

INTRODUCTORY NOTE TO CASE 002/02 AGAINST KHIEU SAMPHAN  
(E.C.C.C. SUP. CT. CHAMBER)  
BY JOHN D. CIORCIARI\*  
[December 23, 2022]

## Introduction

On September 22, 2022, the Supreme Court Chamber (SCC) of the Extraordinary Chambers in the Courts of Cambodia (ECCC) pronounced its judgment against Khieu Samphan, a key figure in the Khmer Rouge regime that ruled the country in the late 1970s.<sup>1</sup> The appellate SCC upheld the Trial Chamber’s conviction of Khieu Samphan for war crimes and genocide, as well as all but two convictions against him for crimes against humanity. The SCC also found him responsible for additional crimes and affirmed his life sentence. On December 23, 2022, the court published the full written judgment, bringing to a close Case 002/02, the third and final trial at the ECCC.

## Background

The ECCC was a UN-backed hybrid court with jurisdiction to try “senior leaders” and others deemed “most responsible” for genocide, war crimes, crimes against humanity, and selected domestic crimes committed during the rule of the Communist Party of Kampuchea (CPK) between April 17, 1975 and January 6, 1979.<sup>2</sup> Its first case, Case 001, featured the trial and conviction of Duch, former head of the infamous S-21 security center at Tuol Sleng. Its second case, Case 002, concerned a broad range of alleged crimes orchestrated by senior Khmer Rouge leaders. It began in 2010, when Khieu Samphan, former Deputy CPK Chairman Nuon Chea, former Foreign Minister Ieng Sary, and former Minister of Social Affairs Ieng Thirith were indicted on charges of genocide, war crimes, and crimes against humanity.

Given Case 002’s scale and complexity, the ECCC’s Trial Chamber decided in 2011 to sever the charges into multiple smaller trials. Case 002/01 focused on crimes against humanity linked to forced population movement, including the April 1975 evacuation of Phnom Penh. Ieng Thirith was ruled unfit to stand trial and Ieng Sary died before the trial concluded, but Khieu Samphan and Nuon Chea were convicted in 2014 of crimes against humanity and sentenced to life in prison—verdicts upheld on appeal.

Case 002/02 addressed a wider array of charges, including genocide against Cham Muslims and ethnic Vietnamese; forced marriages and rape; internal party purges; and crimes committed at key security centers and worksites throughout the country. After a lengthy trial, the Trial Chamber found Khieu Samphan and Nuon Chea guilty in 2018 of myriad crimes against humanity, genocide against the Vietnamese population, and grave breaches of the Geneva Conventions.<sup>3</sup> It sentenced both men to life in prison, merging the sentences in Case 002/01 and 002/02.<sup>4</sup>

Both men appealed, although Nuon Chea died in 2019 before his appeal could be adjudicated. In a voluminous appeal, Khieu Samphan alleged that the Trial Chamber committed over 1,800 errors related to the fairness and scope of the proceedings, rulings on substantive crimes and individual criminal responsibility, and pronouncement of the judgment. The Co-Prosecutors filed a much narrower appeal, challenging the Trial Chamber’s ruling that the Khmer Rouge practice of compelling sexual intercourse within forced marriages constituted a crime against humanity only against female victims.

## The Supreme Court Chamber’s Decision

The SCC rejected the vast majority of Khieu Samphan’s challenges, beginning with his claims that the Trial Chamber had violated his rights by issuing an oral summary before the full written judgment, exhibiting bias, and erring in the scope of the judicial investigation and trial.<sup>5</sup> The SCC then considered his appeals regarding the crimes of which he was convicted, issuing noteworthy rulings with regard to several crimes.

First, the SCC rejected Khieu Samphan’s argument that the Trial Chamber erred by applying a standard of *dolus eventualis* when adjudicating the crime against humanity of murder, finding that such a standard was part of

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customary law by 1975.<sup>6</sup> Nevertheless, the SCC overturned his convictions for two such murders at Phnom Kraol Security Centre, as the evidence hinged on statements of deceased witnesses whom Khieu Samphan could not confront.<sup>7</sup>

Second, the SCC rejected Khieu Samphan's claim that under customary international law in 1975, the crime against humanity of persecution required an intent to remove the persecuted persons from their home communities or from society as a whole.<sup>8</sup> The SCC also dismissed his claim that indiscriminate Khmer Rouge practices—such as banning prayer or forcing Cham Muslims to eat pork—did not amount to “discrimination in fact,” ruling that such a finding “can be established from the consequences or impact of a particular group.”<sup>9</sup> The SCC upheld most of the Trial Chamber's findings on political persecution, religious persecution of Buddhist monks, and racial persecution of Vietnamese. It did reverse his conviction for the crime against humanity of political persecution at one worksite, however, ruling that the Trial Chamber had erred in finding that he had violated a fundamental right to equal treatment under international law as of 1975–79.<sup>10</sup>

Third, the SCC dismissed Khieu Samphan's claims that the Trial Chamber had violated the principle of legality when finding that it was foreseeable and accessible that other inhumane acts were punishable as crimes against humanity by 1975. It also rejected his assertions that an act must violate a specific provision in a human rights instrument to be punishable, reasoning that “the purpose of the crime of other inhumane acts is to enable the prosecution of grave conduct which is not already criminalized as distinct crimes against humanity at the time in question.”<sup>11</sup>

Fourth, the SCC upheld the Trial Chamber's finding that the CPK implemented deliberate policies of forced marriage and forced intercourse within marriage, dismissing Khieu Samphan's challenges. However, it granted the Co-Prosecutors' sole appeal and overturned the Trial Chamber's ruling that forced intercourse only constituted crimes against humanity of other inhumane acts in relation to female victims. The SCC ruled that the Trial Chamber had erred by focusing on the traditional elements of the crime of rape, including penetration, and ruled that “forced intercourse in the context of forced marriage” itself amounted to a crime against humanity as of 1975–79, subjecting both males and female victims to “serious mental or physical suffering or injury.” The SCC thus entered additional convictions against Khieu Samphan pertaining to male victims.<sup>12</sup>

Fifth, the SCC rejected Khieu Samphan's multiple challenges to his genocide conviction, upholding the Trial Chamber's decision based on its assessment of his role in a deliberate CPK effort to destroy the Vietnamese in whole or in part.<sup>13</sup>

After examining Khieu Samphan's challenges on the underlying crimes, the SCC dismissed almost all of his claims regarding his roles and responsibilities in the Khmer Rouge regime. It upheld the Trial Chamber's findings that, among other things, he was President of the State Presidium, supported CPK policies in speeches and through diplomacy, was actively involved in the CPK Central Committee and aware of its key decisions, frequently attended CPK Standing Committee meetings, and was part of a central bureaucratic node called “Office 870,” giving him access to myriad CPK policy communications.<sup>14</sup>

The SCC also upheld the Trial Chamber's finding that Khieu Samphan had participated in a joint criminal enterprise (JCE). It rejected his claim that the CPK's pursuit of a socialist revolution was simply a political plan, concluding that his assertion “utterly ignore[d] the reality that crimes were committed on a massive scale throughout the implementation process.”<sup>15</sup> The SCC concluded that Khieu Samphan had contributed to the common criminal purpose, noting that “contribution to a JCE may take many forms,” including activities that were “on their face, directed at implementing a socialist revolution as opposed to the commission of specific crimes.”<sup>16</sup> Dismissing Khieu Samphan's claim that he neither knew of crimes nor intended them, the SCC found that the Trial Chamber had correctly inferred his knowledge from his position and conduct and had reached “the only reasonable inference that KHIEU Samphan intended the crimes encompassed by the common purpose.”<sup>17</sup>

Moreover, the SCC found Khieu Samphan guilty of additional crimes, concluding *proprio motu* that the Trial Chamber had erred in requiring evidence of direct intent for a JCE conviction. The SCC ruled that *dolus eventualis* also suffices, noting its prior ruling that “the common purpose may encompass crimes in which the commission is neither desired nor certain” when an accused person was aware that the crime was a possible consequence of implementing the plan but proceeded anyway.<sup>18</sup> On this basis, the SCC reversed the Trial Chamber's convictions of Khieu

Samphan for aiding and abetting the crime against humanity of murder at several worksites and security centers, instead convicting him personally via JCE of the crime against humanity of murder for the acts in question.<sup>19</sup>

Lastly, the SCC affirmed Khieu Samphan's life sentence and the Trial Chamber's decision to merge it with the sentence imposed in Case 002/01, concluding that while the Trial Chamber had committed errors, they did not "render the ultimate sentence inappropriate or unfair in any way."<sup>20</sup>

## Discussion

The Case 002/02 appeal judgment was significant in part for its jurisprudence. Among other conclusions, the SCC ruled that by 1975, international criminal law encompassed a relatively broad principle of JCE liability and that a relatively expansive set of acts could constitute "other inhumane acts" for purposes of crimes against humanity. The judgment thus helped articulate the status of international criminal law in the decades before the advent of the ad hoc tribunals for the former Yugoslavia and Rwanda. The judgment contributed important jurisprudence on forced sexual intercourse as well, which was notable given the difficulty of prosecuting cases of sexual violence against men and boys at international criminal tribunals.<sup>21</sup> In terms of process, the SCC replicated the Trial Chamber's practice of issuing of non-authoritative summary pronouncements prior to publishing a massive printed judgment—a step other tribunals may emulate.

The appeal judgment's significance also lies in its status as the ECCC's closing chapter. Cambodians generally welcomed the judgment, which included the first and only final conviction for genocide at the ECCC, but some observers found the ECCC's reliance on the traditional legal definition of genocide, including crimes against Vietnamese and Chams but not the majority population, at odds with the broader "social and historical understandings" of genocide in Cambodia.<sup>22</sup> Others have long argued that the Case 002 judgments were "too little, too late,"<sup>23</sup> coming long after many key Khmer Rouge suspects and survivors had passed. Khieu Samphan is now 92 years of age.

Critics also note that local media coverage of the Case 002/02 judgment generally downplayed other challenges at the ECCC, including the impasse over Cases 003 and 004, which concerned alleged crimes by Khmer Rouge military leaders and key subnational officials.<sup>24</sup> Prime Minister Hun Sen opposed those cases publicly, and resistance from Cambodian officials at the ECCC helped prevent Cases 003 and 004 from going to trial. The Case 002/02 appeal judgment thus brought an end to the lengthy and costly ECCC proceedings, leaving the court with just three convictions and a mixed legacy.

## ENDNOTES

- 1 Transcript of Appeal Judgment: Public, Case File No. 002/19-09-2007-ECCC/SCC (Sept. 22, 2022).
- 2 Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on October 27, 2004 (NS/RKM/1004/006), art. 1.
- 3 The Trial Chamber also found Nuon Chea guilty of genocide against Cham Muslims.
- 4 Case 002/02 Judgment, Case File No. 002/19-09-2007-ECCC/SCC (Nov. 16, 2018).
- 5 *Id.* Parts IV–VI.
- 6 *Id.* ¶¶ 687–89.
- 7 *Id.* ¶¶ 739–51.
- 8 *Id.* ¶¶ 871–82.
- 9 *Id.* ¶¶ 886–88.
- 10 *Id.* ¶¶ 961–66.
- 11 *Id.* ¶ 1138.
- 12 *Id.* ¶¶ 1534–63.
- 13 *Id.* ¶¶ 1635–38.
- 14 *Id.* Part VIII(A).
- 15 *Id.* ¶ 1816.
- 16 *Id.* ¶ 1876.
- 17 *Id.* ¶ 1893.
- 18 *Id.* ¶ 1949 (referencing Case 002/01 Appeal Judgment, Case File No. 002/19-09-2007-ECCC/SCC (Nov. 23, 2016), ¶¶ 808, 1054).
- 19 *Id.* Part VIII(B)(9).
- 20 *Id.* ¶ 2069.
- 21 Juliette Rémond Tiedrez, *On the rape of men in the context of forced marriages at the Extraordinary Chambers in the Courts of Cambodia*, EJIL:TALK! (Apr. 1, 2023), <https://www.ejiltalk.org/on-the-rape-of-men-in-the-context-of-forced-marriages-at-the-extraordinary-chambers-in-the-courts-of-cambodia>.
- 22 Rachel Killean, *Symposium on the ECCC: The Case 002/02 Appeal Judgment's Implications for Genocide Recognition in*

- Cambodia*, OPINIO JURIS (Oct. 31, 2022), <http://opiniojuris.org/2022/10/31/symposium-on-the-eccc-the-case-002-02-appeal-judgments-implications-for-genocide-recognition-in-cambodia>. See also Sarah Williams, *Khmer Rouge Tribunal Leaves a Mixed Legacy*, East Asia Forum (Nov. 10, 2022), <https://www.eastasiaforum.org/2022/11/10/khmer-rouge-tribunal-leaves-a-mixed-legacy>.
- 23 Human Rights Watch, *Khmer Rouge Convictions: “Too Little, Too Late”* (Aug. 8, 2014), <https://www.hrw.org/news/2014/08/08/Cambodia-khmer-rouge-convictions-too-little-too-late>.
- 24 See Rosemary Grey & Rachel Killean, *Communicating Justice: Cambodian Press Coverage of the ECCC’s Final Judgment*, INT’L CRIM. L. REV. 1-35 (2023).

CASE 002/02 AGAINST KHIEU SAMPHAN (E.C.C.C. SUP. CT. CHAMBER)\*  
[September 22, 2022]



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

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

Supreme Court Chamber  
Chambre de la Cour suprême

Case File/Dossier No. 002/19-09-2007-ECCC/SC

**Before:**

**Judge KONG Srim, President**  
**Judge Chandra Nihal JAYASINGHE**  
**Judge SOM Sereyvuth**  
**Judge Florence Ndepele MWACHANDE-MUMBA**  
**Judge MONG Monichariya**  
**Judge Phillip RAPOZA**  
**Judge YA Narin**

**Greffiers:**

**Peace MALLENI, SEA Mao, PHAN Theoun**

**Date:**

**23 December 2022**

**Language(s):**

**Khmer/English**

**Classification:**

**PUBLIC**

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**APPEAL JUDGMENT**

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Fergal GAYNOR (Reserve)

**Accused**

KHIEU Samphân

**Civil Party Lead Co-Lawyers**

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\*Due to the length of this judgment, what is reproduced here consists of excerpts selected by the author of the introductory note. The full decision is (at the time of writing) available on the website of the Extraordinary Chambers in the Courts of Cambodia at <https://www.eccc.gov.kh/en/document/court/appeal-judgment>, and it is also available in full as supplementary material on the *International Legal Materials* page on the Cambridge Core website here: <https://www.cambridge.org/core/journals/international-legal-materials>.

## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION</b> .....	[1]
	<b>A. FACTUAL BACKGROUND</b> .....	[1]
	<b>B. PROCEDURAL HISTORY</b> .....	[3]
	<b>C. KHIEU SAMPHÂN'S APPEAL</b> .....	[7]
	<b>D. THE CO-PROSECUTORS' APPEAL</b> .....	[7]
<b>II.</b>	<b>STANDARD OF APPELLATE REVIEW</b> .....	[8]
	<b>A. INTRODUCTION</b> .....	[8]
	<b>B. ALLEGED ERRORS OF LAW</b> .....	[9]
	<b>C. ALLEGED ERRORS OF FACT</b> .....	[10]
	<b>D. CHALLENGES TO INTERLOCUTORY DECISIONS</b> .....	[12]
	<b>E. ISSUES OF GENERAL SIGNIFICANCE</b> .....	[13]
	<b>F. STANDARD FOR SUMMARY DISMISSAL</b> .....	[13]
	<b>G. CONCLUSION</b> .....	[15]
<b>III.</b>	<b>PRELIMINARY MATTERS</b> .....	[15]
	<b>A. STRUCTURE OF THE APPEAL BRIEFS</b> .....	[15]
	<b>B. THE VALUE OF PRECEDENT AT THE ECCC</b> .....	[17]
<b>IV.</b>	<b>ALLEGED ERROR IN THE ISSUANCE AND PRONOUNCEMENT OF THE JUDGMENT</b> .....	[20]
<b>V.</b>	<b>ALLEGED ERRORS IN THE FAIRNESS OF THE PROCEEDINGS</b> .....	[31]
	<b>A. THE PRINCIPLE OF LEGALITY</b> .....	[33]
	<b>B. RECHARACTERISATION OF CHARGES</b> .....	[37]
	1. Alleged Introduction of a New Constitutive Element .....	[39]
	2. Alleged Lack of Notice .....	[41]
	3. Conclusion .....	[43]
	<b>C. ALLEGED PARTIALITY OF THE TRIAL CHAMBER</b> .....	[43]
	1. Alleged Failure to Address Allegations of Bias .....	[43]
	2. Alleged Importation of Findings from Case 002/01 .....	[44]
	3. Alleged Importation of Evidence from Case 002/01 .....	[48]
	<b>a. CHHAOM Sé</b> .....	[53]
	<b>b. EM Oeun</b> .....	[56]
	<b>c. Policy against Buddhists</b> .....	[58]
	4. Other Findings Allegedly Demonstrating Bias .....	[63]
	<b>D. ALLEGED ERRORS IN EVIDENTIARY DECISIONS MADE DURING TRIAL</b> .....	[65]
	1. Decisions on Witness Appearances .....	[65]
	2. Disclosure of Case 003 and 004 Material .....	[75]
	<b>a. Alleged Legal Errors</b> .....	[79]
	<b>b. Alleged Violations of Fair Trial Rights</b> .....	[84]
	3. Admission of Evidence During Trial .....	[88]
	<b>a. Admission of Evidence During Trial under Rule 87(4)</b> .....	[90]
	<b>b. Admission of Case 003 and 004 Materials</b> .....	[91]
	<b>c. Admission of Written Statements of "Low Probative Value and Relevance" and "Complete Books"</b> .....	[94]
	<b>d. Allegations of Prejudice: "Undue Delay"</b> .....	[97]

4.	Admission of Documents Originating from Christopher GOSCHA . . .	[99]
a.	<b>The Trial Chamber's Steps to Obtain the GOSCHA Documents</b> . . . . .	[103]
b.	<b>Challenges to the Trial Chamber's Admission of GOSCHA Documents</b> . . . . .	[106]
c.	<b>Challenges to the Trial Chamber's Use of the GOSCHA Documents</b> . . . . .	[108]
5.	Admission of the S-21 Logbook . . . . .	[111]
6.	Failure to Recall Stephen HEDER, François PONCHAUD and Philip SHORT . . . . .	[114]
a.	<b>Stephen HEDER and François PONCHAUD</b> . . . . .	[117]
b.	<b>Philip SHORT</b> . . . . .	[123]
7.	Failure to Reopen Trial Proceedings to Admit Evidence of Two Witnesses . . . . .	[127]
<b>E.</b>	<b>ALLEGED ERRORS IN THE TRIAL CHAMBER'S EVIDENTIARY APPROACH</b> . .	[130]
1.	Challenges to Evidentiary Standards . . . . .	[130]
a.	<b>Burden and Standard of Proof</b> . . . . .	[130]
b.	<b>Deductive Reasoning, Extrapolations and Generalisations</b> . .	[132]
c.	<b>Alleged Errors in Relation to Exculpatory Evidence</b> . . . . .	[141]
d.	<b>Number of Evidentiary Items and Probative Value</b> . . . . .	[149]
e.	<b>Corroboration</b> . . . . .	[152]
f.	<b>Inconsistencies</b> . . . . .	[154]
g.	<b>Cultural Bias</b> . . . . .	[157]
h.	<b>Hearsay</b> . . . . .	[160]
2.	Assessment of Documentary Evidence . . . . .	[163]
a.	<b>Assessment of Contemporaneous Documentary Evidence</b> . . .	[164]
i.	CPK Statutes . . . . .	[165]
ii.	Standing Committee Meeting Minutes . . . . .	[166]
b.	<b>KHIEU Samphân's Interviews, Statements and Publications</b> . . . . .	[169]
i.	KHIEU Samphân's Interviews . . . . .	[169]
ii.	KHIEU Samphân's Statements and Publications . . . . .	[171]
c.	<b>Out-of-Court Statements</b> . . . . .	[172]
d.	<b>Propaganda</b> . . . . .	[174]
e.	<b>Evidence Obtained through Torture</b> . . . . .	[176]
f.	<b>Witness and Civil Party Evidence</b> . . . . .	[181]
i.	Written Statements whose Authors Could not Testify . . . . .	[181]
ii.	Assessment of Civil Party Applicants' Statements . . . . .	[189]
g.	<b>Documents Benefitting from Presumption</b> . . . . .	[191]
h.	<b>Expert Evidence</b> . . . . .	[193]
<b>VI.</b>	<b>ALLEGED ERRORS IN THE SCOPE OF THE JUDICIAL INVESTIGATION AND TRIAL</b> . . . . .	[194]
<b>A.</b>	<b>THE SCOPE OF THE JUDICIAL INVESTIGATION</b> . . . . .	[194]
1.	The Law . . . . .	[194]
a.	<b>Alleged Error in Characterisation of Requests Relating to the Scope of the Investigation as Preliminary Objections</b> . . . . .	[195]
b.	<b>Alleged Expediency in Characterising Requests as Preliminary Objections</b> . . . . .	[203]
c.	<b>Alleged Miscarriage of Justice</b> . . . . .	[207]



2.	Challenges to the Jurisdiction of the Trial Chamber to Adjudicate Certain Facts and the Related Findings . . . . .	[211]
a.	<b>Legal Standard for Determining the Merits of a Case</b> . . . . .	[213]
b.	<b>Challenges to the Trial Chamber’s Jurisdiction to Adjudicate Certain Facts and the Related Findings</b> . . . . .	[214]
<b>B.</b>	<b>INSUFFICIENTLY SUPPORTED CHARGES IN THE CLOSING ORDER</b> . . . . .	[219]
1.	Deaths from Starvation in the Tram Kak Cooperatives . . . . .	[221]
2.	“Discriminatory Treatment” Regarding New People in the Tram Kak Cooperatives . . . . .	[223]
3.	“Discriminatory Treatment” Regarding Former Khmer Republic Members in the Tram Kak Cooperatives . . . . .	[224]
<b>C.</b>	<b>LACK OF LEGALLY QUALIFIED MATERIAL FACTS CHARGED IN CASE 002/02</b> . . . . .	[227]
1.	Alleged Error in the Legal Standard Regarding Notice of Charges . . . . .	[227]
2.	Alleged Errors Related to Charged Crime Sites . . . . .	[230]
a.	<b>Tram Kak Cooperatives</b> . . . . .	[232]
b.	<b>Trapeang Thma Dam Worksite</b> . . . . .	[235]
c.	<b>1st January Dam Worksite</b> . . . . .	[237]
d.	<b>Kampong Chhnang Airfield Construction Site</b> . . . . .	[239]
e.	<b>Kraing Ta Chan</b> . . . . .	[239]
f.	<b>Au Kanseng</b> . . . . .	[241]
g.	<b>Phnom Kraol</b> . . . . .	[242]
3.	Alleged Errors Regarding Specific Groups . . . . .	[243]
a.	<b>The Cham</b> . . . . .	[243]
b.	<b>The Vietnamese</b> . . . . .	[245]
c.	<b>Former Khmer Republic Soldiers and Officials</b> . . . . .	[247]
<b>D.</b>	<b>FACTS EXCLUDED FROM CASE 002/02 UPON SEVERANCE OF THE CASE</b> . . . . .	[249]
1.	Alleged Absence of <i>Saisine</i> for Facts of Persecution on Political Grounds and the Other Inhumane Act of Forcible Transfer . . . . .	[250]
2.	Alleged Absence of <i>Saisine</i> for Facts Relating to the Other Inhumane Act of Forcible Transfer of Population in the Course of Population Movement Phase Two . . . . .	[253]
3.	Alleged Absence of <i>Saisine</i> for Facts Relating to the Other Inhumane Act Through Enforced Disappearances of the Vietnamese at the Tram Kak Cooperatives . . . . .	[257]
4.	An Ill-Defined Marathon Trial . . . . .	[262]
<b>E.</b>	<b>OUT OF SCOPE BUT RELEVANT EVIDENCE</b> . . . . .	[264]
<b>VII.</b>	<b>ALLEGED ERRORS IN THE UNDERLYING CRIMES</b> . . . . .	[271]
<b>A.</b>	<b>MURDER AS A CRIME AGAINST HUMANITY</b> . . . . .	[272]
1.	Whether the <i>Mens Rea</i> of <i>Dolus Eventualis</i> Was Part of Customary International Law by 1975 . . . . .	[273]
2.	Whether a <i>Mens Rea</i> that Includes <i>Dolus Eventualis</i> Was Foreseeable and Accessible . . . . .	[283]
3.	Whether the Trial Chamber Erred Concerning Culpable Omissions . . . . .	[284]
4.	Whether the Trial Chamber Erred in its Assessment of Temporality . . . . .	[287]
5.	Whether Murder Was Established at the Following Sites . . . . .	[288]
a.	<b>Tram Kak Cooperatives</b> . . . . .	[288]
b.	<b>Trapeang Thma Dam Worksite</b> . . . . .	[294]
c.	<b>1st January Dam Worksite</b> . . . . .	[296]



	d. Kampong Chhnang Airfield Construction Site .....	[304]
	e. Phnom Kraol Security Centre .....	[305]
<b>B.</b>	<b>EXTERMINATION AS A CRIME AGAINST HUMANITY .....</b>	<b>[310]</b>
	1. Extermination of the Cham .....	[310]
	a. Killing of Cham at Trea Village .....	[311]
	b. Killing of Cham at Wat Au Trakuon .....	[314]
	c. The Numeric Threshold for Extermination .....	[318]
	d. Intention to Kill on a Large Scale .....	[320]
	2. Extermination of the Vietnamese .....	[323]
	a. Killing of Vietnamese in Svay Rieng .....	[324]
	b. Killing of Vietnamese in DK Waters .....	[326]
	c. Killing of Vietnamese in Kampong Chhnang Province .....	[329]
	d. Killing of Vietnamese at Wat Khsach .....	[330]
	e. Killing of Vietnamese in Kratie .....	[333]
	f. Killing of Six Vietnamese at Au Kanseng .....	[334]
	g. Whether the Killings Amount to Extermination .....	[335]
<b>C.</b>	<b>ENSLAVEMENT AS A CRIME AGAINST HUMANITY .....</b>	<b>[338]</b>
	1. Enslavement at Phnom Kraol .....	[338]
<b>D.</b>	<b>DEPORTATION AS A CRIME AGAINST HUMANITY .....</b>	<b>[340]</b>
	1. Tram Kak Cooperatives .....	[340]
	2. Prey Veng .....	[348]
<b>E.</b>	<b>TORTURE AS A CRIME AGAINST HUMANITY .....</b>	<b>[354]</b>
	1. Torture of the Cham .....	[354]
<b>F.</b>	<b>PERSECUTION AS A CRIME AGAINST HUMANITY .....</b>	<b>[356]</b>
	1. Applicable Law .....	[356]
	a. Whether an Objective to Remove a Group from Society is an Element of Persecution .....	[357]
	b. Whether Undifferentiated Treatment that Has a Particular Impact on a Class of Individuals Can Amount to Discrimination in Fact .....	[360]
	2. Political Persecution .....	[362]
	a. Political Persecution of the Cham .....	[362]
	i. Alleged Errors Concerning the <i>Actus Reus</i> .....	[363]
	ii. Alleged Error Concerning the <i>Mens Rea</i> .....	[365]
	iii. Whether Arrests May Be Referred to in Establishing the Requisite Level of Severity .....	[366]
	b. Political Persecution of Other “Real or Perceived Enemies” .....	[368]
	i. Whether “Real or Perceived Enemies of the CPK” is a Suf- ficiently Discernible Group .....	[369]
	ii. Tram Kak Cooperatives .....	[374]
	<i>Former Khmer Republic Soldiers and Officials</i> .....	[375]
	<i>New People</i> .....	[376]
	a) Rations .....	[377]
	b) Working Conditions, Including in Mobile Youth Units .....	[380]
	c) Miserable Treatment .....	[381]
	d) Monitoring and Arrests .....	[382]
	iii. Trapeang Thma Dam Worksite .....	[385]

	iv.	1st January Dam Worksite . . . . .	[389]
		<i>New People</i> . . . . .	[389]
		<i>Former Khmer Republic Soldiers and Officials</i> . . . . .	[392]
	v.	S-21 Security Centre . . . . .	[394]
	vi.	Au Kanseng Security Centre . . . . .	[397]
3.		Religious Persecution . . . . .	[400]
	a.	<b>Religious Persecution of the Cham</b> . . . . .	[400]
		i. The Persecutory Acts . . . . .	[402]
		ii. Whether the Persecutory Acts Occurred . . . . .	[405]
		<i>1st January Dam Worksite</i> . . . . .	[406]
		<i>Elsewhere in Cambodia</i> . . . . .	[409]
		iii. Whether the Restrictions on Freedom of Religion Were Permissible . . . . .	[412]
		iv. Whether the Persecutory Acts Discriminated in Fact . . . . .	[413]
		v. Whether the Restrictions on Religious and Cultural Practices Breached Fundamental Rights . . . . .	[415]
		vi. Whether There Was Intent to Discriminate on Religious Grounds . . . . .	[416]
		vii. Whether the Threshold of Severity Was Established . . . . .	[419]
	b.	<b>Religious Persecution of Buddhists and Buddhist Monks</b> . . . . .	[420]
		i. Alleged Lack of Evidence Regarding the Physical or Mental Effects of the Persecutory Acts against Buddhists . . . . .	[422]
		ii. Alleged Absence of Discriminatory Treatment against Bud- dhist Monks and Buddhists in General . . . . .	[426]
		<i>Whether the Persecutory Acts against Buddhist Monks Discriminated in Fact</i> . . . . .	[427]
		<i>Whether the Acts against Buddhists in General Discriminate in Fact and Whether there Was Intent to Discriminate</i> . . . . .	[429]
4.		Racial Persecution . . . . .	[432]
	a.	<b>Tram Kak Cooperatives</b> . . . . .	[433]
	b.	<b>S-21 Security Centre</b> . . . . .	[436]
	c.	<b>Au Kanseng Security Centre</b> . . . . .	[440]
	d.	<b>Prey Veng and Svay Rieng</b> . . . . .	[442]
		i. Discernibility of the Group . . . . .	[443]
		ii. Whether the Persecutory Acts Occurred . . . . .	[444]
		iii. Whether the Acts Were Discriminatory in Fact . . . . .	[446]
		iv. Whether the Vietnamese Were Deliberately Targeted . . . . .	[447]
G.		<b>OTHER INHUMANE ACTS AS CRIMES AGAINST HUMANITY</b> . . . . .	[449]
	1.	Assessing the Legality of Other Inhumane Acts . . . . .	[451]
		a. <b>The Trial Chamber's Assessment of the Principle of Legality</b> . . . . .	[451]
		b. <b>Alleged Requirement to Breach a Prohibition in Human Rights Instruments to Amount to an Other Inhumane Act</b> . . . . .	[453]
	2.	Enforced Disappearances . . . . .	[457]
		a. <b>Tram Kak Cooperatives</b> . . . . .	[458]
		b. <b>Kraing Ta Chan Security Centre</b> . . . . .	[461]
		c. <b>Phnom Kraol Security Centre</b> . . . . .	[466]

3.	Forced Marriage and Rape in the Context of Forced Marriage . . . . .	[469]
a.	<b>The Legality of Forced Marriage and Rape in the Context of Forced Marriage as the Crimes Against Humanity of Other Inhumane Acts</b> . . . . .	[469]
i.	Forced Marriage . . . . .	[471]
	<i>The Conduct of Forced Marriage</i> . . . . .	[471]
	<i>“Formal International Unlawfulness”</i> . . . . .	[475]
	<i>The Legality of Arranged Marriage</i> . . . . .	[479]
	<i>Ejusdem Generis</i> . . . . .	[482]
ii.	Rape in the Context of Forced Marriage . . . . .	[485]
	<i>The Definition of Rape</i> . . . . .	[486]
	<i>“Formal International Unlawfulness”</i> . . . . .	[493]
	<i>Ejusdem Generis</i> . . . . .	[496]
iii.	Conclusion . . . . .	[499]
b.	<b>Factual Findings on the Regulation of Marriage Policy</b> . . . . .	[499]
i.	Introduction . . . . .	[499]
ii.	Objectives of the Policy . . . . .	[500]
	<i>Increased Population Growth</i> . . . . .	[500]
	<i>Control over Sexual Relations Outside Marriage</i> . . . . .	[506]
	<i>Alleged Contradictions between the Goals of the Policy</i> . . . . .	[511]
iii.	The Elements of the Regulation of Marriage Policy . . . . .	[514]
	<i>The CPK Principle of Consent to Marriage</i> . . . . .	[515]
	<i>Marriages of Disabled Persons</i> . . . . .	[529]
	<i>Wedding Ceremonies</i> . . . . .	[533]
	<i>Forced Sexual Intercourse in the Context of Forced Marriage</i> . . . . .	[537]
	a) Findings on Forced Sexual Intercourse . . . . .	[538]
	b) Whether there Was a “Policy” of Forced Sexual Intercourse . . . . .	[539]
	c) The Climate of Coercion . . . . .	[541]
	(i) Monitoring by Armed Militia After the Wedding Ceremonies . . . . .	[541]
	(ii) Acts of “Rape” as Punishment . . . . .	[546]
	(iii) Lack of Express Statement of Coercive Circumstances . . . . .	[549]
	d) Concealment of Non-Consummation . . . . .	[551]
iv.	The Implementation of the Regulation of Marriage Policy . . . . .	[554]
	<i>Instructions from the Upper Echelon to Arrange Marriages and Approval of Matches Arranged by Lower-Level Cadres</i> . . . . .	[555]
	<i>Reports on Marriage to the Upper Echelon</i> . . . . .	[558]
	<i>Reports on the Monitoring of the Consummation of Marriage</i> . . . . .	[560]
	<i>KHIEU Samphân’s Personal Involvement in the Regulation of Marriage</i> . . . . .	[562]
	a) Sole or Primary Reliance on Civil Party Evidence . . . . .	[562]
	b) Alleged Inconsistencies in CHEA Deap’s Evidence . . . . .	[566]
	c) Corroboration by Other Evidence . . . . .	[569]
	d) Overall Finding on the Reliance on CHEA Deap’s Civil Party Evidence . . . . .	[572]

c.	<b>Legal Findings on Forced Marriage, Rape in the Context of Forced Marriage and Sexual Violence in the Context of Forced Marriage as the Crimes Against Humanity of Other Inhumane Acts</b> . . . .	[572]
i.	Introduction . . . . .	[572]
ii.	Forced Marriage . . . . .	[573]
	<b><i>The Actus Reus of Forced Marriage</i></b> . . . . .	[574]
	<b><i>The Relevance of Traditional Arranged Marriages to an Assessment of Gravity</i></b> . . . . .	[578]
	<b><i>Serious Mental or Physical Suffering or Injury</i></b> . . . . .	[581]
a)	Standard for Assessing Serious Mental or Physical Suffering or Injury . . . . .	[583]
b)	Reliance on the Evidence of Civil Parties . . . . .	[584]
c)	Absence of Tradition in Ceremonies . . . . .	[585]
d)	Other Traumatic Events . . . . .	[587]
e)	Development of Feelings During Forced Marriage . . . . .	[589]
f)	Credibility of Civil Parties EM Oeun and MOM Vun . . . . .	[593]
g)	SOU Sotheavy . . . . .	[595]
iii.	Forced Sexual Intercourse in the Context of Forced Marriage . . . . .	[596]
	<b><i>The Conduct of Forced Sexual Intercourse</i></b> . . . . .	[596]
	<b><i>Female Victims: KHIEU Samphân's Appeal</i></b> . . . . .	[599]
a)	Relevance of Arranged Marriage . . . . .	[600]
b)	Serious Mental or Physical Harm or Suffering . . . . .	[602]
(i)	Absence of Express Statements of Harm . . . . .	[602]
(ii)	"Rapes" as Part of the Coercive Environment . . . . .	[604]
(iii)	Credibility Challenges . . . . .	[605]
(iv)	SOU Sotheavy . . . . .	[606]
c)	Evidence of Harm not Considered by the Trial Chamber . . . . .	[607]
	<b><i>Male Victims: The Co-Prosecutors' Appeal</i></b> . . . . .	[609]
a)	Whether the Trial Chamber Was Required to Consider Both Serious Mental or Physical Suffering or Injury, and a Serious Attack on Human Dignity . . . . .	[611]
b)	Serious Mental or Physical Harm or Suffering . . . . .	[613]
c)	Human Dignity . . . . .	[620]
H.	<b>GENOCIDE</b> . . . . .	[631]
1.	Genocide of the Vietnamese . . . . .	[631]
a.	<b>Whether the <i>Actus Reus</i> Was Properly Established</b> . . . . .	[631]
i.	Whether Members of a Protected Group Were Targeted . . . . .	[631]
ii.	Whether Members of the Protected Group Were Killed . . . . .	[633]
b.	<b>Whether the <i>Mens Rea</i> Was Properly Established</b> . . . . .	[635]
i.	Whether the Intent Was to Destroy the Protected Group as Such . . . . .	[635]
ii.	Whether the Intent Was to Destroy the Protected Group in Whole or in Part . . . . .	[643]
VIII.	<b>ALLEGED ERRORS RELATING TO INDIVIDUAL CRIMINAL RESPONSIBILITY</b> . . . . .	[645]
A.	<b>KHIEU SAMPHÂN'S ROLES AND FUNCTIONS</b> . . . . .	[645]
1.	Deputy Prime Minister, Minister of National Defence and Cambodian People's National Liberation Armed Forces Commander-in-Chief . . . . .	[645]

	<b>a. April 1975 Special National Congress and December 1975 Third National Congress</b> .....	[645]
	<b>b. Meetings of Military Personnel in Phnom Penh</b> .....	[647]
2.	President of the State Presidium .....	[648]
	<b>a. Appointment</b> .....	[648]
	<b>b. Roles and Responsibilities</b> .....	[648]
	<b>c. Speeches</b> .....	[651]
3.	Member of the Central and Standing Committees .....	[655]
	<b>a. Membership in the Central Committee</b> .....	[656]
	i. Membership .....	[656]
	ii. Scope of Duties and Powers of the Central Committee ...	[659]
	iii. Attributing Standing Committee Decisions to the Central Committee .....	[663]
	iv. Presence at Congresses .....	[669]
	<b>b. Attendance and Participation in Meetings of the Standing Committee</b> .....	[674]
	i. Position of “Unique Standing” within the Party .....	[675]
	ii. Attendance and Participation in Standing Committee Meetings .....	[678]
	<b>c. Democratic Centralism</b> .....	[682]
4.	Residual Functions .....	[685]
	<b>a. Participating in Education Sessions</b> .....	[685]
	<b>b. Member of Office 870</b> .....	[692]
	<b>c. Role with Respect to Trade and Commerce</b> .....	[696]
	i. Oversight of the Commerce Committee .....	[696]
	ii. Education Sessions for Commerce Cadres .....	[700]
	<b>d. Responsibility for the Ministry of Foreign Affairs</b> .....	[702]
<b>B.</b>	<b>JOINT CRIMINAL ENTERPRISE</b> .....	[705]
1.	Applicable Law .....	[706]
2.	Criminality of the Common Purpose .....	[710]
3.	Policy of Establishing and Operating Security Centres and Execution Sites .....	[713]
4.	Policy of Establishing and Operating Cooperatives and Worksites ...	[718]
5.	Policy of Targeting Specific Groups .....	[723]
	<b>a. The Vietnamese</b> .....	[724]
	<b>b. The Cham</b> .....	[728]
	<b>c. Former Khmer Republic Soldiers and Officials</b> .....	[732]
	<b>d. Buddhists</b> .....	[735]
6.	Policy of Regulating Marriage .....	[735]
7.	KHIEU Samphân’s Contribution .....	[736]
8.	KHIEU Samphân’s Knowledge and Intent .....	[742]
	<b>a. Alleged “Vicarious” Intent</b> .....	[746]
	<b>b. Knowledge Indicative of Intent</b> .....	[748]
	<b>c. Cooperatives and Worksites</b> .....	[753]
	<b>d. Security Centres, Execution Sites, and Purges</b> .....	[760]
	<b>e. Specific Groups</b> .....	[769]
	<b>f. Regulation of Marriage</b> .....	[776]

9.	<i>Proprio Motu</i> Issue Concerning the Applicability of JCE to Crimes Committed with <i>Dolus Eventualis</i> . . . . .	[777]
a.	<b>Whether the Common Plan Encompassed the Crime Against Humanity of Murder Committed with <i>Dolus Eventualis</i></b> . . . . .	[785]
b.	<b>KHIEU Samphân’s JCE Liability for the Crime Against Humanity of Murder Committed with <i>Dolus Eventualis</i></b> . . . . .	[787]
<b>IX.</b>	<b>SENTENCING</b> . . . . .	[790]
<b>A.</b>	<b>THE LAW RELEVANT TO SENTENCING SENIOR LEADERS</b> . . . . .	[793]
1.	The Principle of Legality . . . . .	[794]
2.	The Principles of Equality Before the Law, Proportionality, and Individualisation of Sentences . . . . .	[796]
<b>B.</b>	<b>CLARIFICATION CONCERNING THE SECOND SENTENCE IMPOSED ON KHIEU SAMPHÂN</b> . . . . .	[806]
<b>C.</b>	<b>THE STANDARD OF APPELLATE REVIEW FOR SENTENCING</b> . . . . .	[810]
<b>D.</b>	<b>ALLEGED ERRORS RELATED TO SENTENCING</b> . . . . .	[810]
1.	Alleged Error Regarding Consideration of Rape in Security Centres . . . . .	[815]
2.	Alleged Error Regarding Double Counting of Abuse of Position of Authority and Influence . . . . .	[817]
<b>E.</b>	<b>IMPACT OF THE SUPREME COURT CHAMBER’S FINDINGS ON THE SENTENCE</b> . . . . .	[819]
<b>X.</b>	<b>DISPOSITION</b> . . . . .	[823]
<b>XI.</b>	<b>ANNEX I: GLOSSARY AND ABBREVIATIONS</b> . . . . .	[827]
<b>XII.</b>	<b>ANNEX II: TABLE OF AUTHORITIES</b> . . . . .	[828]

## I. INTRODUCTION

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

### A. FACTUAL BACKGROUND

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

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

4. The Trial Chamber convicted KHIEU Samphân of the crimes against humanity of murder, extermination, deportation, enslavement, imprisonment, torture, persecution on political, religious, and racial grounds, and other inhumane acts comprising conduct characterised as enforced disappearances, forcible transfer, forced marriage, and rape in the context of forced marriage.<sup>21</sup> He was also convicted of genocide by killing members of the Vietnamese group<sup>22</sup> and grave breaches of the Geneva Conventions, namely wilful killing, torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving prisoners of war or civilians the rights of fair and regular trials, and the unlawful confinement of civilians.<sup>23</sup>

5. The Trial Chamber sentenced KHIEU Samphân to life imprisonment.<sup>24</sup> Taking into consideration the life sentence imposed on him in Case 002/01, the Trial Chamber merged the two sentences into a single term of life imprisonment.<sup>25</sup> It

\*Due to the length of this judgment, what is reproduced here consists of excerpts selected by the author of the introductory note. The full decision is (at the time of writing) available on the website of the Extraordinary Chambers in the Courts of Cambodia at <https://www.eccc.gov.kh/en/document/court/appeal-judgment>, and it is also available in full on the *International Legal Materials* page on the Cambridge Core website at <https://www.cambridge.org/core/journals/international-legal-materials>.



also found that the civil parties suffered harm by acts for which KHIEU Samphân was convicted, and consequently granted, in part, their plea for moral and collective reparations, endorsing thirteen specific communal memorial projects.<sup>26</sup>

## B. PROCEDURAL HISTORY

6. As a result of their convictions for crimes against humanity, grave breaches of the Geneva Conventions, and genocide, KHIEU Samphân and his co-Accused, the late NUON Chea, were sentenced to life imprisonment by the Trial Chamber on 16 November 2018.<sup>27</sup> On that day, the Trial Chamber issued a summary of its findings, indicating that the authoritative account of its written reasons in full would be made available in due course and its fully reasoned, written judgment was notified in Khmer, English, and French on 28 March 2019.<sup>28</sup> Three days after the Trial Chamber issued the summary of its findings, KHIEU Samphân filed an urgent appeal requesting that the Supreme Court Chamber annul it for lack of form, and declare the subsequent fully reasoned Trial Judgment invalid.<sup>29</sup> The Supreme Court Chamber dismissed the urgent appeal on 13 February 2019.<sup>30</sup> On 20 March 2019, KHIEU Samphân requested this Chamber to annul this decision, citing the Court's unlawful composition.<sup>31</sup> He submitted that the Reserve Judge of the Supreme Court Chamber, Judge RAPOZA, was not properly designated as a sitting judge when the decision was delivered.<sup>32</sup> On 16 August 2019, the Supreme Court Chamber dismissed the request, concluding that at the time the impugned decision was issued, Judge RAPOZA had been validly appointed and sworn in as a Supreme Court Chamber Judge, and thus the chronology of the filing of the Chamber's decision had been mischaracterised in relation to the judge's appointment.<sup>33</sup>

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

8. On 21 June 2019, the Co-Prosecutors filed their notice of appeal against the Trial Judgment, setting forth a single ground of appeal.<sup>38</sup> They submitted that the Trial Chamber erred in law and/or fact by finding that male victims of forced marriage who were coerced to have sexual intercourse without their consent were not victims of the crime against humanity of other inhumane acts.<sup>39</sup> On 1 July 2019, NUON Chea and KHIEU Samphân filed notices of appeal against the Trial Judgment.<sup>40</sup> NUON Chea listed 351 grounds of appeal,<sup>41</sup> while KHIEU Samphân advanced at least 1,824 errors allegedly committed by the Trial Chamber.<sup>42</sup> On 23 July 2019, NUON Chea requested an extension of time and page limits for filing his appeal brief.<sup>43</sup> Twelve days later, NUON Chea passed away at the Khmer-Soviet Friendship Hospital in Phnom Penh.<sup>44</sup> Two days later, the Co-Lawyers for NUON Chea requested this Chamber to either terminate the appellate proceedings concerning NUON Chea or, alternatively, allow the appellate proceedings to continue in the interests of justice.<sup>45</sup> On 13 August 2019, the Supreme Court Chamber terminated all proceedings against NUON Chea, remaining seised of the Defence request concerning, *inter alia*, the impact of NUON Chea's death on the Trial Judgment and the underlying conviction.<sup>46</sup> In a subsequent decision dated 22 November 2019, this Chamber clarified that the termination of proceedings against NUON Chea did not vacate the Trial Judgment and that his death barred any appellate review.<sup>47</sup>

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

10. On 8 October 2019, KHIEU Samphân filed a motion for admission of the additional evidence of Witnesses EK Hen and CHUON Thy and their corresponding audio recordings.<sup>53</sup> On 24 October 2019, the Co-Prosecutors responded to the motion<sup>54</sup> and on 4 November 2019, KHIEU Samphân submitted his reply.<sup>55</sup> On 6 January 2020, the Supreme Court Chamber granted KHIEU Samphân's request for admission of additional evidence.<sup>56</sup>

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

12. On 27 February 2020, KHIEU Samphân filed his Appeal Brief in French.<sup>60</sup> On 20 March 2020, the Co-Prosecutors filed a request to respond to KHIEU Samphân's Appeal Brief, which included additional grounds contained from earlier arguments.<sup>61</sup> On 24 April 2020, the Chamber granted the Co-Prosecutors' request.<sup>62</sup> On 23 April 2020, the English translation of Annex A to KHIEU Samphân's Appeal Brief was filed.<sup>63</sup> KHIEU Samphân's Appeal Brief was notified in English and Khmer on 14 July 2020 and 7 October 2020, respectively.<sup>64</sup> On 12 October 2020, the Co-Prosecutors responded in English, with the Khmer and French versions of their Response filed on 24 and 25 November 2020, respectively.<sup>65</sup> The Lead Co-Lawyers responded in English on 4 January 2021, with the Khmer and French versions filed on 16 and 23 March 2021, respectively.<sup>66</sup>

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

14. On 5 August 2022, the Supreme Court Chamber scheduled the pronouncement of its appeal judgment for 22 September 2022.<sup>70</sup>

### C. KHIEU SAMPHÂN'S APPEAL

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

### D. THE CO-PROSECUTORS' APPEAL

16. The Co-Prosecutors advance a single ground of appeal. They challenge the Trial Chamber's finding that forced sexual intercourse or forced consummation in the context of forced marriage did not constitute the crime against humanity of other inhumane acts in the instance of male victims. They allege that the Trial Chamber made legal and factual errors in its determination on serious physical and mental suffering or injury, as well as on human dignity. Accordingly, they aver that these errors invalidated the decision and resulted in a miscarriage of justice.<sup>73</sup> The Co-Prosecutors request for this finding to be set aside, and that the conviction for the crime against humanity of other inhumane acts be amended to include sexual violence against male victims.<sup>74</sup> The Co-Prosecutors submit that the requested relief is in accordance with Rule 110(4), because KHIEU Samphân has already been convicted of the crime of other inhumane acts.<sup>75</sup>

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

...

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

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

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

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

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

...

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

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

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

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

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

...

79. Furthermore, this Chamber rejects KHIEU Samphân's claim that the summary delivered in open court, with a fully reasoned judgment to follow, was a judgment under Rule 102(1). Nothing in this rule specifies that such distribution or publication of the fully reasoned judgment must take place on the same day as pronouncement at the public hearing. In fact, it is not uncommon in international criminal cases of such magnitude to issue an oral summary of the judgment with written reasons to follow to allow for the completion of editorial and/or translation processes. This Chamber finds that there is no legal basis to claim that the procedural error influenced the verdict, the

judgment, or the decision. There is no evidence of any prejudice against KHIEU Samphân. It follows that a lawful and reasoned judgment capable of appeal was pronounced on 16 November 2018 in summary form, with the full written version distributed and published on 28 March 2019. His right to review the decision underpinning both his convictions and his sentence remained wholly intact, pending the distribution and publication of the full written Judgment, as evidenced by the present adjudication of his appeal against the Trial Judgment.

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

## V. ALLEGED ERRORS IN THE FAIRNESS OF THE PROCEEDINGS

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

...

### A. THE PRINCIPLE OF LEGALITY

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

...

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

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

...

### C. ALLEGED PARTIALITY OF THE TRIAL CHAMBER

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



...

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

122. Moreover, the mere fact that the Trial Chamber may have reached similar conclusions on similar issues in both trials does not, *per se*, demonstrate that its determinations were necessarily biased or attributable to a predisposition against KHIEU Samphân, and is accordingly insufficient to displace the presumption of impartiality. On this, the case law of the *ad hoc* tribunals echoed by the Special Panel has established that professional judges can be relied upon to rule fairly on the issues before them, relying solely on the evidence adduced in the particular case, and are accordingly not disqualified from hearing two or more cases arising out of the same series of events and involving similar evidence.<sup>311</sup> KHIEU Samphân’s submissions in these respects are accordingly dismissed.

...

#### 4. Other Findings Allegedly Demonstrating Bias

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

...

154. The Supreme Court Chamber considers that these allegations found throughout KHIEU Samphân’s Appeal Brief concern allegations of bias arising from judicial decisions. This Chamber recalls that “[a] showing of bias, or appearance of bias, can be made, *inter alia*, based on statements contained in the reasoning of a decision of the court in question” and that the enquiry is directed at establishing whether its reasoning revealed lack of impartiality.<sup>433</sup> This Chamber dismisses KHIEU Samphân’s allegations insofar as they merely disagree with the Trial Chamber’s findings or allege factual or legal errors, as matters which are instead subject to appeal,<sup>434</sup> and which are accordingly addressed in the relevant sections of this judgment in accordance with the applicable standard of review. Such allegations do not, however, establish that these findings were made because of a predisposition against KHIEU Samphân.

...

## VI. ALLEGED ERRORS IN THE SCOPE OF THE JUDICIAL INVESTIGATION AND TRIAL

...

### E. OUT OF SCOPE BUT RELEVANT EVIDENCE

...

655. KHIEU Samphân argues that the Trial Chamber erred in law and violated his rights to be informed of the nature and cause of the charge against him, to adequate time and facilities for the preparation of his defence, to an impartial tribunal that respects the scope of its jurisdiction, to legal and procedural certainty, and to be tried without undue delay taking into account and employing the “out-of-scope but relevant evidence” about facts not seized.<sup>1836</sup> In a footnote of his Appeal Brief,<sup>1837</sup> KHIEU Samphân takes issue with the Trial Chamber’s findings that it may

(1) rely on evidence outside the temporal or geographic scope of the Closing Order;<sup>1838</sup> (2) use evidence of the treatment of Buddhists outside the Tram Kak Cooperatives;<sup>1839</sup> (3) use evidence concerning the Khmer Krom;<sup>1840</sup> and (4) use evidence pertaining to crimes committed by the Revolutionary Army of Kampuchea on Vietnamese territory.<sup>1841</sup>

656. KHIEU Samphân contends that the Trial Chamber’s approach is inconsistent with its role and the purpose of criminal proceedings as stated in the Internal Rules, as well as a violation of the guiding and fundamental principles of criminal law. He argues that the Trial Chamber must examine whether the charges against the Accused for which he was indicted amount to a crime and whether he is liable for it, and that the judgment shall be limited to these facts, and the Accused shall only be required to defend himself against these facts.<sup>1842</sup> Citing his Closing Brief, KHIEU Samphân opines that he previously discussed at length the principles and factual scope of the jurisdiction of a trier of fact that determines the information to be provided about the charges against him and denounces the resulting confusion.<sup>1843</sup>

...

665. The Supreme Court Chamber notes that the applicable law before the ECCC does not preclude the admission or the consideration of evidence on facts falling outside of the temporal or geographic jurisdiction of the Court. On the contrary, Rule 87(1) directs that “all evidence is admissible” unless otherwise provided in the Internal Rules, and Rule 89 *quater* generally grants the Trial Chamber the discretion to reduce the scope of the trial. Rule 89 *quater* (1) permits the Trial Chamber to exercise this discretion by excluding certain facts set out in the Indictment while ensuring the remaining facts are representative of the scope of the Indictment. Rule 89 *quater* (3) explicitly provides that “[e]vidence relating to the facts excluded [from the scope of the trial] may be relied upon to the extent it is relevant to the remaining facts”.<sup>1867</sup>

666. In the same vein, the Supreme Court Chamber reaffirms the well-established principle, widely accepted at *ad hoc* tribunals,<sup>1868</sup> and adopted by the Co-Investigating Judges<sup>1869</sup> and the Chambers of the ECCC,<sup>1870</sup> that a trial chamber may validly admit and rely on evidence that falls outside of the temporal or geographic scope of the Closing Order and the jurisdiction of the Court in the three circumstances listed herein: (1) to clarify a given context; (2) to establish by inference the elements, particularly the *mens rea*, of criminal conduct occurring during the material period; or (3) to demonstrate a deliberate pattern of conduct. In this case, the Trial Chamber expressly stated its intention to limit the scope of the trial with the issuance of the Case 002 Additional Severance Decision<sup>1871</sup> and Annex, and in the course of the trial, further assured the parties that “[t]he Chamber [would] therefore only rely on this evidence for these limited purposes and exclusively when the out-of-scope evidence is consistent with other evidence.”<sup>1872</sup>

667. In addition, with its obligation to safeguard the fundamental rights of the accused pursuant to Rule 21(1) duly in mind, and recalling the consistent jurisprudence of the Chambers of the ECCC,<sup>1873</sup> as well as the established legal approach adopted by *ad hoc* tribunals,<sup>1874</sup> the Supreme Court Chamber reaffirms that in assessing an indictment and determining whether an accused was adequately put on notice of the nature and cause of the charges against him or her in order to prepare a defence, the indictment must be considered as a whole, and thus each paragraph therein should not be read in isolation, but rather should be considered in the context of the other paragraphs in the indictment.<sup>1875</sup>

668. Given the foregoing, the Supreme Court Chamber finds no error in the Trial Chamber’s conclusion that it may rely on the evidence outside the temporal or geographic scope of the Closing Order for the limited purposes of clarifying a given context, establishing by inference the elements of criminal conduct occurring during the material period, or demonstrating a deliberate pattern of conduct. Consequently, this Chamber rejects KHIEU Samphân’s challenge in this regard.

...

## VII. ALLEGED ERRORS IN THE UNDERLYING CRIMES

...

### A. MURDER AS A CRIME AGAINST HUMANITY

...

679. KHIEU Samphân claims his conviction for murder as a crime against humanity was based on several legal and factual errors. He argues that (1) the *mens rea* of murder as a crime against humanity under customary international law in 1975 did not include *dolus eventualis*;<sup>1896</sup> (2) a *mens rea* that includes *dolus eventualis* was not foreseeable and accessible to him;<sup>1897</sup> (3) the Trial Chamber made errors in finding culpable omissions as part of the *actus reus* of murder as a crime against humanity at Tram Kak Cooperatives, Trapeang Thma Dam, 1st January Dam, and Kampong Chhnang Airfield Worksites;<sup>1898</sup> (4) the Trial Chamber erred in its analysis of the *mens rea* with respect to temporality at Tram Kak Cooperatives, Trapeang Thma Dam, 1st January Dam and Kampong Chhnang Airfield Worksites;<sup>1899</sup> and (5) the Trial Chamber erred in its factual findings that the murders committed with *dolus eventualis* had been established at Tram Kak Cooperatives, Trapeang Thma Dam Worksite, 1st January Dam and Kampong Chhnang Airfield Construction Site, and it further erred in finding that two murders, one committed with direct intent and one murder with *dolus eventualis* were perpetrated at Phnom Kraol Security Centre.<sup>1900</sup> These arguments will be addressed in turn.

### 1. Whether the *Mens Rea* of *Dolus Eventualis* Was Part of Customary International Law by 1975

...

687. The Supreme Court Chamber determines that the Trial Chamber correctly analysed customary international law in 1975 to determine that the *mens rea* of murder as a crime against humanity included *dolus eventualis*. This finding was based on the Supreme Court Chamber's review of the *Medical Case* in the Case 002/01 Appeal Judgment, as well as the Trial Chamber's own analysis of that case. KHIEU Samphân's disagreement with these analyses is insufficient to persuade the Supreme Court Chamber to reconsider its analysis. The Supreme Court Chamber adds that while KHIEU Samphân has contested these analyses of the *Medical Case*, by arguing that the *Medical Case* reveals a *mens rea* of direct intent, he has not cited any other international jurisprudence to support his claim that the *mens rea* was limited to direct intent.

688. The Supreme Court Chamber does not consider that the Trial Chamber erred in referring to *ad hoc* tribunals' jurisprudence as providing guidance on the applicable *mens rea* of the crime against humanity of murder. The Trial Chamber recalled that, in order to accord with the principle of legality, the definition of murder must reflect the state of customary international law in 1975, and it relied on the Supreme Court Chamber's assessment in Case 002/01 as well as conducting its own assessment, noting that the *ad hoc* tribunals' jurisprudence was not completely consistent and simply provided guidance.<sup>1931</sup> The Trial Chamber was not bound by *ad hoc* tribunals' jurisprudence. There is no error in considering the jurisprudence as guidance. The Supreme Court Chamber also recalls that pursuant to Article 33 new of the ECCC Law, chambers may seek guidance at the international level.

689. The fact that the ICC does not include *dolus eventualis* in the *mens rea* of murder as a crime against humanity, or in the *mens rea* of other crimes within the ICC's jurisdiction, does not support a conclusion that the *mens rea* of murder under customary international law did not include *dolus eventualis*. The ICC is not regarded as having codified customary international law on *mens rea*.<sup>1932</sup>

...

694. In response to KHIEU Samphân's alternative argument that there is no evidence of a general principle that includes *dolus eventualis* in the *mens rea* of murder, the Supreme Court Chamber notes that he has criticised the Trial Chamber's analysis but offers no supporting reasons of his own. He objects to the Trial Chamber's alleged assimilation of complex notions of national criminal law taken out of their context,<sup>1947</sup> but determining general principles of domestic law must necessarily distil general concepts from complex notions. The Trial Chamber was cognisant of the fact that domestic jurisdictions differ and that "the precise definition of this crime may vary".<sup>1948</sup> It properly surveyed a variety of common law and civil law jurisdictions, as well as Russia and Japan. KHIEU Samphân argues that the Supreme Court and Trial Chambers erroneously interpreted the requisite intent in various jurisdictions, but his examples do not show any error. The finding was not that, as a general principle, the legal systems of the world employ a *mens rea* exactly equivalent to *dolus eventualis*; rather the Supreme Court Chamber found that "the causing of death with less than direct intent but more than mere negligence, such as *dolus eventualis* or recklessness, incurs criminal responsibility and is considered as intentional killing"<sup>1949</sup> and the Trial Chamber found that "the vast



majority of these domestic systems recognise that a standard of *mens rea* lower than direct intent may apply in relation to murder, the lowest being *dolus eventualis*.<sup>1950</sup> The Supreme Court Chamber therefore sees no error in considering, for example, that section 18(a) of the New South Wales Crimes Act 1900 punishes acts committed with “reckless indifference to human life, or with intent to kill or inflict grievous bodily harm”.<sup>1951</sup> Recklessness has a *mens rea* lower than direct intent.

695. Furthermore, the Trial Chamber recognised that Cambodian law is a “noticeable exception” to the legal systems it analysed, in which legislation or case law “clearly criminalised as intentional killing[] conduct where the perpetrator was acting with less than direct intent.”<sup>1952</sup> Domestic practice need not be entirely uniform to establish a general principle,<sup>1953</sup> and contrary to KHIEU Samphân’s assertion, there is no legal error in concluding that a general principle exists despite Cambodian law not being in conformity with the general principle.

...

697. Finally, the Supreme Court Chamber concludes that the Trial Chamber did not err in including *dolus eventualis* in the *mens rea* of murder as a crime against humanity in 1975. As KHIEU Samphân’s argument concerning the *mens rea* of murder under customary international law in 1975 was rejected, his arguments that the Trial Chamber erred in failing to establish that the murders at Tram Kak Cooperatives, Trapeang Thma Dam Worksite, 1st January Dam Worksite, Kampong Chhnang Airfield Construction Site, S-21 Security Centre, Kraing Ta Chan Security Centre, and Phnom Kraol Security Centre due to living, working and detention conditions and blood-drawing at S-21<sup>1957</sup> had been committed with direct intent rather than *dolus eventualis*, fail and are accordingly dismissed.

...

## 5. Whether Murder Was Established at the Following Sites

### a. Tram Kak Cooperatives

...

713. KHIEU Samphân submits that the Trial Chamber erred in determining that deaths were due to, *inter alia*, starvation and rudimentary medical care.<sup>1994</sup> Concerning deaths due to starvation, he argues that the report from the Southwest Zone dated 3 June 1977, on which the Trial Chamber relied on to find that there were periods of great food shortages, does not support such a finding.<sup>1995</sup> He also submits that the Trial Chamber misinterpreted some witness testimony and relied on evidence of low probative value.<sup>1996</sup> Concerning the deaths due to rudimentary medical care, KHIEU Samphân claims that the Trial Chamber erred in finding that the *actus reus* was rudimentary medical care, malnutrition, and overwork because it relied exclusively on RIEL Son’s testimony. RIEL Son became Deputy Chief of the Tram Kak District Hospital in late 1976<sup>1997</sup>, and he did not state that deaths were due to rudimentary medical care.<sup>1998</sup> Finally, KHIEU Samphân raises two alleged errors concerning the *mens rea* that have not been addressed elsewhere in this Judgment: first, that the Trial Chamber did not establish the *mens rea* beyond reasonable doubt since it did not determine whether the Tram Kak authorities had deliberately imposed the conditions “with the knowledge that they would likely lead to deaths” or “in the acceptance of the possibility of this fatal consequence”,<sup>1999</sup> namely, it should have found either one of these alternatives beyond a reasonable doubt; and second, that the Trial Chamber erred in finding that the *mens rea* was satisfied in the form of *dolus eventualis* despite its conclusion that factors beyond the control of the authorities may have contributed to lack of food and medical resources in some cases.<sup>2000</sup> He submits that it is “impossible to establish the connection between the measures implemented by the authorities to redress the country, independent factors and pre-existing factors, and their impact on the population. Accordingly, there are questions about the factors that caused the humanitarian catastrophe”.<sup>2001</sup>

...

718. Finally, the Supreme Court Chamber does not consider it an error of law that the Trial Chamber found that the *mens rea* was satisfied due to the fact that the authorities imposed the conditions “with the knowledge that they would likely lead to deaths or in the acceptance of the possibility of this fatal consequence”.<sup>2028</sup> The Trial Chamber determined that the continuance of the conditions after the effects became apparent demonstrated that the authorities were aware that deaths were likely or accepted the possibility of deaths. It was therefore unnecessary to distinguish between them because either the authorities’ knowledge or their acceptance would indicate that the *mens rea* had

been satisfied and could be inferred. The Supreme Court Chamber concludes that KHIEU Samphân has not demonstrated that the Trial Chamber reached a finding no reasonable trier of fact could reach simply by pointing to the factors beyond the control of authorities. The Trial Chamber acknowledged that factors beyond the control of authorities may have partly contributed to the lack of food and medical facilities,<sup>2029</sup> but considering the climate of control, threats, fear, hunger, and discrimination, and the persistence of the harsh conditions for an extended period of time including after the effects became so apparent, the Trial Chamber found that the conditions were wilfully imposed. Even if factors beyond the control of the authorities were entirely responsible for the lack of food and medicine, and the Supreme Court Chamber does not suggest that this is the case, this would not explain deaths caused by overwork and exhaustion. KHIEU Samphân's arguments concerning murder as a crime against humanity at Tram Kak Cooperatives are therefore dismissed.

...

#### e. Phnom Kraol Security Centre

...

741. KHIEU Samphân submits that the Trial Chamber erred by finding that Heus's murder was established on the basis of two Written Records of Interview, despite the fact that he was unable to test this evidence in court.<sup>2119</sup> He considers that because the Written Records of Interview were prepared by the Co-Investigating Judges at the same time and place with one interview occurring at 10:10 a.m. and the other at 10:15 a.m., there is the possibility of collusion or at least contamination between the two accounts.<sup>2120</sup> He further submits that the Trial Chamber breached the principles of adversarial proceedings and equality of arms by establishing murder on the basis of evidence he could not challenge, citing ECtHR jurisprudence demonstrating that the right to a fair trial is violated when a conviction is based on evidence that was not subject to adversarial argument and to Article 427 of the French Code of Criminal Procedure, which states that "[t]he judge may only base his decision on evidence which was submitted in the course of the hearing and adversarially discussed before him."<sup>2121</sup>

742. KHIEU Samphân next submits that the Trial Chamber erred in finding that Touch was murdered with *dolus eventualis* based on the Written Record of Interview of a deceased civil party.<sup>2122</sup> He argues that the Trial Chamber had clarified in the Case 002/01 Trial Judgment that it may use statements of deceased persons but would not base any conviction decisively on them, and that the Supreme Court Chamber validated this approach.<sup>2123</sup> He submits that the Trial Chamber failed to provide any reasons for deviating from this approach, instead simply stating that SOK El was credible, despite the fact that her 2008 statement was not corroborated by any other evidence.<sup>2124</sup>

...

751. While the statements and Civil Party Applications of UONG Dos and SOK El corroborated each other concerning the death of Heus, the conviction was still based solely on evidence KHIEU Samphân was unable to test in court. While the statement of SOK El concerning the death of Touch was corroborated in general terms by other evidence demonstrating the poor conditions of detention, it was the sole piece of evidence relied on to prove Touch's death based on the detention conditions. The Supreme Court Chamber finds the Trial Chamber's findings concerning the deaths of Heus and Touch to be in error, given that they were based decisively on the written statements from witnesses KHIEU Samphân was unable to confront. Accordingly, it overturns the Trial Chamber's findings concerning the crime against humanity of murder with regard to the deaths of Heus and Touch.

## B. EXTERMINATION AS A CRIME AGAINST HUMANITY

### 1. Extermination of the Cham

...

#### c. The Numeric Threshold for Extermination

774. The Trial Chamber stated that although it was unable to establish a definite number of victims, it was satisfied that "a great number of Cham civilians" were taken to Trea Village and Wat Au Trakuon security centres and that the killings occurred on a massive scale and formed part of the same operation.<sup>2217</sup>

775. KHIEU Samphân argues that the Trial Chamber finding on the number of victims was based on speculation and was imprecise.<sup>2218</sup>

...

777. While extermination has generally been defined as “killing on a large scale”,<sup>2221</sup> there is no numeric threshold required for the crime against humanity of extermination.<sup>2222</sup> Extermination has been found on the basis of fewer than 60 killings.<sup>2223</sup> The Trial Chamber considered that the killings at Trea Village and at Wat Au Trakuon “formed part of the same murder operation.”<sup>2224</sup> The *actus reus* of extermination may be established through an aggregation of separate incidents where they form part of the same operation.<sup>2225</sup>

778. Considering that the Trial Chamber found that the CPK targeted the Cham to be purged, this Chamber concludes that it is not unreasonable to find that the killings at Trea Village and Wat Au Trakuon formed part of the same operation where the numbers of victims could be aggregated when determining whether killing occurred on a massive scale for the *actus reus* of extermination. Although the Trial Chamber did not have the exact number of victims at Trea Village or Wat Au Trakuon, one witness referred to 400-500 Cham who were arrested and held at Wat Au Trakuon and testified that he was told by his friend, their executioner, that they were killed.<sup>2226</sup> The Supreme Court Chamber concludes that this number on its own would amount to killing on a large scale, even without aggregating the killing that occurred at Trea Village. This argument is dismissed.

...

## 2. Extermination of the Vietnamese

...

### g. Whether the Killings Amount to Extermination

...

818. KHIEU Samphân contends that the killings of Vietnamese found by the Trial Chamber were isolated incidents and did not meet the requisite breadth of scale to amount to extermination.<sup>2360</sup> He argues that the specific instances of killing found by the Trial Chamber establish the deaths of no more than 19 individuals.<sup>2361</sup> He considers that the killings could not amount to the same murder operation as they occurred in five different zones of the country on different dates.<sup>2362</sup> He submits that the Trial Chamber unreasonably extrapolated to estimate that approximately 60 Vietnamese were murdered because there was no evidence or objective basis for it to estimate the average number of deaths at sea as two per family and five per boat.<sup>2363</sup>

...

820. The Supreme Court Chamber notes that the Trial Chamber explicitly considered that, across multiple sites, Vietnamese were “specifically screened out and separated from non- Vietnamese before being killed”.<sup>2367</sup> Contrary to KHIEU Samphân’s submission, the Trial Chamber did not need to compare events, “seeking similarities”.<sup>2368</sup> These similarities exist objectively and they demonstrate that Vietnamese victims were targeted not as individuals but distinct from their Khmer neighbours or relatives, by virtue of their being perceived as Vietnamese. Moreover, the Trial Chamber found that these killings took place in the broader context of a nationwide policy targeting Vietnamese, both civilians and combatants, for hostile treatment, a finding already affirmed by this Chamber. It was these factors, among others, that led the Trial Chamber to find that killings in Kampong Chhnang province in 1977 and in Kratie province in 1978, whose relationship KHIEU Samphân disputes,<sup>2369</sup> were not distinct events, but instead formed “part of the same murder operation”.<sup>2370</sup> As for the scale requirement, without including the killings of five of PRAK Doeun’s children and the parents of UCH Sunlay’s wife, which the Trial Chamber erroneously established,<sup>2371</sup> the total number of killings established stands at more than 50.<sup>2372</sup> Besides these killings, the majority of which the Trial Chamber established based on witnesses’ live testimony, the Trial Chamber also established the killings of six Vietnamese at Au Kanseng Security Centre<sup>2373</sup> and the killings of hundreds of Vietnamese soldiers and civilians at S-21,<sup>2374</sup> killings encompassed in its finding of extermination. Nor can the Trial Chamber’s estimate of two people per family and five people per boat where the evidence was not specific be read as anything other than cautious.<sup>2375</sup> Indeed, the Trial Chamber explicitly articulated that the number of specific killings it found to be

established “in light of the overall evidence, is almost certainly an underestimation of the actual situation”.<sup>2376</sup> This Chamber therefore views this as a finding of the minimum death toll, which, given that “there is no numerical minimum; extermination has been found to have been committed in relation to thousands of killings as well as for fewer than sixty individuals”,<sup>2377</sup> fails to undermine the Trial Chamber’s finding that the massive scale requirement was satisfied.

821. For the foregoing reasons, KHIEU Samphân’s submissions in relation to the killings of Vietnamese in Svay Rieng, DK waters, Kampong Chhnang province, Wat Khsach, Kratie province, and Au Kanseng Security Centre, and with respect to their characterisation as extermination are dismissed.

...

## F. PERSECUTION AS A CRIME AGAINST HUMANITY

### 1. Applicable Law

868. The Trial Chamber defined the crime against humanity of persecution as:

- (i) an act or omission which [...] discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (*actus reus*); and
- (ii) deliberate perpetration of an act or omission with the intent to discriminate on political, racial or religious grounds (*mens rea*).<sup>2512</sup>

869. This definition of persecution was affirmed by the Supreme Court Chamber in Case 002/01 and was not contested by the parties during the trial stage.<sup>2513</sup>

870. KHIEU Samphân alleges two errors of law relating to this definition of persecution and the interpretation of its elements. First, he submits that the Trial Chamber erred by omitting a requirement in customary international law that a deprivation of rights or discrimination must have as its objective the removal of persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself.<sup>2514</sup> Second, he argues that the Trial Chamber erred in characterising undifferentiated treatment that has a particular impact on a class of individuals as discrimination in fact.<sup>2515</sup> The Supreme Court Chamber will address these arguments in turn. Arguments relating to factual issues are addressed separately in the relevant sections of this Judgment.

#### a. Whether an Objective to Remove a Group from Society is an Element of Persecution

...

876. This Chamber is unpersuaded by the jurisprudence relied upon by KHIEU Samphân to alter its finding. The IMT may have found that some defendants intended to remove Jews from German society, but this was not set out by the IMT as an element of persecution. Rather, it was a finding made based on the facts of the case. The same is true of the *Eichmann* case.

877. The IMT was presented with a significant amount of evidence concerning the pre-1939 treatment of Jews and appears to have considered that persecution occurred prior to the existence of a policy directed toward removing Jews from German society (though it may have lacked jurisdiction over these acts of persecution due to their not having been committed in execution of or connection with war crimes or crimes against peace). The IMT Judgment states:

The persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale. [...] *With the seizure of power, the persecution of the Jews was intensified.* A series of discriminatory laws was passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and their rights of citizenship. *By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life.*<sup>2528</sup>

878. The facts found were of increasing and worsening discrimination against the Jews culminating in their arrests and removal to slave labour and death camps. There is no suggestion in that judgment that those Jews who fled Germany because of the discriminatory laws which restricted their professional, economic and family life were *not* persecuted as they were *not removed from German life* nor is there any suggestion that the crime of persecution mandated the extermination of the Jews or any targeted group.

879. In the same vein, the *Eichmann* case, which KHIEU Samphân also focuses on, read in context, also indicates that the intent to discriminate for persecution was construed more broadly than the intent to eliminate persons belonging to a group from society, as KHIEU Samphân argues.<sup>2529</sup> The relevant part of the *Eichmann* Judgment, which he also quotes, in fact reads that “[a]ll his acts carried out with the intent of exterminating the Jewish People also amount, in fact, to the persecution of Jews on national, racial, religious and political grounds.”<sup>2530</sup> The Court did not hold that the intent of persecution *is* the intent to exterminate or eliminate the persons. Rather, it cautiously stated that it additionally “amounts to” persecution.

880. Furthermore, the reason persecution is considered a crime against humanity is due to the inhumanity of discriminatory gross or blatant denials of fundamental human rights.<sup>2531</sup> It would be nonsensical to consider that this crime could not serve to protect a group of people living in a society where their fundamental human rights are violated, but would only protect those intended to be removed from that society. A group could be considered “second-class citizens” and treated poorly without a desire that they be removed from society.

881. While the concern is with the law as it existed in 1975, it is notable that the additional *mens rea* element suggested by KHIEU Samphân was not considered for inclusion in the Rome Statute. Were it at one time considered an element of persecution, one should expect to find at least some discussion of whether to remove it, yet this does not appear to have been discussed.

882. As this Chamber has found that an intent to remove “persons from the society in which they live, or eventually even from humanity itself” is not an element of the *mens rea* of persecution, KHIEU Samphân has failed to show an error of law by the Trial Chamber. His arguments that the Trial Chamber erred by failing to establish that this element had been met with regard to Buddhists and Monks and the Cham are therefore moot.<sup>2532</sup> This argument is dismissed in whole.

**b. Whether Undifferentiated Treatment that Has a Particular Impact on a Class of Individuals Can Amount to Discrimination in Fact**

...

886. The Supreme Court Chamber considers that the primary issue before it is whether a finding of discrimination in fact can be established from the consequences or impact felt by a particular group. The Supreme Court Chamber recalls that the *actus reus* of persecution requires an act or omission which discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law.<sup>2542</sup> Discrimination in fact refers to whether the target group actually suffers discriminatory consequences as a result of the act or omission, that is, discriminatory intent alone is insufficient.<sup>2543</sup>

887. The Supreme Court Chamber agrees with the Co-Prosecutors that there is no legal requirement to differentiate between direct or indirect discrimination when establishing the existence of discrimination in fact. This Chamber considers that whether the acts amount to direct or indirect discrimination is irrelevant for a determination of whether the group suffered consequences of the relevant act or omission. An act or omission is considered discriminatory when a victim is targeted because of the victim’s membership in a group defined by the perpetrator on a political, racial, or religious basis.<sup>2544</sup> Whether a victim is targeted by indirect discrimination relates to the intent behind the act or omission. Sometimes, to establish whether laws are directed specifically towards one group when applied to all requires some examination. For instance, if a regime decreed that all citizens had to eat meat once a week this would have little deleterious effect on meat eaters but would affect those who belonged to religions that followed vegetarianism. Because the decree has negative consequences particularly for those whose religions require vegetarianism, members of those groups can be considered to have suffered discrimination in fact as a result of the decree. Whether this decree simply had unintended consequences for those religious groups or was a



ruse to target those groups is a matter for enquiry into the objective of the decree. A holistic and contextual evaluation might determine that the intent behind the decree was specifically to target the adherents of religions that practiced vegetarianism. In such a situation, the conduct would amount to persecution.

888. In conclusion, the Trial Chamber did not err in law by considering the impact on the victims when determining whether discrimination in fact occurred. KHIEU Samphân's argument to the contrary is dismissed.

## 2. Political Persecution

### a. Political Persecution of the Cham

...

891. KHIEU Samphân submits that the Trial Chamber erred in law by failing to establish that the population transfers affected exclusively or at least primarily Cham and were therefore discriminatory, or that in the course of the transfer, the Cham were treated differently from others; this being the test the Supreme Court Chamber set out in Case 002/01 with regard to "New People."<sup>2550</sup> He argues that the Trial Chamber erred in fact by finding that the transfer of Cham as part of a broader transfer of the population could be considered discriminatory.<sup>2551</sup>

...

896. The Supreme Court Chamber notes that it has upheld the Trial Chamber's finding that the CPK targeted the Cham because of the Koh Phal and Svay Kleang rebellions in order to disperse them and to ease tensions.<sup>2560</sup> Thus, the Cham were targeted for dispersal based on being considered political enemies. The dispersal had the discriminatory consequence for the Cham of breaking up their communities.<sup>2561</sup> Therefore, the act of dispersing the Cham was properly considered by the Trial Chamber to be discriminatory and the *actus reus* of the crime against humanity of persecution on political grounds is established. KHIEU Samphân's argument is dismissed.

...

### b. Political Persecution of Other "Real or Perceived Enemies"

905. The Trial Chamber found that persecution on political grounds as a crime against humanity occurred against the targeted group of "real or perceived enemies of the CPK" at Tram Kak Cooperatives,<sup>2583</sup> Trapeang Thma Dam Worksite,<sup>2584</sup> 1st January Dam Worksite,<sup>2585</sup> Kampong Chhnang Airfield Construction Site,<sup>2586</sup> S-21 Security Centre,<sup>2587</sup> Kraing Ta Chan Security Centre,<sup>2588</sup> Au Kanseng Security Centre,<sup>2589</sup> and Phnom Kraol Security Centre.<sup>2590</sup> While the targeted group of "real or perceived enemies of the CPK" could also include the Cham,<sup>2591</sup> the Trial Chamber's findings of political persecution related to the Cham were separately dealt with by the Trial Chamber and are separately dealt with in the section of this Judgment related to the treatment of the Cham.

...

907. Before turning to the challenges related to political persecution at Tram Kak Cooperatives, Trapeang Thma Dam Worksite, 1st January Dam Worksite, S-21 Security Centre, and Au Kanseng Security Centre, the Supreme Court Chamber will address KHIEU Samphân's overarching argument that "real or perceived enemies of the CPK" is not a sufficiently discernible group such that it could be the target of persecution on political grounds.

...

916. In Case 002/01, the Supreme Court Chamber explained that "[i]n particular in respect of [persons of certain ethnicity or nationality or persons representing certain social strata], they may be made the object of political persecution not because all, or even the majority, of their members hold political views opposed to those of the perpetrator, but because they are perceived by the perpetrator as potential opponents or otherwise as obstacles to the implementation of the perpetrator's political agenda."<sup>2626</sup> The Supreme Court Chamber extensively analysed post-World War II jurisprudence and concluded in Case 002/01 that political persecution was understood as encompassing situations where the perpetrators designated targeted groups in broad strokes without inquiry into the political views held by the individuals concerned.<sup>2627</sup> It "thus confirm[ed] the possibility that persecution as a crime against humanity might target aggregated groups without any common identity or agenda."<sup>2628</sup>

917. The Supreme Court Chamber thus rejects KHIEU Samphân's argument that "real or perceived enemies of the CPK" is not sufficiently discernible since the specific categories of enemies were not exhaustive and expanded over time. As demonstrated from the Supreme Court Chamber's past jurisprudence on this issue, political persecution may occur where a group is broadly targeted because its members are perceived by the perpetrator to be political enemies. They need not consist of a single homogenous polity.<sup>2629</sup> As long as all members of the group are perceived to be political enemies, it does not matter whether they otherwise fall under different categories or whether these categories are exhaustive, as it is the designation of political enemy that has led to their targeting.

...

## ii. Tram Kak Cooperatives

...

929. KHIEU Samphân submits that the Trial Chamber erred in finding that at Tram Kak, (1) New People received different rations; (2) working conditions were worse for New People; (3) working conditions were worse particularly in youth units; (4) New People were subjected to "miserable treatment"; and (5) New People were subject to surveillance and arrest.<sup>2649</sup> The Supreme Court Chamber notes that the Trial Chamber also found that New People were categorised separately from Base People; segregated from Base People in separate cooperatives or separate working groups; and treated as subordinate to Base People.<sup>2650</sup> These findings were not specifically challenged by KHIEU Samphân.

...

948. In sum, the Supreme Court Chamber considers that the Trial Chamber erred in finding that it had been established beyond reasonable doubt that the working conditions for New People were worse than those of Base People, except for the fact that New People could not hold leadership positions or benefit from the better working conditions that came along with such positions, and that New People were targeted for arrest for innocuous thoughts, speech or conduct considered to be contrary to the revolution. It considers that the Trial Chamber did not err in finding that New People received less food than Base People, that the working conditions of New People were worse than those of Base People in that New People could not hold positions of authority and benefit from the better working conditions that came along with these positions, and that New People in particular suffered from miserable treatment.

949. The Supreme Court Chamber concludes that the underlying discriminatory acts of providing less food to New People, preventing New People from holding leadership positions, and subjecting New People to "miserable treatment", together with the Trial Chamber's uncontested findings that New People were categorised separately from Base People, segregated from Base People in separate cooperatives or separate working groups, and treated as subordinate to Base People is sufficient to meet the gravity threshold to amount to persecution as a crime against humanity. These underlying acts must be considered cumulatively and in context,<sup>2698</sup> and in this regard the results of providing the New People with less food are relevant: New People in particular suffered and died from malnutrition.<sup>2699</sup> KHIEU Samphân's argument is dismissed.

...

## iv. 1st January Dam Worksite

...

### *New People*

961. KHIEU Samphân submits: (1) that the Trial Chamber erred in fact because there was no discrimination against New People at the 1st January Dam Worksite;<sup>2731</sup> (2) erred in law by asserting that there was a fundamental right to equal treatment;<sup>2732</sup> (3) erred in law and in fact by finding that the treatment violated the fundamental right of New People to equal treatment;<sup>2733</sup> and (4) erred in law by failing to set out the requisite level of gravity that needed to be met for the underlying acts to be characterised as persecution.<sup>2734</sup>



962. The Co-Prosecutors respond that the Trial Chamber correctly determined there was discrimination at the 1st January Dam Worksite.<sup>2735</sup> They respond that KHIEU Samphân failed to explain how the Trial Chamber's reference to a fundamental right to equal treatment invalidates the decision; failed to demonstrate that the Trial Chamber erred in law or fact in finding that the treatment suffered by New People was a violation of a fundamental right; and failed to demonstrate that the Trial Chamber erred in its application of the gravity threshold for persecution.<sup>2736</sup> They argue that the Trial Chamber's finding of persecution was not grounded on a right to equal treatment but on the violation of multiple rights.<sup>2737</sup>

963. Finding it to be dispositive, the Supreme Court Chamber will now address the argument concerning whether the Trial Chamber erred in finding that there was a fundamental right to equal treatment that had been violated. The Trial Chamber found that "[t]he CPK treatment of New People at the 1st January Dam infringed upon and violated their fundamental right to equal treatment."<sup>2738</sup> The Trial Chamber did not explain what this right entails and did not examine whether such a right existed in Cambodia in 1975-1979. According to the ICCPR, which did not enter into force until 23 March 1976, and was not signed by Cambodia until 1980, the right to equal treatment refers to the right of all persons to be equal before the law and entitled to the equal protection of the law.<sup>2739</sup> The Trial Chamber did not analyse whether New People and Base People were considered equal before the law and made no findings in this regard.

964. The Supreme Court Chamber rejects the argument put forward by the Co-Prosecutors<sup>2740</sup> that the Trial Chamber determined that the fundamental rights violated include the rights to life, personal dignity, liberty and security, and freedom from arbitrary or unlawful arrest. The Trial Chamber's legal findings on political persecution distinguish between New People and former Khmer Republic soldiers and officials:

- (a) Paragraph 1688 of the Trial Judgment sets out the acts the Trial Chamber found to discriminate in fact against New People (part of the *actus reus* of persecution; the acts or omissions must also deny or infringe upon a fundamental right laid down in international customary or treaty law) and that they were deliberately perpetrated with the intent to discriminate (the *mens rea*).
- (b) Paragraph 1689 states that the CPK's treatment of New People at the 1st January Dam Worksite infringed upon and violated their fundamental right to equal treatment (the rest of the *actus reus* requirement for persecution). It also contains the Trial Chamber's analysis of the gravity requirement for the acts to rise to the level of persecution. It makes the finding that "[a]lthough the acts found above to have been discriminatory against New People do not on their own amount to independent crimes, the *actus reus* of persecution is nevertheless established with regard to New People."
- (c) Paragraph 1690 then sets out the acts the Trial Chamber found to discriminate in fact against former Khmer Republic soldiers and officials (part of the *actus reus* of persecution) and finds that there was a specific intent to discriminate against them (the *mens rea*).
- (d) Paragraph 1691 lists the fundamental rights that the Trial Chamber considered to be violated (the rest of the *actus reus* requirement for persecution) and contains the Trial Chamber's analysis of the gravity requirement for the acts to rise to the level of persecution.

965. Paragraph 1691 is somewhat ambiguous in its finding that "[a]cts committed against *these groups of workers* infringed upon or violated their fundamental rights pertaining to life, personal dignity, liberty and security and freedom from arbitrary or unlawful arrest [ . . . ]".<sup>2741</sup> Considering the separation between the Trial Chamber's analysis of the elements of persecution relating to New People and its analysis of the elements relating to former Khmer Republic soldiers and officials, as well as its finding in paragraph 1689 that the *actus reus* of persecution had been met, prior to its finding in paragraph 1691 concerning violation of the rights to life, personal dignity, liberty and security, and freedom from arbitrary or unlawful arrest, the Supreme Court Chamber interprets "these groups of workers" to refer only to Khmer Republic soldiers and officials.

966. As the Trial Chamber erred in finding that there was a fundamental right to equal treatment laid down in international customary or treaty law that had been infringed or violated, the Supreme Court Chamber upholds

KHIEU Samphân's argument and reverses his conviction for political persecution against New People at the 1st January Dam Worksite. The remaining arguments relevant to this challenge need not be considered.

...

### **3. Religious Persecution**

#### **a. Religious Persecution of the Cham**

...

#### **iv. Whether the Persecutory Acts Discriminated in Fact**

1027. KHIEU Samphân considers that the persecutory acts were applied equally to everyone and submits that they did not discriminate in fact as equal treatment cannot be characterised as indirect discrimination.<sup>2887</sup> He considers that the Trial Chamber erred by not focusing on whether measures applied indiscriminately to everyone but instead on only considering their impact on the Cham.<sup>2888</sup>

...

1030. It is this Chamber's considered view that the argument that there was no discrimination simply because the restrictions affected everyone fails to appreciate the intrinsic differences between the two groups, the Khmer Buddhists and Cham Muslims, who were both treated appallingly. Daily prayers, diet, dress, and language distinguished one group from the other.<sup>2892</sup> To offer pork to one may have been a welcome addition to a poor diet.<sup>2893</sup> To offer it to the other placed them in a difficult position as it was a prohibited food.<sup>2894</sup> The closure of a wat or pagoda does not involve a betrayal of the Buddhist religion in the individual while the prohibition of attendance at the mosque for Friday prayers and the prohibition of daily prayers has a different effect on Muslims as it involves a deviation from fundamental Islamic culture. Similarly, the prevention of speaking one's own language when one's distinctive dress and religion is prohibited may take on more resonance than when prohibited in isolation.

1031. The forcing of pork on Cham who were displaced and broken up from their communities had a particular resonance absent in non-Cham. The introduction of a prohibited food into their diet had to be humiliating and abhorrent. They were obliged to betray their religion by eating the prohibited food or to starve.<sup>2895</sup> This act was specific to the Cham and amounted to discrimination in fact. It was a discriminatory act of significance in its effect on the Cham population which did not affect other displaced people. The forcing them to eat pork or pork soup was an assault on their religion, while the prohibition on the use of their language, an assault on their distinct culture, which considered cumulatively with their being prohibited from attending their mosques or praying daily amounted to discrimination in fact.

...

#### **vi. Whether There Was Intent to Discriminate on Religious Grounds**

1037. KHIEU Samphân submits that the Trial Chamber erred in law and fact when it relied on its erroneous findings to infer discriminatory intent against the Cham "because of their religious and cultural practices".<sup>2905</sup> He argues that the Trial Chamber found that the Cham were discriminated against as a political group, but, in the section of the Trial Judgment dealing with religious persecution, found that there was an intent to discriminate against the Cham based on religious grounds, without explaining why it had changed the basis of persecution.<sup>2906</sup>

...

1042. The clear evidence relied upon by the Trial Chamber cannot be ignored: that the restrictions on religious and cultural practices, intended to assimilate the Cham, lay behind the rebellions.<sup>2915</sup> Their identity as Cham with different religious practices and their taking guidance from their religious leaders and teachers, their way of life on or near rivers, not being either farmers or town people was at odds with the CPK common plan to eliminate differences in social class and create one homogenous Khmer race of peasant workers. The targeting of Cham people was because they were Cham with a different ethnic origins, language, religion and customs making them different from the majority Khmer.<sup>2916</sup> To eliminate their differences, their religion and religious practices were prohibited, and no allowances were made for their strict taboo of pork or pork products<sup>2917</sup> or their requirement to pray five times daily.<sup>2918</sup> In the

case of the Cham, it may be superficially difficult to distinguish between their targeting as enemies on political grounds because of the two rebellions in late 1975 or because they were Cham with different customs and especially a *reactionary* religion which had to be eradicated by integration into Khmer people as occurred during the pre-17 April 1975 period followed by the orders in 1977 for their extermination. The history of their increasingly strict targeting for discriminatory treatment and ultimately their total purging is evidence of the real purpose for their proposed targeting: because they were not Khmer. This infinitely more serious targeting does not detract from the facts of the lesser forms of discrimination against them for religious reasons which started in the Khmer Rouge takeover of Kroch Chhmar and its environs and continued thereafter.<sup>2919</sup> This Chamber concludes that the Trial Chamber's inference of an intent to discriminate on both political and religious grounds was reasonable.

1043. The Supreme Court Chamber considers that KHIEU Samphân has merely proposed a different interpretation of the evidence by failing to accept the difference between the levelling down of all society to worker peasants subject to the same deprivation and the specific actions to exclude Cham from Khmer society. KHIEU Samphân has failed to demonstrate that the Trial Chamber erred in fact in making its finding that the Cham were specifically targeted as a religious group. This challenge is therefore dismissed.

...

#### **vii. Whether the Threshold of Severity Was Established**

...

1048. While it is regrettable that the Trial Chamber did not clearly articulate the appropriate analysis of whether the religious and cultural restrictions “rise to the same level of gravity or seriousness”<sup>2926</sup> as other underlying offences for crimes against humanity, but instead confused the issue by referring to the other crimes committed against the Cham, it is apparent to the Supreme Court Chamber that the religious and cultural restrictions do indeed rise to the requisite level of gravity to constitute a crime against humanity. The religious and cultural restrictions not only denied the fundamental right to freedom of religion but also destroyed the Cham's very identity. They caused the Cham to lose the characteristics that made them Cham, and even caused them lose the capacity to pass on their religious identity to future generations, forever destroying a piece of their religious heritage.<sup>2927</sup> The requisite level of severity has thus been established for the persecutory acts to amount to the crime against humanity of religious persecution. The Trial Chamber's error in analysing the severity of the acts does not invalidate KHIEU Samphân's conviction for the crime of religious persecution.

#### **b. Religious Persecution of Buddhists and Buddhist Monks**

...

#### **ii. Alleged Absence of Discriminatory Treatment against Buddhist Monks and Buddhists in General**

1064. As previously discussed, and similar to his arguments regarding the religious persecution against the Cham at the 1st January Dam Worksite and throughout Cambodia,<sup>2972</sup> KHIEU Samphân submits that the Trial Chamber erred in law in characterising undifferentiated treatment that has a particular impact on a class of individuals as discrimination in fact and by considering the impact on Buddhists of measures meant to apply to everyone.<sup>2973</sup> He argues that the acts perpetrated against Buddhist monks do not amount to discrimination in fact<sup>2974</sup> and that there is no de facto discrimination or discriminatory intent with regard to Buddhists in general since they were subjected to the same regulations as the general population.<sup>2975</sup>

...

#### *Whether the Persecutory Acts against Buddhist Monks Discriminated in Fact*

...

1070. In light of the religious persecution of Buddhist monks, the Supreme Court Chamber notes that the general prohibition of religion and religious practice was effected through a multitude of measures aimed at assimilating the

population into a single atheistic and homogenous group, regardless of the religious group.<sup>2986</sup> As a result, the forced disrobing of Buddhist monks was related to this objective, implying that nobody could teach, become a monk, wear robes or practice religion. Nevertheless, the Supreme Court Chamber finds that Buddhist monks were not solely targeted in order to assimilate them with the rest of the population. The CPK policies conspicuously were orchestrated to abolish religion and religious practices, as the CPK was aware of the centrality of Buddhism and the influence of monks on Cambodian traditions and daily life.

1071. The Supreme Court Chamber notes that Buddhist monks were also specifically identified and targeted because of their “special” status in society. This approach is evidenced by numerous references to them as “worms” or “leeches”,<sup>2987</sup> “[t]he petty bourgeoisie [ . . . ] who give up monkhood” as an easy source to be “convinced by enemies”,<sup>2988</sup> but also as a “special class” in the sense that, although monks were similar to peasants in some respects, “they do not labour in crop production by themselves, they live with support from all [ . . . ] other classes”, “[t]hey depend economically on the peasants to support their livelihood” and high-ranking monks are connected to the “upper stratum”, which set them apart in a different category.<sup>2989</sup> Other CPK documents describe the monks with good and bad points, noting nonetheless that most monks “do not work hard”<sup>2990</sup>, that their situation could also be similar to the police and soldier class, intellectual class and various ethnic classes.<sup>2991</sup> Similarly, a policy document dated 22 September 1975 stated that “from 90 to 95 percent of [monks] abandoned their monkhood”, and that “this special layer [of the society] will no longer cause any worry”.<sup>2992</sup> Buddhism was incompatible with the revolution because it had been an instrument of exploitation.<sup>2993</sup> Finally, according to KAING Guek Eav alias Duch, POL Pot further explained during the CPK’s anniversary meeting in September 1978 that the Party was trying to “eliminate” Buddhism and the way to do this was to make monks build dams and blend together with the popular masses.<sup>2994</sup> In light of the foregoing, the Supreme Court Chamber finds that the CPK specifically targeted Buddhist monks because they were monks.

1072. In addition, the Supreme Court Chamber is satisfied that, while acts of persecution against Buddhist monks overlap with the general prohibition of religious practices, these were conducted in a discriminatory manner. This Chamber also finds that these persecutory acts resulted in discriminatory consequences as the role of monks was abolished and their status in society was lowered.<sup>2995</sup> The Supreme Court Chamber concludes that Buddhist monks were subjected to discrimination and thus such discriminatory conduct amounts to persecution on religious grounds. This challenge is accordingly dismissed.

#### 4. Racial Persecution

...

1080. The Trial Chamber found that the crime against humanity of racial persecution of Vietnamese was established at Tram Kak Cooperatives, S-21 Security Centre, Au Kanseng Security Centre, and in Prey Veng and Svay Rieng.<sup>3013</sup> It found that this crime was committed as part of a policy of targeting Vietnamese “for adverse treatment throughout the DK period (in particular, for deportation before April 1977 and for destruction as a racial group thereafter)”, because the Vietnamese were considered to be “the DK’s most dangerous enemy”.<sup>3014</sup> KHIEU Samphân alleges that racial persecution did not occur at any of the above-mentioned sites. His arguments will be addressed in turn.

...

##### iii. Whether the Acts Were Discriminatory in Fact

1113. According to KHIEU Samphân, the Trial Chamber erred by failing to establish that the Vietnamese were targeted on the basis of their race. He argues that there were numerous grounds for arrest during the DK era, and that some witnesses explained that their Vietnamese family members may have been targeted for other reasons, as a result of their past activities.<sup>3123</sup>

...

1116. The Supreme Court Chamber observes that KHIEU Samphân has argued only that the Trial Chamber failed to explain why and how the persecutory acts targeted the Vietnamese.<sup>3126</sup> Although the Trial Chamber did not explicitly address why it considered the deportation of Vietnamese from Prey Veng, the killings of Vietnamese

in Svay Rieng, and the above-mentioned arrests to have targeted the Vietnamese in the section of the judgment dealing with racial persecution in Prey Veng and Svay Rieng, this finding must be considered in context. The Trial Chamber found that there was a nationwide CPK policy targeting the Vietnamese and calling for their expulsion, and, from April 1977, for their destruction.<sup>3127</sup> In this context, it was entirely reasonable for the Trial Chamber to conclude that the deportation, killings, and arrests of Vietnamese were due to their race.

...

## G. OTHER INHUMANE ACTS AS CRIMES AGAINST HUMANITY

1122. The Trial Chamber found that KHIEU Samphân committed, through a JCE, the crimes against humanity of other inhumane acts through attacks against human dignity and conduct characterised as enforced disappearances, forced transfer, forced marriage, and rape within the context of forced marriage.<sup>3142</sup>

...

1126. KHIEU Samphân submits that the Trial Chamber erred in law in its assessment of the legality of other inhumane acts, in its finding concerning enforced disappearances as other inhumane acts, and in findings concerning forced marriage and rape in the context of forced marriage. These arguments will be addressed in turn.

### 1. Assessing the Legality of Other Inhumane Acts

#### a. The Trial Chamber's Assessment of the Principle of Legality

1127. KHIEU Samphân submits that the Trial Chamber did not perform a rigorous examination of the principle of legality but merely concluded without reason that it was both foreseeable and accessible in general, that other inhumane acts were punishable as crimes against humanity by 1975.<sup>3155</sup> He argues that it is not enough to say that other inhumane acts were foreseeable since this category can cover numerous types of behaviour; instead, the Trial Chamber should have identified the conduct at issue and examined whether it could have been defined as criminal at the time.<sup>3156</sup>

...

1130. The Supreme Court Chamber considers that KHIEU Samphân misunderstands the application of the principle of legality with regard to other inhumane acts and its previous jurisprudence on this issue. What is required is that the category of other inhumane acts be foreseeable and accessible to the Accused. If the category of other inhumane acts is interpreted and applied properly, keeping in mind the safeguards discussed below, foreseeability and accessibility are ensured.<sup>3161</sup> There is no requirement that the underlying conduct be criminalised at the relevant time.<sup>3162</sup>

1131. In Case 002/01, the Supreme Court Chamber explained that the *ejusdem generis* principle provides an essential safeguard by requiring that the underlying conduct considered to amount to an other inhumane act be of a similar nature and gravity to the enumerated crimes against humanity.<sup>3163</sup> The Supreme Court Chamber in Case 002/01 explained that the requirement that the underlying conduct cause serious mental or physical suffering or injury or constitute a serious attack on human dignity was another limitation that adequately circumscribes this category of crime.<sup>3164</sup> Finally, the Supreme Court Chamber explained that it subscribed to the approach taken by the ICTY *Kupreškić* Trial Chamber of “relating ‘other inhumane acts’ to conduct infringing basic rights appertaining to human beings, as identified under international legal instruments” as another limitation on the interpretation of other inhumane acts.<sup>3165</sup> These limitations together circumscribe the conduct that can be properly considered to amount to an other inhumane act, such that the requirements of foreseeability and accessibility are satisfied.

...

#### b. Alleged Requirement to Breach a Prohibition in Human Rights Instruments to Amount to an Other Inhumane Act

1134. KHIEU Samphân submits that the Supreme Court Chamber has agreed with ICTY jurisprudence which seeks to establish potential unlawfulness of the acts at the time of commission.<sup>3169</sup> He argues that the Trial Chamber erred by providing a “simple evocation of the fundamental rights included in instruments at the



time” when it should have analysed these human rights instruments to identify prohibitions, to determine formal unlawfulness.<sup>3170</sup> He submits that the *Kupreškić* Trial Chamber considered international texts to establish basic human rights whose violation may constitute a crime against humanity, but the *Stakić* Trial Chamber rejected this approach as rights contained in international instruments do not necessarily amount to norms recognised in international criminal law.<sup>3171</sup> He argues that the Supreme Court Chamber in Case 002/01 seemed to establish a compromise between these two positions, by specifying that in addition to considering rights, it is also necessary to identify prohibitions contained in human rights instruments.<sup>3172</sup> He considers that the International Co- Investigating Judge investigating Cases 003 and 004 also subscribed to this approach.<sup>3173</sup>

...

1137. The Supreme Court Chamber finds that KHIEU Samphân has again misinterpreted this Chamber’s jurisprudence in Case 002/01. In that case, as explained above, this Chamber subscribed to the approach taken by the ICTY *Kupreškić* Trial Chamber of “relating ‘other inhumane acts’ to conduct infringing basic rights appertaining to human beings, as identified under international legal instruments”.<sup>3180</sup> The Supreme Court Chamber explained that this “introduces a requirement of formal international unlawfulness and, in this way, a further limitation on a blanket authorisation to interpret ‘other inhumane acts’”, which would assist in ensuring foreseeability.<sup>3181</sup> This Chamber in Case 002/01 reiterated that it is not required that the specific conduct must be expressly criminalised under international law, as this would render the concept of other inhumane acts as a residual category futile and ineffective. This Chamber stated that:

Rather, the ‘formal unlawfulness’ requirement is to be achieved by identifying affirmative articulation of rights and prohibitions contained in human rights instruments, applicable at the time relevant for charges of ‘other inhumane acts’.<sup>3182</sup>

The Supreme Court Chamber then referred to the prohibitions contained in Article 3 common to Geneva Conventions and the rights protected by the Universal Declaration of Human Rights (“UDHR”) as examples relevant for the case at hand.<sup>3183</sup>

1138. The Supreme Court Chamber did not state that prohibitions contained in human rights instruments must be identified *in addition to* rights. This Chamber in Case 002/01 made clear that “the principle of *nullum crimen sine lege certa* is respected if the specific conduct which is found to constitute other inhumane acts violates a basic right of the victims and is of similar nature and gravity to other enumerated crimes against humanity.”<sup>3184</sup> The *Kupreškić* Trial Chamber did not make such a distinction between rights and prohibitions.<sup>3185</sup> Nor did the *Katanga & Ngudjolo Chui* Pre-Trial Chamber, which also followed this approach.<sup>3186</sup> The International Co Investigating Judge, who was deciding on a request for investigative action into conduct alleged to amount to forced pregnancy and forced impregnation, stated that “there must be a customarily accepted standard tied to the appropriate human right by which the inhumanity of the act is judged.”<sup>3187</sup> He was unable to find that there was a clear human rights standard concerning forced pregnancy by 1975 and therefore did not consider that it amounted to an other inhumane act at the time, and declined the request for investigative action.<sup>3188</sup> The International Co-Investigating Judge’s approach merges the assessment required to identify a distinct criminal prohibition based on custom with the approach to be used when assessing the specificity of conduct charged within the crime of other inhumane acts. The assertion that there must be a “customarily accepted standard” against which to benchmark conduct within the crime of other inhumane acts, which rests upon one academic text in the International Co-Investigating Judge’s decision,<sup>3189</sup> cannot be supported. As noted above, the purpose of the crime of other inhumane acts is to enable the prosecution of grave conduct which is not already criminalised as distinct crimes against humanity at the time in question. It would be illogical to require that an assessment of conduct for these purposes be so stringent.

...

### 3. Forced Marriage and Rape in the Context of Forced Marriage

#### a. The Legality of Forced Marriage and Rape in the Context of Forced Marriage as the Crimes Against Humanity of Other Inhumane Acts

...

1174. KHIEU Samphân challenges the legality of forced marriage and rape in the context of forced marriage, as other inhumane acts. He challenges findings on: (1) the charged conduct of forced marriage, and the definition of rape; (2) “formal international unlawfulness”, that is, the identification of violated basic rights; (3) the application of the principle of *ejusdem generis*; and (4) the legality of the charged conduct of forced marriage under Cambodian law before the DK regime.<sup>3285</sup> These arguments are considered in turn below.

### **i. Forced Marriage**

...

#### *The Conduct of Forced Marriage*

...

1185. The Supreme Court Chamber notes that, while other international criminal courts provide a range of descriptions of conduct that constitutes forced marriage, there is emerging consensus on the nature and essence of forced marriage to encompass a forced conjugal association. This Chamber finds that the acts of forcibly marrying males and females violated the basic rights of physical integrity and human dignity applicable in 1975-1979 and are of comparable gravity to the enumerated crimes against humanity. While forced marriage has occurred and continues to occur during conflict time, most commonly as committed by male perpetrators against female victims,<sup>3313</sup> there is no limit to the understanding of the conduct to this fact pattern. Given that this conduct is not an independent crime, but is charged as other inhumane acts, it is difficult to adequately exemplify definitive ways in which it is perpetrated during conflict. This Chamber concludes that victims of forced marriage include both males and females.

#### *“Formal International Unlawfulness”*

...

1195. The alleged conduct of forced marriage in this case also included forced sexual intercourse with regard to both female and male victims. While this Chamber in Case 001 found that rape was not established as an independent crime against humanity in 1975-1979,<sup>3331</sup> it did so because it was not until reports of widespread or systematic rape in the early 1990s that the elements of rape as a crime against humanity crystallised. Between 1975-1979, the underlying conduct of forced sexual intercourse was, at a minimum, internationally recognised as a violation of basic rights. Furthermore, forced sexual intercourse is a form of cruel, inhuman and degrading treatment that is prohibited under international law and in Cambodia, which joined the UN in 1955 and ratified the Geneva Conventions in 1958.<sup>3332</sup> Forced sexual intercourse, like forced marriage, certainly violates privacy and physical autonomy. This Chamber thus concludes that this conduct, properly described as forced sexual intercourse in the context of forced marriage, fell within the scope of crimes against humanity of other inhumane acts.

...

### **ii. Rape in the Context of Forced Marriage**

1214. The Trial Chamber determined that there was no requirement that rape as a specific kind of underlying conduct had been expressly recognised as falling within the category of other inhumane acts by 1975.<sup>3369</sup> The Trial Chamber considered the Closing Order allegation that the Accused was charged with the crime against humanity of other inhumane acts through conduct characterised as rape in the context of forced marriage.<sup>3370</sup> The Trial Chamber considered that the Closing Order alleged that, by imposing the consummation of forced marriage, the perpetrators intended to commit a physical invasion of a sexual nature against a victim in coercive circumstances in which consent was absent.<sup>3371</sup> As noted by the Trial Chamber, in Case 001, the Supreme Court Chamber held in Case 001 that rape required the sexual penetration, however slight, of: (1) the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (2) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.<sup>3372</sup> The Trial Chamber concluded that men fell outside this definition, and stated that it would consider, in the alternative, whether men were subjected to another form of sexual violence amounting to other inhumane acts,<sup>3373</sup> which was additionally charged in the Closing Order.<sup>3374</sup>



*The Definition of Rape*

1215. KHIEU Samphân submits that the Trial Chamber erred in applying the definition of rape which was established by the Supreme Court Chamber in Case 001 when identifying the elements of the crime of rape in 1975, rather than applying a different definition applicable to conjugal rape.<sup>3375</sup> He argues that the Trial Chamber ignored the fact that conjugal rape was not a crime in Khmer society in 1975,<sup>3376</sup> and it is still not expressly addressed and established in Cambodian law.<sup>3377</sup> He further contends, citing various civil and common law jurisdictions, that numerous countries have different definitions for rape that is committed in a conjugal context.<sup>3378</sup> According to KHIEU Samphân, the Trial Chamber committed an error of law by applying a “classic” definition of rape to the facts alleged.<sup>3379</sup>

...

1219. This Chamber recalls that as previously outlined, there was no obligation to consider whether an independent crime against humanity was established by the charged conduct.<sup>3384</sup> The Trial Chamber set out the applicable law, noting that:

none of these categories of conduct had crystallised as independent crimes against humanity by 1975, and they are not charged here as such. The Chamber must accordingly assess all such conduct against the definition of other inhumane acts. In order to carry out such assessment, the Chamber’s task is facilitated by setting out its understanding of the constituent elements of such conduct, where it is determined necessary to ensure proper analysis.<sup>3385</sup>

The only relevant crime is the crime of other inhumane acts itself, which the Trial Chamber considered to have long been established under customary international law.<sup>3386</sup> The Trial Chamber correctly stated this standard, finding that there was no requirement that rape, as a specific kind of underlying conduct, was expressly recognised as a crime by 1975.<sup>3387</sup> Despite correctly stating the standard, the Trial Chamber did not apply it properly. Instead, it sought to identify the “elements” of the crime of rape, as if the charged conduct had to also amount to an independent crime. This Chamber considers an attempt to identify “elements” for conduct within the scope of other inhumane acts to be legally misguided and anachronistic.<sup>3388</sup> The rationale for the crime of other inhumane acts is to capture conduct which is not independently criminalised: therefore, it would be illogical to seek to identify criminal elements of such conduct.

1220. The Supreme Court Chamber determines that the Trial Chamber erred in its identification of the elements of rape in its analysis. Rather, the Trial Chamber should have only considered whether the charged conduct had occurred in fact and whether this conduct otherwise met the elements of the crime of other inhumane acts. As a result, KHIEU Samphân’s claim that the Trial Chamber should have found different elements, specifically those of the crime of “conjugal rape”, is rendered moot.<sup>3389</sup> In order to correct the Trial Chamber’s error, this Chamber will accordingly identify the charged conduct.

1221. The Co-Investigating Judges considered that, based on the factual findings made in the “Marriage” section of the Case 002 Closing Order, the legal elements of the crime of against humanity of rape had been established in the context of forced marriage.<sup>3390</sup> The Co- Investigating Judges found that by imposing the consummation of forced marriages, the perpetrators committed a physical invasion of a sexual nature against a victim in coercive circumstances in which the consent of the victim was absent.<sup>3391</sup> Consummation of marriage was regularly monitored by CPK cadres and couples who refused to consummate the marriage would be arrested.<sup>3392</sup> The *mens rea* was that the perpetrators intended the physical invasion of a sexual nature, with the knowledge that it occurred in coercive circumstances or without the consent of the victim.<sup>3393</sup> The Co-Investigating Judges concluded that, “[b]ased on these facts, the crime of rape in the context of forced marriage was one of the crimes used by the CPK leaders to implement the common purpose.”<sup>3394</sup>

1222. The formulation outlined in the Closing Order, then, heralds the incorrect approach adopted by the Trial Chamber, focusing on the “elements” of crimes, rather than the conduct of forced consummation. The Closing Order was, however, clearly amended on this point by the Pre-Trial Chamber.<sup>3395</sup> The Pre-Trial Chamber held that while rape had long been prohibited as a war crime, it was not enumerated as a separate crime against humanity from 1975-1979.<sup>3396</sup> Accordingly, the Pre-Trial Chamber found that the Co-Investigating Judges erred in charging rape as an

enumerated crime against humanity, but upheld the Co- Investigating Judges' finding that "the facts characterised as crime against humanity in the form of rape can be characterised as crimes against humanity of other inhumane acts and therefore are to be charged as such."<sup>3397</sup> While the Trial Chamber referred to the change in Closing Order in a footnote,<sup>3398</sup> it appears to have followed the Closing Order's language in its unamended form.

1223. The primary conduct which underpins the charge of rape and sexual violence in the Closing Order is the forced consummation of marriage, in other words, a forced act of sexual intercourse between a forcibly married man and woman. The coercive circumstances as charged are demonstrated by the fact that, immediately after the ceremony, couples reported that they were relocated to an area whereby the consummation of marriage was monitored by CPK cadres.<sup>3399</sup> Other witnesses reported a fear of physical violence, imprisonment, or even death if they failed to consummate their marriages.<sup>3400</sup> A coercive atmosphere was also established by the forced marriages themselves which, as outlined above, took place in a situation in which individuals feared death or other forms of punishment.

...

### iii. Conclusion

1246. The Supreme Court Chamber has considered and dismissed KHIEU Samphân's challenges to the Trial Chamber's findings on the legality of forced marriage as an other inhumane act. With regard to the Trial Chamber's findings on the legality of "rape" and "other acts of sexual violence", the Supreme Court Chamber has determined that the Trial Chamber erred in identifying and defining the elements of crimes for conduct within the crime of other inhumane acts. This Chamber has concluded that the charged conduct is forced sexual intercourse in the context of marriage, and clarifies that this conduct is charged equally to both men and women, and that this conduct properly described as forced sexual intercourse in the context of forced marriage, fell within the scope of the crime against humanity of other inhumane acts. It has otherwise considered and dismissed all of KHIEU Samphân's challenges in relation to the legality of this conduct.

...

#### *Forced Sexual Intercourse in the Context of Forced Marriage*

1341. The Trial Chamber found that after the wedding ceremonies, arrangements were usually made by the local authorities for newly wedded couples to sleep in an assigned location specifically to have sexual intercourse.<sup>3779</sup> Militiamen were commonly ordered to monitor the couples at night to ensure that they had sexual intercourse.<sup>3780</sup> Both men and women felt compelled to engage in sexual intercourse, and couples who were discovered not to have engaged in sexual intercourse were re-educated or threatened with being killed or receiving punishment.<sup>3781</sup> In certain instances, rape was used as punishment for failure to consummate a marriage.<sup>3782</sup> Couples who did not consummate their marriage had to hide the fact and pretend that they loved each other to avoid negative consequences.<sup>3783</sup>

1342. KHIEU Samphân challenges the conclusion that forced sexual intercourse took place pursuant to any policy,<sup>3784</sup> as well as the findings on monitoring of forced consummation,<sup>3785</sup> acts of "rape" as punishment,<sup>3786</sup> and the fact that there was a lack of evidence, in some cases, of an express statement of coercion to consummate the marriages.<sup>3787</sup> He also argues that the Trial Chamber's analysis of concealment of forced consummation shows numerous legal and factual errors.<sup>3788</sup>

1343. The Supreme Court Chamber recalls that it has found above that the Trial Chamber erred in directing itself to consider whether the elements of rape as an independent crimes were established, and in having found that men could not be victims of rape or other acts of sexual violence.<sup>3789</sup> This Chamber has, furthermore, found that the Trial Chamber should, instead, have considered only whether the conduct which was described in the Closing Order was established. This conduct was, in this case coerced sexual intercourse between forcibly married couples, involving both male and female victims. This Chamber will consider, throughout consideration of KHIEU Samphân's challenges below, whether the Trial Chamber's error impacted its assessment of other factual findings, and, if necessary, will correct any consequential errors.

...

## ii. Forced Marriage

1439. KHIEU Samphân raises a number of challenges to the Trial Chamber's findings on the conduct of forced marriage. He argues, first, that the Trial Chamber erred in the findings it made on the *actus reus* of forced marriage, pointing to the factual distinction between arranged marriage and forced marriage, as well as the findings on non-consent.<sup>4064</sup> Second, he argues that the Trial Chamber erred in failing to consider the context of arranged marriage in its assessment of seriousness.<sup>4065</sup> Third, he challenges various of the Trial Chamber's findings on serious mental or physical suffering caused to individual civil parties and witnesses.<sup>4066</sup> These arguments will be considered in turn below.

...

### *Male Victims: The Co-Prosecutors' Appeal*

1534. The Trial Chamber considered "the mental and physical suffering inflicted upon those individuals who were raped as part of the requirement that marriage would be consummated, and that such acts were performed intentionally."<sup>4363</sup> It found that considered holistically, this conduct was of a similar gravity to other enumerated crimes against humanity, and that the *actus reus* of other inhumane acts through conduct characterised as rape in the context of forced marriage was therefore established.<sup>4364</sup> The Trial Chamber held, however, that while men were also unable to refuse to consummate the marriage, there was not "clear evidence concerning the level of seriousness of this kind of conduct and of its impact on males".<sup>4365</sup> Accordingly, "while acknowledging that men were subjected to sexual violence that was contrary to human dignity," the Trial Chamber was unable to reach a finding on the seriousness of the mental and physical suffering suffered by these men.<sup>4366</sup>

1535. The Co-Prosecutors challenge the Trial Chamber's conclusion that forced consummation in the case of male victims did not meet the threshold for the crime of other inhumane acts. They argue that the Trial Chamber made legal and factual errors in its findings with respect to the evidence of mental and physical suffering on the part of men.<sup>4367</sup> They also argue that the Trial Chamber erred in concluding that, while men were subjected to sexual violence that was contrary to human dignity, it was unable to determine the seriousness of their suffering and, consequently, was unable to conclude that men were victims of the crime against humanity of other inhumane acts.<sup>4368</sup> They submit that these legal and factual errors invalidated the decision and resulted in a miscarriage of justice.<sup>4369</sup> The Co-Prosecutors request that the erroneous finding be set aside, and that the conviction for the crime of other inhumane acts be corrected to include sexual violence against male victims.<sup>4370</sup>

...

## b) Serious Mental or Physical Harm or Suffering

...

1552. This Chamber concludes that the men who experienced forced sexual intercourse were, quite rightly, found by the Trial Chamber to have been "subjected to sexual violence".<sup>4410</sup> In the present case, the Trial Chamber concluded that it was "unable to reach a finding on the seriousness of the mental and physical suffering", due to the "absence of clear evidence."<sup>4411</sup> This Chamber observes that the Trial Chamber appears to misapply the standard for other inhumane acts. The *actus reus* requires an act or omission that caused serious mental or physical suffering; it does not require that *both* mental and physical suffering be established.<sup>4412</sup>

1553. The Supreme Court Chamber also finds the Trial Chamber's reference to requiring "clear evidence" to be unclear. First, it is noteworthy that the Trial Chamber relied on identical findings of fact, the occurrence of forced sexual intercourse, to find that female victims had experienced serious mental or physical suffering or injury.<sup>4413</sup> "Newly married couples" were placed in an assigned location to have sexual intercourse after marriage, where they were monitored by armed militia.<sup>4414</sup> It held that "both" men and women felt compelled to have sexual intercourse with their new spouses;<sup>4415</sup> and "couples" who were found not to have had sexual intercourse were re-educated or threatened with being killed or punished.<sup>4416</sup> While the Trial Chamber considered evidence where women had additional coercive experiences, whether through sexual violence committed by their husbands, or by third parties,<sup>4417</sup> the overall finding was that both men and women were coerced into sexual intercourse.

1554. This Chamber particularly notes, in this regard, that the Trial Chamber did not make findings demonstrating that all female victims had experienced physical harm. Earlier in its legal analysis, the Trial Chamber considered some features of penetrative sex which were distinctive to women. It found that while in-court statements were not always explicit in describing penetration, “circumstances such as the pain, the bleeding for a long time thereafter, or the explicit reference to forced penetration allow the Chamber to conclude that such penetration occurred.”<sup>4418</sup> These findings are, however, focused around the occurrence of the act of penetration, and not the harm itself. This Chamber recalls that what is required is physical *or* mental harm, and considers, therefore, that there is no requirement that physical harm must occur for the crime of other inhumane acts to be established for victims of either gender. This Chamber finds it impossible to envisage how non-consensual sexual intercourse would not be, at a minimum, mentally harmful.

...

1563. In light of the above, the Supreme Court Chamber finds that no reasonable trier of fact could have concluded that serious physical and mental harm or suffering was not established in the case of male victims of forced sexual intercourse. The Trial Chamber’s finding of fact is reversed insofar as it relates to male victims of forced sexual intercourse.

...

### c) Human Dignity

...

1584. For all of these reasons, this Chamber concludes that the Trial Chamber’s approach demonstrates a degree of error. The Supreme Court Chamber, consequently, overturns the Trial Chamber’s finding and enters its own finding that male victims of the policy of forced consummation of marriage, were, at minimum, seriously mentally harmed when they were forced to have sexual intercourse.

1585. This Chamber has also considered whether the human dignity of male victims was seriously breached by the act of forced sexual intercourse. This evaluation was not strictly necessary, because the Trial Chamber was not obliged to conduct analyses of both serious mental or physical harm or suffering, and a serious breach of human dignity. Nonetheless, however, given the extent of the Trial Chamber’s errors when it came to assessing serious mental or physical suffering or injury, this Chamber considered it important to also appraise the Trial Chamber’s approach to this matter.

1586. The Trial Chamber failed to conduct an independent evaluation of human dignity, as it was required to do when it found that serious mental or physical suffering or injury was not established. Instead, the Trial Chamber appeared to adopt the standard in relation to which a finding of harm to human dignity is deemed insufficient to establish the crime. This was an error. The Supreme Court Chamber has further found, on evaluation of the facts, that the conduct in question very clearly amounted to a serious breach of human dignity. This Chamber observes that this conclusion is generally applicable also to female victims. Both men and women experienced serious humiliation and degradation in being forced to copulate on demand, at risk of immediate physical harm at the hands of armed militia, and/or other acts of physical harm or death. Some women also experienced the specific harm of being sexually violated by their husbands. This Chamber has also considered, however, that male victims experienced a further, specific harm at being forced to penetrate, and thus victimise, another person. Being the tool of sexual violence, as well as the victim of it, is a serious breach of human dignity.

1587. This Chamber has found no error in the Trial Chamber’s conclusion that the conduct charged as forced marriage was established, and that it caused serious mental and physical suffering of similar gravity to other crimes against humanity.<sup>4476</sup> All of KHIEU Samphân’s submissions on these points are dismissed.

1588. The Supreme Court Chamber has also considered KHIEU Samphân’s challenges to the Trial Chamber’s finding that female victims being forced to consummate their marriages amounted to the crime of rape, established serious mental and physical suffering, and was of a similar gravity to other crimes against humanity.<sup>4477</sup> The

Supreme Court Chamber has held that the Trial Chamber erred in directing itself to consider whether the “elements” of rape were established. This Chamber has clarified that the findings of fact are essentially gender-neutral, in that both male and female victims were forced to have sexual intercourse, in order to consummate their marriages. While women may have experienced specific coercive threats, including sexual violence by their husbands or other men, these acts did not form part of the charged conduct, but instead, part of the coercive environment. Males and females were both victims of the charged conduct: the fact that one was forced to penetrate, and one was forced to be penetrated, is immaterial.

1589. The Supreme Court Chamber has rejected all of KHIEU Samphân’s challenges to the Trial Chamber’s findings on the victims identified as female victims. It has found that the Trial Chamber reasonably considered the context of forced marriage, and properly appraised evidence of serious mental or physical harm or suffering. This Chamber has, however, found that the Trial Chamber erred in failing to properly recognise SOU Sotheavy’s identity as a transgender woman. The Supreme Court Chamber has summarised SOU Sotheavy’s evidence as to the acute harm she experienced, and has made the finding that this civil party should be considered as part of the universe of female victims of the policy of forced consummation.

1590. The Supreme Court Chamber has upheld, in full, the Co-Prosecutors’ appeal to the Trial Chamber’s finding that there was no sufficient evidence of serious mental or physical harm or suffering on the part of the male victims who were forced to consummate their marriage. The Trial Chamber reached a conclusion no reasonable trier of fact could have reached, and also failed to provide a reasoned opinion. Particularly prominent as an error in its assessment was the different treatment of men and women with regard to identical factual circumstances. The Trial Chamber also made unreasonable findings on the evidence and failed to consider direct relevant evidence. This Chamber has also held that the Trial Chamber erred in failing to consider whether human dignity had been seriously breached in light of its negative finding on physical or mental suffering or injury. This Chamber has, furthermore, found that forcing individuals to have sexual intercourse amounted to a serious breach of human dignity. This conclusion applied to both male and female victims, albeit with distinctive elements applicable to each.

1591. The Supreme Court Chamber recalls that, according to Rule 110 (4), in the case of appeal by the Co-Prosecutors, this Chamber has the power to modify the findings of the Trial Chamber’s decision if it deems them erroneous but cannot modify the disposition of the Trial Judgment. This Chamber sets aside the Trial Chamber’s finding that the crime of other inhumane acts as a crime against humanity was not established with regard to male victims. The Supreme Court Chamber enters a new finding that male victims who were forced to have sexual intercourse in the context of forced marriage experienced at a minimum serious mental harm, and also a serious attack on human dignity. KHIEU Samphân’s conviction for conduct amounting to forced sexual intercourse in the context of forced marriage as an other inhumane act is otherwise upheld.<sup>4478</sup>

## H. GENOCIDE

### 1. Genocide of the Vietnamese

1592. The Trial Chamber found that the crime of genocide, including its *actus reus* and *mens rea*, by killing members of the Vietnamese group was established.<sup>4479</sup>

1593. KHIEU Samphân disputes the Trial Chamber’s findings on genocide, challenging its conclusions that both the *actus reus* and *mens rea* had been established.<sup>4480</sup>

...

### ii. Whether the Intent Was to Destroy the Protected Group in Whole or in Part

...

1635. The evidence presented to the Trial Chamber amply demonstrated that all Vietnamese located in Cambodia were specifically targeted for destruction, thus constituting a “distinct entity which must be eliminated as such.” Their intended destruction would, if successful, have resulted in the annihilation of all Vietnamese from Cambodia. Given the size of the Vietnamese community in Cambodia, its total elimination would amount to a destruction “in part” of the larger Vietnamese group, one that can be considered “substantial.”



1636. The Supreme Court Chamber is thus not persuaded by the contention of KHIEU Samphân that the total number of Vietnamese killed in Cambodia is insufficient to establish that “a substantial part of the group of ethnic Vietnamese was targeted.”<sup>4561</sup> When considering the *mens rea* for genocide, the reference to the destruction of a group “in whole or in part” relates to the intent of the perpetrator rather than the result that is actually achieved.<sup>4562</sup> Thus, the destruction of a group is not required for an offense to qualify as genocide. A large number of victims can indeed serve to demonstrate the requisite intent, although there is no numerical threshold that must be met. In light of these conclusions, KHIEU Samphân’s submission is rejected in this regard.

1637. For the foregoing reasons, the evidence presented to the Trial Chamber supported its conclusion of a specific intent to destroy “the Vietnamese group, as such.” Similarly, the evidence supports the conclusion that the intent involved was to destroy the group “in whole or in part.” The Supreme Court Chamber thus discerns no error in the Trial Chamber’s determination that “the *mens rea* of the crime of genocide by killing is established.”<sup>4563</sup>

1638. Having discerned no error in the Trial Chamber’s findings and rulings with respect to both the *actus reus* and the *mens rea* of the crime of genocide, the Supreme Court Chamber affirms the Trial Chamber’s determination that “the crime of genocide by killing members of the Vietnamese group is established.”<sup>4564</sup>

## VIII. ALLEGED ERRORS RELATING TO INDIVIDUAL CRIMINAL RESPONSIBILITY

### A. KHIEU SAMPHÂN’S ROLES AND FUNCTIONS

...

#### 2. President of the State Presidium

...

##### b. Roles and Responsibilities

1649. The Trial Chamber held that KHIEU Samphân’s role as Chairman or President of the State Presidium entailed two main tasks: performing diplomatic and ceremonial functions,<sup>4590</sup> and making speeches.<sup>4591</sup> The Trial Chamber concluded that “[i]n accordance with the largely symbolic nature of the role [...] KHIEU Samphan’s responsibilities as part of this role were mostly confined to diplomatic duties within DK and the general promotion of the CPK line.”<sup>4592</sup> KHIEU Samphân alleges several errors pertaining to these findings.

1650. First, he submits that since his position as President of the State Presidium was “only ‘largely symbolic’”, the Trial Chamber erred in relying on it “as a charge against him”.<sup>4593</sup> The Co-Prosecutors submit that KHIEU Samphân fails to demonstrate an error.<sup>4594</sup> The Supreme Court Chamber notes that KHIEU Samphân misapprehends the Trial Chamber’s description of his position as President of the State Presidium as “symbolic”. The Trial Chamber held that the role of President of the State Presidium held symbolic significance as, while he did not exercise executive or decision-making authority in this role, he nevertheless acted as the “public face of the DK”.<sup>4595</sup> It did not, as he implies, hold that the position existed only on paper. As President, he received diplomatic missions, represented the DK abroad and, on his own evidence to the Co Investigating Judges, attended meetings of the Standing Committee “to be informed to be able to talk [...] to diplomats”.<sup>4596</sup> The Supreme Court Chamber does not accept that the Trial Chamber’s description of his role as being “symbolic” either precluded or detracted from it properly relying upon his conduct in this role as an aspect of his contribution to the common purpose<sup>4597</sup> and an aggravating factor in sentencing.<sup>4598</sup>

...

1654. The Supreme Court Chamber has given ample consideration both to KHIEU Samphân’s submissions on the criminality of the common plan and to his relentless and entirely baseless refrain that he supported only entirely innocuous and benevolent policies and endeavors of the CPK.<sup>4608</sup> This Chamber concludes that KHIEU Samphân mischaracterises the Trial Chamber’s findings: the Trial Chamber found that he promoted the CPK line, in its various facets, rather than any “general” or non-criminal CPK line. In fact, the Trial Chamber found that KHIEU Samphân’s speeches promoted its criminal policies, which included deporting and eliminating Vietnamese,<sup>4609</sup> establishing and



operating cooperatives and worksites,<sup>4610</sup> abolishing Buddhist practices,<sup>4611</sup> and arranging marriages.<sup>4612</sup> This argument is without merit and is therefore dismissed.

...

### **3. Member of the Central and Standing Committees**

#### **a. Membership in the Central Committee**

1667. Although KHIEU Samphân concedes that he was “first an alternate member and then a full member” of the Central Committee,<sup>4650</sup> in his view, the Trial Chamber made several errors in assessing the significance of his role. He submits the Trial Chamber erred by (1) extending the powers of the Central Committee; (2) attributing decisions of the Standing Committee to the Central Committee; (3) “conveniently” dating KHIEU Samphân’s admission as a full member of the Central Committee in order to implicate him in the Central Committee decision of 30 March 1976; and (4) finding that he participated in Party Congresses.<sup>4651</sup> The Co-Prosecutors respond that there are no errors in the Trial Chamber’s findings, and that KHIEU Samphân overlooks the totality of the evidence and misrepresents some of the Trial Chamber’s findings.<sup>4652</sup>

...

#### **ii. Scope of Duties and Powers of the Central Committee**

...

1684. The Supreme Court Chamber accepts that the Trial Chamber’s findings do not straightforwardly support the proposition that all members of the Central Committee would necessarily have received all reports addressed to *Angkar*, although some or all may well have received them. This Chamber notes in particular the Trial Chamber’s stated uncertainty as to which persons or organs were encompassed by the term *Angkar* and the various iterations of “870”.<sup>4701</sup> The Supreme Court Chamber notes the Trial Chamber’s conclusion that day-to-day executive power was delegated to the Standing Committee and that, by contrast, the Central Committee met relatively infrequently,<sup>4702</sup> and that documents requiring updates were to be sent to Office 870 or the Standing Committee.<sup>4703</sup> The Trial Chamber’s conclusion that reports were sent to the Central Committee seems to be derived mainly from its theoretical statutory power to monitor the implementation of Party policy rather than concrete evidence that the Central Committee did so.

1685. Nevertheless, most telegrams relied upon by the Trial Chamber in support of KHIEU Samphân’s knowledge were addressed or copied to “Office”, that is, Office 870, where KHIEU Samphân worked from October 1975 onwards.<sup>4704</sup> The Trial Chamber established that there was a vertical reporting system whereby reports from sector committees to the zone level were forwarded up, usually to Office 870.<sup>4705</sup> Being one of very select members of Office 870, which was moreover at the apex of power given its mandate to oversee the implementation of the Standing Committee decisions, the Supreme Court Chamber finds it absolutely implausible that KHIEU Samphân was ignorant of the information flowing to that office. Further, the Supreme Court Chamber has upheld the Trial Chamber’s finding that KHIEU Samphân was kept informed of DK trade and commerce matters by virtue of his position in the Commerce Committee.<sup>4706</sup> The Supreme Court Chamber thus concludes that the basis of KHIEU Samphân’s knowledge was clearly established. KHIEU Samphân’s submissions are therefore dismissed.

...

#### **b. Attendance and Participation in Meetings of the Standing Committee**

##### **i. Position of “Unique Standing” within the Party**

...

1723. The Supreme Court Chamber finds no error in the Trial Chamber’s finding that KHIEU Samphân attended “numerous”<sup>4816</sup> Standing Committee meetings, or its description of his attendance as “regular”.<sup>4817</sup> Minutes in evidence indicate that he was present at 16 meetings. While these took place over only a small part of the indictment period, they show that KHIEU Samphân was a frequent attendee, as the Trial Chamber noted, on the available minutes he was ranked third in the list of attendees with POL Pot and NUON Chea listed above his name.<sup>4818</sup> It

was not unreasonable for the Trial Chamber to consider that the minutes provide a snapshot of his attendance at Standing Committee meetings and to deduce that this pattern was followed regularly throughout the DK nor, in this Chamber's view, is KHIEU Samphân reasonably entitled to any presumption that he did not remain for the entire length of meetings at which his attendance was noted, in the absence of supporting evidence.

1724. The Supreme Court Chamber also holds the view that KHIEU Samphân has not shown unreasonableness in the Trial Chamber's conclusion that the Standing Committee "met to discuss the implementation of the Party's political line and the administration of the country"<sup>4819</sup> or that "important matters"<sup>4820</sup> or "matters central to the common purpose"<sup>4821</sup> were discussed and "crucial decisions" made at these meetings.<sup>4822</sup> These are rather moderate conclusions in light of the breadth of key topics covered in the minutes and the Trial Chamber's finding, explicitly accepted by KHIEU Samphân, that the Standing Committee was the "highest decision-making body of the CPK".<sup>4823</sup>

1725. In light of these findings, the Trial Chamber's conclusion that KHIEU Samphân's frequent attendance at Standing Committee meetings accorded him "a position of unique standing" in the CPK<sup>4824</sup> is also reasonable. In seeking to show that the Trial Chamber should instead have found his role to be "without influence or power", KHIEU Samphân advances an alternative interpretation of the evidence without showing any error. He rehashes arguments raised both before the Trial Chamber in Cases 002/01 and 002/02 and in his Closing Brief, these have been repeatedly considered and have been addressed.

1726. Finally, KHIEU Samphân overlooks that his "position of unique standing" was relied upon by the Trial Chamber in support of its findings that he was aware of crimes by virtue of his proximity to the Party Centre.<sup>4825</sup> Whether this position also entailed "power or influence" is thus immaterial to the knowledge gained through his presence among the upper echelon.<sup>4826</sup> More importantly, as no finding of KHIEU Samphân's awareness rests solely or decisively on his attendance at Standing Committee meetings or position of unique standing within the CPK, an error in this regard could not occasion a miscarriage of justice.<sup>4827</sup>

1727. As such, KHIEU Samphân's arguments on these points are dismissed.

...

## B. JOINT CRIMINAL ENTERPRISE

1800. The Trial Chamber found that, by 17 April 1975, and continuing until at least 6 January 1979, several senior CPK leaders, including KHIEU Samphân, shared the criminal common purpose of rapidly implementing socialist revolution in Cambodia through a "great leap forward" designed to build the country, defend it from enemies, and radically transform the population into an atheistic and homogenous Khmer society of worker-peasants.<sup>5028</sup> According to the Trial Chamber, the common purpose was criminal because it was intrinsically linked to policies that involved the commission of crimes,<sup>5029</sup> namely: (1) the establishment and operation of cooperatives and worksites;<sup>5030</sup> (2) the establishment and operation of security centres and execution sites;<sup>5031</sup> (3) the targeting of specific groups;<sup>5032</sup> and (4) the regulation of marriage.<sup>5033</sup>

1801. The Trial Chamber further found that, in sharing in the common purpose, KHIEU Samphân as a senior leader and the public face of DK, actively promoted the policies domestically and on the international stage and encouraged, incited, and legitimised its implementation through criminal policies, including by instructing CPK cadres on their implementation while enabling and controlling the same.<sup>5034</sup> The Trial Chamber thus determined that KHIEU Samphân made a significant contribution to the commission of crimes perpetrated by CPK cadres within the scope of Case 002/02,<sup>5035</sup> and that he shared the intent of other senior leaders in a joint criminal enterprise to participate in, and commit the crimes encompassed by, the common purpose.<sup>5036</sup> The Trial Chamber accordingly found KHIEU Samphân guilty of committing, through the joint criminal enterprise, genocide, crimes against humanity, and grave breaches of the Geneva Conventions, and sentenced him to life imprisonment.<sup>5037</sup>

1802. KHIEU Samphân disputes every part of these key findings and submits that first, the Trial Chamber made several errors of law and fact in defining the common purpose of the senior leaders of DK as criminal. He disputes the criminal appellation to each of the CPK's policies.<sup>5038</sup> He further contends that the Trial Chamber was in error when it found that he shared the criminal aspect of the common purpose and that he significantly contributed to it, as well

as in finding that he intended to participate in the common purpose and in the crimes underlying it.<sup>5039</sup> He argues that these errors invalidate the judgment and accordingly requests the Supreme Court Chamber overturn his convictions.<sup>5040</sup> This chapter will approach the Trial Chamber's findings in the context of KHIEU Samphân's premises that: (1) the common plan was not criminal; (2) the policies included in the common plan were not criminal; (3) he was in any event not a participant in the common plan; and (4) all findings that he was a significant contributor to the common plan are factually wrong and legally unsound.

...

## 2. Criminality of the Common Purpose

...

1815. The Supreme Court Chamber recalls that, in order to give rise to criminal liability, the common purpose being the object of the planned action between several persons has to be of a criminal character, in the sense that it either amounted to or involved the commission of a crime.<sup>5081</sup> In the context of the detailed and thorough assessment of the evidence made by the Trial Chamber, including specific facts of this period of just over three years between 1975 and 1979, and in the years prior to the takeover of Cambodia following the CPK's victory in the civil war, the suggestion that the CPK's common purpose did not involve the commission of any crimes is quite extraordinary. While it is not inconceivable for revolutions to benefit society without resulting in bloodshed or criminal activity, this was not one of them.

1816. KHIEU Samphân's repeated insistence that the common purpose of rapidly implementing socialist revolution in Cambodia was not criminal but rather purely political utterly ignores the reality that crimes were committed on a massive scale throughout the implementation process. The Trial Chamber also duly recognised that the common purpose of achieving a revolutionary Cambodian society through a "great leap forward" was not *per se* criminal, but – considering the evidence called – determined that its successful implementation "was contingent upon the execution of harmful policies and the elimination of all counter-revolutionary elements perceived to be inhibiting the Party or the progress of the socialist revolution."<sup>5082</sup> In any event, the fact that a common purpose may be political at its core does not necessarily preclude its implementation by criminal means.

...

## 5. Policy of Targeting Specific Groups

...

1843. KHIEU Samphân submits that the Trial Chamber erred in concluding that there were policies targeting the Vietnamese people,<sup>5170</sup> the Cham,<sup>5171</sup> former Khmer Republic officials and soldiers,<sup>5172</sup> and Buddhists.<sup>5173</sup>

...

### a. The Vietnamese

...

1847. This Chamber is not persuaded by KHIEU Samphân's submissions. The evidence, from senior cadres, telegrams, and *Revolutionary Flag* publications, among other authorities, reveals that the CPK indiscriminately targeted all Vietnamese, combatants and civilians, through its rhetoric, both oral and written. Before turning to consider this evidence, the Trial Chamber carefully articulated the reasons underlying its interpretation of the word "Yvon", finding that it was employed, both by the CPK in contemporaneous documents and by witnesses during their in-court testimony, "to refer to Vietnam or Vietnamese in general terms" and not exclusively to combatants.<sup>5180</sup> The Trial Chamber then conducted a similarly detailed assessment of its reading of references to the "Yvon" and Vietnam as "the 'hereditary enemy' of the Cambodian people and of the Party",<sup>5181</sup> referring to several examples of senior CPK leaders employing this term in an indiscriminate fashion.<sup>5182</sup> This Chamber finds no error in the Trial Chamber's understanding of the two terms. Nor did the Trial Chamber err in the reasoning provided in support thereof; instead, it explicitly explained that it would consider each term and any accompanying derogatory intent, "on a case-by-case basis and by taking into account the totality of the evidence and the circumstances in

which” it was used.<sup>5183</sup> Any other errors alleged regarding the impugned policy must therefore considered in view of these properly established findings.

...

#### **b. The Cham**

...

1858. The Supreme Court Chamber does not consider that the absence of an official CPK document stating that there was a policy concerning the Cham indicates that no such policy existed. This Court has operated from the beginning on the premise that few documents were left behind by the retreating Khmer Rouge when the Vietnamese invasion commenced, the exceptions being at S-21 and Tram Kak District. The Trial Chamber found that such a policy existed based largely on Telegram 15’s reference to discussions about dispersing the Cham and from the organised actions in purging Cham in 1977-1978. The Trial Chamber was unimpressed by the public documents referring to friendship towards all religions, finding they were a disingenuous means of shoring up public support. As dissembling was a large part of the *modus operandi* of the DK regime, the finding that there was a policy to target the Cham is not a conclusion that no reasonable finder of fact could have reached.

...

1860. Finally, although KHIEU Samphân argues that there was not a policy of specific measures targeting the Cham but rather the application of equal measures to the entire population,<sup>5235</sup> this ignores the Trial Chamber’s finding that the policy evolved over time and eventually became one of “purg[ing]” the Cham.<sup>5236</sup> The Supreme Court Chamber finds that KHIEU Samphân has failed to demonstrate that the Trial Chamber erred in finding that the CPK specifically targeted the Cham group.<sup>5237</sup> This argument is therefore dismissed.

#### **c. Former Khmer Republic Soldiers and Officials**

...

1864. The Supreme Court Chamber considers that KHIEU Samphân has not demonstrated that the Trial Chamber erred in finding that a policy broadly targeting former Khmer Republic soldiers and officials for adverse treatment existed throughout the DK period that was intrinsically linked to the common purpose of the joint criminal enterprise and involved the commission of persecution on political grounds. The Trial Chamber relied on a range of contemporary documents, as well as witness, civil party, and expert evidence to make this finding, with KHIEU Samphân challenging only: (1) the reliance on his victory speech; (2) the events at Tuol Po Chrey; and (3) the findings that discrimination occurred against former Khmer Republic soldiers and officials at Tram Kak Cooperatives, the 1st January Dam Worksite, S-21 Security Centre, and Kraing Ta Chan Security Centre.

...

1868. As KHIEU Samphân has failed to demonstrate that the Trial Chamber erred in relying on (1) his victory speech; (2) the events at Tuol Po Chrey; and (3) the findings that discrimination occurred against former Khmer Republic soldiers and officials at the above- mentioned sites, this argument is dismissed.

...

### **7. KHIEU Samphân’s Contribution**

...

1874. KHIEU Samphân submits that the Trial Chamber erred in finding that he significantly contributed to a common criminal purpose.<sup>5267</sup> In particular, he contends that the Trial Chamber wrongly found that his support for, participation in, and/or contribution to the political aspects of the non-criminal common purpose of implementing socialist revolution in Cambodia were sufficient to establish his significant contribution to the commission of any crimes such purpose may have involved.<sup>5268</sup> He argues that “[i]n a JCE having an aim that is not criminal in itself, the significant contribution should not be made to the achievement of the (non-criminal) common purpose but to the commission of the crime”,<sup>5269</sup> and that “[f]ailing to be able to determine a specific action of [his] characterising

his contribution to criminal aspects of the common purpose, the Chamber had recourse to ruses to include [him] in collective responsibility contrary to the need to determine his individual responsibility.”<sup>5270</sup> KHIEU Samphân further challenges the Trial Chamber’s conclusions that he supported and promoted the common criminal purpose, and encouraged, incited, legitimised, instructed, facilitated, and controlled its implementation, as well as several specific findings or pieces of evidence underlying the Trial Chamber’s conclusions in this respect.<sup>5271</sup>

...

1876. Before criminal liability attaches under JCE, an accused’s contribution to the common criminal purpose must be significant although not indispensable to its success. The nature and significance of the role played is to be determined on a case-by-case basis, taking into account a variety of factors including the position of the accused, the level and efficiency of the participation or any efforts taken to prevent crimes.<sup>5275</sup> Such contribution may take many forms,<sup>5276</sup> and as previously determined by this Chamber, “even activities that are on their face unrelated to the commission of crimes may be taken into account when determining whether the accused made a significant contribution thereto.”<sup>5277</sup> The Supreme Court Chamber accordingly rejects KHIEU Samphân’s general argument that the Trial Chamber could not take into account activities that were, on their face, directed at implementing a socialist revolution (as opposed to the commission of specific crimes) when determining that he made a significant contribution to furthering the JCE’s common criminal purpose.

1877. The Supreme Court Chamber similarly rejects his submission that the Trial Chamber essentially imposed on him a “collective responsibility” or guilt by association,<sup>5278</sup> as a review of the Trial Judgment shows that it clearly based its conclusions about KHIEU Samphân’s significant contribution to the JCE on his own acts or conduct as opposed to those of others, including, *inter alia*: his continued occupation of positions within the CPK and DK throughout the indictment period;<sup>5279</sup> his regular attendance and participation at Standing Committee meetings and Central Committee Party Congresses where crucial decisions were made and matters were discussed;<sup>5280</sup> his membership in Office 870 from October 1975, and oversight of DK commerce matters from October 1976 until January 1979;<sup>5281</sup> his participation in meetings, discussions, and mass rallies concerning the identification and purge of enemies;<sup>5282</sup> his leading indoctrination sessions at mass rallies and re-education seminars;<sup>5283</sup> his continued calls on the masses to work collectively in fields and factories despite his knowledge of appalling conditions, grueling work regimes and inadequate food;<sup>5284</sup> his calls on the population to divest themselves of personal sentiment towards their parents in favour of *Angkar*, as well as his openly promoting the Party’s policy to rapidly increase the population, actively encouraging the arrangement of marriages contrary to Buddhist traditions and instructing the same so that couples could produce children in order to augment forces to defend the country, and supporting the abolition of Buddhism in DK;<sup>5285</sup> and his active propagation of the CPK’s rhetoric calling for the discrimination against the Vietnamese in the midst of heightened tensions and growing hostility towards them, as well as his vocal support for the CPK’s policies to deport them.<sup>5286</sup>

1878. Further, the Trial Chamber considered his position, role and functions as a member of the CPK to place his contribution to the JCE in context.<sup>5287</sup> This included: (1) his continued occupation of positions of influence within the CPK and DK throughout the relevant period;<sup>5288</sup> (2) his regular attendance and participation at Standing Committee meetings and Central Committee Party Congresses where crucial decisions affecting the policies were made and discussed, *e.g.* on the “smashing” of enemies, agriculture, drought, and industry;<sup>5289</sup> and (3) his membership in Office 870 from October 1975 and of oversight of DK commerce matters from October 1976 until January 1979.<sup>5290</sup>

...

1885. KHIEU Samphân’s allegations of error in the Trial Chamber’s findings regarding his significant contribution to the JCE’s common criminal purpose are accordingly dismissed.

## 8. KHIEU Samphân’s Knowledge and Intent

...

1887. KHIEU Samphân disputes these findings that he intended to support and participate in a common purpose that was criminal in nature,<sup>5323</sup> and continues his *leitmotif* that the common purpose was not criminal and so there could not be a joint *criminal* enterprise. He contends that the Trial Chamber erred in “considering that sharing and



contributing to the non-criminal common purpose allowed it to find on the contribution to the alleged criminal policies when it needed to establish the intent to participate in the criminal aspect of the common purpose and, in the case at hand, to the criminal aspect of the alleged policies.”<sup>5324</sup> He further contends that the Trial Chamber applied an incorrect reasoning to deduce criminal intent, namely by considering that the commission of crimes by principal perpetrators was sufficient to deduce his own criminal intent to commit those crimes.<sup>5325</sup> He argues that any conclusions about his intent to commit crimes should rather have been based on his own specific conduct or participation in the criminal aspect of the common purpose rather than on that of any other alleged JCE participants.<sup>5326</sup> He further contends that his alleged intent should have been assessed in relation to specific crimes rather than on “crimes” in general,<sup>5327</sup> and that the Trial Chamber erred in concluding that he knew of and intended the commission of any crimes at cooperatives and worksites,<sup>5328</sup> purges,<sup>5329</sup> at security centres and execution sites as well as during against any particular groups,<sup>5330</sup> or by regulating marriages.<sup>5331</sup> Moreover, he argues that the Trial Chamber erred in stating that the requisite level of knowledge varies at different times, and in relying on evidence of his knowledge of crimes subsequent to their occurrence to establish his mens rea under JCE.<sup>5332</sup>

...

#### a. Alleged “Vicarious” Intent

...

1893. This Chamber agrees with the ICTR Appeals Chamber that, because explicit manifestations of criminal intent are often rare in the context of criminal trials, the requisite intent may normally be inferred from relevant facts and circumstances,<sup>5351</sup> and that knowledge of crimes combined with continued participation in a joint criminal enterprise can be conclusive as to a person’s intent.<sup>5352</sup> In this respect, contrary to KHIEU Samphân’s assertion that the Trial Chamber deduced his criminal intent vicariously through that of others, the Trial Chamber inferred his intent from his own acts and conduct, reciting, *inter alia*: his “enthusiasm for the implementation of the CPK’s plans [...] [despite] his knowledge of the appalling working and living conditions which were intentionally imposed at cooperatives and worksites throughout the country” as well as “encourag[ing] cadres to assign more work to New People and to deprive them of adequate food while supporting the unequal treatment of class enemies perceived to be impeding the CPK’s progress”;<sup>5353</sup> his “contribut[ion] to nationwide purges”;<sup>5354</sup> and “urg[ing] cadres to identify enemies obstructing the work of the Party, urg[ing] seething anger and ‘vigilance’ against them, and warn[ing] that traitors would be killed”;<sup>5355</sup> his being “personally informed about arbitrary detentions and conditions of imprisonment in Preah Vihear and “exercis[ing] his authority to extricate his relatives therefrom” (members of his wife’s family);<sup>5356</sup> his “statements about the Vietnamese” and “his calls to remove Vietnamese populations from Cambodia back to Vietnam in the early days of DK”;<sup>5357</sup> his “words and actions during the DK period evinc[ing] his contempt for the Vietnamese and direct intent to kill, on a large scale, the Vietnamese in Cambodia from April 1977 through 6 January 1979”;<sup>5358</sup> his “support[ing] the charade of normalcy [aimed at shoring up the legitimacy of the interim CPK-dominated government which, behind the scenes, was defrocking monks in large numbers,] [...] before discontinuing any mention of the monkhood while at the same time urging the arrangement of marriages in a fashion fundamentally inconsistent with the Buddhist traditions”;<sup>5359</sup> his “call[s] for the execution of Khmer Republic leadership and [being] a staunch supporter of the Party’s discriminatory policies throughout the DK period”;<sup>5360</sup> and, his “personal instruct[ions] that all ministries were to arrange marriages so that couples could produce children for the ultimate defence of the country”.<sup>5361</sup> All of these acts/conduct on KHIEU Samphân’s part, which individually may not have been sufficiently compelling, collectively were able to impel the Trial Chamber to draw the only reasonable inference that KHIEU Samphân intended the crimes encompassed by the common purpose.

...

#### b. Knowledge Indicative of Intent

...

1902. The Supreme Court Chamber observes that, in concluding that KHIEU Samphân had the requisite *mens rea* under JCE, the Trial Chamber clearly considered that he had direct contemporaneous knowledge of the commission of crimes and shared the intent for their commission with other JCE members. For instance, with respect to his



intent for crimes committed at cooperatives and worksites, the Trial Chamber considered, *inter alia*, that he “knew that the population was being converted into a society of worker-peasants which was being forced to work continually”,<sup>5391</sup> and that “[h]is enthusiasm for the implementation of the CPK’s plans was not dampened by his knowledge of the appalling working and living conditions which were intentionally imposed at cooperatives and worksites throughout the country”.<sup>5392</sup> Similarly, with respect to security centres, execution sites, and internal purges, the Trial Chamber considered that KHIEU Samphân “demonstrated acute knowledge of the circumstances of his fellow leaders’ arrests”,<sup>5393</sup> that he “supported the principle of secrecy, knew about the widespread arrests of people at bases on the basis of their real or perceived affiliation with enemies, was personally informed about arbitrary detentions and conditions of imprisonment in Preah Vihear and exercised his authority to extricate his relatives therefrom”.<sup>5394</sup> The Trial Chamber also found that KHIEU Samphân had contemporaneous knowledge of the crimes committed during the DK period against the Cham,<sup>5395</sup> Vietnamese,<sup>5396</sup> Buddhists,<sup>5397</sup> and former Khmer Republic officials,<sup>5398</sup> as well as of the crimes committed in the course of the CPK’s nationwide policy to regulate marriage.<sup>5399</sup> It also found that he acquired knowledge of current affairs by his attendance at meetings of the Standing Committee and because he lived and worked in close proximity to POL Pot, NUON Chea, SON Sen, IENG Sary, and the numerous other members of the Standing and Central Committees.<sup>5400</sup>

...

### c. Cooperatives and Worksites

...

1910. The Supreme Court Chamber agrees with KHIEU Samphân that the sections of the Trial Judgment relevant to KHIEU Samphân’s knowledge and intent reveal a dearth of reasoning in respect of crimes committed at the Tram Kak Cooperatives, Trapeang Thma Dam, 1st January Dam, and Kampong Chhnang Airfield Construction Site. In light of the fundamental importance of the element of intent in establishing criminal liability, and the highly inferential nature of the exercise in establishing intent, the Trial Chamber should have explained its conclusions here with more diligence and specificity to each crime site as charged. However, the Trial Chamber did indicate elsewhere in its Judgment that, “for the purposes of assessing any knowledge relevant to the crimes charged on the part of the Accused, it will assess all of the information before it, including the visits of CPK leaders to specific crime sites.”<sup>5421</sup> Moreover, a holistic view of the Trial Judgment shows findings throughout that are relevant to KHIEU Samphân’s knowledge of and link to crimes at each specific site, from which his intent to commit them can reasonably be inferred.

...

## 9. *Proprio Motu* Issue Concerning the Applicability of JCE to Crimes Committed with *Dolus Eventualis*

1946. The Supreme Court Chamber considers it necessary to address an issue of general significance to the ECCC’s jurisprudence that arises from the Trial Judgment but was not advanced on appeal by any party. Although the Supreme Court Chamber’s powers are exercised within the limits of the issues appealed by the parties, this Chamber, in line with the ICTR and ICTY Appeals Chamber,<sup>5578</sup> has held that it may exceptionally address issues *proprio motu* that would not lead to an invalidation of the judgment but are nevertheless of general significance to the tribunal’s jurisprudence.<sup>5579</sup> The exercise of such a power is within the appellate chamber’s discretion; if it declines to address an issue, the trial chamber’s opinion remains the formal pronouncement on that issue and will therefore carry some weight.<sup>5580</sup>

1947. The issue in the case at hand pertains to the applicability of JCE liability to *dolus eventualis* crimes, *i.e.*, crimes where the perpetrator is aware of the risk that the objective elements of the crime may result from his or her actions or omissions and accepts such an outcome.<sup>5581</sup> *Dolus eventualis* does not include a standard of negligence or gross negligence.<sup>5582</sup> In response to KHIEU Samphân’s argument that JCE I requires proof of direct intent with respect to both the common purpose and the underlying crime,<sup>5583</sup> the Trial Chamber determined “that the degree of intent required under JCE I is direct intent” and that “indirect intent (*dolus eventualis*) does not suffice

for a finding of JCE before the ECCC.”<sup>5584</sup> As a result, the Trial Chamber concluded that the crime against humanity of murder committed with *dolus eventualis* fell outside the common purpose of the JCE, and accordingly analysed KHIEU Samphân’s responsibility for this crime under the mode of liability of aiding and abetting instead.<sup>5585</sup> This Supreme Court Chamber finds that the Trial Chamber erred by ignoring that this Chamber’s established jurisprudence in Case 002/01 that an accused may be held liable for crimes that are not directly intended but nevertheless encompassed by a JCE’s common purpose.

1948. In Case 002/01, the Supreme Court Chamber noted that “the legal categories [of JCE] that the ICTY Appeals Chamber identified in *Tadić* appear to have been based primarily on an assessment of the facts of the underlying cases; the categories were not expressly used in the post-World War II jurisprudence nor are they sharp-contoured legal definitions free from overlap.”<sup>5586</sup> The Supreme Court Chamber found that, in situations where the accused did not carry out the *actus reus* of the international crime charged but acted in concert with others, “criminal liability based on making a contribution to the implementation of a common criminal purpose was, at the time relevant to the charges in the case at hand, limited to crimes that were actually encompassed by the common purpose”,<sup>5587</sup> because liability under JCE for crimes that fell outside the common purpose (*i.e.*, JCE III) was not part of customary international law in 1975. In light of its conclusion that liability under JCE could therefore only arise for crimes falling *within* the common purpose, the Supreme Court Chamber explained that “the criteria for deciding which crimes are encompassed by a common purpose are of great relevance”.<sup>5588</sup> It recalled that the common purpose could either “amount to” or “involve” the commission of crimes:<sup>5589</sup>

[T]he common purpose “involves” the commission of a crime if the crime is a means to achieve an ulterior objective (which itself may not be criminal). In such a scenario, it is not necessary that those who agree on the common purpose actually desire that the crime be committed, as long as they recognise that the crime is to be committed to achieve an ulterior objective. This may include crimes that are foreseen as means to achieve a given common purpose, even if their commission is not certain. For instance, if a gang agrees to break into a house to steal and to use, if necessary, deadly force to overcome any resistance that they may encounter, it would be unconvincing to conclude that the eventual murder was not encompassed by the common purpose because it was not certain that murder would actually be committed in the course of the break-in. Rather, in such scenario, the crime of murder was a constituent element of the plan that was conceived, even if the members of the gang did not know whether it would actually be committed. Thus, if attaining the objective of the common purpose may bring about the commission of crimes, but it is agreed to pursue this objective regardless, these crimes are encompassed by the common purpose because, even though not directly intended, they are contemplated by it.<sup>5590</sup>

1949. The Supreme Court Chamber explained that whether a crime is contemplated by the common purpose is primarily a question of fact, but “[w]hat is of note is that the common purpose may encompass crimes in which the commission is neither desired nor certain, just as it is sufficient for the commission of certain crimes that the perpetrator acted with *dolus eventualis* and therefore neither desired that the crime be committed nor was certain that it would happen.”<sup>5591</sup> The Supreme Court Chamber stated specifically that:

[I]f murder is committed through a joint criminal enterprise, it has to be established that the accused had the objective to bring about the death of the victim through the implementation of the common purpose or was aware that the death would be the certain result thereof (direct intent), or *was aware that the death of the victim was a possible consequence of the implementation of the common purpose, but proceeded to implement it regardless, having accepted the possible occurrence of deaths (dolus eventualis)*.<sup>5592</sup>

1950. Indeed, in Case 002/01, the Supreme Court Chamber considered it appropriate to change the Trial Chamber’s legal characterisation of certain deaths which occurred during the course of Movement of the Population Phase Two from extermination to the crime against humanity of murder committed with *dolus eventualis*, and found that these crimes were encompassed by the common purpose and that KHIEU Samphân bore JCE liability for them.<sup>5593</sup>

1951. The Trial Chamber did not acknowledge the Supreme Court Chamber's decision, but instead relied selectively on jurisprudence from the *ad hoc* tribunals:

The Chamber notes that the *mens rea* requirement for JCE varies according to category and in particular depending on whether crimes are encompassed by the common purpose. While JCE I requires that crimes are encompassed by the common purpose, JCE III pertains to crimes committed outside the common purpose as a natural and foreseeable consequence of effecting that common purpose. On the basis of this distinction, international jurisprudence has held that JCE I requires direct intent while JCE III requires only that an accused was aware that these crimes were a possible consequence of the execution of the common purpose and willingly took the risk that they would be committed (*dolus eventualis*). For example, in *Stanišić and Simatović*, the ICTY Trial Chamber stated that: “[i]t follows [. . .] that the first form of the JCE requires intent in the sense of *dolus directus*, and that recklessness or *dolus eventualis* does not suffice”. In *Karemera and Ngirumpatse*, the ICTR Appeals Chamber stated that: “[t]he question of “foreseeability” relates to the extended form of joint criminal enterprise, not the basic form”. The ICTY Appeals Chamber confirmed in *Šainović et al.* that the “ability to predict” is an improper *mens rea* standard under JCE I and that the Trial Chamber had correctly required that Šainović “had knowledge of, as opposed to ability to foresee, the commission of crimes and shared the intent for their commission with the other members of the JCE”.

The Chamber finds that the intent (*dolus eventualis*) that forms part of the definition of JCE III cannot be transposed into JCE I. As JCE III was not part of customary international law during the relevant period of the Closing Order, indirect intent (*dolus eventualis*) does not suffice for a finding of JCE before the ECCC. Accordingly, and consistent with the submissions of the KHIEU Samphan Defence, the Chamber finds that the degree of intent required under JCE I is direct intent.<sup>5594</sup>

1952. The Trial Chamber essentially, and incorrectly, considered that if the commission of a crime is merely foreseeable, that crime automatically falls outside the common purpose. This ignores situations where the probable commission of a crime was jointly and willingly agreed upon by all JCE participants, as in the example given by this Chamber in Case 002/01 of the gang breaking into a house and agreeing to use lethal force if necessary. In such situations, as the JCE participants share an agreement as regards the commission of a crime with *dolus eventualis* in furtherance of the common purpose, the crime is encompassed by the common purpose.

1953. The jurisprudence cited by the Trial Chamber rests, sometimes indirectly, on the *Tadić* Appeal Judgment. When defining the applicable *mens rea* for the three forms of JCE it defined in customary international law, the *Tadić* Appeals Chamber stated that “the *mens rea* element differs according to the category of common design under consideration. With regard to the first category, *what is required is the intent to perpetrate a certain crime* (this being the shared intent on the part of all co-perpetrators).”<sup>5595</sup> This is distinct from JCE III, where, according to the Appeals Chamber:

[W]hat is required is the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime *other than the one agreed upon in the common plan* arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.<sup>5596</sup>

1954. The *Tadić* case dealt with a situation where Tadić (the accused) was part of an armed group of men involved in an attack on two villages as part of an ethnic cleansing campaign to remove non-Serbs from the area.<sup>5597</sup> Five men were killed as a result of the attack, but the Trial Chamber was unable to determine whether Tadić himself took part in their killing,<sup>5598</sup> although he personally “took an active part in the brutal and violent beating” of four men as part of the attack.<sup>5599</sup> Killing was not found to be part of the common criminal purpose.<sup>5600</sup> The ICTY Appeals Chamber therefore considered whether the killings were a natural and foreseeable consequence of the attack on the villages, such that Tadić might incur liability via JCE III.

1955. As the *Tadić* Appeals Chamber was determining whether Tadić might bear responsibility for crimes *outside* the common purpose, its principal focus was not on the level of intent required for crimes *within* the common purpose. Its statement that such crimes must be perpetrated with intent (which it did not elaborate upon or explain) may be seen as the simple requirement that the JCE members share the *mens rea* required for the underlying crime.<sup>5601</sup>

1956. Indeed, some ICTY Chambers have interpreted it in this way. The *Brđanin & Talić* Trial Chamber, quoted with approval by the *Krstić* Trial Chamber,<sup>5602</sup> stated that:

The state of mind of the accused to be established by the prosecution accordingly differs according to whether the crime charged:

- (a) was within the object of the joint criminal enterprise, or
- (b) went beyond the object of that enterprise, but was nevertheless a natural and foreseeable consequence of that enterprise.

If the crime charged fell within the object of the joint criminal enterprise, the prosecution must establish that *the accused shared with the person who personally perpetrated the crime the state of mind required for that crime.*<sup>5603</sup>

1957. No chamber at the *ad hoc* tribunals has analysed whether a crime falling *within* the common purpose could be committed with *dolus eventualis*, although some, referring back to *Tadić* or to other cases that refer to *Tadić*, have stated without any actual analysis that direct intent is required.<sup>5604</sup>

1958. The *Tadić* Appeals Chamber did not actually state that “direct intent” was required for JCE I, but rather “the same criminal intent” or “shared intent”.<sup>5605</sup> *Dolus eventualis* is considered to be a form of intent. As this Chamber explained in Case 002/01, “the causing of death with less than direct intent but more than mere negligence (such as *dolus eventualis* or recklessness) incurs criminal responsibility and *is considered as intentional killing.*”<sup>5606</sup>

1959. It would be nonsensical to require a higher *mens rea* for the form of participation than for the underlying crime. If one can incur liability for individually committing with *dolus eventualis* the crime against humanity of murder, he or she should equally be held liable for participating in a joint criminal enterprise that commits the same crime. As the *Tadić* Appeals Chamber explained, “to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act.”<sup>5607</sup>

1960. The Supreme Court Chamber does not consider this approach to be a “fundamental reshaping of the concept of individual responsibility for collective criminal action”.<sup>5608</sup> The threshold for liability is not lowered by considering that one could be liable for *any* crime within the common plan so long as its commission was merely foreseeable.<sup>5609</sup> To incur liability via JCE, the JCE participant must possess the requisite *mens rea* for the underlying crime inherent in the common plan.<sup>5610</sup> One could not be held liable via JCE, for example, for genocide that was foreseeable but not intended, as the crime of genocide requires direct intent.

1961. The Supreme Court Chamber recognises, however, that where the common purpose is inferred from events, it is particularly important to determine which crime(s) fall(s) within the common purpose and whether there has been a meeting of minds by the JCE participants in respect of the crime(s) where the JCE participants accept the commission of the crime either as a goal, as an inevitable consequence of the primary purpose or as an eventuality treated with indifference.<sup>5611</sup> This is because the outcome will be considerably different depending on whether the crime at issue is considered to fall within the common purpose. As explained in Case 002/01, “[w]hether a crime was contemplated by the common purpose is primarily a question of fact that – absent an express agreement – has to be assessed taking into account all relevant circumstances, including the overall objective of the common purpose and the likelihood that it may be attained only at the cost of commission of crimes.”<sup>5612</sup> While the existence of a common purpose, the crime(s) encompassed by the common purpose, and the meeting



of minds regarding the commission of the crime(s) may be implicit and inferred from the evidence, any such inferences drawn must be the only reasonable ones available on the evidence.

1962. In view of the Trial Chamber's error concerning the *mens rea* required for JCE liability, and its subsequent failure to consider KHIEU Samphân's individual responsibility for the crime against humanity of murder committed with *dolus eventualis* within the JCE, the Supreme Court Chamber will now consider whether the crime against humanity of murder committed with *dolus eventualis* fell within the common purpose. If the crime against humanity of murder committed with *dolus eventualis* is considered to have been part of the common purpose, the Supreme Court Chamber will assess KHIEU Samphân's responsibility for this crime through JCE, as the Trial Chamber has found "that commission through a joint criminal enterprise most accurately and appropriately reflects KHIEU Samphan's responsibility for the crimes that fall within the common purpose."<sup>5613</sup> If the Supreme Court Chamber finds that KHIEU Samphân is responsible under JCE, the Supreme Court Chamber will recharacterise KHIEU Samphân's conviction for aiding and abetting the crime against humanity of murder committed with *dolus eventualis* to commission of this crime via JCE.

1963. Rule 110(2) permits the Supreme Court Chamber to change the legal characterisation of the facts contained in the Trial Judgment to accord with a new form of liability<sup>5614</sup> provided that it does not go beyond those facts<sup>5615</sup> or violate fair trial rights. An accused's fair trial rights are not violated by recharacterisation where the accused is aware of the possibility of the legal recharacterisation and is given sufficient opportunity to defend against it.<sup>5616</sup> In the present case, as addressed in Section V.B above, KHIEU Samphân was charged with the crime against humanity of extermination but was on notice that the facts considered to amount to extermination could also be characterised as murder, and that this Chamber had clarified that murder as a crime against humanity may be committed with *dolus eventualis*.<sup>5617</sup> He was aware that this Chamber had also clarified that crimes committed with *dolus eventualis* may incur JCE liability.<sup>5618</sup> Accordingly, the Supreme Court Chamber considers that the proposed legal recharacterisation would not violate KHIEU Samphân's fair trial rights.

...

**b. KHIEU Samphân's JCE Liability for the Crime Against Humanity of Murder Committed with *Dolus Eventualis***

1967. To be held liable via JCE for any crime against humanity including murder committed with *dolus eventualis*, KHIEU Samphân must have made a significant contribution to the common purpose of the JCE and he must have possessed the requisite *mens rea*, which in this case, as discussed above, entails that he was aware of the substantial likelihood of deaths occurring due to the imposition of the harsh living and working conditions at the cooperatives and worksites and the poor conditions of detention at the security centres. The Supreme Court Chamber has also upheld the Trial Chamber's determination that KHIEU Samphân made a significant contribution to the common purpose of the JCE.<sup>5629</sup>

...

1974. Although KHIEU Samphân is correct that the findings made in Section 18.1.1, on which the Trial Chamber relied in part, were not made in response to knowledge of deaths due to conditions imposed at cooperatives, worksites, and security centres, these findings are relevant to his knowledge of deaths. The Trial Chamber considered the evidence of KHIEU Samphân's awareness of the substantial likelihood of the commission of other crimes within the common purpose of the JCE in detail in this section. It found that he "knew of the wide-scale food shortages at cooperatives and worksites."<sup>5645</sup> It considered evidence that he personally observed conditions at worksites,<sup>5646</sup> and witnessed the abysmal conditions.<sup>5647</sup> By his own admission and description after the fall of the DK regime, KHIEU Samphân witnessed "starvation", "lack of medicines" and "[p]eople [who] were forced to work without food, while they could barely walk, but even so, they were made to work."<sup>5648</sup> The Trial Chamber held, by consequence, that he "knew of the abject working conditions at cooperatives and worksites during the DK period"<sup>5649</sup> and "knew of the crimes committed in the course of the policy to establish and operate cooperatives and worksites."<sup>5650</sup> It was on the basis of these findings, as well as KHIEU Samphân's knowledge as demonstrated by his conduct including attending at CPK Standing Committee meetings, radio-broadcast speeches, and political training of CPK cadres that the Trial Chamber concluded that "he knew that deaths would likely result from the conditions imposed at cooperatives and worksites."<sup>5651</sup>

1975. Concerning his knowledge of the likelihood of deaths from detention conditions, the Supreme Court Chamber agrees with KHIEU Samphân that the Trial Chamber erred in relying on his knowledge of purges to imply knowledge in security centres. The Trial Chamber did not explain how KHIEU Samphân's knowledge of the arrest, imprisonment, mistreatment, or execution of real or perceived enemies translated into an awareness that the conditions imposed in the security centres were likely to lead in death. Knowledge of deaths occurring by execution does not imply knowledge of deaths caused by poor conditions of detention. The Trial Chamber did, however, find that KHIEU Samphân knew of the substantial likelihood that the harsh conditions at the cooperatives and worksites extended to security centres.<sup>5652</sup> KHIEU Samphân failed to explain why this finding was unreasonable. The Supreme Court Chamber holds the view that if KHIEU Samphân was aware of the likelihood of deaths occurring in cooperatives and worksites due to the deprivation of food, medical care, and hygiene, he would have been similarly aware of the likelihood of these conditions leading to death inside the security centres. Key to all findings of knowledge by KHIEU Samphân is his role as an attendee at the highest-level meetings of the CPK where the limited minutes which exist show that all issues of interest and concern were discussed on a regular basis.

1976. For the foregoing reasons, the Supreme Court Chamber rejects KHIEU Samphân's submissions that the Trial Chamber erred in fact in finding he was aware of the substantial likelihood of deaths at Tram Kak Cooperatives, 1st January Dam Worksite, Trapeang Thma Dam Worksite, Kampong Chhnang Airfield Construction Site, S-21 Security Centre, and Kraing Ta Chan Security Centre. The Supreme Court Chamber finds that the crime against humanity of murder committed with *dolus eventualis* at the above crimes sites was included in the common purpose of the JCE and that KHIEU Samphân bears JCE liability for this crime. It recharacterises the form of liability at issue from aiding and abetting to JCE liability, which is a return to the characterisation of the facts as outlined in the Closing Order. It therefore will not consider KHIEU Samphân's remaining challenges related to aiding and abetting.

## IX. SENTENCING

...

### B. CLARIFICATION CONCERNING THE SECOND SENTENCE IMPOSED ON KHIEU SAMPHÂN

2018. Before turning to the challenges related to sentencing, the Supreme Court Chamber considers it necessary to clarify a matter concerning KHIEU Samphân's sentence: whether he now serves a single life sentence or two concurrent life sentences. This issue arises because, due to its breadth, Case 002 was severed by the charges into Cases 002/01 and 002/02 in the interests of trial management,<sup>5738</sup> something that has not occurred previously at the ECCC or in international criminal jurisprudence<sup>5739</sup> and is not foreseen under Cambodian law.

...

2028. This Chamber notes that had Case 002 not been severed into two separate trials, KHIEU Samphân would not have been sentenced twice. An additional life sentence to run cumulatively or concurrently could not, in the interests of justice, be imposed merely because Case 002 was severed in the interest of trial management. In addition to the stigma or perhaps opprobrium of an additional life sentence, serving two concurrent life sentences rather than a single sentence could affect the notion of hope in a very elderly man and perhaps affect any opportunity for an eventual conditional release.<sup>5748</sup>

2029. While the Trial Chamber had to impose a sentence following its finding of guilt in Case 002/02,<sup>5749</sup> it confused matters by referring to concurrent sentences, or two sentences served at the same time as one another, and by equating the situation before it with the situation addressed in domestic Cambodian law by Article 138 of the Criminal Code of Cambodia. As noted above, Cambodian law does not provide for severance of charges, and therefore cannot be applied to this situation.

...

2034. The Supreme Court Chamber clarifies that KHIEU Samphân now serves a single sentence of life imprisonment covering the totality of his criminal responsibility for the crimes of which he was convicted in Cases 002/01 and 002/02. He does not serve two concurrent life sentences. His single life sentence, the maximum sentence allowed



by law, demonstrates the seriousness with which Cambodia and the entire international community regard violations of international law.

...

#### E. IMPACT OF THE SUPREME COURT CHAMBER'S FINDINGS ON THE SENTENCE

2066. The Supreme Court Chamber recalls that it has upheld KHIEU Samphân's convictions for: (1) the crimes against humanity of murder, extermination, deportation, enslavement, imprisonment, torture, persecution on political, religious, and racial grounds, and other inhumane acts through attacks against human dignity, conduct characterised as enforced disappearances, forced transfer, forced marriage, and rape within the context of forced marriage; (2) the crime of genocide by killing members of the Vietnamese ethnic, national, and racial group; and (3) grave breaches of the Geneva Conventions of wilful killing, torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or a civilian the rights of a fair and regular trial, and unlawful confinement of a civilian under the Geneva Conventions at S-21 Security Centre, changing his form of liability for murders committed with *dolus eventualis* from aiding and abetting liability to JCE liability.<sup>5821</sup> It has reversed the finding of political persecution of New People at the 1st January Dam Worksite, considering that the Trial Chamber erred in finding that a fundamental right to equal treatment had been infringed or violated by the treatment of New People at that worksite.<sup>5822</sup> It has also reversed the finding of murder as a crime against humanity at Phnom Kraol Security Centre, which was based on two discrete murders, findings that the murders could not be established beyond reasonable doubt based on the available evidence.<sup>5823</sup> His overall convictions for persecution on political grounds and murder as crimes against humanity stand, as they were based on multiple acts of political persecution and multiple murders at other locations.<sup>5824</sup> The Supreme Court Chamber has also granted the Co-Prosecutors' Appeal, entering a conviction for the crime against humanity of other inhumane acts through conduct characterised as rape in the context of forced marriage with regard to male victims.<sup>5825</sup> The Supreme Court Chamber also recalls that it found that the Trial Chamber erred in double counting KHIEU Samphân's position of authority and influence when considering the gravity of the crimes and also when considering aggravating circumstances.<sup>5826</sup>

2067. The Supreme Court Chamber notes that, as explained above,<sup>5827</sup> KHIEU Samphân is serving a life sentence, the maximum sentence permitted at the ECCC, which was imposed by the Trial Chamber for his convictions in Cases 002/01 and upheld by the Supreme Court Chamber on appeal. Case 002/01 and 002/02 were prosecuted separately but originated from a single indictment that was severed in the interests of trial management and in light of the frail health and advance age of all the Accused. Although the two cases are thus related, they deal with different facts that were adjudicated in two trials that produced separate dispositions, each of which requires the imposition of a separate sentence after finding of guilt. For this reason, the Trial Chamber sentenced KHIEU Samphân to life imprisonment for the crimes of which he was convicted in in Case 002/02 and this Chamber affirms that sentence.

2068. The Supreme Court Chamber considers the life sentence that was imposed in Case 002/02 to be appropriate in light of all the circumstances, including the tragic nature of the underlying crimes and the extent of harm caused by KHIEU Samphân. In the circumstances, however, in addition to affirming the life sentence in this case, this Chamber affirms the decision of the Trial Chamber to have the sentence run concurrently with the one imposed in Case 002/01 s permitted by Article 138 of the Cambodian Criminal Code.

2069. Nonetheless, this Chamber concludes that the Trial Chamber's finding that a life sentence was appropriate for the crimes at issue in Case 002/02 would not be appreciably altered by the Supreme Court Chamber's recharacterisation of aiding and abetting liability to JCE liability, its reversal of the crime against humanity of political persecution of New People at the 1st January Dam Worksite or the crime against humanity of murder at Phnom Kraol, its entering a conviction for the crime against humanity of other inhumane acts through conduct characterised as rape in the context of forced marriage with regard to male victims, or its finding that the Trial Chamber erred in double counting KHIEU Samphân's position of authority and influence as an aggravating factor as to the gravity of the crimes; and finally that the Trial Chamber erred in assessing mitigating factors. The Supreme Court has thoroughly considered each of these assertions and considers them without merit. The sole exception is the claim that the Trial Chamber erred in assessing the gravity of the crimes committed by including a crimes of which KHIEU Samphân

was not charged and impermissibly double counting his position of authority and influence. Although, the Supreme Court Chamber decides that doing so constituted error, it also concludes that in the circumstances of this case their consideration does not render the ultimate sentence inappropriate or unfair in any way.

2070. Participation in a JCE is considered a higher form of liability than aiding and abetting and tends to attract a higher sentence.<sup>5828</sup> As noted above, KHIEU Samphân already serves the highest sentence permitted by ECCC law, this recharacterisation has no effect on his sentence, nor does the conviction with regard to male victims of rape in the context of forced marriage. The reversal of the finding of political persecution at the 1st January Dam Worksite affected only one group of “real or perceived enemies” persecuted at the 1st January Dam Worksite and does not affect the multiple other findings of political persecution elsewhere throughout Cambodia. The reversal of the finding of murder at Phnom Kraol Security Centre relates only to two deaths, and as this is only a small fraction of the overall deaths at issue, it is insufficient to affect the sentence. Consequently, KHIEU Samphân’s position of authority and influence was only one of many factors the Trial Chamber considered in its gravity analysis, and there is no question that a life sentence would be appropriate considering the gravity of the crimes without having inappropriately considered this an aggravating factor.

## X. DISPOSITION

For the foregoing reasons, **THE SUPREME COURT CHAMBER,**  
**PURSUANT TO** Article 4(1)(b) of the ECCC Agreement, Articles 14 new (1)(b) and 36 new of the ECCC Law and Internal Rule 111;

**NOTING** the respective written submissions of the Parties on appeal and their arguments presented at the hearing from 16 to 19 August 2021;

**GRANTS**, in part, and **DISMISSES**, in part, KHIEU Samphân’s Appeal, and therefore:

Insofar as it relates to facts of deaths that occurred at Tram Kak Cooperatives, Trapeang Thma Dam Worksite, 1st January Dam Worksite, Kampong Chhnang Airfield Construction Site, S-21 Security Centre, and Kraing Ta Chan Security Centre:

**REVERSES** KHIEU Samphân’s conviction for aiding and abetting the crime against humanity of murder with *dolus eventualis*, and, recharacterising the facts, **ENTERS** a conviction for the crime against humanity of murder with *dolus eventualis* through a joint criminal enterprise;

Insofar as it relates to facts of deaths that occurred at Phnom Kraol Security Centre:

**REVERSES** KHIEU Samphân’s conviction for the crime against humanity of murder at Phnom Kraol Security Centre;

Insofar as it relates to facts of persecution at 1st January Dam Worksite:

**REVERSES** KHIEU Samphân’s conviction for the crime against humanity of persecution on political grounds of New People at the 1st January Dam Worksite;

Insofar as it relates to facts of killings of the Cham that occurred at Trea Village and Wat Au Trakuon and killings of the Vietnamese in Svay Rieng, in DK waters, in Kampong Chhnang province, at Wat Khsach, and in Kratie, as well as at Au Kanseng Security Centre:

**AFFIRMS** KHIEU Samphân’s conviction for the crimes against humanity of extermination;

Insofar as they relate to facts of forced labour of prisoners at Phnom Kraol Security Centre:

**AFFIRMS** KHIEU Samphân’s conviction for the crime against humanity of enslavement;

Insofar as they relate to facts of removal of the Vietnamese from Tram Kak district and from Prey Veng province:

**AFFIRMS** KHIEU Samphân’s conviction for the crimes against humanity of deportation of Vietnamese;

Insofar as they relate to facts of physical and mental mistreatment of the Cham at Trea Village:

**AFFIRMS** KHIEU Samphân’s conviction for the crime against humanity of torture;

Insofar as they relate to facts of the treatment of the Cham and of “real or perceived enemies of the CPK”, including former Khmer Republic soldiers and officials and “New People” at Tram Kak Cooperatives, Trapeang Thma Dam

Worksite, 1st January Dam Worksite (not in relation to “New People”), Kampong Chhnang Airfield Construction Site, S-21 Security Centre, Kraing Ta Chan Security Centre, Au Kanseng Security Centre and Phnom Kraol Security Centre:

**AFFIRMS** KHIEU Samphân’s conviction for the crimes against humanity of persecution on political grounds;

Insofar as they relate to facts of discrimination against the Cham:

**AFFIRMS** KHIEU Samphân’s conviction for the crimes against humanity of persecution on religious grounds;

Insofar as they relate to facts of discrimination against Buddhists and Buddhist Monks:

**AFFIRMS** KHIEU Samphân’s conviction for the crimes against humanity of persecution on religious grounds;

Insofar as they relate to facts of discrimination of the Vietnamese at Tram Kak Cooperatives, S-21 Security Centre, Au Kanseng Security Centre and in Prey Veng and Svay Rieng provinces:

**AFFIRMS** KHIEU Samphân’s conviction for the crimes against humanity of persecution on racial grounds;

Insofar as they relate to facts of disappearances at Tram Kak Cooperatives, Kraing Ta Chan Security Centre, and Phnom Kraol Security Centre:

**AFFIRMS** KHIEU Samphân’s conviction for the crimes against humanity of other inhumane acts through conduct characterised as enforced disappearances;

Insofar as they relate to facts of forcible transfers of the Cham in the course of the Movement of Population Phase Two:

**AFFIRMS** KHIEU Samphân’s conviction for the crimes against humanity of other inhumane acts through conduct characterised as forced transfer;

Insofar as they relate to facts of forced marriage and forced sexual intercourse in the context of forced marriage within the context of the nationwide regulation of marriage:

**AFFIRMS** KHIEU Samphân’s conviction for the crimes against humanity of other inhumane acts through conduct characterised as forced marriage and rape, and additionally categorized as crime against humanity of other inhumane acts in the form of sexual violence, understood to constitute forced sexual intercourse in the context of forced marriage with regard to female victims;

**GRANTS** the Co-Prosecutors’ Appeal; and **ENTERS** a conviction for the crime against humanity of other inhumane acts through conduct characterised as forced marriage and additionally categorized as crime against humanity of other inhumane acts in the form of sexual violence, understood to constitute forced sexual intercourse in the context of forced marriage with regard to male victims;

Insofar as they relate to wilful killing, torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving prisoners of war or civilians the rights of fair and regular trial and the unlawful confinement of civilians:

**AFFIRMS** KHIEU Samphân’s conviction for grave breaches of the Geneva Conventions;

Insofar as they relate to facts of killings of the Vietnamese:

**AFFIRMS** KHIEU Samphân’s conviction for the crime of genocide;

**AFFIRMS** KHIEU Samphân’s sentence of life imprisonment in Case 002/02, which shall run concurrently with the life sentence imposed in Case 002/01;

**ORDERS** that KHIEU Samphân remain in the custody of the ECCC pending the issuance of the full written Appeal Judgment and the finalisation of arrangements for his transfer, in accordance with the law, to the prison where he will continue to serve his sentence.

Done in Khmer and English.

Dated this 23<sup>rd</sup> day of December 2022

At Phnom Penh,

Cambodia

[Signatures]

## ENDNOTES

- 1 Co-Prosecutors' Appeal against the Case 002/02 Trial Judgment, 20 August 2019, F50 ("Co-Prosecutors' Appeal (F50)"); Case 002/02 KHIEU Samphân's Appeal Brief, 27 February 2020, F54 ("KHIEU Samphân's Appeal Brief (F54)").
- 2 Case 002/02 Judgement, 16 November 2018, E465 ("Trial Judgment (E465)").
- 3 Trial Judgment (E465), para. 276.
- 4 Trial Judgment (E465), para. 279.
- 5 Trial Judgment (E465), para. 279.
- 6 Trial Judgment (E465), paras 279, 296.
- 7 Trial Judgment (E465), para. 296.
- 8 Trial Judgment (E465), paras 296-297.
- 9 Trial Judgment (E465), para. 564.
- 10 Trial Judgment (E465), paras 564-567.
- 11 Trial Judgment (E465), paras 582, 624, Disposition.
- 12 Trial Judgment (E465), paras 569, 572.
- 13 Trial Judgment (E465), para. 576.
- 14 Trial Judgment (E465), paras 576, 582, 591-592, 594, 596-599, 624, 4257, Disposition.
- 15 Trial Judgment (E465), paras 597-599, 624, Disposition.
- 16 Trial Judgment (E465), paras 607, 619-621, 624, Disposition.
- 17 Trial Judgment (E465), paras 608, 616, 619.
- 18 Trial Judgment (E465), paras 589, 603-604.
- 19 Trial Judgment (E465), paras 4306-4307.
- 20 Trial Judgment (E465), paras 574, 600-604, 624, Disposition.
- 21 Trial Judgment (E465), paras 4306-4307, 4326-4328, 4331-4332, Disposition.
- 22 Trial Judgment (E465), paras 4293-4294, 4330-4336, Disposition.
- 23 Trial Judgment (E465), paras 4291, 4295, 4341, Disposition.
- 24 Trial Judgment (E465), paras 4400, 4402, Disposition.
- 25 Trial Judgment (E465), para. 4402, Disposition.
- 26 Trial Judgment (E465), paras 4454-4467, Disposition.
- 27 T. 16 November 2018 ("Pronouncement of Judgment in Case 002/02"), E1/529.1, ERN (EN) 01595987-01595990, pp. 53-56.
- 28 T. 16 November 2018 ("Pronouncement of Judgment in Case 002/02"), E1/529.1.
- 29 KHIEU Samphân's Urgent Appeal against the Judgement Pronounced on 16 November 2018, 19 November 2018, E463/1 ("KHIEU Samphân's Urgent Appeal (E463/1)").
- 30 Decision on KHIEU Samphân's Urgent Appeal against the Summary of Judgement Pronounced on 16 November 2018, 13 February 2019, E463/1/3 ("Decision on KHIEU Samphân's Urgent Appeal (E463/1/3)").
- 31 KHIEU Samphân's Request for Annulment of Decision E463/1/3 on his Urgent Appeal against the Judgement of 16 November 2018, 20 March 2019, E463/1/4 ("KHIEU Samphân's Annulment Request (E463/1/4)").
- 32 KHIEU Samphân's Annulment Request (E463/1/4).
- 33 Decision on KHIEU Samphân's Request for Annulment of Decision E463/1/3 on his Urgent Appeal against the Judgement of 16 November 2018, 16 August 2019, E463/1/5.
- 34 NUON Chea's Urgent First Request for an Extension of Time and Page Limits for Filing his Notice of Appeal against the Trial Judgement in Case 002/02, 3 April 2019, F40/1.1; KHIEU Samphân's Defence Request for Extension of Time and Number of Pages to File Notice of Appeal, 3 April 2019, F39/1.1.
- 35 Decision on NUON Chea and KHIEU Samphân's Requests for Extension of Time and Page Limits on Notices of Appeal, 26 April 2019, F43.
- 36 KHIEU Samphân's Application for Review of Decision on Requests for Extensions of Time and Page Limits on Notices of Appeal, 3 May 2019, F44.
- 37 Decision on KHIEU Samphân's Application for Review of Decision on Requests for Extensions of Time and Page Limits on Notices of Appeal, 7 June 2019, F44/1.
- 38 Co-Prosecutors' Notice of Appeal of the Trial Judgment in Case 002/02, 21 June 2019, E465/2/1 ("Co-Prosecutors' Notice of Appeal (E465/2/1)").
- 39 Co-Prosecutors' Notice of Appeal (E465/2/1), para. 2.
- 40 NUON Chea's Notice of Appeal against the Trial Judgement in Case 002/02, 1 July 2019, E465/3/1 ("NUON Chea's Notice of Appeal (E465/3/1)"); KHIEU Samphân's Notice of Appeal (002/02), 1 July 2019, E465/4/1 ("KHIEU Samphân's Notice of Appeal (E465/4/1)").
- 41 NUON Chea's Notice of Appeal (E465/3/1), pp. 3-60.
- 42 KHIEU Samphân's Notice of Appeal (E465/4/1), paras 15-35.
- 43 NUON Chea's First Request for an Extension of Time and Page Limits for Filing his Appeal Brief against the Trial Judgement in Case 002/02, 23 July 2019, F47.
- 44 NUON Chea's Death Certificate, 4 August 2019, F46/1.1. See also Co-Prosecutors' Submission on NUON Chea's Death Certificate, 5 August 2019, F46/1.
- 45 Urgent Request concerning the Impact on Appeal Proceedings of NUON Chea's Death prior to the Appeal Judgement, 6 August 2019, F46/2.
- 46 Decision to Terminate Proceedings against NUON Chea, 13 August 2019, F46/3.
- 47 Decision on Urgent Request concerning the Impact on Appeal Proceedings of NUON Chea's Death prior to the Appeal Judgement, 22 November 2019, F46/2/4/2.
- 48 Co-Prosecutors' Appeal (F50).
- 49 KHIEU Samphân's Response to the Prosecution's Appeal in Case 002/02, 23 September 2019, F50/1 ("KHIEU Samphân's Response (F50/1)").
- 50 Civil Party Lead Co-Lawyers' Submissions relating to KHIEU Samphân's Response to the Co-Prosecutors' Appeal, 7 October 2019, F50/1/1.
- 51 KHIEU Samphân's Defence Request to Reject the Civil Party "Submissions" (F50/1/1) pursuant to the Practice



- Direction on the Filing of Documents, 11 October 2019, F50/1/1/1.
- 52 Decision on KHIEU Samphân's Request to Reject the Civil Parties Submission, 29 January 2020, F50/1/1/2, para. 13.
- 53 KHIEU Samphân's Request for Admission of Additional Evidence, 8 October 2019, F51.
- 54 Co-Prosecutors' Response to KHIEU Samphân's Request to Admit Additional Evidence (F51), 24 October 2019, F51/1.
- 55 KHIEU Samphân's Reply to the Prosecution's Response to his Request to Admit Additional Evidence, 4 November 2019, F51/2.
- 56 Decision on KHIEU Samphân's Request for Admission of Additional Evidence, 6 January 2020, F51/3 ("Decision on Admission of Additional Evidence (F51/3)").
- 57 KHIEU Samphân's Application for Disqualification of the Six Appeal Judges Who Adjudicated in Case 002/01, 31 October 2019, F53 ("KHIEU Samphân's Disqualification Application (F53)").
- 58 Co-Prosecutors' Response to KHIEU Samphân's Application to Disqualify the Six Appeal Judges Who Adjudicated Case 002/01, 25 November 2019, F53/4; Civil Party Lead Co-Lawyers' Response to KHIEU Samphân's Application for Disqualification of Six Appeal Judges, 25 November 2019, F53/5.
- 59 Decision on KHIEU Samphân's Application for Disqualification of Six Appeal Judges Who Adjudicated in Case 002/01, 14 July 2020, 11 ("Decision on KHIEU Samphân's Disqualification Application (11)").
- 60 KHIEU Samphân's Appeal Brief (F54).
- 61 Co-Prosecutors' Request for Additional Pages to Respond to KHIEU Samphân's Appeal of the Case 002/02 Judgment, 20 March 2020, F55.
- 62 Decision on Co-Prosecutors' Request for Additional Pages to Respond to KHIEU Samphân's Appeal Brief of the Case 002/02 Judgment, 24 April 2020, F55/3 ("Decision on Co-Prosecutors' Request (F55/3)").
- 63 Annex A – Summary of Grounds for KHIEU Samphân's Appeal (002/02), 23 April 2020, F54.1.1 ("Annex A to KHIEU Samphân Appeal (F54.1.1)").
- 64 KHIEU Samphân's Appeal Brief (F54).
- 65 Co-Prosecutors' Response to KHIEU Samphân's Appeal of the Case 002/02 Trial Judgment, 12 October 2020, F54/1 ("Co-Prosecutors' Response (F54/1)").
- 66 Civil Party Lead Co-Lawyers' Response to KHIEU Samphân's Appeal of the Case 002/02 Trial Judgment, 4 January 2021, F54/2 ("Lead Co-Lawyers' Response (F54/2)").
- 67 Interoffice Memorandum, 'Notification of appeal hearing dates in Case 002/02 pursuant to Internal Rule 108(3)', 22 January 2021, F58.
- 68 Interoffice Memorandum, 'Notification with regard to appeal hearing in Case 002/02 pursuant to Internal Rule 108(3)', 28 April 2021, F62.
- 69 Scheduling Order for the Appeal Hearing in Case 002/02, 16 June 2021, F66, pp. 4-5.
- 70 Order Scheduling Pronouncement of Appeal Judgment, 5 August 2022, F72.
- 71 KHIEU Samphân's Notice of Appeal (E465/4/1), paras 15-35.
- 72 KHIEU Samphân's Appeal Brief (F54), paras 29-79.
- 73 Co-Prosecutors' Appeal (F50), para. 2.
- 74 Co-Prosecutors' Appeal (F50), paras 3, 40.
- 75 Co-Prosecutors' Appeal (F50), para. 40.  
...
- 144 KHIEU Samphân's Appeal Brief (F54), para. 30.
- 145 KHIEU Samphân's Appeal Brief (F54), paras 29, 32.
- 146 KHIEU Samphân's Appeal Brief (F54), paras 52, 67.
- 147 KHIEU Samphân's Appeal Brief (F54), para. 29.  
...
- 186 Case 002/01, Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013, E163/5/1/13 ("First Severance Appeal Decision (E163/5/1/13)"), para. 30.  
...
- 191 KHIEU Samphân's Appeal Brief (F54), paras 97, 332-333.
- 192 KHIEU Samphân's Appeal Brief (F54), para. 84.  
...
- 211 Case 002/01 Appeal Judgment (F36), para. 762.
- 212 Case 002/01 Appeal Judgment (F36), para. 762.
- 213 Case 002/01 Appeal Judgment (F36), paras 759, 763.
- 214 Case 002/01 Appeal Judgment (F36), paras 759, 764.  
...
- 226 Case 002/01 Appeal Judgment (F36), para. 764; Case 001 Appeal Judgment (F28), paras 104, 721.  
...
- 274 KHIEU Samphân's Appeal Brief (F54), paras 127-129.
- 275 KHIEU Samphân's Appeal Brief (F54), paras 127, 129-133, 158-164.  
...
- 309 See *supra* Section II, para. 19 ("Appeals shall identify the finding or ruling challenged, with specific reference to the page and paragraph numbers of the decision of the Trial Chamber").
- 310 KHIEU Samphân concedes this by his own submission that the Trial Chamber reached its finding in Case 002/01 on the CPK's forced marriage policy "even before considering the evidence in Case 002/02". See KHIEU Samphân's Appeal Brief (F54), para. 130.
- 311 See Disqualification Decision (E314/12/1), paras 66-70, and references cited therein.  
...
- 417 See, e.g., KHIEU Samphân's Appeal Brief (F54), paras 947, 1211, 1214, 1229, 1239, 1244, 1249.
- 418 See, e.g., KHIEU Samphân's Appeal Brief (F54), para. 675.
- 419 KHIEU Samphân's Appeal Brief (F54), paras 2145-2146.
- 420 Co-Prosecutors' Response (F54/1), para. 41.
- 421 Lead Co-Lawyers' Response (F54/2), paras 80, 86-87.
- 422 Lead Co-Lawyers' Response (F54/2), paras 86-87; T. 16 August 2021, F1/9.1, pp. 85-86.
- 423 Lead Co-Lawyers' Response (F54/2), paras 86-87.  
...
- 433 Case 002/01 Appeal Judgment (F36), para. 112.



- 434 See Disqualification Decision (E314/12/1), para. 36 (“A disagreement with the substance of a decision is a matter for appeal rather than an application for disqualification”); Decision on KHIEU Samphân’s Disqualification Application (11), para. 101.  
...
- 1836 KHIEU Samphân’s Appeal Brief (F54), paras 120-125.
- 1837 KHIEU Samphân’s Appeal Brief (F54), fn. 134.
- 1838 Trial Judgment (E465), para. 60.
- 1839 Trial Judgment (E465), paras 177-178.
- 1840 Trial Judgment (E465), paras 181-185, 816.
- 1841 Trial Judgment (E465), paras 189-190, 778.
- 1842 KHIEU Samphân’s Appeal Brief (F54), paras 121, 123-124.
- 1843 KHIEU Samphân’s Appeal Brief (F54), para. 122, referring to KHIEU Samphân’s Closing Brief (E457/6/4/1), paras 59-299.  
...
- 1867 See also Internal Rules, Rule 66 bis (5).
- 1868 Prosecutor v. Nahimana et al., Appeals Chamber (ICTR), ICTR-99-52-A, Judgement, 28 November 2007 (“Nahimana et al. Appeal Judgment (ICTR)”), para. 315. See also Prosecutor v. Prlić et al., Trial Chamber III (ICTY), IT-04-74-T, Decision on Slobodan Praljak’s Motion for Clarification of the Time Frame of the Alleged Joint Criminal Enterprise, 15 January 2009 (“Prlić et al. Trial Decision (ICTY)”), p. 9; Prosecutor v. Taylor, Trial Chamber II (SCSL), SCSL-03-01-T, Judgement, 18 May 2012 (“Taylor Trial Judgment (SCSL)”), paras 101, 110.
- 1869 Case 002, Order on Requests D153, D172, D173, D174, D178 & D284, 12 January 2010, D300, paras 9-10.
- 1870 Trial Judgment (E465), para. 60; Case 002/01 Appeal Judgment (F36), paras 227, 236; Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 88.
- 1871 Case 002 Additional Severance Decision (E301/9/1).
- 1872 Trial Judgment (E465), para. 60.
- 1873 Case 002/01 Appeal Judgment (F36), para. 35; Case 002/01 Trial Judgment (E313), fn. 1682; Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 296; Case 002 Decision on Provisional Detention (D427/5/10), para. 31.
- 1874 Ngirabatware Appeal Judgment (IRMCT), para. 249; Ngirabatware Decision on Motion to Dismiss (ICTR), para. 21; Rutaganda Appeal Judgment (ICTR), para. 30; Mrkšić et al. Appeal Judgment (ICTY), para. 138; Gacumbitsi Appeal Judgment (ICTR), para. 123; Taylor Decision on Motion Pleading of JCE (SCSL), para. 76.
- 1875 Case 002/01 Appeal Judgment (F36), para. 35; Case 002/01 Trial Judgment (E313), fn. 1682; Case 002 Decision on Provisional Detention (D427/5/10), para. 31.  
...
- 1896 KHIEU Samphân’s Appeal Brief (F54), paras 575-632.
- 1897 KHIEU Samphân’s Appeal Brief (F54), paras 633-636.
- 1898 KHIEU Samphân’s Appeal Brief (F54), paras 673-675, 759, 769-771, 821.
- 1899 KHIEU Samphân’s Appeal Brief (F54), paras 685, 761, 785, 823.
- 1900 KHIEU Samphân’s Appeal Brief (F54), paras 678-685 (Tram Kak Cooperatives), 758-762 (Trapeang Thma Dam Worksite), 772-786 (1st January Dam Worksite), 819-824 (Kampong Chhnang Airfield Construction Site), 863-879 (Phnom Kraol Security Centre).  
...
- 1931 Trial Judgment (E465), paras 634-635.
- 1932 See generally Roger S. Clark, “The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences”, in (2001) 12 *Crim. L. Forum*, 291, where the author, who participated in drafting the Rome Statute of the International Criminal Court, discusses trying to find common ground between different legal systems concerning the “Mental Element” or *mens rea* set out in Rome Statute, Art. 30.  
...
- 1947 KHIEU Samphân’s Appeal Brief (F54), para. 624.
- 1948 Trial Judgment (E465), para. 650.
- 1949 Case 002/01 Appeal Judgment (F36), para. 409.
- 1950 Trial Judgment (E465), para. 650.
- 1951 Trial Judgment (E465), fn. 2010. Contra KHIEU Samphân’s Appeal Brief (F54), para. 626.
- 1952 Trial Judgment (E465), paras 647-648. See also Trial Judgment (E465), paras 640-646.
- 1953 For example, the *Furundžija* Trial Chamber noted that “[i]t is apparent from our survey of national legislation that, *in spite of inevitable discrepancies*, most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.” *Furundžija* Trial Judgment (ICTY), para. 181 (emphasis added).  
...
- 1957 See KHIEU Samphân’s Appeal Brief (F54), paras 637-640.  
...
- 1994 KHIEU Samphân’s Appeal Brief (F54), paras 678-682.
- 1995 KHIEU Samphân’s Appeal Brief (F54), para. 678.
- 1996 KHIEU Samphân’s Appeal Brief (F54), paras 679-680.
- 1997 Trial Judgment (E465), para. 820.
- 1998 KHIEU Samphân’s Appeal Brief (F54), para. 682.
- 1999 KHIEU Samphân’s Appeal Brief (F54), paras 676-677.
- 2000 KHIEU Samphân’s Appeal Brief (F54), para. 683.
- 2001 KHIEU Samphân’s Appeal Brief (F54), para. 684.  
...
- 2028 Trial Judgment (E465), para. 1145 (emphasis added).
- 2029 Trial Judgment (E465), para. 1145.  
...
- 2119 KHIEU Samphân’s Appeal Brief (F54), para. 865.
- 2120 KHIEU Samphân’s Appeal Brief (F54), para. 866.
- 2121 KHIEU Samphân’s Appeal Brief (F54), para. 868.
- 2122 KHIEU Samphân’s Appeal Brief (F54), paras 870-875.
- 2123 KHIEU Samphân’s Appeal Brief (F54), para. 871.
- 2124 KHIEU Samphân’s Appeal Brief (F54), para. 872.  
...
- 2217 Trial Judgment (E465), paras 3311-3312.
- 2218 KHIEU Samphân’s Appeal Brief (F54), para. 911.  
...

- 2221 Case 002/01 Appeal Judgment (F36), paras 521, 525.
- 2222 Case 002/01 Appeal Judgment (F36), para. 551.
- 2223 Case 002/01 Appeal Judgment (F36), para. 551, referring to Prosecutor v. Lukić and Lukić, Appeals Chamber (ICTY), IT-98-32/1-A, Judgement, 4 December 2012 (“Lukić & Lukić Appeal Judgment (ICTY)”), para. 537.
- 2224 Trial Judgment (E465), para. 3312.
- 2225 See Prosecutor v. Stanišić & Župljanin, Appeals Chamber (ICTY), IT-08-91-A, Judgement, 30 June 2016 (“Stanišić & Župljanin Appeal Judgment (ICTY)”), para. 1022; Prosecutor v. Tolimir, Appeals Chamber (ICTY), IT-05-882-A, Judgement, 8 April 2015, para. 147; Prosecutor v. Mladić, Trial Chamber I (ICTY), IT-09-92-T, Judgment (Volume III of V), 22 November 2017, para. 3067.
- 2226 T. 14 September 2015, E1/346.1, pp. 33-38, 42-43.  
...
- 2360 KHIEU Samphân’s Appeal Brief (F54), para. 1020.
- 2361 KHIEU Samphân’s Appeal Brief (F54), para. 1021.
- 2362 KHIEU Samphân’s Appeal Brief (F54), paras 1023-1025.
- 2363 KHIEU Samphân’s Appeal Brief (F54), paras 1026-1027.  
...
- 2367 Trial Judgment (E465), para. 3500.
- 2368 KHIEU Samphân’s Appeal Brief (F54), para. 1023.
- 2369 KHIEU Samphân’s Appeal Brief (F54), para. 1024.
- 2370 Trial Judgment (E465), para. 3500.
- 2371 See supra Sections VII.B.2.c and VII.B.2.e.
- 2372 Trial Judgment (E465), fn. 11787 estimates 59 killings. Without those of UCH Sunlay’s (two) parents-in-law and those of PRAK Doeun’s five children, the figure is still 52 specific killings.
- 2373 Trial Judgment (E465), para. 3499, referring to paras 2926, 2959.
- 2374 Trial Judgment (E465), para. 3499, referring to paras 2571, 2621.
- 2375 Trial Judgment (E465), fn. 11787.
- 2376 Trial Judgment (E465), para. 3499.
- 2377 Case 002/01 Appeal Judgment (F36), para. 551, referring to Lukić & Lukić Appeal Judgment (ICTY), para. 537; Ndahimana v. Prosecutor, Appeals Chamber (ICTR), ICTR-01-68-A, Judgement, 16 December 2013, para. 231.  
...
- 2512 Trial Judgment (E465), para. 713.
- 2513 Trial Judgment (E465), para. 713.
- 2514 KHIEU Samphân’s Appeal Brief (F54), para. 642.
- 2515 KHIEU Samphân’s Appeal Brief (F54), paras 744, 813, 954.  
...
- 2528 United States of America et al. v. Goering et al., Judgment (IMT), 1 October 1946, in Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946 (1947), Vol. I (“IMT Judgment”), pp. 247-249 (emphasis added).
- 2529 KHIEU Samphân’s Appeal Brief (F54), paras 653-655.
- 2530 KHIEU Samphân’s Appeal Brief (F54), para. 654, fn. 1139, referring to District Court of Jerusalem Criminal Case No. 40/61, 36 ILR, 1968, para. 201.
- 2531 Draft Code of Crimes against Peace and Security of Mankind, 1996, p. 49: “The inhumane act of persecution may take many forms with its common characteristic being the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction as recognized in the Charter of the United Nations (Arts. 1 and 55) and the International Covenant on Civil and Political Rights (art. 2)”.
- 2532 KHIEU Samphân’s Appeal Brief (F54), paras 656-657.  
...
- 2542 See supra Section VII.F.1.
- 2543 Case 001 Appeal Judgment (F28), paras 228, 271.
- 2544 Case 002/01 Appeal Judgment (F36), para. 690.  
...
- 2550 KHIEU Samphân’s Appeal Brief (F54), paras 926-927, referring to Case 002/01 Appeal Judgment (F36), para. 701.
- 2551 KHIEU Samphân’s Appeal Brief (F54), para. 926.  
...
- 2560 See infra Section VIII.B.5.b.
- 2561 Trial Judgment (E465), para. 3322.  
...
- 2583 Trial Judgment (E465), para. 1179.
- 2584 Trial Judgment (E465), para. 1413.
- 2585 Trial Judgment (E465), para. 1692.
- 2586 Trial Judgment (E465), para. 1828.
- 2587 Trial Judgment (E465), para. 2604.
- 2588 Trial Judgment (E465), para. 2843.
- 2589 Trial Judgment (E465), para. 2993.
- 2590 Trial Judgment (E465), para. 3151.
- 2591 See Trial Judgment (E465), para. 3772.  
...
- 2626 Case 002/01 Appeal Judgment (F36), para. 669.
- 2627 Case 002/01 Appeal Judgment (F36), paras 670-677.
- 2628 Case 002/01 Appeal Judgment (F36), para. 678.
- 2629 Case 002/01 Appeal Judgment (F36), para. 678.  
...
- 2649 KHIEU Samphân’s Appeal Brief (F54), para. 727.
- 2650 Trial Judgment (E465), para. 1176.  
...
- 2698 Case 001 Appeal Judgment (F28), para. 257.
- 2699 Trial Judgment (E465), para. 1177.  
...
- 2731 KHIEU Samphân’s Appeal Brief (F54), paras 788-796.
- 2732 KHIEU Samphân’s Appeal Brief (F54), para. 797.
- 2733 KHIEU Samphân’s Appeal Brief (F54), para. 797.
- 2734 KHIEU Samphân’s Appeal Brief (F54), para. 797.
- 2735 Co-Prosecutors’ Response (F54/1), para. 819.
- 2736 Co-Prosecutors’ Response (F54/1), para. 820.
- 2737 Co-Prosecutors’ Response (F54/1), para. 821.
- 2738 Trial Judgment (E465), para. 1689.
- 2739 ICCPR, Arts 14, 26.

- 2740 Co-Prosecutors' Response (F54/1), para. 821. This argument was also supported by the Lead Co-Lawyers. See Lead Co-Lawyers' Response (F54/2), para. 447.
- 2741 Trial Judgment (E465), para. 1691 (emphasis added).  
...
- 2887 KHIEU Samphân's Appeal Brief (F54), paras 813, 954-956.
- 2888 KHIEU Samphân's Appeal Brief (F54), paras 939-942, 954.  
...
- 2892 Trial Judgment (E465), para. 3204.
- 2893 See, e.g., T. 27 May 2015 (HUN Sethany), E1/306.1, p. 53.
- 2894 See, e.g., Trial Judgment (E465), paras 1656, 3236, 3239, 3242, 3247 (and testimony cited therein).
- 2895 See, e.g., Trial Judgment (E465), paras 1656, 3246.  
...
- 2905 KHIEU Samphân's Appeal Brief (F54), para. 958, quoting Trial Judgment (E465), para. 3329.
- 2906 KHIEU Samphân's Appeal Brief (F54), para. 959.  
...
- 2915 Trial Judgment (E465), para. 3228, referring to paras 3251-3268.
- 2916 Trial Judgment (E465), para. 3228
- 2917 The Trial Chamber received evidence that refusing to eat pork had consequences. See T. 17 September 2015 (HIM Man), E1/349.1, pp. 40-41; T. 8 September 2015 (HIM Man), E1/350.1, p. 15; T. 25 May 2015 (MEAS Laihour), E1/304.1, p. 110.
- 2918 See Trial Judgment (E465), para. 3250.
- 2919 Trial Judgment (E465), paras 3228, 3230.  
...
- 2926 Trial Judgment (E465), para. 716 ("Persecutory acts may include the other underlying offences for crimes against humanity (such as murder, extermination, enslavement, imprisonment and torture), as well as other acts which rise to the same level of gravity or seriousness, including acts which are not necessarily crimes in and of themselves. In determining whether this threshold is met, acts should not be considered in isolation but rather should be examined in their context and with consideration of their cumulative effect. Although persecution often consists of a series of acts, a single act or omission may be grave or serious enough to amount to persecution where it results in the gross or blatant denial of a fundamental human right under treaty or customary international law.") (internal citations omitted).
- 2927 Trial Judgment (E465), para. 3242.  
...
- 2972 See *supra* Section VII.F.1.b.
- 2973 KHIEU Samphân's Appeal Brief (F54), para. 745.
- 2974 KHIEU Samphân's Appeal Brief (F54), para. 744.
- 2975 KHIEU Samphân's Appeal Brief (F54), para. 745.  
...
- 2986 Trial Judgment (E465), para. 3390 (the CPK intended "to establish an atheistic and homogenous society without class divisions").
- 2987 T. 16 February 2015 (EM Phoeung), E1/263.1, p. 24.
- 2988 Revolutionary Flag, Issue 6, June 1977, E3/135, ERN (EN) 00142907, 00446860.
- 2989 Notebook, 24 March 1973, E3/8380, ERN (EN) 00940617-00940619; DK Notebook, undated, E3/8381, ERN (EN) 01369266.
- 2990 Notebook, undated, E3/1233, ERN (EN) 00711617; Notebook, 24 March 1973, E3/8380, ERN (EN) 00940618.
- 2991 DK Notebook, undated, E3/8381, ERN (EN) 01369261, 01369266 (echoing the undated Notebook, E3/1233, ERN (EN) 00711616-00711617, listing monks as a "special class").
- 2992 Policy Document, No. 6, 22 September 1975, E3/99, ERN (EN) 00244275.
- 2993 Trial Judgment (E465), para. 1108.
- 2994 Trial Judgment (E465), para. 1092, referring to T. 29 March 2012 (KAING Guek Eav), E1/56.1, pp. 8-9 (stating that KAING Guek Eav *alias* Duch attended this meeting and described POL Pot and NUON Chea alongside each other on the stage).
- 2995 Buddhist monks had an important place in Cambodian society at the time. Trial Judgment (E465), paras 260-261.  
...
- 3013 Trial Judgment (E465), para. 4005. It did not find racial persecution to have been established at Kraing Ta Chan Security Centre. Trial Judgment (E465), para. 3509.
- 3014 Trial Judgment (E465), para. 4005.  
...
- 3123 KHIEU Samphân's Appeal Brief (F54), paras 1037-1039.  
...
- 3126 KHIEU Samphân's Appeal Brief (F54), paras 1037-1039.
- 3127 Trial Judgment (E465), para. 3416.  
...
- 3142 Trial Judgment (E465), para. 4326.  
...
- 3155 KHIEU Samphân's Appeal Brief (F54), paras 659-660.
- 3156 KHIEU Samphân's Appeal Brief (F54), para. 665.  
...
- 3161 Case 002/01 Appeal Judgment (F36), para. 578.
- 3162 Case 002/01 Appeal Judgment (F36), para. 584.
- 3163 Case 002/01 Appeal Judgment (F36), para. 578.
- 3164 Case 002/01 Appeal Judgment (F36), paras 579-581.
- 3165 Case 002/01 Appeal Judgment (F36), para. 584.  
...
- 3169 KHIEU Samphân's Appeal Brief (F54), para. 667.
- 3170 KHIEU Samphân's Appeal Brief (F54), paras 669, 671.
- 3171 KHIEU Samphân's Appeal Brief (F54), para. 668.
- 3172 KHIEU Samphân's Appeal Brief (F54), para. 669.
- 3173 KHIEU Samphân's Appeal Brief (F54), para. 670; T. 17 August 2021, F1/10.1, pp. 36-38.  
...
- 3180 Case 002/01 Appeal Judgment (F36), para. 584.
- 3181 Case 002/01 Appeal Judgment (F36), para. 584.
- 3182 Case 002/01 Appeal Judgment (F36), para. 584.
- 3183 Case 002/01 Appeal Judgment (F36), para. 584.
- 3184 Case 002/01 Appeal Judgment (F36), para. 586.
- 3185 Kupreškić et al. Trial Judgment (ICTY), para. 566.

- 3186 Prosecutor v. Katanga and Ngudjolo Chui, Pre-Trial Chamber I (ICC), ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008 (“Katanga & Ngudjolo Chui Confirmation of Charges Decision (ICC)”), para. 448: “In the view of the Chamber, in accordance with article 7(I)(k) of the Statute and the principle of *nullum crimen sine lege* pursuant to article 22 of the Statute, inhumane acts are to be considered as serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7(1) of the Statute.”
- 3187 Case 004, Consolidated Decision on the Requests for Investigative Action Concerning the Crime of Forced Pregnancy and Forced Impregnation, 13 June 2016, D301/5 (“Case 004 Consolidated Decision on the Requests (D301/5)”), para. 64.
- 3188 Case 004 Consolidated Decision on the Requests (D301/5), paras 70-74.
- 3189 Case 004 Consolidated Decision on the Requests (D301/5), para. 64, referring to Terhi Jyrkkiö, “Other Inhumane acts as Crimes Against Humanity”, in (2011) 1 Helsinki Law Rev. 204.  
...
- 3285 See KHIEU Samphân’s Appeal Brief (F54), paras 1098-1155, 1281-1301.  
...
- 3313 UN Secretary-General report on forced marriage, in which the vast majority of identified victims are female, see United Nations Security Council, “Conflict-Related Sexual Violence: Report of the Secretary-General”, UN Doc. S/2021/312, 30 March 2021, in which the vast majority of identified victims are female.  
...
- 3331 Case 001 Appeal Judgment (F28), para. 180.
- 3332 Article 5 of the UDHR provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” and Article 3 common to Geneva Conventions I to IV prohibits, *inter alia*, cruel treatment and outrages upon personal dignity.  
...
- 3369 Trial Judgment (E465), para. 728.
- 3370 Trial Judgment (E465), para. 729, referring, *inter alia*, to Case 002 Closing Order (D427), paras 1430-1433.
- 3371 Trial Judgment (E465), para. 729, referring to Case 002 Closing Order (D427), para. 1431.
- 3372 Trial Judgment (E465), para. 731, referring to Case 001 Trial Judgment (E188), para. 362. The Trial Chamber’s definition of rape in Case 001 was endorsed by the Supreme Court Chamber. See Case 001 Appeal Judgment (F28), para. 208 & fn. 428.
- 3373 Trial Judgment (E465), para. 731.
- 3374 Trial Judgment (E465), fn. 2237, where the Trial Chamber stated that “[t]he Closing Order notes that: ‘[t]he facts characterised as crimes against humanity in the form of rape can additionally be categorised as crimes against humanity of other inhumane acts in the form of sexual violence.’ See Closing Order (D427), para. 1433.”
- 3375 KHIEU Samphân’s Appeal Brief (F54), paras 1291-1293.
- 3376 KHIEU Samphân’s Appeal Brief (F54), paras 1294-1296, 1316.
- 3377 KHIEU Samphân’s Appeal Brief (F54), paras 1297, 1316.
- 3378 KHIEU Samphân’s Appeal Brief (F54), paras 1298-1299.
- 3379 KHIEU Samphân’s Appeal Brief (F54), para. 1300.  
...
- 3384 Trial Judgment (E465), paras 725, 741.
- 3385 Trial Judgment (E465), para. 727.
- 3386 Trial Judgment (E465), para. 728.
- 3387 Trial Judgment (E465), para. 728.
- 3388 See Case 002/01 Appeal Judgment (F36), para. 589.
- 3389 The Supreme Court Chamber considers that it is, in any event, hard to imagine such arguments being successful as a challenge even if conduct had in fact been charged as the independent crime of rape. There was a crime of rape in Cambodia in 1975 which had no marital exemption. KHIEU Samphân fails to identify an exception for rape in marriage under Cambodian law. He relies instead on amorphous cultural assertions, such as the argument that women were oppressed in marriage according to the textual doctrine of “Chbab srey,” and the claim that amorous feelings were not considered as a prerequisite in traditional marriage. See KHIEU Samphân’s Appeal Brief (F54), paras 1317-1318. As to whether other countries had a marital exemption for rape in 1975- 1979, KHIEU Samphân fails to explain why this is of relevance for Cambodia in 1975-1979.
- 3390 Case 002 Closing Order (D427), para. 1430.
- 3391 Case 002 Closing Order (D427), para. 1431.
- 3392 Case 002 Closing Order (D427), para. 1432.
- 3393 Case 002 Closing Order (D427), para. 1431.
- 3394 Case 002 Closing Order (D427), para. 1432.
- 3395 Case 002, Decision IENG Thirith’s and NUON Chea’s Appeals Against the Closing Order, 13 January 2011, D427/3/12 (“Case 002 Decision on Appeals Against Closing Order (D427/3/12)”), para. 11(2); Case 002 Decision on Closing Order Appeals (D427/2/15 & D427/3/15), paras 149-166.
- 3396 Case 002 Decision on Closing Order Appeals (D427/2/15 & D427/3/15), paras 150-154.
- 3397 Case 002 Decision on Closing Order Appeals (D427/2/15 & D427/3/15), para. 154; Case 002 Decision on Appeals Against Closing Order (D427/3/12), para. 11(2).
- 3398 Trial Judgment (E465), fn. 7.
- 3399 Case 002 Closing Order (D427), para. 1432.
- 3400 Case 002 Closing Order (D427), para. 858.  
...
- 3779 Trial Judgment (E465), para. 3696.
- 3780 Trial Judgment (E465), para. 3696.
- 3781 Trial Judgment (E465), para. 3696.
- 3782 Trial Judgment (E465), para. 3658.
- 3783 Trial Judgment (E465), para. 3647.
- 3784 KHIEU Samphân’s Appeal Brief (F54), paras 1362-1363, 1365, 1370.
- 3785 KHIEU Samphân’s Appeal Brief (F54), paras 1345-1348.
- 3786 KHIEU Samphân’s Appeal Brief (F54), paras 1368-1369, fn. 2591.



- 3787 KHIEU Samphân's Appeal Brief (F54), paras 1372, 1375.
- 3788 KHIEU Samphân's Appeal Brief (F54), para. 1374.
- 3789 Co-Prosecutors' Response (F54/1), para. 738.  
...
- 4064 KHIEU Samphân's Appeal Brief (F54), paras 1153-1154,
- 4065 KHIEU Samphân's Appeal Brief (F54), para. 1160.
- 4066 KHIEU Samphân's Appeal Brief (F54), para. 1188.  
...
- 4363 Trial Judgment (E465), para. 3698.
- 4364 Trial Judgment (E465), para. 3698.
- 4365 Trial Judgment (E465), para. 3701.
- 4366 Trial Judgment (E465), para. 3701.
- 4367 Co-Prosecutors' Appeal (F50), paras 25-39.
- 4368 Co-Prosecutors' Appeal (F50), paras 18-24.
- 4369 Co-Prosecutors' Appeal Brief (F50), para. 2.
- 4370 Co-Prosecutors' Appeal Brief (F50), paras 3, 40.  
...
- 4410 Trial Judgment (E465), para. 3701.
- 4411 Trial Judgment (E465), para. 3701.
- 4412 See Trial Judgment (E465), para. 724.
- 4413 Trial Judgment (E465), para. 3697.
- 4414 Trial Judgment (E465), para. 3696.
- 4415 Trial Judgment (E465), para. 3696.
- 4416 Trial Judgment (E465), para. 3696.
- 4417 Trial Judgment (E465), paras 3646, 3650-3653, 3658, 3697.
- 4418 Trial Judgment (E465), para. 3697.  
...
- 4476 Trial Judgment (E465), para. 3692.
- 4477 Trial Judgment (E465), para. 3692.
- 4478 Trial Judgment (E465), paras 4326-4327.
- 4479 Trial Judgment (E465), paras 3514-3519.
- 4480 KHIEU Samphân's Appeal Brief (F54), paras 1052-1097.  
...
- 4561 KHIEU Samphân's Appeal Brief (F54), para. 1063.
- 4562 Schabas, *Genocide in International Law*, p. 277.
- 4563 Trial Judgment (E465), para. 3518.
- 4564 Trial Judgment (E465), para. 3519.  
...
- 4590 Trial Judgment (E465), para. 597 (internal citations omitted).
- 4591 Trial Judgment (E465), para. 598 (internal citations omitted).
- 4592 Trial Judgment (E465), para. 599.
- 4593 KHIEU Samphân's Appeal Brief (F54), para. 1694.
- 4594 Co-Prosecutors' Response (F54/1), para. 923.
- 4595 Trial Judgment (E465), para. 624. See generally Trial Judgment (E465), Section 8.3.2: Roles and Functions—KHIEU Samphan: Roles During the DK Period: President of the State Presidium.
- 4596 KHIEU Samphan Written Record of Adversarial Hearing, 19 November 2007, E3/557, ERN (EN) 00153270, p. 5.
- 4597 See, e.g., Trial Judgment (E465), paras 4257, 4265.
- 4598 See Trial Judgment (E465), para. 4389.  
...
- 4608 See *infra* Section VIII.B.2. See also Case 002/01 Appeal Judgment (F36), paras 811-817, 978-985.
- 4609 Trial Judgment (E465), paras 3399-3406, 4260, 4269, referring, *inter alia*, to Phnom Penh Rally Marks 17th April Anniversary (in SWB/FE/5791/B collection), 16 April 1978, E3/562, ERN (EN) S00010563; KHIEU Samphan Speech at Anniversary Meeting, 17 April 1978, E3/169, ERN (EN) 00280396-00280398; Sihanouk Attends, Khieu Samphan Addresses KCP Banquet (in FBIS collection), 30 September 1978, E3/294, ERN (EN) 00170170.
- 4610 Trial Judgment (E465), paras 4265-4267, referring to Phnom Penh Reportage on Third National Congress: Khieu Samphan Report (in FBIS collection), 6 January 1976, E3/273, ERN (EN) 00167810-00167816, 00167817; Deputy Premier Khieu Samphan Grants Interview to AKI (in FBIS collection), 13 August 1975, E3/119, ERN (EN) 00167386; Welcome Rally Marks Sihanouk's Return: Khieu Samphan Speech (in FBIS collection), 12 September 1975, E3/271, ERN (EN) 00167454; U.S. State Department Telegram, Subject: Khieu Samphan Visit to PRC, August 1975, E3/619, ERN (EN) 00413733; Khieu Samphan's Speech at Anniversary Meeting (in SWB/FE/5490/C collection), 15 April 1977, E3/200, ERN (EN) S00004164-S00004170.]
- 4611 Trial Judgment (E465), para. 4268, referring, by way of cross-references to other parts of the judgment, to Phnom Penh Reportage on Third National Congress: KHIEU Samphan Report (in FBIS collection), 5 January 1976, E3/273, ERN (EN) 00167816; Khieu Samphan Interviewed on Executions, National Problems (in FBIS collection), 26 September 1976, E3/608, ERN (EN) 00419843; Phnom Penh Rally Marks 17th April Anniversary (in SWB/FE/5791/B/1 collection), 16 April 1978, E3/562, ERN (EN) S00010565.
- 4612 Trial Judgment (E465), paras 4248-4268, referring, by way of cross references to other parts of the judgment, to KHIEU Samphan's Speech at Anniversary Meeting (in SWB/FE/5908/A3 collection), 15 April 1977, E3/201, ERN (EN) 00419514.  
...
- 4650 KHIEU Samphân's Appeal Brief (F54), para. 1705.
- 4651 KHIEU Samphân's Appeal Brief (F54), paras 1706-1729.
- 4652 Co-Prosecutors' Response (F54/1), paras 890-897.  
...
- 4701 Trial Judgment (E465), Section 5.1.5: Administrative Structures: Structure of the CPK: Office 870' and Section 5.1.8: 'Administrative Structures: Structure of the CPK: Angkar'.
- 4702 Trial Judgment (E465), paras 355, 357.
- 4703 See, e.g., Decision of the Central Committee Regarding a Number of Matters, 30 March 1976, E3/12, ERN (EN) 00182809-00182810; Minutes of Meeting on Base Work, 8 March 1976, E3/232, ERN (EN) 00182633- 00182634.
- 4704 See Trial Judgment (E465), para. 364; Trial Judgment (E465), Section 8.3.4.1: 'Roles and Functions—KHIEU Samphân: Roles During the DK Period: Residual Functions: Membership of Office 870'. KHIEU Samphân's challenges to the Trial Chamber's findings of his role in Office 870 are further addressed below at See *infra* Section VIII.A.4.b.
- 4705 See Trial Judgment (E465), Section 6.2.2: 'Communication Structures: Lines of Communication: Between the Party



- Centre and the Zones or Autonomous Sectors', para. 492. See also Trial Judgment (E465), para. 3913 (fn. 13053).
- 4706 See *infra* Section VIII.A.4.c.i.  
...
- 4816 Trial Judgment (E465), para. 604.
- 4817 See Trial Judgment (E465), paras 4257, 4258, 4277.
- 4818 See Trial Judgment (E465), para. 602.
- 4819 Trial Judgment (E465), para. 3740.
- 4820 Trial Judgment (E465), para. 604. See also Trial Judgment (E465), para. 624.
- 4821 Trial Judgment (E465), para. 4258.
- 4822 Trial Judgment (E465), paras 604, 624, 4257.
- 4823 Trial Judgment (E465), para. 346. See, e.g., KHIEU Samphân's Appeal Brief (F54), para. 1730.
- 4824 See Trial Judgment (E465), paras 604, 624.
- 4825 See *infra* Section VIII.B.7.
- 4826 KHIEU Samphân's contribution to the common purpose via attendance at Standing Committee meetings is considered in the following section.
- 4827 It is for this reason that the Supreme Court Chamber is also unpersuaded by KHIEU Samphân's submissions that his knowledge of crimes committed at the Kampong Chhnang Airfield could not be established by his attendance at relevant Standing Committee meetings. See KHIEU Samphân's Appeal Brief (F54), paras 1740- 1743; Co-Prosecutors' Response (F54/1), para. 900.  
...
- 5028 Trial Judgment (E465), paras 3733-3743, 4068, 4069, 4074.
- 5029 Trial Judgment (E465), paras 3928, 3987, 3998, 4012, 4022, 4061, 4067, 4068.
- 5030 Trial Judgment (E465), paras 3866-3929.
- 5031 Trial Judgment (E465), paras 3930-3987.
- 5032 Trial Judgment (E465), paras 3988-4061.
- 5033 Trial Judgment (E465), paras 4062-4067.
- 5034 Trial Judgment (E465), paras 4070, 4073, 4074, 4257-4278, 4306.
- 5035 Trial Judgment (E465), para. 4306.
- 5036 Trial Judgment (E465), paras 4279-4307. This finding excludes KHIEU Samphân's alleged genocidal intent regarding the Cham, which the Trial Chamber was unable to infer. See Trial Judgment (E465), paras 4290, 4308.
- 5037 Trial Judgment (E465), paras 4306, 4307.
- 5038 KHIEU Samphân's Appeal Brief (F54), paras 1399-1600.
- 5039 KHIEU Samphân's Appeal Brief (F54), paras 1600-1603, 1938-2118. See also T. 18 August 2021, F1/11.1, pp. 8-37; T. 19 August 2021, F1/12.1, pp. 63-69.
- 5040 KHIEU Samphân's Appeal Brief (F54), paras 2031-2113.  
...
- 5081 Case 002/01 Appeal Judgment (F36), paras 789, 814.
- 5082 Trial Judgment (E465), para. 3743.  
...
- 5170 KHIEU Samphân's Appeal Brief (F54), paras 1551-1560.
- 5171 KHIEU Samphân's Appeal Brief (F54), paras 1561-1577.
- 5172 KHIEU Samphân's Appeal Brief (F54), paras 1578-1585.
- 5173 KHIEU Samphân's Appeal Brief (F54), paras 1586-1591.  
...
- 5180 Trial Judgment (E465), para. 3379, referring to T. 7 December 2015 (CHOEUNG Yaing Chaet), E1/363.1, pp. 12, 13, 80; T. 1 March 2016 (KHOUY Muoy), E1/394.1, p. 52; T. 11 December 2015 (UNG Sam Ean), E1/366.1, p. 40; T. 2 December 2015 (SAO Sak), E1/362.1, p. 92; DK Telegram, 4 August 1978, E3/1094, p. 7; T. 16 December 2015 (PAK Sok), E1/369.1, p. 49; S-21 List of Prisoners, undated, E3/8463, pp. 43, 52, 55, 58, 59, 61, 62, 63, 70, 72-74, 94, 314.
- 5181 Trial Judgment (E465), para. 3381.
- 5182 Trial Judgment (E465), para. 3381, referring to DK Government Statement, 2 January 1979, E3/8404, pp. 10- 11; T. 28 April 2016 (PRAK Khorn), E1/424.1, pp. 6-7; T. 3 February 2016 (MEAS Voeun), E1/387.1, p. 24; T. 16 December 2015 (PAK Sok), E1/369.1, p. 33; Written Record of Interview of PAK Sok, 18 October 2013, E3/9674, p. 10; Revolutionary Flag, July 1978, E3/746, p. 1.
- 5183 Trial Judgment (E465), paras 3379, 3381.  
...
- 5235 KHIEU Samphân's Appeal Brief (F54), para. 1574.
- 5236 Trial Judgment (E465), para. 3228.
- 5237 See also *supra* Section VII.F.2.a and Section VII.F.3.a.  
...
- 5267 KHIEU Samphân's Appeal Brief (F54), paras 2001-2003, 2008-2011, 2013.
- 5268 KHIEU Samphân's Appeal Brief (F54), paras 2002, 2003, 2009-2011, 2013, 2015, 2017.
- 5269 KHIEU Samphân's Appeal Brief (F54), para. 2011.
- 5270 KHIEU Samphân's Appeal Brief (F54), para. 2008. See also KHIEU Samphân's Appeal Brief (F54), para. 2017; T. 18 August 2021, F1/11.1, p. 17.
- 5271 KHIEU Samphân's Appeal Brief (F54), paras 2011-2030.  
...
- 5275 Case 002/01 Appeal Judgment (F36), para. 980.
- 5276 Case 002/01 Appeal Judgment (F36), paras 981-983.
- 5277 Case 002/01 Appeal Judgment (F36), para. 984.
- 5278 KHIEU Samphân's Appeal Brief (F54), para. 2008.
- 5279 Trial Judgment (E465), para. 4257.
- 5280 Trial Judgment (E465), paras 4257-4260, 4262, 4277.
- 5281 Trial Judgment (E465), paras 4257, 4276.
- 5282 Trial Judgment (E465), paras 4258, 4272, 4277.
- 5283 Trial Judgment (E465), para. 4262.
- 5284 Trial Judgment (E465), paras 4265-4267, 4273, 4276.
- 5285 Trial Judgment (E465), paras 4268, 4273.
- 5286 Trial Judgment (E465), paras 4269, 4271.
- 5287 See *supra* Section VIII.A.
- 5288 Trial Judgment (E465), para. 4257.
- 5289 Trial Judgment (E465), paras 4257-4260, 4262, 4277.
- 5290 Trial Judgment (E465), paras 4257, 4276.  
...
- 5323 KHIEU Samphân's Appeal Brief (F54), paras 2031, 2041-2043.

- 5324 KHIEU Samphan's Appeal Brief (F54), para. 2032.
- 5325 KHIEU Samphan's Appeal Brief (F54), paras 2033-2037. See also T. 18 August 2021, F1/11.1, p. 16.
- 5326 KHIEU Samphan's Appeal Brief (F54), paras 2035, 2036.
- 5327 KHIEU Samphan's Appeal Brief (F54), para. 2038.
- 5328 KHIEU Samphan's Appeal Brief (F54), paras 1816-1848, 2039-2052.
- 5329 KHIEU Samphan's Appeal Brief (F54), paras 1849-1878, 2053-2061.
- 5330 KHIEU Samphan's Appeal Brief (F54), paras 1879-1927, 2062-2113.
- 5331 KHIEU Samphan's Appeal Brief (F54), paras 1928-1931, 2114-2118.
- 5332 KHIEU Samphan's Appeal Brief (F54), paras 1804-1807, 1932-1937.
- ...
- 5351 *Kayishema and Ruzindana* Appeal Judgment (ICTR), paras 159, 198.
- 5352 *Prosecutor v. Karemera & Ngirumpatse*, Appeals Chamber (ICTR), ICTR-98-44-A, Judgment, 29 September 2014 ("Karemera & Ngirumpatse Appeal Judgment (ICTR)"), para. 632.
- 5353 Trial Judgment (E465), para. 4281.
- 5354 Trial Judgment (E465), para. 4284.
- 5355 Trial Judgment (E465), para. 4285.
- 5356 Trial Judgment (E465), para. 4285.
- 5357 Trial Judgment (E465), para. 4292.
- 5358 Trial Judgment (E465), para. 4293.
- 5359 Trial Judgment (E465), para. 4297.
- 5360 Trial Judgment (E465), para. 4300. See also Trial Judgment (E465), para. 4302.
- 5361 Trial Judgment (E465), para. 4304.
- ...
- 5391 Trial Judgment (E465), para. 4281, referring to para. 4210.
- 5392 Trial Judgment (E465), para. 4281, referring to paras 4215, 4231-4234.
- 5393 Trial Judgment (E465), para. 4284, referring to paras 4222, 4225-4229, 4234, 4258, 4272.
- 5394 Trial Judgment (E465), para. 4285, referring to paras 4231-4234.
- 5395 Trial Judgment (E465), para. 4236.
- 5396 Trial Judgment (E465), paras 4237-4239.
- 5397 Trial Judgment (E465), paras 4240-4243.
- 5398 Trial Judgment (E465), paras 4244-4246, referring to paras 4299-4302.
- 5399 Trial Judgment (E465), paras 4247-4249.
- 5400 Trial Judgment (E465), paras 4208, 4213-4214, 4216, 4281.
- ...
- 5421 Trial Judgment (E465), para. 1261.
- ...
- 5578 *Krnjelac* Appeal Judgment (ICTY), para. 6; *Prosecutor v. Akayesu*, Appeals Chamber (ICTR), ICTR-96-4-A, Judgment, 1 June 2001 ("*Akayesu* Appeal Judgment (ICTR)"), paras 17-19.
- 5579 Case 001 Appeal Judgment (F28), para. 15. See also Case 002/01 Appeal Judgment (F36), para. 1138.
- 5580 See *Akayesu* Appeal Judgment (ICTR), para. 23. See also Case 002/01 Appeal Judgment (F36), para. 1139.
- 5581 *Prosecutor v. Lubanga*, Pre-Trial Chamber I (ICC), ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, para. 352. See also *Bemba* Decision Pursuant to Article 61(7)(a) and (b) (ICC), para. 363.
- 5582 See Case 002/01 Appeal Judgment (F36), paras 390-391, where the Supreme Court Chamber quoted and adopted the definition used by the *Stakić* Trial Chamber:  
The technical definition of *dolus eventualis* is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he "reconciles himself" or "makes peace" with the likelihood of death. Thus, if the killing is committed with "manifest indifference to the value of human life", even conduct of minimal risk can qualify as intentional homicide.
- 5583 KHIEU Samphan's Closing Brief (E457/6/4/1), paras 452, 459-462, 470, 498.
- 5584 Trial Judgment (E465), para. 3715.
- 5585 Trial Judgment (E465), para. 4311:  
Having considered all of the evidence and in light of KHIEU Samphan's role in the joint criminal enterprise, the Chamber finds that commission through a joint criminal enterprise most accurately and appropriately reflects KHIEU Samphan's responsibility for the crimes that fall within the common purpose. For these crimes, the Chamber will therefore not analyse KHIEU Samphan's responsibility under the other, additionally charged, modes of liability. Regarding the crime against humanity of murder committed with *dolus eventualis* as established at the Tram Kak Cooperatives, 1st January Dam Worksite, Trapeang Thma Dam Worksite, Kampong Chhnang Airfield Construction Site, S-21 Security Centre, Kraing Ta Chan Security Centre and Phnom Kraol Security Centre, the Chamber recalls that it does not fall within the common purpose. The Chamber will consider KHIEU Samphan's responsibility for these crimes under the mode of aiding and abetting, as the Chamber finds that this most accurately reflects KHIEU Samphan's role vis-à-vis these murders.
- 5586 Case 002/01 Appeal Judgment (F36), para. 775.
- 5587 Case 002/01 Appeal Judgment (F36), para. 807.
- 5588 Case 002/01 Appeal Judgment (F36), para. 807.
- 5589 Case 002/01 Appeal Judgment (F36), para. 807.
- 5590 Case 002/01 Appeal Judgment (F36), para. 808.
- 5591 Case 002/01 Appeal Judgment (F36), para. 808.
- 5592 Case 002/01 Appeal Judgment (F36), para. 1054 (emphasis added).
- 5593 Case 002/01 Appeal Judgment (F36), paras 561-562, 868, 1088-1089.
- 5594 Trial Judgment (E465), paras 3714-3715.
- 5595 *Tadić* Appeal Judgment (ICTY), para. 228 (emphasis added).

- 5596 *Tadić* Appeal Judgment (ICTY), para. 228 (emphasis added).
- 5597 *Tadić* Appeal Judgment (ICTY), paras 175, 178.
- 5598 *Tadić* Appeal Judgment (ICTY), para. 179.
- 5599 *Tadić* Trial Judgment (ICTY), para. 374.
- 5600 *Tadić* Appeal Judgment (ICTY), para. 231.
- 5601 Case 002/01 Appeal Judgment (F36), para. 1053: “In the view of the Supreme Court Chamber, for an accused to be guilty of a crime based on liability under the notion of JCE, his or her *mens rea* must cover, both the ingredients of the crime and those of the mode of liability.”
- 5602 *Krstić* Trial Judgment (ICTY), para. 613.
- 5603 *Prosecutor v. Brđanin & Talić*, Trial Chamber II (ICTY), IT-99-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 31 (emphasis added). Later jurisprudence has clarified that the physical perpetrator of the crime need not be a member of the JCE. “[W]hat matters in a first category JCE is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, but whether the crime in question forms part of the common purpose.” *Brđanin* Appeal Judgment (ICTY), para. 410.
- 5604 See *Karemera & Ngirumpatse* Appeal Judgment (ICTR), para. 564 (“The Appeals Chamber finds no merit in Karemera’s contention that the Trial Chamber did not discuss whether it was foreseeable to him that the traditional weapons were purchased through the Fund with the purpose of destroying the Tutsi population. The question of ‘foreseeability’ relates to the extended form of joint criminal enterprise, not the basic form on the basis of which Karemera was convicted. Karemera’s argument is therefore dismissed”); *Šainović et al.* Appeal Judgment (ICTY), para. 1014 (“The Appeals Chamber is concerned that, in relying on Šainović’s knowledge of events which occurred in 1998, the Trial Chamber used language suggesting that it might have erred in law in relation to the *mens rea* standard for JCE I. In particular, the Trial Chamber’s reference to Šainović’s ability “to predict” the situation in 1999 resembles the foreseeability standard embedded in the *mens rea* for JCE III. Pursuant to JCE I, the accused must share the intent for the commission of the crimes alleged in the Indictment and not merely foresee their occurrence.”); *Prosecutor v. Stanišić and Simutović*, Trial Chamber I (ICTY), IT-03-69-T, Judgment (Volume II of II), 30 May 2013, fn. 2193 (“It follows [...] that the first form of the JCE requires intent in the sense of *dolus directus*, and that recklessness or *dolus eventualis* does not suffice.”)
- 5605 *Tadić* Appeal Judgment (ICTY), paras 196, 220.
- 5606 Case 002/01 Appeal Judgment (F36), para. 409. See also *Stakić* Trial Judgment (ICTY), para. 587, explaining that “German law takes *dolus eventualis* as sufficient to constitute intentional killing” and finding that *dolus eventualis* satisfies the *mens rea* requirement for murder as a violation of the laws or customs of war. See also Johan D. Van der Vyver, “The International Criminal Court and the Concept of *Mens Rea*”, (2004) 12(1) *U Miami Int’l & Comp. L. Rev.* 57, pp. 61-63: The notion of fault is comprised of either intent (*dolus*) or negligence (*culpa*). A wrongful act is committed intentionally if the perpetrator contemplated the illegality and/or harmful consequences of the act. Negligence denotes the mental disposition of a person who commits a wrongful act, and although the person who committed the act did not intend to act illegally or to cause the harmful consequences of the act, in doing so he or she deviated from conduct expected of a reasonable person within the same circumstances. While the person who acts intentionally foresees the illegality and harmful consequences of his or her act, the person who acts negligently does not appreciate the illegality or the harmful consequences of his or her action, while a reasonable person would in the prevailing circumstances have foreseen and avoided acting illegally or bringing about the harmful consequences of the act. [...] Intent can take on one of three forms, to be distinguished in view of the presence or absence of a desire to bring about the harmful consequences that emanated from the act or omission [then listing *dolus directus*, *dolus indirectus*, and *dolus eventualis* as those three forms].
- 5607 *Tadić* Appeal Judgment (ICTY), para. 192.
- 5608 See Cóman Kenny, “Jurisprudence Continues to Evolve: The ECCC’s Revision of Common Purpose Liability”, in (2018) 16 *J. Int’l Crim. Just.* 623, p. 624.
- 5609 As some commentators seem to believe. See Elinor Fry and Elies van Sliedregt, “Targeted Groups, Rape and *Dolus Eventualis*”, in (2020) 18 *J. Int’l Crim. Just.* 701, p. 719.
- 5610 Case 002/01 Appeal Judgment (F36), para. 1053.
- 5611 Case 002/01 Appeal Judgment (F36), para. 809.
- 5612 Case 002/01 Appeal Judgment (F36), para. 808.
- 5613 Trial Judgment (E465), para. 4311.
- 5614 See Case 001 Trial Judgment (E188), para. 493, where the Trial Chamber, interpreting Rule 98(2), stated:  
The Parties do not dispute that Internal Rule 98 (2) permits changes to the legal characterisation of both the crimes and the forms of responsibility included in the Amended Closing Order. While comparable provisions in the Cambodian legal system do not specifically address changes to a form of responsibility, the Chamber is satisfied that this type of change is permissible under Internal Rule 98(2).  
Rule 98(2) is analogous to Rule 110(2), but applies to the Trial Chamber rather than the Supreme Court Chamber.
- 5615 Case 001 Trial Judgment (E188), paras 493-496.
- 5616 See Case 001 Trial Judgment (E188), paras 497-500, where the Trial Chamber examined Article 35 (new) of the ECCC Law, ECtHR jurisprudence, Regulation 55 of the ICC, and ICC jurisprudence and determined that an accused’s fair trial rights are not violated by recharacterisation where the accused is aware of the possibility of the legal recharacterisation and is provided with sufficient opportunity to defend against it.
- 5617 Case 002/01 Appeal Judgment (F36), para. 409.
- 5618 See KHIEU Samphân’s Closing Brief (E457/6/4/1), paras 452, 459-462, 470, 498 where this very issue was addressed.  
...
- 5629 See *supra* Section VIII.B.7.  
...
- 5645 Trial Judgment (E465), para. 4212.

- 5646 Trial Judgment (E465), para. 4213.
- 5647 Trial Judgment (E465), para. 4214.
- 5648 Trial Judgment (E465), para. 4214, quoting KHIEU Samphân Interview, undated, E3/4050, ERN (EN) 00789062.
- 5649 Trial Judgment (E465), para. 4216.
- 5650 Trial Judgment (E465), para. 4218.
- 5651 Trial Judgment (E465), para. 4315.
- 5652 Trial Judgment (E465), para. 4316.  
...
- 5738 See, e.g., Case 002 Decision on Co-Prosecutors' Request (E124/7), para. 5: "[Rule 89ter] was intended to grant the Trial Chamber, where the interests of justice so require, a discretionary trial management mechanism enabling it on its own motion to separate proceedings and to examine in different trials different parts of the Indictment."
- 5739 See Case 002, Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, E284/4/8, para. 40.  
...
- 5748 Article 513 of the Criminal Procedure Code of Cambodia provides that a convicted person sentenced to life imprisonment who has served the sentence for at least 20 years may receive conditional release. See Case 001 Appeal Judgment (F28), paras 385-388, explaining that the ECCC does not have competence to deal with such matters, which should be decided according to procedures in force at the time when parole is to be considered for a particular convicted person.
- 5749 According to Article 39 of the ECCC Law, "[t]hose who have committed any crime as provided in Articles 3 new, 4, 5, 6, 7 and 8 shall be sentenced to a prison term from five years to life imprisonment" (emphasis added). According to Rule 98(5) of the Internal Rules, "[i]f the Accused is found guilty, the Chamber shall sentence him or her in accordance with the Agreement, the ECCC Law and these [Internal Rules]" (emphasis added).  
...
- 5821 See *supra* Section VIII.B.9.b.
- 5822 See *supra* Section VII.F.2.b.4.
- 5823 See *supra* Section VII.A.5.e.
- 5824 See *supra* Sections VII.A, VII.F.2.
- 5825 See *supra* Section VII.G.3.c.iii.
- 5826 See *supra* Section IX.D.2.
- 5827 See *supra* Section IX.B.
- 5828 See, e.g., *Mrkšić et al.* Appeal Judgment (ICTY), para. 407; *Simić et al.* Appeal Judgment (ICTY), para. 265. Empirical research on sentencing at the ICTY and ICTR confirms that aiding and abetting attracts a lower sentence. Elies van Sliekdregt, "The Curious Case of International Criminal Liability", (2012) 10 *J. Int'l Crim. Just.* 1171, p. 1177.