do not necessarily hold any common political views but
8 who are persecuted because of the perpetrators' political agenda
9 or motivation.

10 [09.49.08]

11 The Supreme Court Chamber does not consider -- consider that the
12 Trial Chamber erred in this regard. It recalls that in the Duch
13 case, it held that the victims must belong to a sufficiently
14 discernible group that is defined by the perpetrator on
15 political, racial or religious grounds. In particular, groups may
16 be made the subject of political persecution because the
17 perpetrator perceived them as potential opponents or otherwise as
18 obstacles to the implementation of a political agenda.

19 New People as a sufficiently discernible group.

20 The Accused further submit that New People were not a
21 sufficiently discernible group and that the Trial Chamber applied
22 an inconsistent definition. The Supreme Court Chamber is not
23 persuaded by these arguments. New People included all those who
24 were living in Phnom Penh on 17 April 1975, irrespective of
25 whether they had been living in the city for long periods of time

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1 or had only recently sought refuge in the city.

2 [09.50.29]

3 Persecution during Population Movement Phase One.

4 The Supreme Court Chamber further considers that the entire
5 population of Phnom Penh was subjected to evacuation, as all were
6 considered to be New People. This does not mean, however, the
7 targeting was indiscriminate, and thus incapable of amounting to
8 persecution.

9 New People were targeted because of who they were perceived to be
10 -- perceived to be and what they were seen to represent. The
11 Accused arguments in this regard were, therefore, rejected.

12 Persecution during Population Movement Phase Two.

13 In relation to Population Movement Phase Two, the Supreme Court
14 Chamber is not satisfied that, as held by the Trial Chamber, the
15 evidence shows that the vast majority of transferees had been New
16 People. As such, it has not been established that the transfer
17 was, in fact, discriminatory. Therefore, the Trial Chamber erred
18 when finding that persecution was committed during Population
19 Movement Phase Two.

20 [09.52.03]

21 Contextual element of crimes against humanity.

22 The Supreme Court Chamber also dismisses the grounds of appeal
23 that revolve around the contextual element of crimes against
24 humanity. The detail reasoning for this finding are contained in
25 the written judgment.

1 Individual criminal responsibility.

2 Turning to the Accused's individual criminal responsibility, the
3 overarching question is whether the crimes committed can be
4 attributed to the Accused.

5 The Trial Chamber found that the Accused were criminally liable
6 based on the basic form of joint criminal enterprise, so-called
7 JCE I, as well as liable due to their planning, instigating and
8 aiding and abetting these crimes and, in respect of Nuon Chea
9 only, for ordering the crimes and on the basis of superior
10 responsibility.

11 [09.53.21]

12 Joint criminal enterprise.

13 The Accused raised several grounds of appeal in relation to their
14 liability based on JCE.

15 Existence of liability based on JCE I at the relevant time.

16 Notably, the Accused challenged the existence of liability based
17 upon JCE I. They submit that, under customary international law
18 as it existed at the time, liability was limited through joint
19 contributions to specific crimes, and that merely making a
20 contribution to the implementation of a common purpose was
21 insufficient to give rise to individual criminal responsibility.

22 The Supreme Court Chamber is not persuaded by these arguments.

23 Even though the term "JCE" was coined by the ICTY, the underlying
24 notion had already emerged in the post-World War II case law.

25 Notably, after World War II, accused were convicted of crimes

1 they had not committed with their own hands because these crimes
2 had been encompassed by a criminal common purpose to which the
3 accused had made a contribution.

4 [09.54.57]

5 The Supreme Court Chamber underlines that the common purpose must
6 be criminal in character. This means that either it must, in
7 itself, amount to the commission of one or more crimes or the
8 implementation of the common purpose must involve the commission
9 of one or more crimes.

10 In this regard, the Supreme Court Chamber notes that the Trial
11 Judgment relied on a somewhat different formulation. Notably, the
12 Trial Chamber inquired whether the common purpose, among other
13 things, resulted in the commission of a crime. This suggests that
14 the Trial Chamber was of the view that crimes that generally
15 resulted from the implementation of the common purpose could be
16 imputed to the Accused, even if these crimes had not been part of
17 the common purpose.

18 In the view of the Supreme Court Chamber, this would amount to
19 the type of liability that has been referred to as JCE III, or
20 extended JCE liability.

21 [09.56.15]

22 The question is thus whether, under customary international law
23 as existed in 1975, liability could be imputed for crimes that
24 merely resulted from the implementation of a common purpose but
25 were not encompassed by it.

1 In this regard, the Supreme Court Chamber notes with approval the
2 decision of the Pre-Trial Chamber on this question, which found
3 that such liability did not exist at the time.

4 Having considered the relevant jurisprudence, the Supreme Court
5 Chamber concludes that there was, indeed, no basis under
6 customary international law for liability for crimes not
7 encompassed by the common purpose.

8 [09.57.10]

9 In light of this finding, it becomes of great relevance to
10 identify the criteria in order to determine which crimes are
11 encompassed by a common purpose. In this regard, the Supreme
12 Court Chamber finds that a common purpose amounts to the
13 commission of a crime if the crime is one of the primary
14 objectives of the common purpose.

15 In contrast, a common purpose involves the commission of crimes
16 if the crimes are not the immediate goal of the transaction, but
17 are seen as a means to achieve an ulterior objective. Whether a
18 crime was encompassed by the common purpose is primarily a
19 question of fact.

20 Relevant factors will be, for example, the overall objective of
21 the common purpose and the likelihood that it may be attained
22 only at the cost of the commission of crimes.

23 In sum, the Trial Chamber made an error in its definition of the
24 legal elements of JCE liability. It falls then on the Supreme
25 Court Chamber to assess whether the elements of JCE liability

1 properly interpreted and nevertheless -- are nevertheless
2 fulfilled.

3 Definition of the common purpose.

4 Turning to the next set of arguments, the Supreme Court Chamber
5 considers that liability under JCE I, requires that the common
6 purpose be criminal in nature.

7 In contrast, the Trial Chamber found that the Accused agreed to a
8 common purpose, which it described as not criminal in itself,
9 that is, the implementation of a rapid socialist revolution in
10 Cambodia.

11 [09.59.32]

12 Nevertheless, this common purpose must be seen in the context of
13 the Khmer Rouge policy of population movement and the policy of
14 targeting Lon Nol soldiers. These policies, according to the
15 Trial Chamber, were utilized to bring the socialist revolution in
16 Cambodia to fruition.

17 While the Trial Chamber did not state that these policies were
18 actually part of the common purpose, it is nevertheless clear
19 that they were considered by the Trial Chamber as the means
20 through which the socialist revolution was to be implemented.

21 Thus, while the Trial Chamber's findings may be perceived to be
22 lacking in precision, there can be no doubt that it was the
23 criminal aspect of the two policies that was at the core of Case
24 002/01.

25 [10.00.39]

1 For that reason, the Supreme Court Chamber rejects the Accused's
2 argument that the purpose, which the Trial Chamber had
3 identified, was non-criminal and therefore could not give rise to
4 liability under JCE.

5 Assistance and content of population movement policy.

6 Several grounds of appeal challenge the Trial Chamber's findings
7 as to the existence and content of the policy to move the
8 population, both from cities to the countryside and from one area
9 to another.

10 As to the policy to evacuate cities, the Supreme Court Chamber
11 cannot see any error in the Trial Chamber's findings that the
12 policy was demonstrated, inter alia, by a consistent pattern of
13 evacuations, particularly since the Trial Chamber did not claim
14 that all evacuations followed exactly the same method of
15 operation.

16 Referring to the policy to move people from one -- from an area
17 to another, the Supreme Court Chamber also finds that the
18 Accused's arguments without merit for the reasons explained in
19 the written judgment.

20 [10.02.24]

21 Crimes encompassed by common purpose in relation Population
22 Movement Phases One and Two.

23 The next issue to be addressed is which crimes were actually
24 encompassed by the common purpose in respect of Population
25 Movement Phase One. This summary addresses only the Supreme Court

1 Chamber's findings relating to the crime of murder as this was
2 the most controversial issue.

3 The Supreme Court Chamber finds that the common purpose
4 encompassed the killing of high-ranking Khmer Republic officials.
5 It also involved the death resulting from the conditions that
6 were imposed during the population movement and the killings of
7 civilians and former soldiers.

8 This is because in the circumstances the members of the JCE were
9 aware of the conditions which the evacuees would have to endure
10 and that it was likely that, in particular, the most vulnerable
11 would die.

12 [10.03.42]

13 The Supreme Court Chamber recalls that the evacuation concerned
14 the entire population of Phnom Penh within a short period of time
15 and during the hottest period of the year.

16 As to the killing of civilians and lower-ranking Khmer Republic
17 soldiers and officials, the Supreme Court Chamber notes that the
18 evacuation of Phnom Penh was carried out in a very short time
19 span and by heavily armed troops. These circumstances indicate
20 that, implicitly, the common purpose also encompassed the
21 prospects that deadly force could be used by the troops who were
22 tasked with evacuating of the city, should they encounter any
23 resistance.

24 This is the case irrespective of whether specific orders to kill
25 were given, who gave such orders and whether such orders were

1 only given to troops under certain commanders.

2 The next question is whether murder was among the crimes
3 encompassed by the common purpose in relation to Population
4 Movement Phase Two.

5 [10.05.22]

6 Given the circumstances under which the transfers were carried
7 out, there is no indication that there was a policy to provide
8 sufficient care for the transferees or protect them from abuses.

9 The occurrence of death amongst the transferees was therefore
10 likely, yet the members of the JCE engaged in the implementation
11 of the common purpose nonetheless. As such, the policy to move
12 the population encompassed implicitly the crime against humanity
13 of murder.

14 Existence and content of the targeting policy.

15 The Trial Chamber found that there had been a Khmer Rouge policy
16 to target former Lon Nol soldiers and officials, which involved
17 the killings at Tuol Po Chrey. The Trial Chamber relied on the
18 Khmer Rouge statements and orders as well as the existence of a
19 consistent pattern of executions. The Accused challenged the
20 Trial Chamber's findings in this regard.

21 [10.06.48]

22 The Supreme Court Chamber notes that in respect of a pattern of
23 executions existing before April 1975, the Trial Chamber placed
24 significant emphasis on the alleged killings at Oudong in 1974.
25 However, for the reasons fully explained in the judgment, the

1 Supreme Court Chamber considers that the evidence on record was
2 too weak to support such a finding. The remaining evidence of
3 killings in the period before 1975 was also relatively weak.
4 As to evidence of killings in the period immediately before and
5 after the events at Tuol Po Chrey, the Supreme Court Chamber
6 considers that it was generally weak, except for a few instances.
7 Similarly, in relation to the alleged killings in late 1975, the
8 Trial Chamber relied on evidence that often lacked detail and
9 primarily consisted of uncorroborated out-of-court statements.
10 The Supreme Court Chamber is similarly unsatisfied with the other
11 evidence relied upon by the Trial Chamber, including Khmer Rouge
12 speeches, policy statements, and other instructions. In some, the
13 Supreme Court Chamber considers that the evidence before the
14 Trial Chamber was inadequate to reasonably substantiate a finding
15 that, at the time of the events at Tuol Po Chrey, there had been
16 a policy to kill all Lon Nol soldiers. Most of the evidence
17 consists of out-of-court statements, which have low probative
18 value. Moreover, the Trial Chamber failed to consider several
19 pieces of evidence, which called into question the existence of a
20 blank policy to kill.

21 [10.09.18]

22 The Supreme Court Chamber recalls, in this context, that, as a
23 consequence of the severance of the proceedings in Case 002, the
24 scope of Case 002/01 is restricted as far as it concerns the
25 targeting policy to the events at Tuol Po Chrey which took place

1 at the end of April 1975.

2 The final result of the analysis is inevitably affected by this
3 temporal limitation, which caused a large proportion of the
4 evidence to be temporarily irrelevant due to the Trial Chamber's
5 inability to demonstrate why instructions issued in 1976 and
6 later imply that a policy had existed in April 1975.

7 [10.10.20]

8 For the foregoing reasons, the Supreme Court Chamber finds, based
9 on the evidence that was before the Trial Chamber, that it was
10 not reasonable to find that a policy contemplating the execution
11 of Lon Nol soldiers and officials existed at the time of the
12 events at Tuol Po Chrey. Accordingly, the Accused cannot be held
13 criminally liable for the crimes against humanity which were
14 committed at Tuol Po Chrey.

15 Legal standard in respect of contribution to the common purpose.

16 Regarding the legal standard in respect of the contribution to
17 the common purpose, the Accused submits that the Trial Chamber
18 failed to establish that they had made a contribution to the
19 commission of criminal acts but merely found that they had
20 engaged in activities generally aimed at the implementation of a
21 socialist revolution in Cambodia.

22 The Supreme Court Chamber considers that the Trial Chamber
23 generally articulated the correct legal standard in that an
24 accused's contribution must be significant, but not necessarily
25 indispensable. The Trial Chamber also correctly considered that a

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1 contribution to the JCE may take many forms. Even activities that
2 are prima facie unrelated to the commission of crimes may be
3 taken into account when determining whether the Accused made a
4 significant contribution.

5 That said, determination should always be based on all -- on an
6 assessment of all activities of the accused persons, that the
7 Chamber has found to have been established.

8 [10.12.32]

9 In sum, the Supreme Court Chamber finds that the Trial Chamber
10 did not err by taking into account activities of the Accused that
11 were, on their face, not directed at the commission of specific
12 crimes.

13 Nuon Chea's contribution to the implementation of the common
14 purpose.

15 The Trial Chamber identified two types of contribution by Nuon
16 Chea to the implementation of the common purpose. The first is
17 his involvement in the planning of the common purpose.

18 The second lies in his role in activities regarding propaganda,
19 education and public training. Nuon Chea raises several grounds
20 of appeal against these findings.

21 [10.13.29]

22 The Supreme Court Chamber dismisses some of these grounds of
23 appeals because they do not have the potential to invalidate the
24 judgment, for example, his challenge to the designation as
25 Brother Number 2.

1 In respect of other grounds of appeal, the Supreme Court Chamber
2 considers that Nuon Chea is merely offering alternative
3 interpretations of the evidence. This concerns, in particular,
4 the finding that he had considerable influence on military policy
5 and that he had, along with Pol Pot, ultimate decision-making
6 power within the Party.

7 In contrast, the Supreme Court Chamber considers that the
8 evidence was insufficient to reasonably establish that Nuon Chea
9 was in charge of Party discipline. Nevertheless, the Supreme
10 Court Chamber does not consider that this error affects the Trial
11 Chamber's conclusion that Nuon Chea had made a significant
12 contribution to the implementation of the common purpose.

13 [10.14.42]

14 Contribution of Khieu Samphan to the implementation of the common
15 purpose.

16 With reference to Khieu Samphan's contribution, the Trial Chamber
17 identified the following activities.

18 First, he had attended meetings of the Standing and Central
19 Committees and Party congresses, as well as meetings to
20 disseminate Khmer Rouge policies to lower cadres.

21 Second, he participated in economic matters within the Khmer
22 Rouge regime.

23 Third, he made public statements in support of the common purpose
24 and policies of the Khmer Rouge.

25 Finally, he acted as a diplomat to garner external support for

1 the Khmer Rouge.

2 Khieu Samphan alleges several errors in the Trial Chamber's
3 findings.

4 [10.15.40]

5 The Supreme Court Chamber considers that most of these findings
6 were reasonably reached, however, it was unreasonable to find
7 that Khieu Samphan had attended a meeting in June 1974, at which
8 the evacuation of Phnom Penh was discussed, given that the Trial
9 Chamber did not explain why it rejected the detailed testimony of
10 Nuon Chea to the contrary. Similarly, the Trial Chamber
11 erroneously attributed a speech that was made in 1976 to Khieu
12 Samphan.

13 Despite these erroneous findings, the Supreme Court Chamber finds
14 that the Trial Chamber's overall conclusion regarding Khieu
15 Samphan's contribution was not unreasonable, having regards to
16 the totality of his actions.

17 Finding that the CPK was a unified hierarchical party and that's
18 the armed forces involved in the evacuation of Phnom Penh were
19 unified.

20 The Accused argued that the Trial Chamber erred when it found
21 that the CPK was a unified and hierarchical party, given that
22 there were indications that from early on, the Party was divided
23 into powerful factions which subsequently escalated. They submit
24 that no reasonable trier of fact could have concluded that Pol
25 Pot and Nuon Chea had shared a common purpose with some of the

1 zone leaders who were inciting rebellion and treason against
2 them.

3 [10.17.57]

4 The Supreme Court Chamber is not persuaded by these arguments. It
5 recalls that the Accused were found to be criminally responsible
6 based on joint criminal enterprise. Therefore, even assuming that
7 secret plots by some of the zone leaders existed, this would not
8 mean that the crimes imputed upon the Accused could not be
9 imputed on the other members of the JCE as well -- as long as it
10 has been established that there was a common purpose of which the
11 crimes formed part.

12 Error of law in respect of requisite intent.

13 As to the requisite intent of JCE liability, Khieu Samphan
14 submits that the correct standard is intent to effect the common
15 purpose. In the view of the Supreme Court Chamber, the Trial
16 Chamber's finding that the intent must cover both the common
17 purpose and the crimes it encompassed is correct.

18 [10.19.16]

19 Khieu Samphan further argues that the Trial Chamber erroneously
20 applied a lower standard because it assessed whether he had been
21 aware of the substantial likelihood of the commission of crimes.

22 In that regard, the Supreme Court Chamber considers that
23 "substantial likelihood" is not, as such, the correct standard.
24 However, the appropriate standard needs to be determined based on
25 the specific crimes that are at issue. For instance, for the

1 crimes against humanity of murder, the requisite mental element
2 is either direct intent or dolus eventualis. Thus, if murder is
3 committed through a joint criminal enterprise, it is sufficient
4 to establish that the Accused was aware that the death of the
5 victim was a possible consequence of the implementation of the
6 common purpose but proceeded to implement it regardless, having
7 accepted the possible occurrence of death.

8 Thus, the Trial Chamber's reference to the standard of
9 substantial likelihood was not, per se, erroneous, but it will
10 depend upon the crime in question.

11 Nuon Chea's intent.

12 As to the specific findings at -- to Nuon Chea's intent in
13 respect of the crime against humanity of other inhumane acts,
14 there is no doubt that Nuon Chea acted with direct intent.

15 Indeed, he acknowledged that he has participated in the decision
16 to evacuate Phnom Penh.

17 Turning to Murder, the Supreme Court Chamber considers that in
18 respect of the so-called super traitors, Nuon Chea had
19 specifically admitted his intent to kill them.

20 [10.21.33]

21 In relation to the other deaths and killings that had occurred,
22 the Supreme Court Chamber considers that he had acted with dolus
23 eventualis, based on the Trial Chamber's findings regarding his
24 knowledge of the circumstances in which the population movements
25 had taken place.

1 Khieu Samphan's intent.

2 Khieu Samphan also challenges the Trial Chamber's findings as to
3 his intent to commit crimes. In particular, he argues that the
4 Party operated under a strict principle of secrecy, which
5 prevented him from acquiring knowledge of the crimes committed.

6 [10.22.21]

7 The Supreme Court Chamber finds that Khieu Samphan has failed to
8 substantiate his arguments. This is because he has failed to
9 engage with the extensive reasoning of the Trial Chamber
10 regarding his knowledge of the crimes and has failed to
11 substantiate the impact that the alleged errors could have on his
12 criminal responsibility.

13 Khieu Samphan challenges numerous other findings of the Trial
14 Chamber relevant to his intent. However, for the most part, the
15 Supreme Court Chamber considers that his arguments failed to
16 establish unreasonableness. The Trial Chamber did, however, err
17 to the extent that it relied on his purported attendance of a
18 special national congress held in April 1975.

19 Nevertheless, although some of the Trial Chamber's findings were
20 erroneous, they do not sufficiently call into question the
21 overall conclusion that Khieu Samphan had acted with the
22 requisite intent.

23 Other modes of liability.

24 The Trial Chamber found that the Accused were also criminally
25 responsible for the crimes which it found to have been

1 established based on liability for planning, instigating, aiding
2 and abetting and, in respect of Nuon Chea only, ordering.

3 [10.24.20]

4 The Accused have raised numerous grounds of appeal in this
5 regard. However, for reasons explained in the written judgment
6 and given the Supreme Court Chamber's finding in relation to the
7 Accused's liability under JCE, it was unnecessary for the Supreme
8 Court Chamber to pronounce on these grounds of appeal.

9 Sentencing.

10 The last set of arguments relates to sentencing. Khieu Samphan in
11 particular challenges the sentence that the Trial Chamber has
12 imposed.

13 The Supreme Court Chamber considers that none of Khieu Samphan's
14 arguments disclose an error in the exercise of discretion on the
15 part of the Trial Chamber.

16 [10.25.18]

17 Finally, the Supreme Court Chamber has considered whether the
18 fact that it has found errors in some of the Trial Chamber's
19 conclusions regarding the Accused's criminal responsibility
20 should lead it to revise the sentence that the Trial Chamber has
21 imposed.

22 The Supreme Court Chamber notes that the gravity of the crimes
23 should be reflected in the sentence. In view of the massive scale
24 of the crimes; the complete lack of consideration for the
25 ultimate fate of the Cambodian population, especially the most

1 vulnerable groups; the fact that the crimes were not isolated
2 events, but occurred over an extended period of time; and the
3 significant roles of the Accused, the Supreme Court Chamber
4 considers that the imposition of a life sentence for each of the
5 Accused is appropriate and therefore confirms the sentence
6 imposed by the Trial Chamber.

7 [10.26.45]

8 The Co-Prosecutors' Appeal.

9 What follows is a brief outline of the Supreme Court Chamber's
10 findings on the Co-Prosecutors' appeal.

11 The Co-Prosecutors questioned the Trial Chamber's finding that
12 the mode of liability of JCE3 is not applicable in proceedings
13 before the ECCC. They seek declaratory relief only and
14 acknowledge that the outcome of their appeal has no bearing on
15 the Accused's conviction. However, for an appeal to be
16 admissible, it must allege errors of law that would invalidate
17 the decision. In the absence of such a claim, the appeal is
18 inadmissible.

19 Nevertheless, the appeals brought by the Accused have provided
20 the Supreme Court Chamber with an opportunity to analyze the
21 notion of JCE, including aspects which are directly relevant to
22 the questions raised by the Co-Prosecutors.

23 Security personnel, please bring the two Accused to the dock.

24 [10.28.22]

25 (The Accused are taken to the dock)

1 [10.31.11]

2 MR. PRESIDENT:

3 Disposition.

4 For the foregoing reasons the Supreme Court Chamber;

5 Pursuant to Article 4(1)(b) of the ECCC Agreement, Article 14 new

6 (1)(b) and 36 new of the ECCC law and Internal Rule 111;

7 Noting the respective written appeal submissions of the parties

8 and the arguments they presented at the hearing from 16 to 18

9 February 2016;

10 Grants in part and dismisses in part Nuon Chea's and Khieu

11 Samphan's appeals.

12 And therefore, Insofar as they relate to facts carried out in the

13 course of Population Movement Phase One;

14 Reverses Nuon Chea's and Khieu Samphan's convictions for the

15 crimes against humanity of extermination;

16 Affirms Nuon Chea's and Khieu Samphan's convictions for the

17 crimes against humanity of murder, persecution on political

18 grounds and other inhumane acts.

19 [10.32.34]

20 Insofar as they relate to the facts carried out in the course of

21 Population Movement Phase Two;

22 Reverses Nuon Chea's and Khieu Samphan's convictions for the

23 crimes against humanity of extermination and persecution on

24 political grounds.

25 Affirms Nuon Chea's and Khieu Samphan's convictions for the crime

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1 against humanity of other inhumane acts and re-characterizing the
2 facts, enters a conviction for the crimes against humanity of
3 murder.

4 And insofar as they relate to the facts carried out at Tuol Po
5 Chrey;

6 Reverses Nuon Chea's and Khieu Samphan's convictions for the
7 crimes against humanity of extermination, murder and persecution
8 on political grounds;

9 Affirms the sentence of life imprisonment imposed by the Trial
10 Chamber on both Nuon Chea and Khieu Samphan;

11 Dismisses the Co-Prosecutors' appeal as inadmissible;

12 And orders that Nuon Chea and Khieu Samphan remain in the custody
13 of the ECCC pending the finalization of the arrangements for
14 their transfer, in accordance with the law, to the prison in
15 which their sentence will continue to be served.

16 This judgment is issued on 23 November 2016, in Khmer and English
17 with a French translation to follow.

18 Security personnel, please take the convicts to the detention
19 centre.

20 The Hearing is now closed.

21 (Court adjourns at 1034H)

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