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Mr KHIEU Samphân's Defence Appeal Brief against the Judgement in Case 002/01

Filed by:

Lawyers for Mr KHIEU Samphân
KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN

Assisted by:
SENG Socheata
Marie CAPOTORTO
Soumeya MEDJEBEUR
Pierre TOUCHE
OUCH Sreypath
Cécile ROUBEIX
Clément BOSSIS

Before:

The Supreme Court Chamber
Judge KONG Srim
Judge Agnieszka KLONOWIECKA-MILART
Judge SOM Sereyvuth
Judge Chandra Nihal JAYASINGHE
Judge MONG Monichariya
Judge YA Narin
Judge Florence Ndepele MUMBA

The Co-Prosecutors
CHEA Leang
Nicholas KOUMJIAN

All Civil Party Lawyers

Mr NUON Chea's Defence

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MAY IT PLEASE THE SUPREME COURT CHAMBER

INTRODUCTION

1. At the 25 October 2013 closing statements hearing, the Defence, despite its awareness of the pressure of international opinion on the ECCC, still harboured the hope that an objective analysis of the facts in context coupled with respect for the law and procedure would move the Chamber to offer a reasonable *ratio decidendi*. Unfortunately, the Judgement that is being appealed did not meet that expectation.

2. Trials of former leaders are not conducted with a view to prosecuting direct perpetrators but those who, on account of their absence and the obviously long distance separating them from the scene of the crimes, may have contributed to those crimes through political decisions and various other means. This distance complicates the assessment of their responsibility and, almost 40 years after the events, the two principal tools that the judge has at his disposal to guide him are the chronology and just assessment of the historical, sociological, political, geopolitical or economic context. The guilt of an accused is determined at the time of the facts tried, not before and not after.

3. The approach followed in the present appeal brief against the Judgement in Case 002/01 (E313) dated 7 August 2014[1] consists first, in identifying the evidence on which the Chamber relied to justify its erroneous findings, and then comparing it with contemporaneous factual evidence so as to consider the concrete and valid evidence that the Chamber had at its disposal, if it had intended to conduct the trial in accordance with the rules of law and procedure. This brief is therefore structured in such a way as to constantly place the reader in the exact situation in which the accused was at the time of the facts tried. That is also why it was necessary to undertake a meticulous and tedious search of the numerous factual errors and distortions that gave rise to the errors of law committed by the Chamber and also resulting from the repeated breaches of the principles governing the right to a fair trial.

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[1] Pursuant to Internal Rules 104 *et seq.*: following KHIEU Samphân's Notice of Appeal Against the Judgement in Case 002/01, filed on 29 September 2014, **E313/2/1**.

4. In contrast to what a reasonable and fair judge would do, the Chamber set out with the assumption that Mr KHIEU Samphân is guilty and then sorted and distorted the evidence to confirm its prior determination. This systematic inculpatory approach is exemplified in the expressions of "satisfaction" hammered out page after page, the Chamber often forgetting that they have to be based on evidence. Hence the need to go beyond the impression of enormousness of the 777-page Judgement in order to unravel the reasoning and identify the flaws at the root of a miscarriage of justice and serious errors of law.

5. Where the Chamber has deliberately mixed up dates and facts, applied a rule that was unknown at the time of the events, distorted the evidence by analysing it in an incomplete and biased manner, relied on evidence that falls outside the scope of the trial, the Defence proposes chronological and objective criteria that take into account the factual context and the applicable law. Since Case 002/01 focuses entirely on the consequences of two population movements and the alleged execution of officials at Tuol Po Chrey, the Defence sought to perform the task which the Chamber eschewed: placing the facts in their context, re-situating KHIEU Samphân at the time of the facts tried.

6. KHIEU Samphân was a member of the movement that fought against the SIHANOUK and LON Nol regimes, but he was also an intellectual and an independent politician who followed his deeply held convictions. Re-situating him in the context of the facts tried is important in that it enables the Supreme Court Chamber to ascertain whether KHIEU Samphân actually wanted that crimes should be committed during the evacuation of Phnom Penh, on 25 and 26 April 1975 at Tuol Po Chrey and in the context of movement of the population (phase two), intended that the said crimes should be committed and contributed to their commission. KHIEU Samphân's Defence submits that the answer to these three questions is no. Proof of the Chamber's errors will be demonstrated.

7. KHIEU Samphân should be acquitted of these charges.

I. BREACHES OF THE RIGHT TO A FAIR TRIAL

8. Throughout the trial and in its Judgement, the Chamber committed numerous errors of law and discernible errors in the exercise of its discretion, resulting in the violation of KHIEU Samphân's fair trial rights enshrined in the texts applicable before the ECCC.[2]

I.1 JURISDICTION

9. **Temporal jurisdiction.** The Chamber committed errors of law by basing some of its findings of guilt on facts and conduct which occurred prior to 17 April 1975, that is, outside the court's temporal jurisdiction.[3] In accordance with the principle that provisions conferring jurisdiction on an international tribunal should be strictly interpreted and the criminal law principle of strict interpretation, it should be established that 1) the crime charged was committed within the temporal jurisdiction of the tribunal, and 2) the acts or omissions of the accused on which his responsibility rests were committed within the temporal jurisdiction of the tribunal and that at the time of the said acts or omissions the accused possessed the requisite intent to be held responsible pursuant to the relevant mode of liability.[4] Insofar as the Chamber based its finding that the Appellant was guilty of planning and instigating crimes during movement of population (phase one) and at Tuol Po Chrey on criminal conduct pre-dating 17 April 1975,[5] these findings of guilt must be invalidated.

10. **Subject-matter jurisdiction.** The Chamber committed an error of law by considering facts not included in the Closing Order, especially because the Appellant was neither given sufficient notice of nor heard in respect of such facts.[6] Under cover of the historical context, the Chamber drew conclusions based on facts pre-dating those of Case 002/01. Thus, at paragraph 583 of the Judgement, where it refers to the movements of the population, the Chamber "*notes that it has considered in this section movements [...] not specified in the Closing Order, insofar as these movements provide context and evidence of a pattern of conduct*." While the Chamber

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[2] Article 12(2) of the Agreement between the United Nations and the Royal Government of Cambodia (with reference to Articles14 and 15 of the ICCPR), Article 31 of the Constitution of the Kingdom of Cambodia, Article 35 (new) of the Law on the Establishment of the ECCC, and Internal Rule 21.
[3] Judgement, paras. 12, 15.
[4] *Nahimana* Appeal Judgement, paras. 313-314.
[5] Judgement, paras. 997-1003, 1014 and 1015, 1039-1043, 1045 and 1046
[6] For example: Judgement, paras. 84, 118, 123, 362, 583 (*et seq.*).

may very well go on to state that as regards the responsibility of the accused, "*it will limit its legal findings on the crimes charged to those locations specifically identified*" in the Closing Order, the point is that the principle has already been violated, since the Chamber would have to consider facts of which the Appellant had not been given notice and for which he was not being tried and used against him to infer that he was party to a criminal plan. The modes of liability considered in the Judgement and discussed *infra* cannot be established without proof of the Appellant's criminal intent at the time of the events. According to settled case law, such intent cannot be found solely in facts anterior to the facts charged. Yet, this error is repeatedly committed by the Chamber using its fictitious consistent pattern of conduct.[7] The historical context is used as a pretext to attempt to remedy the lack of clear evidence of criminal intent on the part of KHIEU Samphân. This is a blatant error of law committed by the Chamber and the resulting findings must be set aside.

11. **Temporal jurisdiction following severance of the charges**. The Chamber committed an error of law by considering in the Judgement that the temporal period at issue in Case 002/01 went from 17 April 1975 to December 1977.[8] This error is mainly related to the facts concerning movement of the population (phase two). These facts are not articulated in the Closing Order;[9] however, the Chamber introduced them massively through written statements,[10] thereby extending its temporal jurisdiction during deliberation since it was very clear during the proceedings that it fixed the end of movement of population (phase two) in late 1976.[11] This last-minute extension is a violation of the right of the Accused to be given specific and timely notice of the case against him and, as such, constitutes a serious error of law. The Chamber also committed an error of fact by using written statements that erroneously set the end of movement

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[7] Apart from Movements of the Population, the same procedure is used to refer to the Committee of the City of Phnom Penh with a view to linking KHIEU Samphân with the CPK before he went underground (Judgement, paras.88, 362), the spies and Khmers of Hanoi to find an example of the policy to smash enemies (Judgement, paras. 118, 123).
[8] For example: Judgement, paras. 169, 193, 197, 628 and 629, 725, 777.
[9] Closing Order, **D427**, para. 262; see also Closing Brief, **E295/6/4**, para. 61.
[10] The Defence is also appealing this decision (15.08.2013, **E299**) making a wholesale admission of written documents that did not allow examination of witnesses and Civil Parties. The fact that the Chamber uses them to change the period covered by the charges is proof of the prejudice and miscarriage of justice which the Defence had anticipated in its closing statement.
[11] T. 18.07.2012, **E1/91.1**, p. 20 L. 20-24 at approximately [09.52.22]; T. 18.07.2012, **E1/91.1**, p. 23 at approximately [09.56.06].

of population (phase two) in late 1977,[12] and by relying on the operation of cooperatives or re-education which fall outside of the scope of the trial.[13] Under the circumstances, this extension must be set aside.

12. **Subject-matter jurisdiction following severance of the charges.** The Chamber committed errors of law by basing its legal findings and findings of guilt on facts falling outside the scope of Case 002/01.[14] The Chamber erred in law by setting out at paragraph 79 of the Judgement the principle of considering "*the existence and, where relevant, the implementation of the CPK policies*". In defining the common purpose,[15] the Chamber went beyond the temporal jurisdiction of the trial (from 1958 to 1979) to look for evidence which itself fell outside the scope of Case 002/01 (collectivization, cooperatives, class struggle, policy to smash enemies, forced labour, re-education). What's more, the facts characterising the implementation of these policies will be tried at a later stage by this same Chamber against the same Accused! This practice is unacceptable and causes serious prejudice to the Appellant since he had been notified of a strict severance and, throughout the trial he was not allowed to defend himself against facts falling outside of the scope of the trial. On this point, the Defence refers to the arguments it raised in August 2013.[16] It is quite clear now that it is precisely these facts that the Chamber is relying on to connect him with the crimes against humanity committed on the ground.[17] Accordingly, the Chamber has committed a serious error of law and its findings must be quashed.

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[12] Regarding the movement of the population from the south to the north, no reported testimony refers to a movement that occurred in 1977, (Judgement, para. 588, Footnotes 1764-1770), only one uncertain testimony could set the date at 1977 (Footnote 1767, T. 27.05.2013, AUN Phally, pp. 34-36. Regarding the movement of the population "*in the northern, southern and central regions*" none of the cited documents mentions the month of December 1977or even late 1977 (Judgement, para. 581, Footnotes 1739-1742). Lastly, to conclude that "*[i]n 1977, population movements were again reported*" the Chamber relies on a terse commentary by the Commission on Human Rights (Judgement, para. 611, Footnote 1911, **E3/1804**, p. 5).

[13] The Chamber held that "*between 1975 and 1977, many people were released after questioning and sent to zones*" by considering the facts from the point of view of re-education in the cooperatives between September 1975 and December 1976 (Judgement, paras. 615-620). Furthermore, the Chamber finds that there was a movement of the population in 1977, based on a single written statement, which no reasonable judge would have done (Judgement, para. 622, Footnote 1966, **E3/4707**, p. 6).

[14] For example: Judgement, paras. 103-127, 168-174, 193-198, 374, 380, 383, 388, 389, 401-405, 408, 409, 506, 516, 517, 571, 576, 581, 600-626, 734, 740, 741, 743, 747-749, 751-755, 759, 764, 765, 771, 772, 774, 776, 777, 778, 782, 784, 785, 790, 791, 794, 795-805, 813-836, 943-1054.

[15] Judgement, paras. 724-778.

[16] Application 01.08.2013, **E275/2/1/1**, paras. 19-51; Closing Brief, **E295**/6/4, paras.1-9; T.25.10.2013, **E1/234.1**, pp. 3-28 [09.08.26].

[17] See *below* part **III.2** Context of the facts falling within the scope of Case 002/01 and **III.6** After the facts, Targeting policy against former Khmer Republic soldiers and officials after the events at Tuol Po Chrey.

I.2. THE RIGHT TO BE INFORMED OF THE CHARGES AGAINST ONESELF

13. The case law acknowledges that "*in criminal matters the provision of full, detailed information concerning the charges against a defendant is an essential prerequisite for ensuring that the proceedings are fair*". This right provides, *inter alia,* that everyone charged with a criminal offence must "*be informed promptly [...] and in detail [...] of the nature and cause of the accusation against him*". It adds "*the need for special attention to be paid*" to the notification of the accusation to the defendant.[18] Finally, as concerns, "*changes in the accusation [...] the accused must be duly and fully informed thereof and must be provided with adequate time and facilities to react to them and organise his defence on the basis of any new information or allegation.*"[19]

14. The Chamber committed errors of law by failing to define with sufficient particularity and by varying the scope of the proceedings in Case 002/01 starting from its Decisions on severance up to the Judgement.[20] It also committed errors of law not only by not responding clearly to requests for clarification made by the parties during the drafting of closing briefs, but also by misleading them.[21] The plethora of decisions relating to the scope of Case 002/01 created confusion throughout the trial in Case 002/01. In October 2011, the Chamber stated "*that there would be no examination of the implementation of policies other than those pertaining to the specific factual allegations falling within the scope of Case 002/01.*"[22] Later, in November 2011, it pointed out that it would be possible to refer to other policies but solely "*to enable the manner in which policy was developed to be established*".[23] The legal uncertainty referred to above was further compounded by the confusion caused to all parties. Thus, the day before filing their closing brief, the Co-Prosecutors sought clarification of the Chamber's position regarding the inclusion of the policy relating to "*enemies and the targeting of former Khmer Republic officials*

[18] Case of *Kamasinki v. Austria*, para. 79; Case of *Penev v. Bulgaria*, para. 33; Case of *Pélissier v. France*, para. 51.
[19] Case of *Mattoccia v. Italy*, para. 61.
[20] For example: Judgement, paras. 45 to 49, 628 and 629, 813; Order **E124**; Order, **E131**; Decision **E124/7**; Memorandum, **E172**; T. 18 July 2012, E1/91.1, p. 20; Memorandum of 8 October 2012, E163/5; Decision of 26 April 2013, E284; T. 24 June 2013, E1/211.1, p. 91; T. 25 June 2013, E1/212.1, pp. 9-10; T. 26 June 2013, E1/213.1, pp. 49-50; T. 4 July 2013, E1/218.1, p. 46; Memorandum, **E284/6**; Memorandum, **E299/2**.
[21] Memorandum of 27August 2013, **E284/6**; Memorandum 10 September 2013, **E299/2.**
[22] Judgement, para. 47, Footnote 126 Decision **E124/2;** Decision **E124/7**, para. 11; Memorandum **E141**.
[23] Memorandum of 17 November 2011 **E141,** p. 2.

and soldiers"[24] within the scope of the case. The Chamber's response was that no further specifications were required since the executions committed at Tuol Po Chrey enabled "*examination of two of the five main themes of the Case 002 Closing Order, i.e. forced movement and execution of purported enemies of the regime*".[25] Except that at the time of the inclusion of Tuol Po Chrey within the scope of the case, in annex E124/7.3 of the decision of October 2011, no mention was ever made of a policy to smash enemies, but of "*targeting of groups [...] (all limited to targeting of former officials of the Khmer Republic)*".[26] Accordingly, the Chamber erred in law by varying the scope of the proceedings up to the end of the trial, thereby preventing the Appellant from properly defending himself since he always considered Tuol Po Chrey from the standpoint of measures targeting specific groups and not of the policy to smash enemies. This error must be cured.[27]

15. The Chamber erred in law by severing the charges without saying what would become of the charges excluded and without ever specifying what it meant by "*general foundation*".[28] The uncertainty created with regard to the charges excluded from Case 002/01 has caused prejudice to the Appellant as recognised by the Supreme Court.[29] The last decision of the Supreme Court[30] was issued too late to stop this prejudice, as the Appellant only became aware of the exact scope of Case 002/01 when the Judgement was rendered. The uncertainty persists since the Appellant still does not know what will become of the remaining charges in Case 002. Furthermore, Case 002/01 was supposed to provide a "*general foundation*" for later and virtual trials. However, nothing was ever said about the evidence needed or the scope of this foundation.[31] The errors committed by the Chamber must therefore be sanctioned and the notion of general foundation defined.

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[24] Request for clarification, 7August 2013, **E284/5,** para.9.
[25] Memorandum of 27August 2013, **E285/6**, para. 2 citing **E284**, para.118.
[26] **E124/7.3**, p. 2, ERN 00852356.
[27] See Urgent Request by the Defence Team of Mr Khieu Samphân for an Immediate Stay of Proceedings, 1.08.2013, **E275/2/1/1**, paras. 19 to 51.
[28] Judgement, paras. 45 to 49; Order 22.09.2011, **E124**; Order 18.10.2011, **E131**; Decision 18.10.2011, **E124/7**; Decision 26.04.2013, **E284**.
[29] Supreme Court Decision 8.02.2013, **E163/5/1/13**, para. 48; Supreme Court Decision 25.11.2013, **E284/4/8**, paras. 8, 62, 69.
[30] Supreme Court Decision 25.11.2013, **E284/4/8**.
[31] Order 18.10.2011, **E131**, p. 2.

16. The Chamber committed errors of law by failing to set a clear and coherent legal framework governing documentary evidence in the context of a severed trial.[32] The Chamber also erred by belatedly issuing insufficiently reasoned decisions on the admission of documents, including written statements. Thus, it rendered its decision to admit 1,399 written statements in lieu of oral testimony on 15 August 2013, that is, a few days prior to the filing of the closing brief.[33] The Defence refers to the submissions in its Urgent Request for an Immediate Stay of Proceedings and the addendum thereto.[34]

17. The Chamber committed errors of law by failing to set a clear and coherent legal framework governing testimonial evidence in the context of a severed trial.[35] It also erred by belatedly issuing its insufficiently reasoned decision on the appearance of witnesses, experts and civil parties.[36] In this regard, the Defence refers to its submissions in its Request for a Stay of Proceedings.[37] Regarding the summoning of witnesses, the parties never had the required visibility nor were they provided with reasoned decisions enabling them to properly prepare for the appearance of witnesses and to know of the case against and for them. Thus, the Chamber summoned LOCARD only to realize that his testimony was not relevant. Similarly, by legitimately overlooking the fact that Becker's work would be used by the Chamber,[38] the Appellant was not able to properly defend himself. By issuing fuzzy and unreasoned rules concerning documents and witnesses, the Chamber maintained the Appellant in the prejudicial situation of not knowing the case that he had to answer.

18. All these errors also violate KHIEU Samphân's rights to legal certainty, to have adequate time and facilities for the preparation of his defence, and to be heard.

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[32] For example: Memorandum 17.11.2011, **E141**; Decision 9.04.2012, **E185**; Decision 20.06.2012, **E96/7**; T. 20.07.2012, E1/93.1, pp. 3-4; T. 18.10.2012, E1/134.1, pp. 106 to 109; Memorandum 19.10.2012, **E223/2**; Decision 3.12.2012, **E185/1**; Memorandum 18.01.2013, **E260**; Decision 26.04.2013, **E284**; T. 24.06.2013, E1/211.1, p. 9; T. 25.06.2013, E1/212.1, pp. 9-10; T. 26.06.2013, E1/213.1, pp. 49-50; Decision 15.08.2013, **E299**; Memorandum 10.09.2013, **E299/2**.
[33] Decision 15.08.2013, **E299**; see also Decision 12.08.2013, **E185/2**.
[34] Urgent Request 01.08.2013, **E275/2/1/1**, paras. 54-60; *Addendum à la Demande urgente*, **E275/2/1/3**.
[35] For example: Order 18.10.2011, **E131**; Memorandum 17.11.2011, **E141**; Memorandum 24.11.2011, **E141/1**; Memorandum 29.11.2011, **E145**; Memorandum 25.05.2012, **E172/24**; Decision 5.07.2012, **E215**; T. 20.07.2012, E1/93.1, pp. 3-4; T. 5.09.2012, E1/122.1, pp. 15-16; T. 17.12.2012, E1/155.1, pp. 28-29; Memorandum 8.01.2013, **E236/4**; Memorandum 18.01.2013, **E260**; T. 6.05.2013, **E1/189.1**, p. 59-60.
[36] Decision 7.08.2014, **E313**, paras. 50-54; see also Application 02.11.2011, **E131/1/6**.
[37] Urgent Request 01.08.2013, **E275/2/1/1**, paras. 61-68.
[38] See also *infra* part **I.4** The right to adversarial proceedings relating to KIERNAN and BECKER (probative value).

I.3. THE RIGHT TO HAVE ADEQUATE TIME AND FACILITIES FOR THE PREPARATION OF ONE'S DEFENCE

19. The right to have adequate time and facilities for the preparation of one's defence implies that the Accused is given the opportunity of doing all what is necessary to organise his defence and to raise all arguments in order to influence the outcome of the proceedings. An impartial tribunal must abide by this fundamental principle whilst balancing the interests of the defendant and the need to conclude the trial within a reasonable time.[39]

20. The Chamber committed errors of law and discernible errors in the exercise of its discretion by holding in the Judgment that in the course of the trial the Appellant was afforded adequate time and facilities for the preparation of his defence.[40] Yet, the Chamber always placed the expeditiousness of the trial proceedings over and above this right. The Appellant has suffered from so many violations of this fundamental right that an urgent request for a stay of proceedings was filed before the Supreme Court in August 2013.[41] Given that a decision on the merits is still pending before the Supreme Court, the Defence refers the Chamber to the violations described in the request. The Defence shall, however, elaborate on a few subsequent examples. On 15 August 2013, the Chamber issued its decision admitting several hundreds of written statements.[42] The Defence thus had barely one and a half months to review these statements before filing its closing brief. It was thus impossible for the Defence to properly review these statements to which it could not respond within the mandated page limit anyway.[43] Moreover, the Appellant himself was denied adequate time and facilities for a detailed review of the allegations articulated by the Co-Prosecutors in their Closing Brief, since the Chamber refused to grant the Appellant adequate time to have the brief translated into a language he understands.[44] The multiplicity of these violations of the Appellant's rights throughout the trial in Case 002/01 has occasioned serious and

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[39] ECHR, *Gregačević v. Croatia*, 10.07.2012, 58331/09, para. 51. See also ICTR, *Ferdinand NAHIMANA, Jean-Bosco BARAYAGWIZA, Hassan NGEZE v. The Prosecutor*, Appeal Judgement, 28 November 2007, ICTR-99-52-A, para. 220 and footnotes 532 and 533: *"A Trial Chamber 'shall provide every practicable facility it is capable of granting [...] when faced with a request by a party for assistance in presenting its case.'"*
[40] Judgement, paras. 33, 38, 41-78; see Table of authorities
[41] Urgent request of 01.08.2013, **E275/2/1/1**
[42] Decision of 15.08.2013, **E299** and annexes
[43] Judgement, paras. 69-73; T. 13 June 2013, **E1/207.1**, p. 9:3 – 10:18; Urgent request of 01.08.2013, **E275/2/1/1**, para. 91
[44] Urgent Request of 01.08.2013, **E275/2/1/1**, para. 76, footnote 70; Request of 01.10.2013, **E295/7**; T. 31 October 2013, **E1/234.1**, p. 32:17 – 33:15.

enduring prejudice. The Chamber must be sanctioned in this regard.

21. The Chamber erred by failing to clearly respond to the requests for clarification regarding the status of documents assigned an E3 number and by refusing to provide to the parties a list of documents during the trial.[45] Thus, at the conclusion of the trial, the Chamber assigned an E3 number to all of the documents put before the Chamber without clarifying the criteria applied nor the exact status of the documents despite repeated requests from the Defence. This absence of clear legal rules affected the Appellant's right to legal certainty[46] and has considerably hampered his ability to fully know the case to which he had to answer.

I.4. THE RIGHT TO ADVERSARIAL PROCEEDINGS AND TO HAVE ONE'S CASE HEARD

22. The Chamber is bound by fair trial rules amongst which the adversarial principle is fundamental. This principle enables the parties to be apprised of and to challenge the evidence in order to influence the opinion of the judges and comment on it.[47]

23. However, the Chamber committed errors of law and discernible errors in the exercise of its discretion by finding in the Judgement that it "*considers that the right of the Accused to adversarial debate was not infringed*" during the trial.[48] The Chamber, through its approach and priorities, did not even bother to keep up the appearance of abiding by the fundamental principles of a fair trial.[49] Hence, the Chamber could not claim, as it did in its Judgement, that the documentary evidence was debated adversarially.[50] The procedure the Chamber used to deal with the documentary evidence – in particular the document presentation hearings – but also the excessively stringent page limitations the Chamber imposed for submissions made it technically impossible to discuss the evidence in the closing brief.[51] Hence, the Defence reiterates all the

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[45] Memo of 11.04.2012, **E178/1**; Memo of 13.02.2013, **E246/1**; Memo of 22.08.2013, **E295/4**; Memo of 30.08.2013, **E295/5/1**
[46] See also *infra*, part **I.5** The Right to Legal Certainty (with regard to documents).
[47] *El Mentouf v. Switzerland*, para. 22; *Strepinska v. France*, para. 16; *Eternit v. France*, para. 33
[48] Judgement, paras. 33, 41, 63-73; see Table of authorities
[49] See Part **I.** Breaches of the Right to a Fair Trial.
[50] Judgement, paras. 33, 63-64: the Defence refers here to its urgent Request of 01.08.2013, **E275/2/1/1**, paras. 78-91, and to its addendum to the documents of 03.09.2013, **E275/2/1/3**
[51] Judgement, paras. 69-73; T. 13 June 2013, **E1/207.1**, p. 9:3 – 10:18; Urgent Request of 01.08.2013, **E275/2/1/1**, para. 91

grounds already articulated in its request to stay and relating to the adversarial principle[52] to which it adds the violations which occurred subsequent to the filing of the request and which are set out in this part.

24. The Chamber committed many errors of law with respect to the admissibility and probative value of the evidence.[53] With respect to the latter matter, the Chamber continuously denied Defence requests in this regard on the ground that it had to be debated only at the end of the trial and then suddenly claiming that the parties had had the opportunity to debate the matter.[54] The Chamber's pronouncements that reduced probative value would be given to written material from experts who did not testify came to naught. Thus, KIERNAN whose writings were to be given minimal probative value was cited in support of certain factual findings.[55] This was also the case for BECKER, whose work appears as the exclusive source substantiating certain findings.[56] Accordingly, the Chamber seriously violated the right of the Appellant who, owing to the fact that he was unable to question these experts, was unable to challenge the evidence that the Chamber selected from their writings. The harm suffered by the Appellant is clear taking into account his conviction.

25. The Chamber also erred by denying requests concerning the conduct of the investigation and its impact on the probative value of the evidence. The irregularities tainting the investigation should have impelled the Chamber to conduct this review which is authorized by Internal Rule 93. Yet, despite Defence requests,[57] the Chamber rejected any review to shed light on these practices[58] and failed to consider the consequences of such irregularities on the probative value of the evidence gathered. The Chamber persisted in its erroneous course by unduly limiting reliance

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[52] Urgent Request of 01.08.2013, **E275/2/1/1**, paras. 69-101
[53] For example: Judgement, paras. 23-26, 30-36; see Table of authorities
[54] Urgent Request of 01.08.2013, **E275/2/1/1**, paras. 78-91
[55] Memo of 13.06.2012, **E166/1/4**, p. 2 *vs.* Judgment, para. 379, footnote 1142 and para. 757, footnote 2385
[56] BECKER did not appear before the Court. However her book serves as the sole foundation for some of the factual findings of the judgement: Judgement, para. 34 *vs.* para. 81, footnote 200, para. 82, footnote 203, para. 83, footnote 209, para. 774, footnote 2441. See also BECKER as a non-exclusive source: para. 759, footnote 2427
[57] IENG Sary's request of 29.08.2012, **E224**, paras. 1-5; Submission in support of 10.09.2012, **E224/2**; IENG Sary's request of 2.11.2012, **E241**; Supporting submission of 15.11.2012, **E241/1**; IENG Sary's Appeal of 7.01.2013, **E251/1/1**, paras1-19; Request of 8.05.2013, **E280/2**
[58] Judgement, para. 42; Decision of 7.12.2012, **E251**; Decision of 26.04.2013, **E283**; Decision of 13.08.2013, **E280/2/1**; Decision of 7.08.2014, **E313**

on audio recordings during the hearings[59] as well as on all documents providing evidence.[60] These denials and limitations have clearly infringed the Appellant's right to have his case debated adversarially.

26. The Chamber erred by providing witnesses before they testified with their prior statements and documents[61] in order to refresh their memories and by then asking them at the start of their testimony to affirm the overall accuracy of these statements and documents.[62] As such, the Chamber favoured expeditiousness to the detriment of the adversarial principle. By voiding the testimonies of their substance, the Chamber prevented any meaningful debate on the credibility of the witnesses, in particular by testing their recollections. This practice, which tainted witness testimony, has caused prejudice to the Appellant.

27. The Chamber erred as well by authorizing the presentation to witnesses of documents unknown at the time of the facts in order to lead them to (directly or indirectly) draw conclusions under the pretext that these documents had been presented to them during the investigation.[63] Such a process necessarily encourages witnesses to speculate, a privilege which is reserved to experts. Moreover, the fact that the OCIJ presented a document to a witness during the investigation is no justification for its presentation at trial. Rather, this is evidence of unacceptable investigatory practices in that they influence the witness.

28. The Chamber erred by denying Defence requests seeking the production of originals and information as to their provenance and chain of custody.[64] The fact that the events occurred a long time ago and the chaos reigning in Cambodia after 1979 require that a certain degree of caution be exercised when dealing with copies, in particular following YOUK Chang's explanation of the dubious methods used to identify originals whose location is in fact

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[59] Decision of 7.12.2012, **E251**; T. 4 July 2013, **E1/218.1**, p. 104:25-108:6; T. 1 August 2012, **E1/100.1**, p. 8:16 – 14:14; T. 10 January 2013, **E1/158.1**, p. 61:14-65:9 and 75:8 – 81:19

[60] Decision of 26 .04.2013, **E283**; Decision of 13.08.2013, **E280/2/1**

[61] The document given to NOU Mao before he appeared in court did not come from the OCIJ: T. 20 June 2013, **E1/210.1**, p. 37:14 – 39:12 at around [11:11:43]. See also *Demande d'informations* [no English translation on Case File], 10.07.2013, **E266/3/1**, para. 9 and paras. 17-19 and T. 23 July 2013, **E1/227.1**, p. 63:14 – 65:25

[62] For example: Judgement, para. 31; Memo of 17.11.2011, **E141**; Memo of 24.11.2011, **E141/1**; T. 19 March 2012, **E1/50.1**, p. 59:7; Memo of 13.06.2012, **E201/2**; Memo of 3.08.2012, **E218**; memo of 27.06.2013, **E292/2/1**

[63] For example: T. 28 March 2012, **E1/55.1**, p. 4:4-12:10; T. 24 April 2012, **E1/67.1**, p. 79:5-87:7; T. 25 April 2012, **E1/68.1**, p. 3:8 – 22:4; T. 31 May 2012, **E1/79.1**, p. 38:9 – 49:3

[64] For example: Decision of 9.04.2012, **E185**

unknown.[65] The Chamber erred by considering that the refutable presumption of relevance and reliability was not rebutted by these statements. The Chamber also erred by considering that an accused was invoking his right to remain silent when he requested to see an original document.[66] The right to remain silent entails something completely different[67] and is not a valid response to legitimate requests pertaining to the authenticity of documents on the basis of which the Appellant is being tried. This error must be sanctioned.

29. The Chamber erred with respect to the admission and use of hundreds of written statements in lieu of oral testimony.[68] Admission of such documents is strictly limited by jurisprudence. In particular, such documents cannot be used to support factual findings concerning the acts and conduct of the accused. On the one hand, the Chamber refused to inform the parties about the planned use of these documents, in spite of Defence requests.[69] On the other hand, the Chamber erred by erroneously applying rules from international jurisprudence providing for the use of such documents for the sole purpose of establishing facts unconnected to the acts and conduct of the Appellant.[70] Nonetheless, the Chamber used some of these written statements to substantiate the existence of the forced marriage policy through JCE.[71] Although this finding appears in the historical background part of the Judgement, it enables the Chamber to establish the existence of one of the five JCE policies and is thus directly linked to the relevant mode of liability and, hence, to the acts and conduct of the Appellant.[72] This example is even more striking in the case of the evidence concerning movement of the population (phase two) for

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[65] YOUK Chang: T. 1 February 2012, **E1/37.1**, p. 53:9-55:18; T. 2 February 2012, **E1/38.1**, p. 9:7-12:9
[66] For example: T. 11 January 2012, **E1/25.1**, p. 40:5-43:8; T. 12 January 2012, **E1/26.1**, p. 4:10-8:10 and 37:15-38:16
[67] See also *infra* part **I.5** The Right to legal certainty (the right to remain silent).
[68] For example: Judgement, paras. 23, 31-35, 128-130, 470, 471, 490, 506-509, 592, 597, 620, 622-624, 669, 791, 829; Decision of 20.06.2012, **E96/7**; Memo of 19.10.2012, **E223/2**; Memo of 13.02.2013, **E246/1**; Memo of 31.05.2013, **E288**; Decision of 15.08.2013, **E299.**
[69] Request for clarification of 02.09.2013, **E299/1**. Reference to legal certainty.
[70] For example "*relates to historical [...] background, concerns crime-based evidence [...]*" or conditions for the characterization of certain international crimes (armed conflict, the widespread and systematic nature of crimes against humanity…): see Decision of 20.06.2012, **E96/7**, para. 24; *The Prosecutor v. Mladen NALETELIĆ & Vinko MARTINOVIĆ*, IT-98-34-PT, *Decision Regarding Prosecutor's Notice of Intent to Offer Transcripts under Rule 92 bis (D)* of 9.07.2001, para. 7.
[71] Judgement, para. 128, footnote 372: documents E3/4745, E3/5044, E3/4779, E3/5008, E3/5066 are included in Annex **E299.1**, pp. 8, 43, 12, 39, 46 respectively.
[72] The Defence furthermore notes that paragraph 919 of the Judgement regarding the criminal responsibility of Nuon Chea for the events at Tuol Po Chrey quotes para. 130 as a basis of its finding.

which the Appellant was found guilty: the Chamber based its factual findings largely on these statements.[73] Accordingly, the Chamber erred by using these written statements to support factual findings concerning the acts and conduct of the Appellant. Hence, the Appellant's right to an adversarial trial has been seriously infringed. The harm he has suffered is significant: it is enduring as it extends into Case 002/02 with regard to policies that will be considered in this case; it is concrete since KHIEU Samphan has been convicted in 002/01 on the basis of factual findings based on these statements.

30. The Chamber has erred by using civil party impact statements. In the overall view of the Chamber's decisions, these statements were only to be used to assess the gravity of the crimes in order "*[...] to provide the Civil Parties an opportunity to present evidence relevant to collective and moral reparations [...]*" and not to provide evidence prejudicial to the Accused.[74] However, the Chamber cites these statements in support of certain factual findings.[75] These errors caused prejudice to the Appellant insofar as he was not warned that the statements would be so used in determining the facts. These errors must be sanctioned.

31. The Chamber erred in preventing the Defence from fully examining certain witnesses.[76] The Chamber abused its discretion when it unduly and repeatedly censored the Defence during PHY Phuon's testimony. The President of the Chamber intervened inappropriately and exacerbatedly by personally objecting to certain questions, suggesting answers to the witness and arbitrarily limiting, without warning, the time allotted to the Defence.[77] This pressure was exerted

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[73] Judgement, para. 588, footnote 1767, 1768, 1769: documents E3/4678, E3/5006, E3/5613, E3/4714, E3/4707, E3/4699, E3/3978 mentioned in these footnotes are included in Annex **E299.1**, pp, 3, 39, 125, 6, 5, 5 and 44 respectively.
[74] Order of 22.05.2013. **E236/5/3/2**, p. 1; Decision of 2.05.2013, **E267/3**, para. 5. See also Memo of 3.08.2012, **E218**; Memo of 7.02.2013, **E236/5**; Decision of 02.05.2013, **E267/3**; Memo of 22.05.2013, **E236/5/3/2;** Memo of 31.05.2013, **E285/1**; Decision of 15.08.2013, **E299**; Memo of 10.09.2013, **E299/2**
[75] For example: Judgement, paras. 23, 35; 471, 473, 488-492, 498, 517, 522, 595, 609; 460, 464, 465, 466, 468, 469, 472, 474, 476, 482, 484, 485, 487, 493, 495, 497, 499, 500, 502, 506, 512, 514, 588, 589, 591, 594, 596, 597, 600, 601, 617.
[76] For example: T. 24 January 2012, **E1/32.1**, p. 44:21-45:21 and p. 68:24-71:17; T. 25 January 2012, **E1/33.1**, p. 15:23-17:1 and p. 39:11-40:13; T. 4 April 2012, **E1/59.1**, p. 39:17-40:18; T. 17 May 2012, **E1/73.1**, p. 75:19-76:17; T. 1 August 2012, **E1/100.1**, p. 29:7-32:4; T. 2 August 2012, **E1/101.1**, p. 17:23-19:16, p. 22:4-24:24, p. 33:1-35:13, p. 34:16-36:12, p. 39:21-42:11; T. 29 January 2013, **E1/166.1**, p. 49:3-51:18; T. 9 May 2013, **E1/192.1**, p. 123:3-129:10; T. 20 June 2013, **E1/210.1**, p. 33:4-35:17
[77] For example: T. 31 July 2012, **E1/99.1**, p. 95:4-96:2; T. 1 August 2012, **E1/100.1**, p. 31:5-32:4, p. 35:18-37:20, p. 53:23-54:25; T. 2 August 2012, **E1/101.1**, p. 31:6-32:6 and p. 33:1-34:16

on several occasions.[78] Accordingly, the Chamber infringed the Appellant's right to an adversarial trial, as limiting the Defence's opportunity to examine witnesses constitutes an irrefutable prejudice.

32. The Chamber committed errors of law and discernible errors in the exercise of its discretion by often preventing the Defence from taking the floor. In particular, the Chamber abused its powers to technically manage speech time by deactivating the Defence's microphone when the Chamber was not pleased with the Defence's submissions.[79] Beyond the generally unacceptable nature of this conduct, the Chamber sometimes acted in this manner even though it had no idea of the purpose and hence the relevance of the submissions,[80] thus prejudicing the Appellant when his Defence was precluded from making oral submissions.

I.5. THE RIGHT TO LEGAL AND PROCEDURAL CERTAINTY

33. The principle of legal certainty seeks "*to protect the defendant against any abuse of authority.*" In this regard, the Chamber committed several errors resulting in the infringement of this fundamental right[81] and causing prejudice to the Appellant.

34. The Chamber committed errors of law by not providing reasons or by not providing adequate reasons in support of important decisions concerning the conduct of the proceedings.[82] The fickleness of the Chamber's decisions and its failure to give reasons therefor have prejudiced the Appellant with regard to the conduct of his defence.

35. The Chamber erred in setting unpredictable and shifting rules concerning the conduct of the proceedings.[83] In spite of the practice direction authorising the filing of replies to responses

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[78] For example: T. 20 June 2013, **E1/210.1**, p. 34:1-35:17
[79] For example: T. 31 May 2013, **E1/79.1**, p. 90:10-94:2; T. 5 June 2012, **E1/81.1**, p. 57:15-59:7; T. 18 July 2012, **E1/91.1**, p. 7:12-9:9; T. 17 August 2012, **E1/114.1**, p. 77:24-82:10 and 89:13-92:2; T. 23 November 2012, **E1/146.1**, p. 95:11-100:4
[80] SUM Alat: T. 4 July 2013, **E1/218.1**, p. 106:21-108:9
[81] ECHR, *Coëme v. Belgium*, Final Judgment, 22 June 2000, para. 102; Internal Rule 21.1
[82] The Defence is appealing all of the decisions that cause prejudice to the Appellant and which are included in the Table of authorities.
[83] For example: T. 30 January 2012, **E1/35.1**, p. 56:9-57:5; T. 31 May 2013, **E1/79.1**, p. 82:21-86:13; T. 24 January 2012, **E1/32.1**, p. 44:21-45:20 and p. 68:23-71:18; T. 26 January 2012, **E1/32.1**, p. 12:25-14:25 and p. 108:17-adjournment; T. 30 January 2012, **E1/35.1**, p. 56:9-57:5; T. 4 April 2012, **E1/59.1**, p. 39:17-40:18; T. 26 April 2012, **E1/69.1**, p. 35:16-36:13; T. 17 May 2012, **E1/73.1**, p. 67:21-85:8; T. 30 May 2012, **E1/78.1**, p. 66:11-68:3; T. 31 May 2012, **E1/79.1**, p. 109:12-111:4; Memo of 13.06.2012, **E201/2**; Memo of 19.07.2012, **E200/4**; T. 20 July 2012,

where there is to be no oral argument, the Chamber decided that determining whether a reply to a written response was required was a matter within its discretion and that its decision in this regard shall be notified by the Senior Legal Officer before conditioning the filing of the reply on an explicit and reasoned request from the parties.[84] With respect to the documents that may be presented to witnesses, the Chamber continuously altered the applicable rules: first, it prohibited the presentation of statements from other witnesses and then authorized it under certain fuzzy and elusive conditions, leading to confusion and the parties' unrelenting questions and delay in the proceedings.[85] These changes put the parties in a prejudicial situation of inequality and legal uncertainty.

36. Consistent with its chaotic management of documents tendered into evidence, the Chamber erred by assigning E3 numbers to documents thereby placing them on the case file even though such placement had not yet been debated adversarially.[86] Indeed, the Chamber attached a presumption of admissibility to these documents and allowed them to be placed on the case file before holding an adversarial debate, thus making the suppression of such documents unlikely in the event of a rebuttal of the presumption. Thus, the Chamber applied the adversarial principle in a non-compliant manner, i.e. retrospectively and erred by applying it as a compulsory, but useless, formality. For example, the Chamber committed an error by using document IS10.18 (footnote 2514), despite what it appears to be suggesting in its confusing explanation,[87] as placing it before the Chamber did not constitute an adversarial debate. However, by claiming that the Appellant had objected to the presentation of this document, the Chamber is suggesting that there was an adversarial debate since the document was "*used*". Yet, the Chamber issued no decision with regard to this document.[88] Moreover, insofar as the Chamber had itself stated that an adversarial debate would ensue later, the Chamber could not use this Defence objection to claim

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E1/93.1, p. 2:21-4:18; Memo of 3.08.2012, **E218**; Memo of 3.09.2012, **E225**; T. 3 July 2013, **E1/217.1**, p. 1:25-13:7

[84] Memo of 10.03.2011, **E64**, p. 1-2 and Memo of 5.10.2011, **E126**, p.1-2; Article 8.4 of the Practice Direction on Filing Documents before the ECCC

[85] T. 30 January 2012, **E1/35.1**, p. 56:9-57:5; T. 31 May 2013, **E1/79.1**, p. 82:21-86:13; T. 17 May 2012, **E1/73.1**, p. 67:21-85:8

[86] For example: Judgement, paras. 23, 789 (footnote 2514); Memo of 11.01.2012. **E159**; T. 16 January 2012, **E1/27.1**, p. 1:22-2:17; Memo of 31.01.2012, **E162**; Written Record of Proceedings of 9.02.2012, **E1/41**; Memo of 11.04.2012, **E178/1**; Decision of 20.06.2012, **E96/7**; Memo of 19.10.2012, **E223/2**; Memo of 13.02.2013, **E246/1**

[87] Judgement, para. 789, footnote 2514

[88] T. 30 January 2013, **E1/167.1**, p. 93:14-95:9

in retrospect that there had been an adversarial debate, most tellingly, during its deliberations. The uncertainty surrounding the evidence admitted by the Chamber and the applicable rules, which were liable to be altered at any time, including during deliberation, resulted in the infringement of the Appellant's right to legal certainty. As the Appellant was unaware of the procedure until the issuing of the Judgment, the prejudice is blatant.

37. The Chamber erred in considering that requests for reconsideration were not admissible before the ECCC whilst responding to them and whilst using its discretion without prompting to reconsider its decisions during its deliberation.[89] In fact, there is no question that these requests are admissible.[90] What's more, the Chamber's position has compounded the procedural uncertainty by the Chamber responding to certain requests whilst claiming that they were inadmissible.[91] During its deliberations, the Chamber also reconsidered a previously denied request to use a new document from the Co-Prosecutors[92] against the Appellant in its judgement. The Defence was never notified of this reconsideration and was never given the opportunity to debate the document adversarially. As the Chamber acted as if it were exempt from complying with its own decisions, the Appellant was unable to know whether or not requests for reconsideration were admissible and whether the Chamber could, nonetheless, reconsider its position after a rejection and respond to the request. This erroneous practice creates a situation of absolute procedural uncertainty that must be sanctioned.

38. The Chamber committed errors of law and discernible errors in the exercise of its discretion by itself disregarding the rules it had imposed upon the parties concerning the examination of witnesses and the placing of documents before the Chamber.[93] It considered that

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[89] For example: Judgement, paras. 42, 43, 44, 136 (footnote 391); Decision of 18.10.2011, **E124/7**; Memo of 29.11.2011, **E145**; Memo of 26.11.2012, **E163/5/4**; Decision of 19.12.2012, **E238/11/1**; Decision of 02.05.2013, **E267/3**; Memo of 10.09.2013, **E299/2**

[90] Decision of the Pre-Trial Chamber, 28.08.2008, **C22/I/68**, para. 25

[91] For example: Decision of 18.10.2011, **E124/7**, para. 2

[92] Judgement, para. 136, footnote 391. The Chamber implicitly considered that this reconsideration could not cause prejudice to the Appellant *"[...] insofar as it partially supports the alibi put forward by the KHIEU Samphan Defence [...]"* However, this utilization should be invalidated insofar as it led to a finding that is to the Appellant's disadvantage regarding this specific point: paras. 138 and 142.

[93] For example: T. 26 April 2012, **E1/69.1**, p. 30:9-33:15, 35:17-36:13; T. 8 August 2012, **E1/104.1**, p. 19:1-22:9; T. 5 September 2012, **E1/122.1**, p. 15:1-16:16; T. 28 January 2013, **E1/165.1**, p. 97:13-98:5 and 103:16-108:12 (versus, in particular, T. 25 January 2012, **E1/33.1**, p. 10:24-11:20, 15:23-16:25, 39:11-40:13; T. 12 June 2012, **E1/85.1**, p. 91:19-93:9; T. 29 January 2013, **E1/166.1**, p. 49:22-51:18); T. 6 May 2013, **E1/189.1**, p. 89:6-90:22; see also *infra*,

rules of procedure only apply to the parties. Thus, Judge LAVERGNE disregarded these rules on several occasions: he presented to SALOTH Ban the statements of another witness even though the parties were not authorized to do the same thing; he used an unknown document during SHORT's testimony and ordered that the document be placed on the case file without the slightest debate; he presented documents in court that "*can be retrieved through search engines*."[94] Such practices were prejudicial in that they placed the Appellant in a situation of uncertainty and insecurity in respect to the rules applicable him.

39. The Chamber committed errors of law and discernible errors in the exercise of its discretion concerning the right to remain silent despite the fundamental nature of this right.[95] First, the Chamber committed an error in recalling the facts concerning the Appellant's exercise of his right to remain silent. By claiming that the Appellant had first made an opening statement and then started testifying before deciding to exercise his right to remain silent, the Chamber committed a discernible error in the exercise of its discretion. Indeed, KHIEU Samphan announced on 13 December 2011 his intention to remain silent until the end of the substantive hearings.[96] He simply altered his position when he responded to the civil parties after being directly addressed by them and after having reaffirmed his right to remain silent.[97] Then the Chamber erred in law by continuously exhorting the Appellant to intervene orally even though he had clearly stated that he was exercising his right to remain silent.[98] This insistence and these errors on the part of the Chamber reflect a certain disregard for a fundamental and essential right as well as a tendency to invoke this right opportunistically. The Chamber's insistence to have the

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infra part **I.6** *The right to an impartial tribunal* (treatment of character witnesses).
[94] T. 26 April 2012, **E1/69.1**, p. 30:9-33:15, 35:17-36:13; T. 6 May 2013, **E1/189.1**, p. 89:6-90:22, 120:3-120:21 and Written Record of Proceedings of 6 may 2013, **E1/189**, p. 6; T. 28 January 2013, **E1/165.1**, p. 96:17-99:2
[95] For example: Judgement, paras. 27, 28, 78, 350; T. 12 January 2012, **E1/26.1**, p. 55:17-82:22 (versus T. 13 December 2011, **E1/21.1**, p. 68:19-70:19);
T. 8 February 2012, **E1/40.1**, p. 46:6-50:17 and T. 9 February 2012, **E1/41.1**, p. 2:6-3:1 and 21:20-22:17 (versus T. 16 January 2012, **E1/27.1**, p. 76:13-80:2 and versus T. 13 December 2011, **E1/21.1**, p. 68:19-70:19); T. 18 April 2012, **E1/63.1**, p. 38:20-40:21; See as well Internal Rule 21.1; Judgement, para. 27
[96] T. 13 December 2011, **E1/21.1**, p. 61:2-62:22
[97] T. 23 November 2012, **E1/146.1**, p. 95:11-99:6
For example: T. 27 May 2013, **E1/197.1**, p. 21:16-22:16; T. 12 January 2012, **E1/26.1**, p. 55:17-82:22; T. 23 November 2012, **E1/146.1**, p. 95:11-99:6; the microphone of KHIEU Samphan's international counsel was deactivated.
[98] For example: T. 27 May 2013, **E1/197.1**, p. 21:16-22:16; T. 12 January 2012, **E1/26.1**, p. 55:17-82:22; T. 23 November 2012, **E1/146.1**, p. 95:11-99:6; the microphone of KHIEU Samphan's international counsel was deactivated.

Appellant give up this right is at odds with the ease with which the Chamber brandished NUON Chea's right to remain silent when the Chamber was confronted with the unsettling issue of the authenticity of documents. By exerting constant pressure on the Appellant to give up his right to remain silent, the Chamber violated KHIEU Samphan's right to legal certainty.

40. The Chamber committed an error of law and abused its power by compelling KHIEU Samphan to participate in hearings for which he had waived his right to be present.[99] By infringing the applicable rules,[100] the Chamber negated the Appellant's representation by his counsel, attacked his dignity and endangered his health.[101]

I.6. THE RIGHT TO AN IMPARTIAL TRIBUNAL

41. The Chamber repeatedly committed errors by applying a procedural double standard in favour of the Prosecution. It exhibited bias and undermined the Defence's confidence[102] by almost systematically overruling Defence objections. It was blatantly biased in questioning certain Defence witnesses. Judge LAVERGNE was aggressive and repeatedly asked rhetorical questions and, in some instances, wryly commenting their evidence.[103] For example, he tried to intimidate SO Socheat by directing invective at her several times, and allowed the Prosecution to behave in equally shocking fashion.[104] This behaviour is clear proof of the Chamber's bias against KHIEU Samphân. The Chamber also erred in setting arbitrary rules regarding the questioning of witnesses. The testimony of Witness PHY Phuon reveals a stark contrast: the Chamber was so irrationally protective of him that the Defence felt compelled to treat him sparingly despite his patent bad faith and uncooperativeness.[105] In contrast, the Chamber was lenient towards the Co-

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[99] T. 27 June 2011, **E1/4.1**, p. 63:18-65:16; Memo of 28.10.2011, **E130/3**; Memo of 29.01.2013, **E223/5**; T. 30 January 2013, **E1/167.1**, p. 2:3-4:6. KHIEU Samphan has very rarely sought to exercise this right, only for health reasons.
[100] *Stanišic* Decision, para. 6; *Zigiranyirazo* Decision, para. 14; Internal Rule 21.2. See also IENG Sary Appeal, 05.01.2012, **E130/4/1**, paras. 44-48; Dissenting Opinion, 20.03.2012, **E51/15/1/2.1**, para. 4 and footnote 12
[101] In particular by forcing him to participate in a key documents hearings without an adversarial debate upon release from several weeks in the hospital (Memo of 29.01.2013, **E223/5**)
[102] KARNAVAS, T. 17 August 2012, **E1/114.1**, pp. 93-9 and pp. 80 to 82.
[103] KIM Vun, T. 22 August 2012, **E1/112.1**, p. 65; SO Socheat, T. 11 June 2013, **E1/205.1**, p. 33-34; JULLIAN-GAUFRES, T. 21 May 2013, **E1/194.1**, p 79; SO Socheat, T. 11 June 2013, **E1/205.1**, pp. 7, 20 to 2.
[104] JULLIAN-GAUFRES, T. 21 May 2013, **E1/194.1**, p. 82-83; SO Socheat, T. 11 June 2013, **E1/205.1**, pp. 16 to 17 p. 27; SO Socheat, T. 11 June 2013, **E1/205.1**, p. 92.
[105] T. 1 January 2012, **E1/100.1**, p. 57: *"try to refrain from asking questions that is trying to intimidate or make the witness lose confidence in his testimony"*. The Defence's questioning time was curtailed: T. 2 August 2012, **E1/101.1**, pp. 32 to 33. ROCHOEM Tom: T. 2 August 2012, **E1/101.1**, p. 39: When the witness was taken to task

Prosecutors when they accused a Defence witness of lying. Such disparate treatment can only be explained by the Chamber's bias.

42. Further, the Chamber was patently biased in granting unjustified Prosecution and Civil Party requests while denying justified Defence requests. For example, the request to place on the case file the written record of interview of PHY Phuon after his appearance satisfied all the requirements of Internal Rule 87(4). His record of interview contained key information regarding the probative value of his testimony. However, the Chamber implicitly rejected the request for its admission without notifying the parties. The Chamber chose to ignore the request because it could not justify its rejection.[106] In light of the heavy reliance on PHY Phuon's record of interview in the Judgement, the prejudice caused to the Appellant needs no further demonstration. In contrast, the Chamber granted a Co-Prosecutors' request for admission of a transcript of a lecture by expert SHORT regarding his book.[107] In the same decision, it denied a request to admit an article in which the expert analyses the research methodology he employed for his book because, *"Philip SHORT (...) will be available for questioning on his research methodology"*.[108] In this instance, the Chamber is blatantly biased in that it could have denied the Co-Prosecutors' request for the same reason it gave for denying the Defence request. The Defence was in fact compromised by the Chamber's unjustified and biased decision, while the Co-Prosecutors had the benefit of an additional document in support of their case. The same is true for the transcript of a 2007 interview which the Chamber admitted in the interests of justice[109] despite the lack of due diligence on the part of the Parties.[110] As used by the Chamber, the concepts of interests of justice and ascertainment of the truth are entirely one-sided and free-floating resulting in a clear prejudice to the Appellant.

43. In addition, the Chamber erred by consistently disregarding exculpatory evidence in favour of the Appellant and evidence impeaching the credibility of witnesses. For example, it ignored memory lapses, flagrant inconsistencies and credibility deficits in regard to Witnesses

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regarding his contradictions, his response was: *"It is up to you which version you wish to take. It's your choice."*

[106] *Cambodia Daily* article, 13 August 2012, **E220.1** (annex to **E220**: Witness PHY Phuon admitted to being confused and having memory lapses. The request for admission went unanswered.

[107] Memo, 18 January 2013, **E260**, para. 6.

[108] *Ibid*., **E260**, para. 8.

[109] Decision, 14 June 2013, **E289/2**, para. 5.

[110] Decision, 14 June 2013, **E289/2**, para. 4.

EM Oeun, NOU Mao and PHY Phuon, which surfaced during questioning by the Defence and were subsequently corroborated in the case of Witness PHY Phuon.[111] The Chamber also ignored exculpatory evidence that the Defence obtained from Witness DUCH.[112] Consistent with its conduct during the proceedings,[113] time and again, the Chamber ignored questions from the Defence.

44. The Chamber displayed its patent bias by distorting facts with a view to interpreting them and drawing conclusions in the Appellant's disfavour.[114] Its biased reading of some of the evidence shows that it oriented its reasoning towards certain preconceived conclusions. That is unacceptable and must be sanctioned. The only reasoning that is valid is legal reasoning. Legal reasoning must be impartial and respectful of the rights of all parties and directed to the ascertainment of the truth without prejudice or bias.

45. In the same way that it mischaracterized certain facts, the Chamber distorted KHIEU Samphân's statements. For instance, it distorted his statements by quoting them out of context and viewing them from the perspective of irrelevant facts.[115]

46. The Chamber committed errors of law by applying a double standard in its assessment of the evidence and failing to consistently apply the *in dubio pro reo* principle. In this regard, the Defence refers to its submissions on the assessment of evidence (II.2. *infra*).

47. The Chamber erred in law by making findings based on facts falling outside the scope of Case 002/01. In compliance with the last Decision on severance, the Defence consistently endeavoured to keep its questioning strictly within the scope of the case and did likewise in its closing brief and closing statement. However, a reading of the Judgement shows that while the Chamber was keenly aware of the scope of the case when it came to reminding the parties about it, it did not display the same rigour when drafting its Judgement. Surprisingly, it made findings concerning the existence of factual matters falling outside the scope of Case 002/01. For example,

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[111] *Cambodia Daily* article, 13 August 2012, **E220.1**. For example: T. 29 August 2012, **E1/117.1**, pp. 18 to 19, 25 to 26; *Mémoire final*, **E295/6/4**, paras. 20 to 23, footnotes 22 to 32; para. 28, footnotes 42 to 43.
[112] DUCH: T. 10 April 2012, **E1/62.1**, pp. 73 to 74.
[113] T. 20 June 2013, **E1/210.1**, pp. 59 to 60.
[114] For example: Judgement, paras. 113, 169, 133, 134, 371, 739, 748, 749, 769, 807, 848, 893.
[115] For example: paras. 36, 110, 364, 371, 730, 737, 749, 769, 783, 784, 785, 787, 789, 815.

it concluded that there had been forced marriages although no questions were allowed on the subject during the proceedings and in total disregard of the rules of procedure. Those are not just two isolated examples; the Chamber did this over and over again in the Judgement.[116] It matters not that the Chamber stated that it would not consider those matters in assessing the evidence: the problem lies in the factual finding itself. The facts which the Chamber handled in this fashion were not adversarially debated before the Chamber, were considered established and challenging them before the same bench in the course of the ensuing trial or trials will prove difficult. Such an error causes a double infringement of the Appellant's rights, namely his right to a fair and adversarial trial in Case 002/01 and his right to be presumed innocent in Case 002/02 and subsequent trials thus resulting in prejudice that can only be cured by invalidating the impugned findings.

48. Finally, the Chamber's bias was further evidenced by statements made by one of its members at a conference in November 2013.[117]

I.7. CUMULATIVE EFFECT OF THE ERRORS AND BREACHES

49. The cumulative effect[118] of all the Chamber's errors and breaches of fundamental rights is proof that it chose expeditiousness over fairness in its conduct of the trial, while demonstrating bias and arbitrariness. KHIEU Samphân was denied an effective defence. The trial was so deeply unfair that the Judgement must be invalidated.

II. ERRORS RELATING TO THE APPLICABLE LAW

II.1. INCORRECT APPLICATION OF THE PRINCIPLE OF LEGALITY

50. The Chamber offended the principle of legality after recalling it.[119] It did not clearly define the elements for which the Accused could incur criminal liability as they stood at the time of the facts charged. It applied rules which emerged subsequent to the facts while claiming that they were foreseeable and accessible to the Accused at the material time. Even so, it had a duty to

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[116] For example: Judgement, paras. 79 to 302, 349 to 409, 506, 516 to517, 571, 576, 581, 600 to 626, 724 to 778, 782, 784, 785, 790, 794 to 798, 804-05, 811 to 837, 945 to 959, 960 to 1054.
[117] *Soutien de KHIEU Samphân à NUON Chea*, 8 September 2014, **F2/1/1**; Request, 1 September 2014, **F2**; Second Request, 2 September 2014, **F2/1**, paras. 3 to 4.
[118] *Renzaho* Appeal Judgement, para. 24; *Ntagerura* Appeal Judgement, para. 114.
[119] Judgement, para. 16.

construe the law strictly and in favour of the Accused.[120]

51. Indeed, the Supreme Court has stressed that *"careful, reasoned review of [...] holdings"* on elements of the principle of legality is *"necessary for ensuring the legitimacy of the ECCC and its decisions"*.[121] The Chamber not only failed to undertake such a review, but the errors which it committed invalidate its Judgement, insofar as KHIEU Samphân could not incur criminal responsibility on the basis of a law which was not applicable, accessible or foreseeable to him.

II.1.A. Crimes

II.1.A.a. Crime against humanity

52. **Nexus to armed conflict.** The Chamber erred in law by holding that *"the definition of crimes against humanity under customary international law in 1975 no longer requires a nexus to armed conflict"*.[122] However, State practice and *opinio juris* instead show that a nexus was still required at that time.

53. The Appellant agrees with the arguments already extensively articulated on this matter by the Pre-Trial Chamber, and then by the Defence and, for the sake of brevity, expressly refers to them.[123] He adds that the Supreme Court has since, much as the Pre-Trial Chamber, stated that the definition of crimes against humanity found in the 1950 Nuremberg Principles, mirroring the definition found in the International Military Tribunal (IMT) Charter, reflected the state of customary international law as it existed at the time.[124] Admittedly, the requirement of a nexus to armed conflict included in that definition was not adopted in the International Law Commission Draft (ILC) Code of 1954. However, as the Chamber itself observed, this was the opinion of the

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[120] *Kokkinakis v. Greece*, para. 52; *Naletelić and Martinović* Judgement, para. 252; *Specific Human Rights Issues: New Priorities, in particular Terrorism*, Commission on Human Rights, E/CN.4/Sub.2/2003/WP. 1, 8 August 2003, para. 65; Pre-Trial Chamber decision, 15 February 2011, **D427/15**, para. 144.
[121] *Duch* Appeal Judgement, para. 97 and footnote 184.
[122] Judgement, para. 177 and footnote 529; Decision of 26 October 2011, **E95/8**.
[123] Pre-Trial Chamber decision, 15 February 2011, **D427/15**, paras. 135 to 144; Pre-Trial Chamber decision, 11 April 2011, **D427/1/30**, paras. 306 to 311; KHIEU Samphân's Response, 22 July 2011, **E95/3**, paras. 21 to 22; IENG Sary Appeal, 25 November 2011, **E95/8/1/1**, paras. 26 to 56.
[124] *Duch* Appeal Judgement, paras. 112, 115 and footnote 223; Pre-Trial Chamber decision, 15 February 2011, **D427/15**, para. 140; Pre-Trial Chamber decision, 11 April 2011, **D427/1/30**, para. 309.

ILC,[125] proof that its draft code reflected its mandate to promote *"the progressive development of international law"*.[126] Accordingly, the Chamber could not use that argument to make up for the lack of proof of the existence of *"extensive State practice, precedent and doctrine"* that would have demonstrated that a nexus to armed conflict was no longer required at that time.[127] In fact, that requirement ceased to exist in 1998 upon the adoption of the Rome Statute.[128] Since the Chamber considered that it was *"beyond doubt"* that an armed conflict nexus was no longer required by 1998,[129] it should have construed the law strictly and in favour of the Accused, in accordance with the principle of legality.

54. The error thereby committed by the Chamber invalidates the Judgement to the extent that it was never established that the crimes for which KHIEU Samphân was convicted were committed in connection with an armed conflict.

55. **State policy**. The Chamber erred in law by considering that the existence of a state policy is not an element of crimes against humanity.[130] This was in fact a requirement under customary international law at the time of the facts charged.

56. First, the Chamber relied on some *ad hoc* tribunals' case law,[131] and then on customary international law sources as it stood at the time, setting out *"contrasting views"* in relation to those proposed by the Defence.[132] The contemporaneous jurisprudence cited by the Chamber not only post-dates the facts, it is also belied by the Rome Statute[133] and ICC jurisprudence,[134] and decried by scholars for not being in keeping with customary international law.[135]

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[125] Decision, 26 October 2011, **E95/8**, paras. 22 to 23.
[126] *Duch* Appeal Judgement, para. 115.
[127] *Duch* Appeal Judgement, paras. 114 to 116.
[128] Pre-Trial Chamber decision, 15 February 2011, **D427/15**, para. 143; KHIEU Samphân's Response, 22 July 2011, **E95/3**, paras. 21 to 22; IENG Sary's Appeal, 25 November 2011, **E95/8/1/1**, para. 55; Marie-Claude Roberge, Jurisdiction of the *ad hoc* Tribunals of the former Yugoslavia and Rwanda over crimes against humanity and genocide, International Review of the Red Cross, 31 December 1997, No. 321
[129] Decision, 26 October 2011, **E95/8**, para. 32.
[130] Judgement, paras. 180 and 181.
[131] Judgement, paras. 181, footnotes 544 and 545.
[132] Judgement, paras. 181, footnotes 546 and 547.
[133] Rome Statute, Article 7(2)(a); Elements of Crimes, Article 7, Introduction, para. 3 and footnote 6.
[134] ICC Pre-Trial Chamber II, Decision on the Confirmation of Charges: Situation in the Republic of Kenya, 23 January 2012, para. 108.
[135] IENG Sary Submissions Regarding the Applicable Law, 18 January 2013, **E163/5/10.2**, paras. 9 to 10, footnote

57. Quite to the contrary, the examples drawn by the Chamber from the Nuremberg cases only reinforce the Defence position. In fact, they indicate that crimes against humanity were committed in furtherance of a Nazi State policy designed to eliminate entire segments of the population.[136] Indeed, according to the IMT Charter, the attack had to be part of State policy,[137] a definition that reflected customary international law.[138] It has subsequently been applied by domestic and regional courts.[139] Only the *ad hoc* tribunals have jettisoned this requirement.[140]

58. The error thus committed by the Chamber invalidates the Judgement insofar as it has never been established that the crimes for which KHIEU Samphân was convicted were in furtherance of a State policy or that he had knowledge of the existence of such a policy.

II.1.A.b. Murder

59. The Chamber erred in law by defining the *mens rea* of murder as the intent to kill or *"to cause serious bodily harm in the reasonable knowledge that the act or omission would likely lead to death"*.[141] At the time of the facts charged, other than the intent to kill, there was no different, alternative, or lesser standard in customary international law.

60. The Chamber merely claims that the definition of the elements of murder as developed by post-World War II jurisprudence was sufficiently accessible to the accused at the time of the facts charged.[142] However, in offering this definition, the Chamber relied solely on the subsequent case law of the *ad hoc* tribunals.[143] Moreover, it is noteworthy that the *ad hoc* tribunals which, were, for the first time, applying a subsidiary standard to the intent to kill,[144] also do not identify any

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26. See also footnotes 29 to 33, analysing the sources in the *Kunarac* Appeal Judgement.
[136] Judgement, para. 181, footnote 547; IENG Sary's Submissions Regarding the Applicable Law, 18 January 2013, **E163/5/10.2**, para. 8, footnote 22 and para. 10, footnote 31.
[137] IMT Charter, Article 6(c); see also Preamble to the London Charter of 8 August 1945 and the Moscow Declaration of 30 October 1943 (which was to be implemented via Control Council Law No. 10; this was essentially domestic legislation, see Pre-Trial Chamber Decision of 11 April 2011, **D427/1/30**, para. 309 and footnote 575).
[138] *Duch* Appeal Judgement, paras. 112 and 115 footnote 223.
[139] For example: Cour de Cassation française, *Affaire Barbie* (Cass., Crim., 20 December 1985, n°85-95166), *Affaire Touvier* (Cass., Crim., 27 November 1992, n° 92-82409) ECHR, *Korbely v. Hungary*, paras. 83 to 84.
[140] IENG Sary's Submissions Regarding the Applicable Law, 18 January 2013, **E163/5/10.2**, para. 9, footnote 26.
[141] Judgement, para. 412.
[142] Judgement, para. 411.
[143] Judgement, para. 412, footnote 1256 and para. 1257 (*Akayesu* Judgement; *Blaškić* Judgement; *Kordić and Čerkez* Appeal Judgement; *Duch*, Judgement referring to the *Blagojević and Jokić* Judgement).
[144] *Sandrock* Judgement, 24-26 November 1945, Law Reports, Vol. I, pp. 35, 37 and 70; *Hoelzer et al.* Judgement,

international cases pre-dating theirs in which that standard was applied.[145] Further, the jurisprudence of the *ad hoc* tribunals shows that their definition of the *mens rea* of murder was not previously and clearly established in international law, since some chambers considered that premeditation was a requirement while others did not.[146]

61. In the absence of evidence of extensive and uniform State practice or of *opinio juris* establishing the existence, prior to 1975, of a customary rule[147] pursuant to which the *mens rea* of murder could be other than the intent to kill, the Chamber offended the principle of legality, which requires that the law must be construed strictly and in favour of the accused.

62. Insofar as it has never been established that KHIEU Samphân possessed the intent to kill, the error thus committed by the Chamber invalidates all its findings concerning murder.[148]

II.1.A.c. Extermination

63. The Chamber erred in law by defining the *mens rea* of extermination as the intent "either" to kill persons on a massive scale, *"or" "to inflict serious bodily injury or create conditions of living that lead to death, in the reasonable knowledge that such act or omission is likely to cause the death of a large number of persons (dolus eventualis)"*.[149] At the time of the facts charged, other than the intent to kill persons on a massive scale, there was no alternative, subsidiary or lesser standard in customary international law.

64. To justify its definition of the *mens rea* of extermination, the Chamber relied solely on the subsequent case law of the *ad hoc* tribunals,[150] which the Chamber itself considers inconsistent.[151] Disregarding the more recent opposing case law of the Appeals Chamber of the *ad hoc* tribunals,

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Record of Proceedings, 25 March to 6 April 1946, Vol. I, pp. 341, 347 and 349 (RCAF Binder 181.009 (D2474).

[145] *Akayesu* Judgement, paras. 587 to 590; *Blaškić* Judgement, paras. 216 and 217; *Kordić and Čerkez* Appeal Judgement, para. 36; *Blagojević and Jokić* Judgement, para. 556. See also: *Rutaganda* Judgement, paras. 79 to 81; *Kupreškić* Judgement, para. 561; *Musema* Judgement, paras. 214 to 216.

[146] *Akayesu* Judgement, para. 588; *Kayishema and Ruzindana* Judgement, paras. 137 to 140.

[147] *Duch* Appeal Judgement, para. 93.

[148] Judgement, paras. 1053 to 1054.

[149] Judgement, para. 417.

[150] Judgement, para. 417, footnote 1267 referring to the *Krstić* Judgement and the *Duch* Judgement (the latter refers to the *Bagosora* Judgement, which in turn refers to the appeal judgements in *Brđanin*, *Stakić*, *Gacumbitsi*, *Ntakirutimana*).

[151] Judgement, para. 417 and footnote 1268.

the Chamber opted for the definition found in the *Krstić* Judgement. The claim that it did so because of *Krstić*'s review of pre-1975 jurisprudence which led it to include the requirement of *dolus eventualis* is deceitful. In reality, in *Krstić*, the judges observed that post-World War II judgements *"[did] not provide any specific definitio*n" of the term extermination, adding that *"only the ICTR ha[d] defined* [the requisite elements of the offence]*"*.[152] They [the judges] then relied on the *Akayesu* Judgement and three ICTY judgements in making *dolus eventualis* a requirement.[153] However, the *Akayesu* Judgement only requires *direct intent* in respect of extermination[154] while the three other judgements deal only with the elements of murder.[155] Not surprisingly therefore, the Appeals Chamber of the *ad hoc* tribunals subsequently overruled the *Krstić* Judgement and excluded the requirement of *dolus eventualis* from the definition of extermination.[156]

65. Further, a review of pre-1975 jurisprudence – which the Chamber did not undertake – heightens the error it committed. A careful reading of the convictions imposed by the IMT for extermination[157] or of the *Eichmann* Judgement[158] shows that the sole standard at that time was the intent to kill persons on a massive scale.

66. In the absence of evidence of extensive and uniform State practice or of *opinio juris* establishing the existence, prior to 1975, of a customary rule[159] pursuant to which the *mens rea* of extermination could be other than the intent to kill persons on a massive scale, the Chamber offended the principle of legality, which requires that the law must be construed strictly and in favour of the accused.

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[152] *Krstić* Judgement, para. 492.
[153] *Krstić* Judgement, para. 495, footnote 1140, referring to the *Akayesu*, *Blaškić*, *Jelisić* and *Kupreškić* judgements.
[154] *Akayesu* Judgement, para. 592.
[155] *Jelisić* Judgement, para. 3; *Kupreškić* Judgement, paras. 560 and 56; *Blaškić* Judgement, para. 217.
[156] Judgement, para. 417, footnote 1268, referring to *Ntakirutimana* Appeal Judgement, para. 522 and *Lukić* Appeal Judgement, para. 536. See also *Stakić* Appeal Judgement, para. 260, *Brđanin* Appeal Judgement, para. 477 and *Munyakazi* Appeal Judgement, para. 141.
[157] IMT Judgement, 1 October 1946, pp. 102 to 103 (*Göring*), pp. 107 to 108 (*Ribbentrop*), pp. 111 to 112 (*Kaltenbrunner*), pp. 115 à 117 (*Franck*), p. 119 to 120 (*Frick*), pp. 136 to 137 (*Sauckel*), p. 143 to 144 (*Seyss-Inquart*), pp. 152 to 154 (*Bormann*).
[158] *Eichmann* Judgement, District Court of Jerusalem, 11 December 1961, paras. 190 to 191, paras. 200 to 201.
[159] *Duch* Appeal Judgement, para. 93.

67. Insofar as it has never been established that KHIEU Samphân possessed the intent to kill persons on a massive scale, the error thus committed by the Chamber invalidates all its findings concerning extermination.[160]

II.1.B. Modes of liability

II.1.B.a. Joint criminal enterprise ("JCE")

68. The Chamber committed errors of law by defining the *mens rea* of JCE-1 and attempting to validate its definition through an expansive interpretation of the elements of the *actus reus.*[161] The various criteria on which it relied did not exist at the time of the facts charged any more than they exist today, and are not sufficient to engage such a mode of liability.

69. First, the Chamber set out the correct *actus reus* requirement, namely that *"there must be a common purpose which amounts to or involves the commission of a crime".*[162] It then made a semantic shift and held that *"a common purpose must either have a crime as its objective or contemplate the commission of crimes as the means of achieving an objective".*[163] Then, after engaging in a false debate on the linguistic inconsistency of the Closing Order, it held that the means of achieving a common purpose *"ont [...] pour conséquence ou impliqu[ent] la commission de crimes" [("resulted in and/or involved crimes")]* by expressly disregarding the phrase *"consistent à commettre des crimes ou en impliquent la perpétration" ["amounts to or involves].*[164] In doing so, the Chamber introduced elements of JCE-3, which concerns cases where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.[165]

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[160] Judgement, paras. 1053 to 1054.
[161] Judgement, paras. 694 to 696.
[162] Judgement, para. 692, footnote 2157, referring to the *Tadić* Appeal Judgement.
[163] Judgement, para. 696, footnote 2170, referring to its Decision on the Applicability of Joint Criminal Enterprise, dated 12 September 2011, **E100/6**.
[164] Judgement, para. 778 and footnotes 2464, 2804. In footnote 2464, the Chamber does not use the wording of the French version (the original), preferring to use its own interpretation of the (unsigned) English version of the Closing Order: *"resulted in and/or involved"*. However, that wording is not part of the jurisprudence relating to JCE-1, in regard to which the wording is *"amounts to or involves"* and *"consiste à commettre ou implique"*. See for example *Tadić* Appeal Judgement, para. 227.
[165] *Tadić* Appeal Judgement, para. 204; Judgement, para. 690, footnote 215.

These erroneous interpretations portend an extension of the *mens rea* of JCE-1 to the lesser degree of *mens rea* of JCE-3, which, as the Chamber recalled, is not applicable.[166]

70. With respect to *mens rea*, the Chamber began by holding that *"an accused must intend to participate in the common purpose and this intent must be shared with the other JCE participants"*.[167] That is false. The issue is not the intent to participate: intent relates to the common purpose. Under JCE-1, *"all of the co-perpetrators possess the same intent to effect the common purpose"*.[168] The *mens rea* required is *"the intent to perpetrate a certain crime"*.[169]

71. The Chamber continued to lower the requisite standard by using a less stringent criterion, namely whether the crimes were foreseeable or whether *"the Accused was aware of the substantial likelihood of their later occurrence"*.[170] Illegally imported from JCE-3, this standard does not apply and the Chamber could not rely on it as a subsidiary or an alternative to the intent that a crime would be perpetrated.[171]

72. Insofar as it has never been established that KHIEU Samphân possessed the intent to perpetrate a certain crime, the errors thus committed by the Chamber invalidate all its findings concerning JCE.[172]

73. The Chamber continued to unlawfully extend to all the modes of liability the lesser degree of *mens rea* of JCE-3, deemed non-applicable since it did not exist under customary international law at the time of the facts charged. Such repeated infringement of the principle of legality foreshadowed the Chamber's need to make up for the absence of evidence of the fact that KHIEU Samphân possessed no direct intent in order to convict him.

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[166] Judgement, para. 691, footnote 2153.
[167] Judgement, para. 694, footnote 2163 referring to *Kvočka* Appeal Judgement, paras. 82 and 118.
[168] *Kvočka* Appeal Judgement, para. 82 (yet it is mentioned in footnote 2163, para. 695), para. 110.
[169] *Tadić* Appeal Judgement, para. 228, *Vasiljević* Appeal Judgement, para. 101, *Stakić* Appeal Judgement, para. 65, *Šainović* Appeal Judgement, paras. 996, 1014.
[170] Judgement, para. 944, Section 16.1.1.
[171] Judgement, paras. 951 to 952, 956, 994, 998, 1002, 1015, 1023, 1028, 1032, 1040, 1042, 1046.
[172] See III.1.D, III.3.D, III.4.D, *infra*.

II.1.B.b. Planning

74. By relying solely on the jurisprudence of the international criminal tribunals, the Chamber erred in law by adopting a much more extensive definition of planning than existed in 1975.[173]

75. With respect to *actus reus*, it made a non-existent distinction between the design of criminal conduct constituting or *involving a crime later perpetrated.*" This subsidiary definition was not adopted by the IMT or any other subsequent court (including the international criminal tribunals).[174] This unlawful extension of the definition of the *actus reus* portends a similar extension of the definition of *mens rea*, and is rather reminiscent of the Chamber's erroneous reasoning in regard to JCE and its interpretation of the term *"involve"* (II.1.b.i., *supra*).

76. In effect, the Chamber introduced into the *mens rea* of planning a standard different from, subsidiary to and lesser than the intent that a crime would be committed. The *"aware[ness] of a substantial likelihood of the commission of a crime upon the execution of the plan"* standard did not exist at the time of the facts charged. The ICTY Appeal Judgement in *Kordić and Čerkez*, which the Chamber cites, does not identify any earlier decision in which a lesser degree than direct intent was applied.[175]

77. For good reason, decisions pre-dating the charged facts required only direct criminal intent. All the Accused before the IMT were convicted on count 1 (common plan or conspiracy). Only those who had collaborated closely with HITLER in the elaboration of the Nazi criminal plans were convicted on this count.[176] Those who were not part of that "inner circle" in respect of whom the court did not find that they possessed the *actus reus* and, therefore, the *mens rea* of the mode of liability were acquitted.[177] According to the United Nations Secretary General's analysis in 1949:

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[173] Judgement, para. 698, referring to the *Duch* Judgement; *Kordić and Čerkez* Appeal Judgement; *Nahimana* Appeal Judgement.
[174] Judgement *Duch,* para. 518; *Kordić and Čerkez* Appeal Judgement, para. 266.
[175] *Kordić and Čerkez* Appeal Judgement, paras. 29 and 31.
[176] IMT Judgement, pp. 101-02 (*Göring)*, pp. 104-05 (*Hess),* pp. 106-07 (*Ribbentrop),* pp. 108-09 (Keitel), pp. 113-14 (Rosenberg), p. 132-33 (*Raeder)*, pp. 138-39 (*Jodl*), p. 147-48 (*Von Neurath*).
[177] Nuremberg Judgement, p. 111 (*Kaltenbrunner)*, p. 115 (*Franck*), p. 118 (*Frick*), p. 120 (*Streicher),* p. 122 (*Funk*), pt. 125 to 127 (*Schacht*), p. 128 (*Dönitz),* p. 134 (*Von Schirach)*, p. 136 (*Sauckel*), p. 140 to 142 (*Von Papen*), p. 142 to 144 (*Seyss-Inquart*), p. 145 (*Speer*), pp. 150-51 (*Fritzsche*), p. 152 (*Bormann*). [Fr. page numbers]

> "[t]he planning must not only be common, it must also be concrete, and consist in the establishment of one or more concrete plans to wage war. Participation in the activities of the Nazi Party or government was not considered by the Tribunal to constitute, in itself, a participation in a criminal conspiracy. To be a party to such a conspiracy each planner must, with knowledge of its purpose, have made a significant contribution to the elaboration of a concrete plan to wage war. (…) Thus only those defendants who belonged to Hitler's inner circle and who with knowledge of his concrete aggressive plans had intimately collaborated with him were convicted on count one [common plan or conspiracy]."[178]

78. It would in fact be unreasonable to think that if the IMT could have convicted by contenting itself with a definition as flexible and expansive as that of the Chamber, it would not have done so. In any event, in the absence of evidence of extensive and uniform State practice or of *opinio juris* establishing the existence, prior to 1975, of a customary rule[179] pursuant to which the *mens rea* of planning could be other than the intent to commit crimes, the Chamber offended the principle of legality, which requires that the law must be construed strictly and in favour of the accused.[180]

79. Insofar as it has never been established that KHIEU Samphân possessed the intent to commit crimes, the error thus committed by the Chamber invalidates all its findings concerning planning.[181]

II.1.B.c. Instigating

80. The Chamber committed an error of law by defining the *mens rea* of instigating as the intent to prompt another to commit a crime or the awareness *"of a substantial likelihood of, the commission of a crime as a result of the instigation*".[182] At the time of the facts charged, other than the intent to prompt another to commit a crime, there was no different, subsidiary or lesser standard in customary international law.

81. To justify its definition, the Chamber relied on its jurisprudence in *Duch*, the ICTY Appeal Judgement in *Kordić and Čerkez* and an IMT case (*Streicher* Judgement).[183] The

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[178] The Charter and Judgment of the Nurnberg Tribunal – History and Analysis (Memorandum submitted by the Secretary-General) (UN, General Assembly, 1949), pp. 53 to 54.
[179] *Duch* Appeal Judgement, para. 93.
[180] *Kokkinakis v. Greece*, para. 52; *Naletelić and Martinović* Judgement, para. 252.
[181] Judgement, paras. 1053 to 1054.
[182] Judgement, para. 700.
[183] Judgement, para. 700, footnote 2185.

jurisprudence which emerged subsequent to the facts charged is not based on any decision predating those of the international criminal tribunals.[184] Moreover, the subsequent jurisprudence which the Chamber only situates after the facts charged, there is uncertainty as to the definition of the *mens rea* of instigating.[185]

82. By contrast, it is clear from the IMT jurisprudence that no subsidiary standard of a lesser degree to the intent to prompt another to commit crimes existed at the time. This is the case in the *Streicher* Judgement cited by the Chamber, where the convicted accused appeared as a staunch Nazi, long-time ultra-extremist anti-Semitic, who continually received current information about the progress of the "final solution" and continued to write and publish his "*propaganda of death*".[186]

83. This is also the case in *Fritzsche*, where the accused was acquitted despite his staunch anti-Semitic speeches, because these speeches did not urge persecution or extermination of Jews. The IMT expressly stated that it could not infer from FRITZSCHE's extremist rhetoric that it was intended to incite the German people to commit atrocities on conquered people. It concluded that FRITZSCHE could not be held to have been a participant in those crimes, adding that his aim was to arouse popular sentiment in support of HITLER and the German war effort.[187] Had awareness of the substantial likelihood of the commission of crimes been codified and applicable at the time, FRITZSCHE would have been convicted.

84. Moreover, a reading of the conventions and jurisprudence cited by the Chamber to justify the existence of instigating at the time of the facts charged shows that only direct intent to prompt another to commit a crime was recognised.[188]

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[184] *Kordić and Čerkez* Appeal Judgement, paras. 29 and 32.
[185] For example: *Oric* Judgement, para. 277; *Lubanga* Judgement, paras. 349 *et seq.*; *Katanga* Judgement 2008, paras. 527 *et seq.*; *Bemba* Judgement 2008, paras. 82 *et seq.*; *Bemba* Judgement 2009, paras. 360 to 369.
[186] IMT Judgement, findings concerning Streicher; Judgement, para. 700, footnote 2185.
[187] IMT Judgement, findings concerning Fritzsche.
[188] Judgement, para. 699, footnote 2178. See for example: Article 2 of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which prohibits *"directly incit[ing] others to the commission of [...] crimes"*; Article 3 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which prohibits direct and public incitement to commit genocide.

85. In the absence of evidence of extensive and uniform State practice or of *opinio juris* establishing the existence, prior to 1975, of a customary rule[189] pursuant to which the *mens rea* of instigating could have been other than the intent to prompt another to commit crimes, the Chamber offended the principle of legality, which requires that the law must be construed strictly and in favour of the accused.

86. Insofar as it has never been established that KHIEU Samphân possessed the intent to instigate the commission of crimes, the error thus committed by Chamber invalidates all its findings concerning instigating.[190]

II.1.B.d. Aiding and abetting

87. The Chamber erred in law in its definition of the *mens rea* of aiding and abetting when it held that to be found guilty of aiding and abetting, an accused must *"know that a crime would likely be committed and that his conduct assists or facilitates the commission of a crime"*.[191] This lesser degree of *mens rea* did not exist at the time of the facts charged.

88. To justify its definition, the Chamber relied on the ICTY Appeal Judgement in *Blaškić* and on a Nuremberg case (*Einsatzgruppen* Judgement).[192] Now, aside from the fact that *Blaškić* post-dates the facts charged, it is not even followed in this regard by many subsequent decisions of the Appeals Chamber of the *ad hoc* tribunals which hold that the requirement is rather *"knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator"*.[193] Moreover, while the jurisprudence of the *ad hoc* tribunals only requires knowledge, the ICC Statute requires both knowledge and intent to facilitate the commission of the crime.[194]

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[189] *Duch* Appeal Judgement, para. 93.
[190] Judgement, paras. 1053 to 1054.
[191] Judgement, para. 704.
[192] Judgement, para. 704, footnote 2198 (also referring to *Duch* Judgement, para. 535, referring to the *Blaškić* Appeal Judgement, and *Brima*: SCSL, also referring to the *Blaškić* Appeal Judgement).
[193] For example: appeal judgements in *Rukundo*, para. 53; *Kalimanzira*, para. 86; *Ntawukulilyayo*, para. 222; *Gotovina & Markac*, para. 127; *Lukić & Lukić*, paras. 427, 440, 458; and *Ndahimana*, para. 157.
[194] Rome Statute, Article 25(3)(c).

89. A careful and correct reading of post-World War II jurisprudence precludes the idea that a lesser degree of *mens rea* existed at the time. The Chamber did nothing more than note that in the *Einsatzgruppen* Judgement, the Tribunal held that *"in locating, evaluating and turning over lists of Communist party functionaries to the executive of his organisation he was aware that the people listed would be executed when found".*[195] However, what we are talking about here is the awareness that the acts performed assist the commission of crimes and not merely awareness that these crimes would likely be committed. In fact, the Tribunal added that even though some of the accused "*were not in command, they [could not] escape the fact that they were members of Einsatz units whose express mission, well known to all the members, was to carry out a large-scale program of murder".*[196]

90. On the other hand, in the *Hechingen Deportation Case*, the Tribunal held that the *mens rea* requirement of complicity included both knowledge that a crime was committed by the perpetrators and awareness of providing complicit assistance to the criminal conduct of the perpetrators of the crime (in this instance, the accused was aware that the act the Gestapo requested him to perform was in furtherance of persecution on racial grounds).[197] In *Zyklon B*, two accused were convicted, because they sold gas to the SS, which was produced by their firm, with the knowledge that the SS intended to use it for the extermination of people in the death camps.[198]

91. In the absence of evidence of extensive and uniform State practice or of *opinio juris* establishing the existence, prior to 1975, of a customary rule[199] pursuant to which the *mens rea* of aiding and abetting could be other than knowledge of assistance to the commission of a specific

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[195]Judgement, para. 704, footnote 2198; *The United States of America v. Otto Ohlendorf et al.* (*Einsatzgruppen*), US Military Tribunal, p. 569 (the Accused was Officer Klingelhoefer).
[196] *Tadić* Appeal Judgement, para. 200, footnote 245.
[197] International Criminal Law, Cases and Commentary, Antonio Cassese, Guido Acquaviva, Mary Fan, Alex Whiting, Oxford University Press, 2011, pp. 383 to 386, (refers to the judgement *Federal Republic of Germany v. S. et al.* (*Hechinghen Deportation* case), Hechinghen Tribunal, 28 June 1947, *"Intent as an accessory requires, first, that the accused knew what act he was furthering by his participation; he must have been aware that the actions ordered from him by the Gestapo served persecution on racial grounds…second that the accused knew that through his participation he was furthering the principal act".*
[198] *United Kingdom v. Bruno Tesch and Two Others* (*Zyklon B*), British Military Tribunal, 1 to 8 March 1946.
[199] *Duch* Appeal Judgement, para. 93.

crime, the Chamber offended the principle of legality, which requires that the law must be construed strictly and in favour of the accused.

92. Insofar as it has never been established that KHIEU Samphân knew that his acts assisted the commission of specific crimes by the principal perpetrators, the error thus committed by the Chamber invalidates all its findings concerning aiding and abetting.[200]

II.1.B.e. Participation by omission (JCE, instigating, aiding and abetting)

93. The Chamber committed errors of law by holding that through JCE, instigating, aiding and abetting, liability could be incurred for participation in a crime resulting from culpable omission.[201] However, such a possibility did not exist at the time of the facts charged.

94. In the case of JCE, the Chamber relied exclusively on the jurisprudence of the *ad hoc* tribunals.[202] For instigating and aiding and abetting, it again relied on this jurisprudence and one[203] and two[204] Nuremberg cases, respectively.

95. The jurisprudence of the *ad hoc* tribunals cited by the Chamber does not cite any prior decision criminalising participation by omission.[205] Moreover, a correct and broader analysis of this jurisprudence establishes how recently these judicially-created notions emerged.[206] In

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[200] Judgement, paras. 1053 to 1054.
[201] Judgement, paras. 693 (JCE), 700 (instigating), 706 (aiding and abetting).
[202] Judgement, para. 693, footnote 2159 (*Kvočka*, *Blaškić*, *Galić* and *Ntagerura* Appeal Judgements).
[203] Judgement, para. 700 note 2181 (*Kordić and Čerkez* Appeal Judgement, also referred to in the *Duch* Judgement, *Ministries* Judgement).
[204] Judgement, para. 706 footnotes 2201 to 2203 (*Brđanin* Appeal Judgement, *Taylor* (SCSL), *Blaškić*, Affaire *des Einsatzgruppen*, *Essen Lynching Case*).
[205] JCE: *Kvočka* Appeal Judgement, paras. 187, 421 and 556, *Blaškić* Appeal Judgement, para. 663 (concerns a superior), *Galić* Appeal Judgement, paras. 168 and 175 (concerns a superior), *Ntagerura*, para. 334 (referring to the *Blaškić* Appeal Judgement); Instigating: *Kordić and Čerkez* Appeal Judgement, para. 27; Aiding and abetting: *Brđanin* Appeal Judgement, para. 277, *Taylor* Appeal Judgement (SCSL), para. 475, *Blaškić* Appeal Judgement, para. 47.
[206] JCE: the conditions for commission by omission were established for the first time in 2004 in the *Ntagerura* Judgement (para. 659). There is no indication that before this date, participation in a JCE by omission had already been criminalised and there is no evidence that such a possibility was foreseen under ICL. Instigating by omission appeared for the first time in 2000 in the *Blaškić* Judgement (para. 280), which made a semantic deduction. Aiding and abetting by omission was mentioned for the first time in 2004 by the Appeals Chamber in the *Blaškić* Appeal Judgement (para. 47), which refused to confirm its existence, all the while not ruling out *"the possibility that in the circumstances of a given case, an omission may constitute the actus reus of aiding and abetting"*. In 2007, in the *Brđanin* Appeal Judgement (para. 274), it stated that it has so far *"declined to analyse whether omission proper may*

addition, the proposal to include liability for omission was formally rejected at the time of the adoption of the Rome Statute.[207]

96. Post-World War II jurisprudence does not support the contention that customary international law criminalised these forms of omission. Like the Chamber, the Appellant has not been able to identify any precedent lending support to the existence of JCE by omission.[208] On the contrary, the single Nuremberg case mentioned by the Chamber concerning instigating by omission shows that the Accused was convicted only for positive acts.[209] The two cases mentioned concerning aiding and abetting by omission are neither probative nor sufficient to prove its existence in customary international law.[210]

97. In the absence of evidence of extensive and uniform State practice or of *opinio juris* establishing the existence, prior to 1975, of a customary rule,[211] pursuant to which an Accused could incur liability for JCE, instigating and aiding and abetting by culpable omission, the Chamber offended the principle of legality, which requires that the law must be construed strictly and in favour of the accused.

98. Accordingly, the Chamber's findings, based on what it considers as KHIEU Samphan's

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lead to individual criminal responsibility for aiding and abetting", before stating that it was inappropriate to do so in the case. It was only in 2008 and 2009 that the Chamber clearly suggested the existence of this concept in the *Orić* Appeal Judgement (para. 43) and the *Mrkšić and Šljivančanin* Appeal Judgement (para. 134).

[207] Per Saland, 'International Criminal Law Principles': Roy Lee (ed.), The International Criminal Court. The making of the Rome Statute (The Hague: Kluwer 1999) pp. 189-216, 212; A. Eser, 'Individual Criminal Responsibility': A. Cassese, P. Gaeta and J. Jones (eds), The Rome Statute of the International Criminal Court: A Commentary. Volume I (Oxford University Press 2002) p. 819; Duttwiler, 'Liability for Omission in International Criminal Law', p. 57.

[208] It is important to point out that none of the post-World War II trials listed in the *Tadić* case contain fledgling signs of a nascent doctrine of JCE founded upon culpable omission.

[209] Trial of the Ministers, p. 576, *Dietrich* Case: *"These press and periodical directives [sent out by Dietrich] were not mere political polemics, they were not aimless expressions of anti-Semitism, and they were not designed only to unite the German people in the war effort. Their clear and expressed purpose was to enrage Germans against the Jews, to justify the measures taken and to be taken against them, and to subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected. By them Dietrich consciously implemented, and by furnishing the excuses and justifications, participated in, the crimes against humanity regarding Jews charged in count five."*

[210] *Einsatzgruppen* Case rather suggests a matter of superior responsibility. The Judgement in the Essen Lynching Trial is insufficiently reasoned, the legal basis of statements of guilt are not clearly discernible and are open to several possible interpretations.

[211] *Duch* Appeal Judgement, para. 93.

culpable omission, must be invalidated.[212]

II.1.C. Accessibility and foreseeability

99. Once again, the Chamber offended the principle of legality by considering that if a crime or mode of liability existed under customary international law in 1975, and KHIEU Samphan held *"senior positions"* at the time, the crime or mode of liability were sufficiently foreseeable and their definitions sufficiently accessible to the Appellant.[213]

100. To begin with, the foreseeability and accessibility of a norm do not depend on the rank of the accused, but on its clarity and whether or not the prohibition is accessible to all members of the public. The purpose of the principle of legality is to ensure that *"one who wishes to avoid criminal liability may do so by receiving notice of what acts lawmakers will deem to be criminal."*[214] It follows that for an offence or mode of liability to be subject to prosecution, their definitions must be *"precise, unequivocal and unambiguous,"*[215] and accessible to all. The senior position held by an accused is no cure for the absence of such a definition.

101. Further, the fact that a crime or mode of liability existed under customary international law in 1975 is insufficient to satisfy the criteria of foreseeability and accessibility. The Appellant could not have foreseen that this law was applicable in Cambodia in 1975. While the Chamber believes that it was the ECCC Law of 2004 which made customary international law applicable before the ECCC,[216] the fact remains that Cambodia has a dualist legal system which precludes the direct application of international norms in domestic law.[217] Given that customary

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[212] *A priori*: Judgement, paras. 952 and generally 788, 794, 805 (JCE); 999, 1025-1026 (planning); 1014, 1031, 1045 (instigating), 1034, 1048 (aiding and abetting). The lack of reasoning concerning omission prevents the Appellant from knowing if he was indeed convicted for culpable omissions, and if so, which ones. Moreover, the Chamber does not define planning by omission (para. 698). In any event, the Chamber did not provide any definition or criteria for any of the modes of liability. See *infra*, II.1.C.
[213] Judgement, para. 411, 415, 426, 435 (by implication), 691, 697, 699, 703. See also paras. 701 and 714.
[214] *Duch* Appeal Judgement, para. 90.
[215] *Specific Human Rights Issues: New Priorities, in particular Terrorism*, Commission on Human Rights, E/CN.4/Sub.2/2003/WP. 1, 8 August 2003, para. 65; General Comment No. 29, State of Emergency (art. 4), Human Rights Committee, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 7; *Case of Kokkinakis v. Greece*, para. 52; *Vasiljević* Judgement, paras. 193, 198, 201, 202.
[216] Judgement, paras. 18 and 19; *Duch* Appeal Judgement, paras. 98 and 99 (the Supreme Court also refers to Article 15 of the International Covenant on Civil and Political Rights, which Cambodia had neither signed no ratified at the time of the events).
[217] In keeping with the French civil law tradition upon which it is based.

international law was not transposed into Cambodian law at the time,[218] all that KHIEU Samphan could reasonably expect was that the 1956 Cambodian Penal Code would apply. However, crimes against humanity and the modes of liability contemplated by the Chamber were not criminalised under the Cambodian Penal Code.

102. Even accepting the fiction that customary international law would have applied in Cambodia in 1975 and that any citizen could have expected it, the Chamber's definitions of crimes and modes of liability were neither accessible nor foreseeable at the time.

103. With respect to the contextual elements necessary for a crime to be characterised as a crime against humanity, the Chamber did not even bother to consider whether their definition was accessible and foreseeable to the Accused at the time of the events.[219] However, it could not shirk that task because the principle of legality applies to anything that might entail criminal responsibility.[220] In any event, a definition that did not require a nexus to armed conflict and State policy was neither foreseeable nor accessible in 1975 (see *supra*, II.1.A.a.).

104. With respect to underlying offences, a definition of the *mens rea* of murder and extermination encompassing an element that was less restrictive than direct intent was neither foreseeable nor accessible in 1975 (see *supra*, II.1.A.b. and c.).[221]

105. With respect to modes of liability, no definition of their *mens rea* encompassing an element that was less restrictive than direct intent was foreseeable or accessible in 1975 (see *supra*, II.1.B.a. to d). Cambodian law only required direct intent,[222] which explains why JCE-3

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[218] Judgement, para. 18, footnote 40: *Case of Kononov v. Estonia*, para. 208 (regarding the period during which the laws and customs of war were being codified up to the Nuremberg Principles: *"International and national law (the latter including transposition of international norms) served as a basis for domestic prosecutions and liability."* emphasis added); Cass., Crim., 17 June 2003, Bull. Crim. 2003 n°122 (affaire *Aussaresses*: *"International custom cannot cover for the lack of an incriminating text characterising as a [crime against humanity], the facts complained of by the civil party"*). For other examples, see: Pre-Trial Chamber Decision of 15 February 2011, **D427/2/15**, para. 97, footnote 215 p. 44; NUON Chea Preliminary Objections, **E51/3**, para. 48; IENG Sary Appeal against the Closing Order, **D427/1/6**, para. 123, footnote 250.
[219] Judgement, paras. 176 to 198.
[220] *Duch* Appeal Judgement, para. 90; *Korbely* Case, 78, 81 to 85, 95.
[221] Article 504 of the 1956 Cambodian Penal Code.
[222] Articles 82 to 86 of the 1956 Cambodian Penal Code (Title II, "*De la participation*").

has been held not to apply before the ECCC.[223]

106. With respect to culpable omission being grounds to incur criminal responsibility for JCE, instigating and aiding and abetting, it could not have been foreseeable and its definition (which the Chamber did not even provide)[224] could not, *a fortiori,* have been accessible in 1975 (see *supra* II.1.B.e.), especially because only positive acts of participation were punishable under Cambodian law.[225] What is more, the Chamber did not establish that the Appellant knew the "precedents" on which these new prohibitions were supposedly based or that he could have had access to them at the time of the events.

107. The Chamber's repeated error in lowering the *mens rea* threshold demonstrates its need to make up for the lack of evidence of direct criminal intent in order to reach a guilty verdict. It even goes so far as to state that *"[t]he requisite level of knowledge varies depending on whether the criminal liability of the Accused materialises before, concurrent with or after the commission of the crimes"*, even though there was no legal basis for this false statement.[226] This spurious temporal distinction enables the Chamber to employ the less stringent criteria of "expectation" and "aware[ness] of the substantial likelihood". This unlawful transposition of the theory of JCE-3, which is not applicable in this case, manifests itself in many of the Chamber's findings.[227] The convictions entered on the basis of these legally inadequate criteria must be quashed.

II.2. INCORRECT APPLICATION OF THE PRINCIPLES OF THE ASSESSMENT OF EVIDENCE

108. To find KHIEU Samphan criminally responsible, the Chamber committed several errors of law concerning the rules of evidence in criminal matters.

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[223] Decision (Pre-Trial Chamber) 20.05.2010, **D97/15/9**, para. 87; Decision 12.09.2011, **E100/6**, para. 28.
[224] Even assuming that the concept existed in 1975, its conditions would not have been clearly defined. Under current jurisprudence, the criteria are numerous and stringent (*Tadić* Appeal Judgement, para. 188; *Ntagerura* Appeal Judgement, para. 333; *Mrkšić and Šljivančanin* Appeal Judgement, paras. 49, 146). It is necessary to establish that the accused 1) must have had a duty to act mandated by a rule of criminal law, i.e. the obligation to take actions the avoidance of which would have been culpable, 2) the accused must have had the ability to act (in order to avoid the consequences being held against him), 3) the accused failed to act intending the criminally sanctioned consequences, and 4) the failure to act resulted in the commission of the crime, which is the *actus reus* of the "commission" by omission. Which the Chamber in any event has never established, see *infra*, III.1.D., III.3.D., III.4.D, III.5.D.
[225] Articles 82 to 86 of the 1956 Cambodian Penal Code (Title II, *"De la participation"*).
[226] Judgement, para. 944, footnote 2875 (in which it may also be seen that each mode of liability requires a specific level of knowledge that does not depend on when the liability of the accused materialises. The required *mens rea* is the same regardless of when liability materialises).
[227] For example: Judgement, paras. 951, 952, 994, 998, 1002, 1015, 1023, 1028, 1032, 1040, 1042, 1046. See *infra*.

109. **Reasonable doubt.** First, the Chamber committed an error of law by considering that there could be a discrepancy between the different language versions of Internal Rule 87(1) that reflect the civil law concept of "*intime conviction*" and the common law "beyond reasonable doubt" standard.[228] In the context of the ECCC, "*intime conviction*" in the French version can only be interpreted to mean "satisfied beyond reasonable doubt",[229] and the Chamber's understanding of the civil law standard is therefore irrelevant. Nonetheless, the Chamber wrongly used its understanding of the civil law concept of "*intime conviction*" repeatedly, the civil law concept being more subjective and less restrictive than the common law standard.

110. The Chamber also committed an error of law and abused its powers by availing itself of its "*intime conviction*" in making numerous finings and making assumptions that were not based upon evidence that had been debated and were not the only reasonable conclusion available. By substantiating its findings in this way, the Chamber violated the basic principle *in dubio pro reo.*[230] In so doing it also objectionably reversed the burden of proof.

111. **Deductive approach.** The Chamber committed an error of law with respect to the deductive approach specific to the application of the rules of evidence.[231] The controlling jurisprudence shows that conviction may not be entered solely on the basis of circumstantial evidence except on the *conditio sine qua non* that the guilt of the accused is the only reasonable inference that can be drawn from the evidence.[232] A review of the deductive methodology of the judges is only possible if they provide the reasoning supporting their conclusions.

112. It is worth recalling the *Furundžija* Appeal Judgement[233] here. It stated that the right of an accused to a reasoned opinion is an aspect of a fair trial. It is against the backdrop of this

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[228] Judgement, para. 22. For concrete examples, see *infra*.
[229] *Duch* Appeal Judgement, para. 18; *Furundžija* Judgement, para. 120 ("intime conviction" in French is equivalent to "beyond reasonable doubt" in English). See also: *Katanga* Dissidence 2014, par 172. The ECHR gives the same substance to both terms: Case of *Barbera et al. v. Spain*, para. 77.
[230] For concrete examples, see *infra*.
[231] For concrete examples, see *infra*.
[232] *Tadić* Judgement, para. 240; *Krnojelac* Judgement, paras. 67, 326, 327; *Kvočka* Appeal Judgement, para. 260; *Ntagerura* Appeal Judgement, paras. 304, 306, 399; *Nahimana* Appeal Judgement, para. 896; *Bagosora* Appeal Judgement, para. 515; *Ntabakuze* Appeal Judgement, para. 217; *Mugenzi* Appeal Judgement, paras. 88, 136; *Šainović* Appeal Judgement, para. 545; *Karemera* Appeal Judgement, paras. 384 to 386; *Nizeyimana* Appeal Judgement, paras. 156 to 158.
[233] *Furundžija* Appeal Judgement, para. 69. See also *Naletelić* Appeal Judgement, para. 603; *Kunarac* Appeal Judgement, 12 June 2002, para. 41.

principle enshrined in the ECCC Law[234] that the factual findings of the Chamber must be reviewed.

113. Thus, when inferring the existence of a particular fact upon which the guilt of an accused depends, whether from circumstantial or direct evidence, the Chamber must give reasons explaining why that inference commends itself to the Chamber beyond reasonable doubt.[235] In such situations, the appeals chambers of the ad hoc tribunals have repeatedly reviewed and quashed the findings of trial chambers for lack of, or insufficient, reasons.[236] The same requirement also applies in cases where the guilt of the accused depends on a finding based on several distinct factual findings.[237] In the same way, the Supreme Court must identify the many errors committed by the Chamber in making its findings.

114. **Contradictions with other evidence.** With respect to contradictions between different evidence, the Chamber committed errors of law by failing to uphold the principle whereby it is incumbent upon it to consider the evidence of every witness in light of the entire record and to explain why, despite material inconsistencies, it nonetheless accepts the evidence of a particular witness.[238]

115. **Motive to lie.** The Chamber also erred in law by failing to fulfil its duty to treat with appropriate caution the evidence of accomplice witnesses or persons with an interest to lie and to consider the totality of the circumstances in which the evidence was tendered,[239] and to fulfil its duty to explain why it accepted the evidence of such witnesses.[240]

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[234] Article 33 of the Law on the Establishment of the ECCC.
[235] *Delalić* Appeal Judgement, para. 458; *Vasiljević* Appeal Judgement, paras. 120, 121; *Stakić* Appeal Judgement, para. 219; *Ntagerura* Appeal Judgement, paras. 304, 306.
[236] *Krstić* Appeal Judgement, paras. 41, 42; *Kordić and Čerkez* Appeal Judgement, paras. 384, 385; *Karemera* Appeal Judgement, paras. 384 to 386.
[237] *Ntagerura* Appeal Judgement, paras. 306, 399; *Karemera* Appeal Judgement, paras. 384 to 386.
[238] For concrete examples, see *infra*; *Kupreškić* Appeal Judgement, paras. 32, 202; *Kordić and Čerkez* Appeal Judgement, paras. 384 to 388; *Hadžihasanović* Appeal Judgement, para. 13; *Muvunyi* Appeal Judgement, paras. 144, 147; *Nchamihigo* Appeal Judgement, paras. 281, 282, 354; *Boškoski* Appeal Judgement, para. 196; *Haradinaj* Appeal Judgement, paras. 128, 129, 134, 196, 203; *Perišić* Appeal Judgement, para. 92.
[239] *Kordić and Čerkez* Judgement, paras. 628, 629; *Blagojević and Jokić* Judgement, para. 24; *Nchamihigo* Appeal Judgement, paras. 42 and 47; *Muvunyi* Appeal Judgement, para. 37; *Renzaho* Appeal Judgement, para. 263; *Setako* Appeal Judgement, para. 143; *Kanyarukiga* Appeal Judgement, para. 181; *Gatete* Appeal Judgement, para. 154; *Lukić* Appeal Judgement, para. 128; *Bizimungu* Appeal Judgement, para. 63. For concrete examples, see *infra*.
[240] *Lukić* Appeal Judgement, para. 128; *Haradinaj* Appeal Judgement, para. 145. *Krajišnik* Appeal Judgement, para.

116. **Hearsay.** Throughout the Judgement, the Chamber relied on hearsay to make factual findings.[241] The Chamber committed an error of law by not assessing hearsay[242] with the requisite caution. It also committed an error of law by making factual findings upon which conviction was based in this regard without giving reasons for its decision.[243]

117. **Written statements.** The Chamber committed another error of law by abusing its power to make factual findings on the basis of written statements – or any other document whose author was not cross-examined – the probative value of which was not in itself sufficient to support such findings.[244] In so doing, and by failing to ascertain whether the requirements for their admission had been met,[245] the Chamber failed in its duty of care in dealing with this kind of evidence.

118. **Experts.** By adopting the opinions of experts and using them as the basis for its findings, the Chamber committed an error of law by failing to ascertain whether the (testimonial or documentary) sources used by the experts met the standards of admissibility and sufficiency of evidence in criminal matters.[246]

119. **Double standard.** Finally, the Chamber committed an error of law by offending the fundamental principles of fairness and justice requiring that it should not apply differing standards in its treatment of evidence for the Prosecution and evidence for the Defence.[247]

III. ERRORS OF FACT

III.0. CROSS-CUTTING ERRORS THROUGHOUT THE RELEVANT PERIOD

120. **Powers and functions of the Central Committee.** The Chamber committed an error of

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146. For concrete examples, see *infra*.
[241] For concrete examples, see *infra*.
[242] *Aleksovski* Decision, para. 15; *Akayesu* Appeal Judgement, paras. 287 to 289; *Bagilishema* Judgement, para. 25; *Ntakirutimana* Judgement, para. 33; *Niyitegeka* Judgement, para. 43; *Rutaganda* Appeal Judgement, para. 34; *Naletelić* Appeal Judgement, para. 516; *Ndindabahizi* Appeal Judgement, para. 115; *Muvunyi* Appeal Judgement, para. 70; *Lukić* Appeal Judgement, para. 577.
[243] *Kalimanzira* Appeal Judgement, para. 99.
[244] For concrete examples, see *infra*.
[245] For concrete examples, see *infra*; Statute of Rome Articles 68.5 and 69.2; *Katanga* Decision 08.2010, para. 14; *Katanga* decision 09.2010 para. 19. *Katanga* Decision 12.2010, para. 42-51.
[246] *Brđanin Decision*, p. 4; *Milošević Decision*, paras. 8-9; *Simba* Appeal Judgement, para. 174; *Nahimana* Appeal Judgement, para. 198, 199; *Strugar* Appeal Judgement, para. 58.
[247] *Ntakirutimana* Appeal Judgement, para. 133; *Renzaho* Appeal Judgement, para. 540. For concrete examples, see *infra*.

fact in stating that the Central Committee had the power to take decisions and *"in part, [...] to analyse the implementation of the Party's policies, to correct abuses and to issue directives"*.[248]

121. This statement is contradicted by the Chamber's own finding that *"[a]lthough the CPK Statute vested the highest level of operational authority in the Central Committee, effective control over the CPK was ultimately exercised by an extra-statutory body known as the Standing Committee"*...*"to which all other tiers were functionally subordinate"*.[249]

122. That statement is based solely on a biased and partial distortion of KHIEU Samphan's utterances.[250] In fact, a fair reading of the passage of the book mentioned by the Chamber will show that the Appellant points out that the Central Committee *"was not an executive organization. It discussed implementation of policies created by the Permanent Bureau"*.[251] At meetings of the Central Committee, *"certain abuses were noted and severely criticized"*. The four examples of *"directives"* that follow are more in the nature of recommendations. There is nothing in the case file to show that these *"directives"* were effectively decreed by the Central Committee.[252] In his book, and before the judges, KHIEU Samphan pointed out that decisions were first taken by the Standing Committee then discussed within the Central Committee which was not only subordinate to the Standing Committee, but had no real power. Meetings of the Central Committee were the venue for the dissemination of the decisions of the Standing Committee and for criticism and self-criticism.[253]

123. Finally, the statement is contradicted by other evidence which corroborates KHIEU Samphan's unmisconstrued statements. According to the minutes of the Standing Committee

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[248] Judgement, paras. 113, 132, 134, 138, 142, 235, 237, 319, 384, 732, 735, 749, 751, 753, 763, 764, 771, 807, 808, 816, 842, 847, 864, 879, 902, 918, 923, 947, 962, 964, 999, 1006, 1019, 1039.
[249] Judgement, paras. 203 and 223 (see also para. 1019); *Duch* Judgement, para. 85: *"In practice, the Central Committee met rarely. Its powers were delegated to, and exercised by its executive, the Standing Committee"*.
[250] Judgement, paras. 384, footnote 1162, 749, footnote 2353, 771, footnote 2432: Book **E3/18**, pp. 58-59, ERN 00103752.
[251] Book **E3/18**, p. 58, footnote 50, ERN 00103752. (Emphasis added).
[252] Book **E3/18**, pp. 58-59, ERN 00103752. See the 4 examples of "directives".
[253] Book **E3/18**, p. 140, ERN 00103793: *"The Central Committee's meetings involved ideological education sessions which prepared civil servants to implement the general political decisions made by the Permanent Committee."*; Written Record of Adversarial Hearing E3/**557**, p. 3-4, ERN 00153268-00153269; Written Record of Interview of Charged Person E3/**27**, pp. 9-10, ERN 00156749-00156750; Written Record of Interview of Charged Person E3/**210**, pp. 2-4, ERN 00156948-00156950; T. 29 May 2013, **E1/198.1**, p. 97 L. 21-25 around [14.47.20].

meeting of 11 March 1976,[254] if "*Comrade Secretary*" believes the Central Committee should be left to "*decide*" the "*problem*" posed by SIHANOUK's resignation, "*the Comrade Secretary outlined the principle ideas on which the entire Standing Committee had already agreed, as follows: (...)*". There follows a long list of decisions taken by POL Pot. As stated by SHORT, meetings of the Central Committee were very rare and were "*partly work conferences, partly conferences to absorb decisions which the Standing Committee had already reached*".[255]

124. It follows that the Chamber could not state that certain decisions had been taken by the Central Committee without running the risk of distorting other evidence and extrapolating. That is what happened with respect to decisions allegedly taken in October 1970:[256] the words of NUON Chea on which the Chamber relies do not refer to the Central Committee but to the "*Centre*".[257] The same goes for the decision to establish cooperatives in May 1972:[258] the *Revolutionary Flag* issues on which the Chamber relies do not refer to a decision of the Central Committee but of the "*Party*", or the "*Party Centre*".[259] As we shall show below, the same is also true for the decision to evacuate Phnom Penh,[260] decisions about the economy allegedly taken in September 1975 and in 1976[261] and the decision of 30 March 1976.[262]

125. This erroneous overstatement of the Central Committee's powers led the Chamber to connect KHIEU Samphan with decision-making power as a candidate member of the Central Committee in 1971, then a full rights member in 1976. No reasonable trier of fact, proceeding on a correct assessment of the available evidence, could believe that the Central Committee had any

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[254] Minutes of the Meeting of the Standing Committee of 11 March 1976, **E3/197**, 3-5 ERN00182640-00182642.
[255] T. 6 May 2013, **E1/189.1**, p. 61 L. 24 to p. 62 L. 1 after [11.57.24].
[256] Judgement, para. 732, footnote 2288, 864.
[257] See Khmer version of: T. 06.12.2011, **E1/17.1**, p. 12 L. 13-14 around [9.42.14]; T. 30.01.2012, **E1/35.1**, p. 36 L. 8 around [11.10.28]. Only the Black Book **E3/23**, pp. 55-56 mentions the Central Committee. But this propaganda document alone cannot serve to establish beyond reasonable doubt that this concerns the Central Committee and not the Standing Committee.
[258] Judgement, para. 113, footnote 312, 842, 947.
[259] See Khmer version of: **E3/50**, p. 2 ERN 00636009 KH 00442209 ("the Party"), **E169/4/1.1.2**, pp. 18-19, ERN 00865708-00865709, KH 00809847-48 ("the Party Centre"), **E3/10**, pp. 10-12 ERN 00450510-00450512 KH 00063072 ("the Party").
[260] Judgement, paras. 132, 134, 138, 142, 735, 807, 816, 879, 918, 923, 999, 1006, 1039; see *infra*, III.1.A.c. *Meetings* / III.1.C.c. *Attendance of a Central Committee meeting in June 1974*.
[261] Judgement, paras. 749, 751, 753, 771, 808, 902; see *infra*, III.5.A. *Document on the political line September 1975* para. 121DA / III.5.C. *Participation in the preparation of economic plans*.
[262] Judgement, paras. 235, 237, 319, 763, 764; see *infra*, III.5.A. *Decision of 30 March 1976*.

decision-making authority, unlike the Standing Committee of which KHIEU Samphan was not a member. Accordingly, the error committed by the Chamber casts reasonable doubt on the guilt of the Appellant and has occasioned a miscarriage of justice.

126. **Democratic Centralism.** The Chamber committed an error of fact in stating that *"the CPK was organised in accordance with the principle of 'democratic centralism"* and that its decisions were taken *"collectively; that is to say, with the input of, and with a broad consensus from, the entire Committee".*[263]

127. The Chamber repeatedly uses the concept of democratic centralism under the pretext that it appears in several versions of the Communist Party of Kampuchea (CPK) Statute[264] and more particularly because it enables the Chamber to contend that CPK decisions were debated and taken collectively. Thus, each time that it defines the principles on which the revolution was founded, the Chamber never fails to cite democratic centralism.[265] At the same time that it asserts that decisions within the Party were made *"democratically"*, the Chamber states that *"power [was] concentrated in a small Standing Committee".*[266]

128. The principle of democratic centralism had two dimensions. The first is the bottom up progression of democratic debate from the base towards the summit of the hierarchy. This "democratic" dimension of the concept is supposedly symbolised by the election of each hierarchical level by the level immediately below. In fact, the Chamber knew[267] that internal elections of this kind were never held within the CPK. In attempting to conclude that this first dimension was a reality, the Chamber points to the *"ubiquity of committees within the CPK hierarchy".*[268] To prove its point convincingly, it should have demonstrated that these committees were the conduit for a genuine bottom up democratic debate. It made no such demonstration. The second dimension of democratic centralism follows the gradual upward movement of democratic debate. Once the Party line had been debated at every level before reaching the summit, the

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[263] For the two quotes: see Judgement, paras. 223 and 228.
[264] CPK Statute, **E3/214**.
[265] Judgement, paras. 86, 223, 726, 755,777, 968,
[266] Judgement, para. 223
[267] Judgement, para. 234.
[268] For the two quotes: see Judgement, para. 223.

summit would make a decision that was binding on all. That was the "centralism" dimension of the concept.

129. As a matter of fact, this is the only aspect of democratic centralism proven by the case file, and the Chamber was aware of this since it also wrote that under the Khmer Rouge regime the new ruling class applied *"unquestioning implementation of the party line without the exercise of proper judgment"*.[269] The Judgement does not prove the first dimension, it only proves the second. If the summit of the hierarchy imposed its will directly without consulting the base, the Chamber did not prove the existence of "democratic centralism", but merely centralism, in which case it should have held that democratic centralism, even though propounded in the Party Statute or in speeches, was nothing but propaganda.

130. To substantiate the existence of democratic centralism, the Chamber starts with the shifting testimony of the Accused NUON Chea. After recalling that according to his Defence, POL Pot took decisions in the place of the Standing Committee,[270] the Judgement cites a passage from a statement (and an interview) where NUON Chea states that within the CPK, democratic centralism was respected at every level and that POL Pot did not have a monopoly on power. The Chamber then seeks to solidify those shaky foundations by distorting an anonymous, undated interview granted by KHIEU Samphan. The finishing touch to this edifice is a quotation *in extenso* of the very confusing testimony of CHANDLER on democratic centralism. After stacking up all this evidence, the Chamber then rejects Short's evidence to the contrary. None of this proves beyond reasonable doubt the existence of democratic centralism.

131. Read in their entirety, NUON Chea's statements reflect a very blinkered concept of democracy, for he explains that at the lower levels *"and if there was no – there was wrong ideas, the Party members at the district levels might correct or might add to that ideas"*.[271] There was thus no bottom up democratic debate since all "wrong" ideas would be "corrected" at the District level or the District might "add" to those ideas. When Nuon Chea describes his idea of democratic centralism, he is talking about a system without democracy.

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[269] Judgement, para. 945.
[270] See the passage quoted by the Chamber: NUON Chea: T.15 December 2011, **E1/23.1**, pp. 33-36, and on the writing of the *Revolutionary Flag* magazines: T.9 July 2013, **E1/220.1**, before [09.59.14].
[271] NUON Chea: T.15 December 2011, **E1/23.1**, p. 32, L.22-24 after [10.55.17].

132. The Chamber also uses the transcript of a video interview of KHIEU Samphan for which both the identity of the interviewer and the date of the interview are unknown.[272] The answer given by the Appellant shows that he is talking about the situation *after* the evacuations: *"when the evacuations were carried out"*. Given that the Closing Order describes three evacuation phases, the last of which was still underway at the end of 1978, in other words one to two years after movement of the population (phase two), it was not possible for the Chamber to conclude that this interview of the Appellant related beyond reasonable doubt to the period of movement of the population (phases one and two). The IENG Sary interview, for its part, is a counter-example given that he explains that his own dissent to the idea of abolishing the currency had no effect at all on the decision taken by the Standing Committee.

133. SHORT and CHANDLER's analyses on the stand are also consistent with the idea that democratic centralism was nothing but an oxymoron in Democratic Kampuchea. CHANDLER stated repeatedly that he had never seen any evidence that POL Pot exercised power alone within the Standing Committee.[273] But he also stated that *"the secretary of the Party has the -- he can have the last word, that's it. No one overrides the secretary of the Communist Party -- the secretary of the Central Committee, no one overrides him. The decisions reached -- this has been characteristic of the CPK throughout its life"*[274] and he is therefore waxing lyrical in the extract quoted by the Chamber when he says the *"atmosphere was collegial"* within the Standing Committee. Accordingly, CHANDLER's conflicting "*unsupported*" opinions were not evidence beyond reasonable doubt of the practice of democratic centralism within the CPK.

134. The Chamber was wrong to disregard SHORT's analysis. SHORT said that even if debate did take place, POL Pot then took whatever decision he had *essentially* taken himself *before* the meeting even began.[275] More importantly, he recalled that the Central Committee only met three

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[272] **E3/4051;** see also comments on this interview *below* part **III.1.C.b** KHIEU Samphan between 1970 and1975 *Powers to take or veto decisions.*
[273] CHANDLER: T.24 July 2012, **E1/95.1**, p. 24, L.4-5 after 09.49.18 and p. 24 L9-19 before [09.59.34].
[274] CHANDLER: T.24 July 2012, **E1/95.1** around [09.48.18].
[275] SHORT: T. 06.05.2013, **E1/189.1**, pp. 60-62.

times during Democratic Kampuchea and clearly stated his disagreement with CHANDLER's "*unsupported*" opinion.[276]

135. Aside from the points articulated hereinafter, the Chamber should have analysed a contemporaneous document, the Minutes of the Meeting of the Standing Committee of 11 March 1976[277] taken at the time of SIHANOUK's resignation. In the minutes, POL Pot does refer to the need to consult the Central Committee about the event, but goes on to impose six very severe decisions to respond to the resignation, despite it having been known for some time. These minutes are a flagrant example of the functioning of a Standing Committee in which POL Pot ruled and which only conforms to the "centralism" dimension of the principle of democratic centralism.

136. What is more, witnesses SUONG Sikoeun, SA Vi and DUCH[278] confirmed in court that respect for the "democratic" dimension of democratic centralism was non-existent. All three made it clear that POL Pot took important decisions *directly*. Finally, to a certain extent it can be considered that the Chamber's finding on democratic centralism is contradicted by another one of its findings, to wit POL Pot and NUON Chea exercised the ultimate decision-making power within the Standing Committee.[279]

137. In the end, the evidence available to the Chamber suggested another finding, more reasonable than the one it made, namely that the organisational structure of Democratic Kampuchea was rigid and strictly hierarchical, and the rights of expression and criticism in Democratic Kampuchea were highly restricted, and even punishable from the base right up to the summit. The Chamber could not infer as being the only reasonable option that CPK decisions

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[276] SHORT: T. 08.05.2013, **E1/191.1**, p. 39 after [10.29.30].
[277] **E3/197**: ERN 00182640-00182642.
[278] SUONG Sikoeun: T. 06.08.2012, **E1/102.1** p. 66, [13.51.18].
[278] SHORT: T. 08.05.2013, **E1/191.1**, after [10.29.30]3.53.26], p. 78, before [13.56.21], T. 7.08.12 2012, **E1/103.1** p. 27-28, T. 16.08.2012, **E1/109.1**, p. 21, L.10-12 from [09.57.11], p. 21-22, and 16-18, p. 22-23, and T. 20.08.2012, **E1/110.1**, p. 28-29, before [10.15.40]; SA Vi: T.8.01.2013, **E1/156.1**, p. 51-52 before [13.39.16]; DUCH: T., 21.03.2012, **E1/52.1**, pp. 73-75 after [14.08.16], T.27.03.2012, **E1/54.1**, pp. 85-87, T.10.04.2012, **E1/62.1**, after [15.09.59].
[279] Judgement, paras. 273, 348, 861, 884, 887, 893, 907, 908, 924, 926, 1079.

were made *"collectively; that is to say, with the input of, and with a broad consensus from, the entire Committee"*.[280]

138. The Chamber relied on this erroneous finding to conclude that within the Central Committee decisions were taken in accordance with the principle of democratic centralism and that there was no doubt that KHIEU Samphan *"acceded to the decision"* to evacuate Phnom Penh purportedly taken at meetings in June 1974 and/or early April 1975.[281] Furthermore, the Chamber relied *a contrario* on this principle to assert that *"even if he* (KHIEU Samphan) *did not actively intervene, he had the right to do so and by his silence indicated assent"*.[282] The Chamber also used democratic centralism to conclude that when the Appellant attended meetings of the Standing Committee he held, to some degree, *"positions of some authority."*[283] All of these findings which are based on a misapprehension of the evidence must be quashed.

139. **"Party Centre" and "Angkar".** The Chamber committed an error of fact in holding that the terms "*Angkar*" and *"Party Centre"* were used to clearly identify certain individuals or bodies even though there is considerable evidence to suggest that the two notions were characterised by lack of clarity and confusion.

140. With respect to *"Party Centre"*, the Chamber had no choice but to consider that this was *"a nebulous term"*. That was clearly apparent in all witness statements; nobody was able to provide a precise definition of the term.[284] After noting that the documents put before the Chamber offered no clarification on the matter,[285] the Chamber nonetheless felt that it could define *"Party Centre"* as referring collectively to the *"senior executive organs of the CPK based in Phnom Penh – namely, the Standing Committee, Central Committee, Military Committee, Office 870, Government Office (S-71) and sub-offices of the Government Office"*.[286] In so doing the Chamber clearly distorted the evidence before it. It even contradicted its own reasoning by

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[280] For the two quotes: see Judgement, paras. 223 and 228.
[281] Judgement, paras. 142, 735, 997.
[282] Judgement, para. 997.
[283] Judgement, para. 1006. The Chamber adds to the democratic centralism argument the fact that, in its opinion, the leadership "placed great trust" in the Appellant. This brief responds to the argument about the great trust in part **III.1.C.b** *Trust and collaboration*.
[284] Judgement, para. 205, footnote 629 in which the Chamber quoted *inter alia* CHANDLER and HEDER.
[285] Judgement, para. 205, footnote 630.
[286] Judgement, para. 206.

proposing separate descriptions of the roles and composition of bodies such as the Standing Committee, the Central Committee, the Military Committee, Office 870, or Government Office (S-71).[287] A reasonable trier would not have made those distinctions only to then bundle them all under the generic heading of *"senior executive organs of the CPK based in Phnom Penh"* as if they were an undifferentiated whole.

141. This is a serious error which invalidates in its entirety the Chamber's reasoning on the Appellant's responsibility. Indeed, through the term *"Party Centre",* the Chamber has sought to water down its scrutiny of KHIEU Samphan's criminal responsibility.[288] Moreover, this serious error of fact has resulted in a miscarriage of justice. This wide and elastic definition of *"Party Centre"* enabled the Chamber to artificially link the Appellant to all the decisions of all of the bodies of Democratic Kampuchea as a result of which the principle *in dubio pro reo* has been systematically violated. The Chamber's findings on this point must be sanctioned.

142. The Chamber committed a similar error of fact with respect to *"Angkar"* by failing to draw the inferences from the findings it made. The Chamber started by pointing out that *"[l]ike the phrase 'Party Centre', however, it was a vague and obfuscatory term"*. It then explains the various meanings as understood by different witnesses and highlights excessive practices by certain individuals using the term *"Angkar"* to designate themselves, thus confirming the wholesale confusion surrounding the term at the time of the facts charged.[289] It also noted that Committee 870, in response to this gratuitous use of the term, issued a directive in 1977 to emphasise that *"[t]he term 'Angkar'"* could be *"used only for the organization. It [could] not be used for any individual."*[290] The Chamber also concluded from the various OCIJ interviews that neither prior to nor after the 1977 directive did those interviewed ever understand the meaning of the term.[291] In light of all of these findings and evidence, it is clear that the Chamber did not take the matter to its logical conclusion nor draw the only reasonable conclusion that was available, namely that it was impossible to precisely define the term *"Angkar"*.

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[287] Judgement, paras. 202 (Standing Committee), 203 (Central Committee), 204 (Military Committee), 207-210 (Office 870), 211-214 (S-71).
[288] This will appear clearly in the discussion of the factual part below.
[289] Judgement, para. 221 footnote 700 to 704.
[290] Directive from Committee 870, 24 July 1977, **E3/740**.
[291] Judgement, para. 222.

143. Having regard to the uncertainty surrounding the exact meaning of the term *"Angkar"*, the Chamber contradicted its own findings by opting for a broad definition of *"Angkar"* without further clarification,[292] and then implicitly including KHIEU Samphan within that definition when it examined his alleged responsibility.[293] As with the term *"Party Centre"*, the vagueness surrounding the term *"Angkar"* raised a doubt that should have benefited the Accused. By using the broad and vague term *"Angkar"* to find KHIEU Samphan responsible on account of his alleged membership of that nebulous entity, the Chamber committed an error of fact which skewed the entirety of its reasoning.

144. By considering that such generic notions were sufficient to pinpoint the members of the *"Party Centre"* and *"Angkar"*, the Chamber did not exercise the necessary caution which required the Chamber to identify the people concerned[294] each time it used the terms. These expansive interpretations of the two notions led the Chamber to wrongly find that the Appellant was generally involved in the policies of Democratic Kampuchea, without establishing his exact role in each offence charged. Accordingly, the Chamber erred in the rest of the Judgement, in making a connection between events attributed to the *"Party Centre"* or to *"Angkar"* and the Appellant's knowledge of such events,[295] which is central to his alleged responsibility. This erroneous reasoning must be invalidated.

145. **The principle of secrecy.** The Chamber recognised the importance of the principle of secrecy to the extent that it elevated it to a founding principle of the revolution and CPK policies.[296] It concluded that it *"was strictly enforced"*[297] before and after 1975.[298] In disregard of all the evidence tendered, however, it refrained from defining the principle, finding that it was strictly enforced at all levels of the CPK and to draw the consequences. In so doing the Chamber committed an error of fact.

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[292] Judgement, see for example paras. 279 to 280, 608, 670, 817.
[293] Judgement, see for example para. 954, footnote 2902 referring to para. 670; para. 956, footnote 2905 referring to para. 274 to 280; para. 956, footnote 2909 referring to para. 608; para. 991, footnote 2983 referring to para. 817.
[294] Judgement, see for example para. 274, 277, 278, 280, 608, 619, 770, 771.
[295] See *infra* part **III.1.D**, The criminal responsibility of KHIEU Samphan.
[296] Judgement, paras. 738, 777, 919, 998, 1023, 1040 (see also: 840, 905, 908, 926, 945).
[297] Judgement, para. 980.
[298] Judgement, paras. 199, 207, 250, 737, 738, 777.

146. It was the evidence of all the witnesses who referred to this principle that it did not merely mean protecting confidentiality; it also meant minding one's business and not getting involved in other people's business. Thus, each person was only informed of what concerned him or her.[299] Information was only provided on a need-to-know basis.[300]

147. The compartmentalisation of functions and information extended to every level of the Party, including the topmost level. Participation at meetings of the Standing Committee depended on the items on the agenda.[301] Similarly, messages addressed to Phnom Penh were directed to very specific recipients depending on their subject.[302] POL Pot alone received all messages and had to be kept informed of everything.[303] In particular, messages addressed to (and sent by) KHIEU Samphan dealt with the distribution of materials or national holidays, but never matters of security. They were always "open", unlike all other communications which were confidential in order to maintain secrecy within the ranks.[304]

148. This evidence, which the Chamber disregarded, confirms what KHIEU Samphan has always maintained: he was only told what he needed to know to perform the duties assigned to him.[305] The Chamber acknowledged that his functions were essentially symbolic and stated that his public speeches provided *"some of the few insights into the Khmer Rouge regime, both internationally and within Cambodia where secrecy was strictly enforced"*.[306] It should have inferred that it was preferable for KHIEU Samphan to know as little as possible in order to

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[299] *Conclusions finales*, **E295/6/4**, para. 216, footnote 378; NY Kan: T. 28 May 2012, **E1/76.1**, p. 87 L. 13 to p. 84 L. 1 around [15.14.18]
[300] P. SHORT: T. 6.05.2013, **E1/189.1**, p. 87, around [14.24.52]; T. 7 May 2013, **E1/190.1**, p. 19, around [09.52.21.
[301] See the references for these documents in footnote 624 of the Judgement (para. 203).
[302] Judgement, para. 273, footnote 860.
[303] NORNG Sophang: T. 6 September 2012, **E1/123.1**, pp. 86-89.
[304] KHAM Phan: T. 11 December 2012, **E1/151.1**, p. 108 L. 6 to p. 109 L. 3-4 around [15.48.00]; T. 14 December 2012, **E1/154.1**, pp. 9-12; record of interview, **E3/58**, p. 4, ERN 00250089. NORNG Sophang: T. 3 September 2012, **E1/120.1**, p. 58 L. 9 to p. 59 L. 4, p. 60 L. 21 p. 64 L. 2; T. 5 September 2012, **E1/122.1**, p. 27 L. 21 to p. 28 L. 6, p. 29 L. 13-19, p. 39 L. 2-16, p. 41 L. 7 to p. 42 L. 7, p. 47 L. 9 to p. 51 L. 3, p. 55 L. 25 to p. 60 L. 5; T. 6 September 2012, **E1/123.1**, pp. 63-65; record of interview **E3/64**, pp. 10-13, ERN 00334051-00334053, pp. 17-18, ERN 00334058-00334059.
[305] For example: T. 29 May 2013, **E1/198.1**, p. 86 to p. 89 around [14.44.52]; REF (written record of interview, Book?). Khieu Samphan interview with The Voice of America, **E3/630**, ERN 00524531; **E3/27**, ERN 00156747; Book by Khieu Samphan, **E3/18**, pp. 127-128 where it is stated that his work has no connection with base people and military affairs and he is not invited to meetings on arrests and purges; T. 14 December 2011, **E1/22.1**, pp. 2-6; Reference to secrecy.
[306] Judgement, para. 980.

safeguard the secrecy that was so important to the CPK.

149. A reasonable trier of fact would have drawn the consequences of the strict enforcement of the principle of secrecy at all levels of the CPK: reasonable doubt as to the nature and extent of the information provided to and accessible to KHIEU Samphan and, consequently, doubt about his responsibility. Accordingly the error of fact committed by the Chamber has occasioned a miscarriage of justice.

III.1. BEFORE 17 APRIL 1975

III.1.A. Events prior to 17 April 1975

III.1.A.a. Events prior to 1970

150. **Context.** The Chamber committed an error of fact by all too often disregarding the context of the Cold War of that time.[307] Yet, it was a crucial factor in understanding the historical background, particularly for understanding Khmer Rouge speeches and actions, a point emphasised by the Defence.[308] The Chamber was wrong in considering that only the establishment and growth of the CPK[309] were relevant to understanding the regime. Ideological confrontation and the geopolitical challenges of the day are central to any understanding of the policy choices of the CPK leaders in the world order prevailing at the time of the events.

151. The Chamber has patently overlooked the entire ideological climate of the period by portraying communism throughout the Judgement as if it were practically a criminal plan in itself.[310] The Appellant's study of Marxism during his student years is used as an element against him.[311] In fact, as the Defence pointed out, at the time of Democratic Kampuchea, the class struggle and especially the struggle for independence by colonised countries or countries under foreign domination were considered both honourable and legitimate.[312] The terminology used in Marxist circles to refer to the "class struggle" or "ideological enemies" could not be taken as

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[307] Judgement, paras.79-103.
[308] *Conclusions finales*, 25 October 2013, **E234.1**, pp. 63 and 64.
[309] Judgement, para. 79.
[310] Judgement, para. 778.
[311] See part **III.1.C** KHIEU Samphan before 1970– *Studies*.
[312] *Conclusions finales*, T. 25 October 2013, **E234.1**, p. 64

evidence of intent to commit crimes. Yet, this simplification underpins the Chamber's reasoning, often leading to a distortion of the evidence.[313]

152. The political blueprint for Democratic Kampuchea, used as the basis for defining the JCE common purpose, although presented as *"not in itself necessarily or entirely criminal",*[314] is then repeatedly analysed without any distinction being drawn between its tenets and its unsuccessful application. This inculpatory interpretation is an error because it blurs the important distinction in JCE law between the criminal and non-criminal aspects of the common purpose. It is at the root of the Appellant's conviction.

153. **Armed struggle and revolutionary violence.** The Chamber committed an error of fact by finding that as of 1960 there was a CPK policy which included "*the necessity*" of armed struggle and revolutionary violence.[315] It bases its findings on statements by POL Pot, IENG Sary, the Appellant and NUON Chea which, if carefully scrutinized in conjunction with other neglected aspects of the situation in Cambodia at the time, prove that it was not the only reasonable conclusion available. If POL Pot's speech at a conference in 1977[316] and the comments attributed to IENG Sary in 1978[317] make mention of the armed struggle, nothing that they say warrants dating the CPK's adoption of such a policy at 1960. The Appellant's book written after the events which is also quoted does not support such a conclusion either. It even says that "*the Cambodian people had to smash the 'feudalist regime' [...] by peaceful methods*".[318] The Chamber has therefore distorted the contents of the book.

154. Finally, by holding that NUON Chea's speeches of 17 January 1977 and July 1978[319] show that a policy of armed struggle and revolutionary violence was adopted at the very start of the CPK movement, the Chamber erred in failing to explain why its interpretation was credible, given that NUON Chea himself said in court that it was decided "*to use arms only if necessary to*

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[313] For example Judgement, paras. 354-356, 362, 364, 726, paras. 777-778, 964-966.
[314] Judgement, paras. 777 and 778.
[315] Judgement, paras. 86 and 88.
[316] Press conference with POL Pot in Pekin, 3 October 1977, **E3/2072**, ERN S 00080547-S 00080548.
[317] Publication by D. Burstein, **E3/707**, ERN 00742549 which describes an interview with IENG Sary in section 8.
[318] Judgement, para. 88, footnote 233, Book by KHIEU Samphan, **E3/18**, p. 13, ERN 00643834 (sic).
[319] Statement by Nuon Chea, 17 January 1977, **E3/147**, ERN 00168465; Statement by Nuon Chea, **E3/196**, pp. 1-2.

protect their forces".[320] He also testified that it was the increasing ruthlessness of the SHANOUK regime that forced the opposition to go underground although political revolution was still the Party policy,[321] as contemporaneous documents attest.[322] The persecution faced by the Party left it no choice but to defend itself.[323] The Chamber could have found evidence of this in a *Revolutionary Flag* issue of January 1977 which gives 1966 as the date when preparation for armed struggle became Party policy.[324]

155. Finally, the Chamber also failed to take into account the impact of the violent repression of the Samlaut peasant uprisings; the peasants' resistance to the grabbing of their lands was supported by the Party. This historical background explains why the CPK switched strategy in 1967 and suggests another reasonable factual finding: that of an armed struggle in reaction to a dead-end situation, contradicting the notion of a policy of armed struggle adopted out of the blue in 1960. Moreover, this other conclusion is more consistent with what is said in the documents mentioned above, and reflects SHORT's opinion, whose testimony on the subject was scrupulously ignored by the Chamber.[325] The error of fact committed by the Chamber in distorting and omitting evidence relating to the pre-1967 CPK strategy has occasioned a miscarriage of justice. This erroneous finding led the Chamber to consider that the political project which the Appellant had joined involved the commission of crimes.

III.1.A.b. Events which occurred between 1970 and 17 April 1975

156. **Armed conflict and the LON Nol regime.** The Chamber repeatedly disregarded the oppressive and illegitimate nature of the LON Nol regime and the armed conflict context,[326] although these are key to understanding the appeal the Khmer Rouge movement had among the peasantry and the decision to wage armed warfare against LON Nol. Several witnesses described the LON Nol regime's ferocious repression of the population. The Defence discussed it in

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[320] Judgement, para. 88.
[321] Nuon Chea: T. 22 November 2011, **E1/14.1**, p. 86 and 87.
[322] *Revolutionary Flag,* December 1975 to January 1976 issue, **E169/4/1.1.2**, p. 7-8.
[323] Speech by NUON Chea, 30 December 1977, **E3/145**, p. 13-14; Telegram, 6 October 1977, **E3/1762**, p. 1-2; NUON Chea: T. 22 November 2011, **E1/14.1**, p. 87.
[324] *Revolutionary Flag,* special issue December 1976-January 1977, **E3/25,** p. 22.
[325] SHORT: T. 7 May 2013, E1/190.1 p. 27-28 around [10.10.05].
[326] Judgement, para. 79-103

detail.[327] Witnesses spoke of the increased enrolment into the Khmer Rouge forces after the coup d'état.[328] Others testified to the effects of US bombing raids in support of the regime and their toll on life in the countryside,[329] creating resentment towards the inhabitants of the capital without the CPK needing to whip it up.[330] The Chamber erred by failing to explain why it did not take these factors into account in its assessment of the evidence.

157. This error by the Chamber also coloured its understanding of the speeches given by the Appellant as a member of the FUNK and later the GRUNK.[331] It is significant that the Chamber never employs the term "coup d'état" (in the French version), opting for more neutral terms such as "overthrow" ("*renversement*" or "*destitution*").[332] And yet the manner in which the LON Nol regime took power accounts for the harsh terminology used by FUNK members in their public statements. As a member of the movement, KHIEU Samphan called the leaders of the coup d'état against SIHANOUK national traitors. SIHANOUK often did likewise. These utterances should have been read in the context of the armed conflict raging between the CPNLAF and the armed forces of the Khmer Republic.

158. Accordingly, the Chamber erred by ignoring these elements that would have led to a finding other than that of the Khmer Rouge movement being intrinsically violent. It could not reasonably refer to "*the radicalisation of CPK policy targeting groups of individuals considered to be enemies*" consistent with *"the Party's increasing use of revolutionary violence"*[333] without bearing in mind that in any armed conflict the term "enemy" is normally used to refer to the

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[327] T. 28 October 2013, **E1/235.1**, pp. **E1/235.1**, pp. 52 to 56.
[328] SCHANBERG: T.7 June 2013, **E1/203.1**, pp. 54-56; KHIEU Samphan: T.13 December 2011, **E1/21.1**, p. 95-96; SUONG Sikoeun: T.2 August 2012, **E1/101.1**, p. 69; NOEM Sem: T.25 September 2012, **E1/126.1**, p. 83-84; PECHUY Chipsè: T.12 November 2012, **E1/143.1**, p. 86-87; CHHOAM Sè: T.11 January 2013, **E1/159.1**, pp. 35-36, 46-47, 61-62; CHUON Thi: T.24 April 2013, **E1/183.1**, pp. 13-15; ONG Thong Hoeung: T.9 August 2012, **E1/105.1**, p. 86-87; KIM Vun: T.23 August 2012, **E1/113.1**, pp. 6-8; KIM Vun: T.28 August 2012, **E1/112.1**, pp. 95-98; MEAS Voeun: T.9 October 2012, **E1/132.1**, pp. 50-52; SUM Chea: T.05.11.2012, **E1/140.1**, pp. 7, 47-48; UNG Ren: T.10 January 2013, **E1/158.1**, pp. 36-37; CHHOUK Rin: T.22 April 2013, **E1/181.1**, pp. 66-67; IENG Phan: T.20 May 2013, **E1/193.1**, pp. 6-8; CHAU Soc Kon: T. 22 May 2013, **E1/195.1**, pp. 60-62; PECH Chim: T. 1 July 2013, **E1/215.1**, p. 80-81.
[329] SCHANBERG: T.7 June 2013, **E1/203.1**, pp. 54-56; KHIEU S.: T.13 December 2011, **E1/21.1**, p. 95-96; PIN Yathay: T.7 February 2013, **E1/170.1**, pp. 72-74; PONCHAUD: T.9 April 2013, **E1/178.1**, p. 55-56; SHORT, T.9 May 2013, **E1/192.1**, pp. 13-15.
[330] Closing statement, **E295/6/4**, paras. 49-50 and 134 to 136.
[331] Judgement, paras. 981-982.
[332] Judgement, p. 69, heading 3.2; see also Judgement, para. 97.
[333] Judgement, para. 123.

opposing side and that a clash between two armed forces invariably implies a armed conflict context violent confrontation. The Chamber's preferred conclusion of a unilateral *"revolutionary violence"* inherent to the CPK was not compelling beyond reasonable doubt. This error led the Chamber, through its one-sided analysis of the evidence, to find as fact that the means used to effect the JCE common purpose was criminal in nature. This is a miscarriage of justice.

159. **Hatred of city people and "class hatred".** The Chamber erred in finding that the Khmer Rouge whipped up hatred of city people and *"class hatred"* and that these feelings were encouraged and lasted throughout the Democratic Kampuchea era.[334] In fact, a careful analysis of the evidence adduced by CHANDLER, SHORT, PONCHAUD, PHY Phuon and the Appellant neither justifies this finding nor supports the conclusion that the purpose of the population movements was to get rid of *"disloyal"* and *"corrupt"* city people.[335]

160. ***Statements by experts*.** The Chamber relied first on CHANDLER who, by way of analogy with the 1873 Thai invasions, ascribed the evacuation of towns and cities to the necessity to move away city people who were considered intrinsically disloyal. It is this historical parallel with the pre-colonial era that led him to *"think*" – that is the term he used on the stand – that the Khmer Rouge did not recruit city people into their army and preferred to keep them at one remove because they mistrusted them.[336] This speculation does not quite fit with other evidence on the record, especially evidence relating to the pre-75 Khmer Rouge strategy of marshalling all forces to carry out a revolution.[337] The parallel with the Thais of the nineteenth century cannot be considered as sufficient and acceptable in terms of criminal evidence in order to infer a purported Khmer Rouge practice between 1970 and 1975. Nor can the extract from SHORT's book be used to back up this conclusion, since SHORT was referring solely to the shutting down of the Kratie market in the midst of the conflict.[338]

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[334] Judgement, paras. 111, 112, 121, 734, 787, 815, 840, 844, 873, 945.
[335] Judgement, paras. 111 and 787.
[336] CHANDLER: T. 19 July 2012, pp. 63 to 68.
[337] Statement by NUON Chea, **E3/196**, p. 1-2 (he says that he also needs the petty bourgeoisie as an allied force, that national capitalists were supplementary forces, as well as some big capitalists, officials in the civil service and government and some Buddhist monks); PHY Phuon: T.25 July 2012, **E1/96.1**, pp. 94-97.
[338] Judgement, para. 111, footnote 307 quoting Book by SHORT, **E3/9**, pp. 255-256, ERN 00396455-00396456.

161. ***PONCHAUD.*** In order to find that the Party fomented both hatred of city people and hatred among classes, the Chamber also relied on PONCHAUD's evidence,[339] according to which a cadre equated the city with evil because of its widespread corruption. However, the remarks were taken out of context, given that he spontaneously added that he did not know "*...whether this statement echoed the thinking of Angkar".*[340] Finally, setting aside the contradictions highlighted in PHY Phuon's[341] testimony, SHORT's views about a meeting in April 1975[342] at which the "*leaders*" are supposed to have discussed the experience of the cities and towns that had been evacuated as a means of controlling the population also did not, in the light of other evidence, support a finding that Khmer Rouge cadres or the Appellant[343] fomented hatred of city people.

162. ***Revolutionary Flag and NUON Chea.*** In its inculpatory analysis, the Chamber did not take into account a *Revolutionary Flag* issue describing the existence of class antagonism dating back before 1960,[344] echoed by a NUON Chea statement in 1978 explaining that *"class hatred"* was rooted in the population's experiences well before the advent of the Khmer Rouge.[345] NUON Chea also refers to the political pressure on and persecution of the CPK in the cities and towns under the SIHANOUK regime and, later, under the LON Nol regime. However, while he describes his mistrust of the governing classes, US imperialists, and spies, he also mentions the work of the Party among all strata of the population, especially "*among the petty bourgeoisie, the students and intellectuals"* and even *"among national capitalists and with high-ranking personalities in the administration".*[346]

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[339] T. 10 April 2013 (PONCHAUD), p. 9.
[340] T. 10 April 2013 (PONCHAUD), p. 9, L.19-21.
[341] PHY Phuon, T. 26 July 2012, **E1/97.1**, pp. 15 and 24; see part **III.1.C.c** *Contents of the meeting and PHY Phuon and the confusion between two meetings;* see also Closing brief, **E295/6/4**, par 20-31.
[342] Judgement, para. 111, footnote 307.
[343] PHY Phuon: T. 25.07.2012, **E1/96.1**, pp. 94-97, T. 30.07.2012, **E1/98.1**, pp. 71-73, T. 01.08.2012, **E1/100.1**, pp. 89-93.
[344] *Revolutionary Flag*, September 1977, **E3/11**, ERN 00486228-00486229.
[345] Statement of the CPK to the Communist Party of Denmark, July 1978, **E3/196**, ERN 00762395
[346] Statement of the CPK to the Communist Party of Denmark, July 1978, **E3/196**, pp. **26-31**, ERN 00762398-00762403

163. ***Appellant's statements and exculpatory evidence.*** Lastly, the Chamber committed a serious error by distorting the comments of the Appellant. Although he refers to mistrust[347] of the oppressing classes, and of the imperialism and colonialism still present in the towns and cities, these words do not amount to the hatred of city people described by the Chamber.[348] To the contrary, PHY Phuon, who is only quoted against the Appellant, reports that before 1975 the Appellant appealed for national unity and bringing together all possible forces beyond the ranks of peasants and workers.[349] The Chamber was careful not to mention that before 1975 the Khmer Rouge had called for bringing together all forces to ensure the success of the revolution.[350]

164. ***Hatred as a motive for the movements of city people.*** As mentioned above, the Chamber also omitted to consider the evacuation of certain cities as a method of mitigating food shortages and ensuring people's safety at a time of armed conflict.[351] A *Revolutionary Flag* of 1973 emphasises the need to provide for the needs of the evacuees.[352] PHY Phuon also says that at Oudong he saw base people and evacuees living together without friction.[353] DUCH also referred to his experience of similar food rationing between evacuees and *"base people."*[354] Finally, NUON Chea referred to directives calling for solidarity between the two groups.[355] These facts were placed before the Chamber by the Defence,[356] but were disregarded although they negated the idea of the participation of the Appellant in a political project premised on the persecution of part of the population.[357] In doing so, the Chamber thus failed in its duty to give reasons for its

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[347] Judgement, para.787, footnote 2497 (**E3/273**, pp. 8-9, ERN 00725798-9, Book, **E3/16**, p. 14, ERN 00643835).
[348] Judgement, paras. 787 and 788.
[349] PHY Phuon T. 25 July 2012, **E1/96.1**, pp. 94 to 97.
[350] *Revolutionary Flag*, September 1977, **E3/11**, ERN 00486233-00486234.
[351] See part **III.1.A.b.** 1970-1975 period, *Distribution and contents of Revolutionary Flag/Revolutionary Youth magazines* and *the consistent pattern in the movements of populations from the cities* (reasons for evacuations).
[352] *Revolutionary Flag*, **E3/785**, p. 8, ERN 00741966.
[353] PHY Phuon: T. 30 July 2012, **E1/98.1**, p. 68 L.13-25 after [14.14.37].
[354] DUCH: T. 21 March 2012, **E1/52.1**, p. 16-, L.23-p. 17 L.9 around [09.48.57].
[355] NUON Chea: T. 31 January 2012, **E1/36.1**, p. 25, L.21 to p. 26 L.1 around [10.08.08]. *("The New People were those who were evacuated, and the Base People were the local people. The Party's Standing Committee and the -- even the commune district level educated the people not to discriminate the New People because we are all Khmer; [...] And don't take the view that they were Base People or they were New People. Of course, there were bad elements who incite the hatred between the base and -- the Base People and the New People. The situation was complicated".* He went on to add: *"There was no distinction in that sense. Once people understood, then, regardless whether they were Base People or New People, they acted together; they consider themselves all Khmer"*).
[356] *Conclusions finales*, E295/6/4, para. 127.
[357] Judgement, paras. 787-788, paras. 945.

decision, and its finding on hatred of city people as a pillar of Khmer rouge policy is a miscarriage of justice that must be sanctioned.

165. **Definition of "enemy"**. In finding that *"the way in which enemy was defined* [*was tactical,*] *remaining vague enough to allow various interpretations and to create an uncertain atmosphere",*[358] the Chamber erred in law and fact.

166. It should first be pointed out here that the questions addressed at paragraphs 117 and 118 of the Judgement do not fall within the jurisdiction of the Chamber for Trial 002/1. These paragraphs are a breach of the provisions of the Decision on severance[359] and constitute an error in law. As for errors of fact, it should be remembered that in the Cambodian civil war context,[360] a reference to part of the population as the "enemy" cannot be used to infer the basis of a criminal policy. The term "enemy" is used 42 times in the Geneva Conventions.

167. In considering the definition of enemy to be deliberately *"vague",* the Chamber did not take into account the prevailing civil war and Cold War context. The armed conflict at the time involved no less than six belligerents,[361] fighting more or less directly and covertly.[362] As such, the task of identifying enemies was a highly complex one. Despite these difficulties, the Khmer Rouge laid down a definition, stating that *"...spies, including CIA, KGB and Vietnamese [...] were regarded as the key enemies"*[363]. The Khmer Rouge also made a distinction among the LON Nol forces between the regular armed forces of the Khmer Republic, and its underground agents.[364] The Chamber should have understood that the Khmer Rouge definition of enemy was consistent with the political and military realities of Cambodia at the time and that, moreover, it distinguished between the official enemy forces and the rest. Accordingly, the Chamber committed an error of fact by considering that the definition was *"vague"*.

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[358] Judgement, para. 117.
[359] See *supra* part **I.1**, *Temporal and subject-matter jurisdiction following severance of the charges.*
[360] See *supra*, part **III.1.A.b**, *Armed conflict and the LON Nol regime*
[361] Khmer Republic, USA, North Vietnam, different Khmer Rouge factions, People's Republic of China and USSR.
[362] See for example: Book by DEAC, **E3/3328**, ERN (EN) 00430774, *"CIA employees, as well, were caught up in actual combat situations. By the end of 1974, the Phnom Penh station, numbering dozens under its third chief since 1970, was one of the intelligence agency's largest".*
[363] Judgement, para. 118.
[364] Judgement, para. 121.

168. The Chamber also committed an error of fact in finding that the way in which enemy was defined in vague terms was *"tactical"* in order *"to allow various interpretations and to create an uncertain atmosphere."* To arrive at this conclusion, the Chamber relied on CHANDLER[365] while omitting the fact that CHANDLER was speculating using historical analogies.[366] What is more, a reading of the *Revolutionary Flag* of August 1975 which CHANDLER analysed, suggests an alternative reasonable conclusion to that of a criminal policy concerning "*enemies*", namely that of developing a counter-espionage policy warranted by years of war.[367] Thus, what the expert said about the *Revolutionary Flag* magazines diminished their probative value[368] and thus the interpretations they underpin.

169. The Chamber then relies on a second *Revolutionary Flag* issue[369] to reinforce its conclusion, but again distorts the evidence to give it an inculpatory slant. In this issue, the classification of *"enemies"* is part of a discussion of the Khmer Rouge need to recruit for the war effort. The need to rally people as widely as possible contradicts the Chamber's conclusion about the intention it ascribed to the Khmer Rouge to create an atmosphere of uncertainty conducive to the commission of crimes.[370] It is quite clear that the classification was to be a progressive one, suggesting an intention to screen the existing forces so as to identify those with whom an alliance was possible. The very existence of this process and its significance are therefore in complete

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[365] CHANDLER: T. 20 July 2012, **E1/93.1**, pp. 11 and 12.

[366] CHANDLER: T. 20 July 2012, **E1/93.1**, p. 11, L. 24 to 25, after [09.25.12] *"It's like the French phrase, a counterrevolutionary, who knows who they are."*

[367] *Revolutionary Flag,* August 1975, Doc. n° **E3/5**, ERN, 00401501: *"Therefore, a situation of war still rears its head, whether world war or regional wars or war upon our country"*; *"the external enemies contact the internal enemies*"; *"want to seize back power, to seize it [i.e. Cambodia] overtly by warfare, to seize it ideologically and economically by espionage*"; *"the important matter is a stance of high revolutionary vigilance appropriate to the situation that I have just mentioned*".

[368] CHANDLER: T.20 July 2012, **E1/93.1**, p. 12, L.7-10, [09.26.11]-[09.27.49] *"This is a periodical whose readership is reserved to Party members, whose articles are origined by high ranking Party members or articles to reflect speeches delivered by high ranking Party members, generally not named as such.*".

[369] *Revolutionary Flag,* special issue of September 1977, **E3/11**.

[370] *Revolutionary Flag,* special issue of September 1977, **E3/11**, p. 23, ERN 00486234: *"If we managed to gather up a large powerful force, we would win a tremendous victory. This was the factor determining whether we would win or lose." "The major contradictions were with imperialism and the feudal landlord system, which we had to combat. As for the minor contradictions, they had to be resolved by reciprocal concession*"; *"By basing ourselves on this line, we gathered up all forces.*"; *"We gathered up everybody*"; p. 24, ERN 00486235, *"We achieved excellent results in organizing these strategic and tactical revolutionary forces, which had the effect of winning to the revolution more and more important forces and of driving the enemy into greater and greater isolation.*"; p. 25, ERN 00486236, *".we had to dare make concessions and allowances for the sake of solidarity in attacking the principal enemy. This line was the path of our leadership".*

contradiction with the Chamber's finding which claims that it was to *"allow various interpretations and to create an uncertain atmosphere."*

170. This erroneous finding occasioned a miscarriage of justice as the Chamber used it to find as a fact that there was a policy targeting Khmer Republic soldiers and officials, which the Chamber then used as a basis for finding KHIEU Samphan criminally responsible.[371]

171. **Distribution and contents of *Revolutionary Flag* and *Revolutionary Youth* magazines**. The Chamber committed an error of fact concerning the contents and distribution of *Revolutionary Flag* and *Revolutionary Youth* magazines before 17 April 1975.[372] The case file contains a single *Revolutionary Youth* and two *Revolutionary Flag* magazines pre-dating 17 April 1975.[373] The Judgement makes massive use of the two *Revolutionary Flag* issues.

172. **Distribution**. The Chamber relied on two *Revolutionary Flag* issues from 1972 to conclude that the *"Party Centre"* communicated easily with the zones and autonomous sectors to the extent that the latter *"reported directly to the Party Centre"*.[374] The Chamber described the makeshift nature of these magazines which, prior to 1975, were written by hand and thus reproduced in limited numbers.[375] It also points out that even after 1975 the distribution was so limited that it was not possible to give a separate copy to each leader.[376] In fact, the 1972 *Revolutionary Flag* squarely addresses the communications difficulties between the leaders and the zones.[377] Separate evidence showed that this problem continued in Democratic Kampuchea. Thus, in March 1976, the Standing Committee had to reissue instructions to zone and autonomous sector representatives requiring them to submit reports.[378] In the final analysis, a different finding could reasonably be drawn from these facts, namely that before (and after) April 1975, Democratic Kampuchea leaders had genuine difficulties in communicating effectively with

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[371] Judgement, paras. 127, 814, 835 to 836 and 995 (JCE); 1043 (planning); 1046 (instigating); 1051 (aiding and abetting).
[372] *Déclaration d'appel*, para. 69.
[373] *Revolutionary Flag*: *Flag*: Sept-Oct 1972, **E3/783**, *Revolutionary Flag*: July 1973, **E3/785**, *Revolutionary Male and Female Youths*: August 1974, **E3/146.**
[374] Judgement, paras. 274 and 275.
[375] Judgement, para. 261.
[376] Judgement, paras. 262 and 263.
[377] *Revolutionary Flag*, special issue of September-October 1972, **E3/783**, pp. 24 and 26, ERN 00721061 and 00721063.
[378] Minutes of the Standing Committee meeting of 8 March 1976, **E3/232**, p. 7, ERN 00182634.

zones and autonomous sectors.

173. Moreover, the Chamber uses its findings on the distribution (and the contents) of these magazines to conclude that before 1975 KHIEU Samphan was aware of the likelihood that crimes would be committed.[379] In fact, given the limited number of handwritten magazines and lack of information as to how they were distributed and who actually received them, it cannot be concluded that the Appellant definitely had access to them or even that he read them.

174. ***Contents***. This brief will look at them on a case-by-case basis. With respect to the *Revolutionary Flag* issues dating back to before 1975, it should be noted that the 1973 *Revolutionary Flag* does not prove the existence of a policy to move populations. Yet, that is the conclusion drawn by the Chamber at paragraph 104. In so doing, it committed an error of fact by disregarding the context of war and its related terminology.[380] The population movements concerned took place in combat zones with the military purpose of moving the population to the liberated zone in order to thwart all enemy effort, make any counteroffensive pointless, and end the war. In fact, the *Revolutionary Flag* states that "*[e]xcept the traitorous clique of Lon Nol, Sirik Matak, Son Ngoc Thanh, In Tam, and Cheng Heng. All over the country, people of all classes, status and forces have been led and mobilized to serve and support the liberation war. This is due to our ability to manage them in accordance with the popular masses' line and views*".[381] By lumping together strategic military population movements and movement of the population (phases one and two) to conclude that a continuous policy existed, without explaining why the context in which they were carried out was of no significance, the Chamber committed an error of fact which occasioned a miscarriage of justice. It must have been aware that the population movements referred to in these *Revolutionary Flag*s were designed to mobilise the population to cope with the war effort. This mistake also enabled the Chamber to conclude that the Appellant had been party to a general population movement policy before 1975, while simultaneously acknowledging that he had no authority to take military or strategic decisions.[382]

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[379] Judgement, paras. 947 to 952.
[380] Judgement, para. 104.
[381] *Revolutionary Flag,* July 1973, **E3/785**, ERN 00713995, p. 2.
[382] Judgement, paras. 365 and 378.

175. The Chamber again misconstrued the 1973 *Revolutionary Flag* by saying that "*the Party leadership, while noting shortages in the liberated zones, declared its commitment to continue forced transfer of population, leaving it to the people to resolve their own problems*".[383] In fact, these shortages were caused by the war and especially the US bombing.[384] In the circumstances, sending the people from the liberated towns out to the surrounding countryside was a way to deal with the disastrous agricultural situation and contribute to the war effort.[385] The Chamber's inculpatory finding that these population movements had only political objectives was not the only reasonable conclusion available.[386]

176. All of the Chamber's errors just cited are triggered by a distortion of the evidence. On that basis, the Chamber concluded that before 1975 there was a policy for moving populations that sprang from the same rationale as the population movements which followed and that the Appellant knew of that policy. These conclusions, which were not the only reasonable ones available, are a miscarriage of justice.

Population movements

177. ***Consistent pattern of the population movements from the cities.*** The Chamber committed an error of fact in concluding that there was a "*consistent pattern of conduct*" according to which, before Phnom Penh fell, the population was systematically forcibly moved from the towns of Kratie, Kampong Cham, Banam and Oudong "*to work in the rice fields in the liberated Zones*".[387] The Chamber defines this consistent pattern of conduct as people being "*forcibly evacuated from cities and towns under false pretexts, without concern for their well-being or their health*" in order to re-educate them through labour, indoctrination, acts of terror and violence.[388] However, this definition is not consistent with the evacuation of cities – where proven – before 17 April 1975.

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[383] Judgement, para. 947.
[384] See part **III.1.A.a** Facts prior to 1970 *Context.*
[385] NY Kan: T. 28 May 2012, **E1/76.1**, pp. 9-11, 22-24 and 69-71; YUN Kim: T. 20 June 2012, **E1/89.1**, pp. 83-85. Press conference by POL Pot in Pekin, **E3/2072**, ERN S 00080548- S 00080549.
[386] Judgement, paras. 110, 111 and 112.
[387] Judgement, para. 791.
[388] Judgement, para. 794.

178. ***Kratie***. This town is quoted as an example in support of the idea that a consistent pattern existed before Phnom Penh was forcibly evacuated immediately after it fell. And yet, according to the Chamber, Kratie was allegedly evacuated in 1973, in other words three years after it was taken.[389] To claim consistency there has to be similarity in the conduct. The purported evacuation of Kratie cannot therefore be compared to the immediate evacuation of Phnom Penh. The two findings contradict each other and are mutually defeating. This is a discernible error of fact.

179. The Chamber also relies on the evidence of YUN Kim even though he stated that he had no knowledge of the events and that his memory was cloudy.[390] The most important aspect is that in his testimony he never refers to the evacuation of Kratie.[391] The Chamber could not reasonably use such sketchy and uncertain statements to justify the existence of a consistent pattern at Kratie.

180. The Chamber also relied on the writings and evidence of SHORT. But, quite apart from the fact that he was not a direct witness to the event, SHORT's sources and methodology on Kratie are unknown.[392] On the stand, he even put the date of the evacuation of Kratie at 1974 instead of 1973.[393] The Chamber also relied on CHANDLER who stated that Kratie was evacuated, but provides no details. This evidence does not establish the existence of a consistent pattern of evacuations conducted "*forcibly [...] under false pretexts*", without concern for the "*well-being*" or "*health*" of the population. Since CHANDLER gave no information about the circumstances of the evacuation, his evidence on this point proved nothing.[394]

181. In the final analysis, on the basis of such tenuous evidence, no reasonable trier would have found that the experience of Kratie between 1970 and 1975 bore out the theory of a predefined consistent pattern. Yet, that is what the Chamber did and the error vitiated its entire reasoning.

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[389] Judgement, para. 106.

[390] Judgement, para. 106, footnote 293: YUN Kim: T. 19 June 2012, **E1/88.1**, p. 32: *"Regarding the Kratie markets, I did not receive any instructions. We were based at a far distance from the market. [...]I cannot recall it well [...] I cannot recall for sure as when the markets were closed".*

[391] See para. 106, footnote 293: T. 19 June 2012, **E1/88.1**, pp. 29-30, pp. 31-33.

[392] T.6 May 2013, **E1/189.1**, p. 18: when the question was put to him, SHORT was not able to respond *("for the other ones. Give me a second")* and never gave the information requested; See also Book by SHORT, **E3/9**, p. 257: in his book SHORT provides no source on this point.

[393] T. 6 May 2013, **E1/189.1**, p. 89.

[394] Judgement, para. 794, footnote 2529: T of 19 July 2012, **E1/92.1**, pp. 60-61: The Chamber validates its description of the supposed consistent practice with a quote from SHORT in which the author limits himself to stating that the town of Kratie and other cities had been evacuated without ever describing how these evacuations unfolded or providing any details.

182. ***Kampong Cham.*** The same gaps are evident in the Chamber's findings on the purported evacuation of Kampong Cham. No direct testimony offers any basis for concluding that it happened. The Chamber's only sources for establishing that it did are the rumours reported by Witness PONCHAUD. The fact that PONCHAUD lived in Kampong Cham more than three years before the alleged evacuation[395] is no reason to validate the uncorroborated hearsay. The parts of his evidence that the Chamber relies on are often not germane[396] and never establish with certainty that the evacuation actually happened.[397] Accordingly, the Chamber erred in its assessment of his evidence.

183. The error criticised here is all the more significant because the Judgement dismisses PHY Phuon's evidence to the contrary that Kratie was never evacuated. This witness's evidence, which the Chamber finds credible when it goes against the Defence, is swept aside in this instance because "*his opinion was speculative.*"[398] However, at no point did the Chamber explain why this part of his testimony would be less credible than the parts used to convict the Appellant. The Chamber was merely content to state that PHY Phuon's evidence was not reliable "*concerning this specific issue*" as opposed to "*other, more detailed, accounts*" on which it bases its conclusions.[399] And yet the other "*more detailed*" accounts are SHORT's uncorroborated hearsay testimony[400] and a sketchy extract from a book by SHAWCROSS.[401] The final piece on which the Chamber relies is an unidentified document attributed to KE Pauk which makes no reference whatsoever to a population movement in Kampong Cham. On the contrary, this document corroborates PHY Phuon's view that the evacuation of the city of Kampong Cham never happened.[402]

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[395] Judgement, para. 107.
[396] T. 9 April 2013, **E1/178.1**, p. 13 on the subject of the peasants fleeing towards the towns to escape the American bombings; pp. 56, 61 and 62: Kampong Cham is not referred to here.
[397] T. 10 April 2013, **E1/179.1**, pp. 6-9: Kampong Cham is mentioned in the quote from the written record of the PONCHAUD interview; Partial transcription of the OCIJ interview with PONCHAUD, 13 February 2009, **E3/4591**, ERN 00885117: PONCHAUD hesitates, situating the evacuation de Kampong Cham in 1972 or 1973.
[398] Judgement, para. 107. See *infra* part **III.1.C.c** on the evacuation decision and PHY Puon's contradictions.
[399] Judgement, para. 107.
[400] SHORT P., "Pol Pot: The history of a Nightmare", **E3/9**, p. 257: in this case, SHORT's source is an unnamed, unidentified peasant whose words are not even corroborated elsewhere in his writings.
[401] Book by SHAWCROSS, **E3/88**, p. 312: The author quotes no source; he did not testify in court so it was not possible to assess his methodology.
[402] **E3/2782**, ERN 00089710: "*... As a result, we could not liberate Kampong Cham. We decided to surround it for*

184. Neither PONCHAUD nor CHANDLER are able to describe an evacuation about which they know nothing.[403] Accordingly, the Chamber erred by resting its findings on insufficient and conflicting evidence. No reasonable trier would have done so. The Chamber had no basis for concluding that the consistent pattern of conduct described at paragraph 794 of the Judgement applied to events at Kampong Cham. The Chamber has committed an error which invalidates its findings.

185. ***Banam.*** The Chamber also relies on the evacuation of Banam although the sole piece of evidence in its possession does not establish that it occurred.[404] That evidence is a very short extract from a *Revolutionary Flag*.[405] The few lines referring to a military attack on Banam do not support the conclusion that the people were forcibly evacuated *"under false pretexts"* and "*without concern for their well-being or their health.*"[406]

186. Moreover, this *Revolutionary Flag* was issued on the occasion of the ninth anniversary of the Army, three years after the alleged evacuation, and contains some propagandistic speeches extolling the glory of the Army and its past victories.[407] It is not corroborated by any contemporaneous evidence. Lastly, Banam was never discussed before the Chamber and the Defence was thus unable to test the truthfulness of the allegation or how the event unfolded. Accordingly, the Chamber erred when it based its findings on a document with sufficiently low probative value to cast a doubt that should have benefitted the Appellant.

187. No reasonable trier of fact would have concluded on the basis of such flimsy evidence that the evacuation of Banam took place as part of a consistent pattern of conduct. The Chamber committed an error of fact which invalidates its entire reasoning.

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the time being".

[403] Judgement, para. 794, footnote 2529: T du 19 July 2012, **E1/92.1**, pp. 59-61: CHANDLER limits himself to saying that after the attack on Kampong Cham, the KR took some people away, in keeping with an Asian practice of warfare. No description of what happened; Partial transcription of PONCHAUD's interview with the OCIJ, **E3/4591**, ERN 00885117: PONCHAUD simply says that Kampong Cham was emptied. In neither example is there anything to substantiate the Chamber's conclusions on the consistent pattern in para. 794.

[404] Judgement, para. 791.

[405] *Revolutionary Flag*, special issue of December 1976 – January 1977, **E3/25**, p. 36.

[406] Judgement, para. 794.

[407] The propaganda purpose of this *Revolutionary Flag* is quite clear. The title referring to memories of military victories describes the revolutionary army of Kampuchea as *"the Brave, Strong, Skilled, and Magnificent Revolutionary Army."* Also see **E3/25**, p. 16. These bombastic speeches cannot be taken as if they contained objective and proven facts.

188. ***Oudong***. The Chamber bases a large part of its theory of consistent pattern of conduct on the evacuation of Oudong. Yet there is little tangible evidence that could be used to piece together what happened at Oudong, and the Chamber rests its finding mainly on SHORT's hearsay evidence[408] and Witness NOU Mao whose contradictions and behaviour[409] should have invalidated his testimony.[410] Furthermore, the Chamber cannot base practically all its findings on a Khmer Rouge propaganda document that was issued in the middle of a war, the contents of which are intrinsically questionable.[411] Moreover, the Chamber refers to a two-stage evacuation:[412] first, arrest and interrogation of "*many people*"[413] at M-13, then relocation. Arresting and interrogating people is neither an evacuation of the population nor a consistent pattern of conduct. The Chamber erred when it conflated the arrest of many people with the evacuation of an entire population.

189. Finally, the Chamber erred by omitting the direct and compelling evidence of MEAS Voeun, a high-ranking Khmer Rouge soldier[414] who told the Chamber that the population of Oudong fled the town to escape the fighting.[415] His testimony adds a layer of nuance to the Chamber's view of the obligatory, vengeful and ideological evacuation of Oudong in 1974.[416] It sheds light on how the assault on the town unfolded and attests to other reasons for the movement of the population, especially the understandable need of people in war zones to get away.[417] It lays to rest the myth of the punitive expedition to Oudong by the Khmer Rouge and the Chamber should have taken this testimony into consideration in its reasoning. Generally, the Chamber

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[408] In this connection the Chamber takes no account of the fact that the passage in SHORT's book has no source: **E3/9**, p. 257. In court, SHORT named PHY Phuon as his principal source: T. 7 May 2013, **E1/190.1**, p. 73.
[409] T. 20 June 2013, **E1/210.1**: the witness had trouble understanding simple questions repeated several times (p. 16-18), gave answers that were irrelevant to the questions, (p. 23-24), or gave the same answers to different questions (p. 46-48). The witness was in fact called to order by the President (p. 25-26); see also his inconsistencies and doubts set out in the Report addressed to the Chamber by WESU, 2 August 2013, **E266/3/2.1**.
[410] Closing brief, **E295/6/4**, para. 28, footnote 43 (on NOU Mao); see *supra* part **II.2** Assessment of the evidence
[411] Judgement, para. 126: the document is "*Nouvelles du Cambodge*", 11 April 1974, **E3/167**.
[412] Judgement, para. 124.
[413] Judgement, para. 124.
[414] MEAS Voeun was a battalion commander in 1974: T. 3 October 2012, **E1/129.1**, p. 88-89.
[415] T. 4 October 2012, **E1/130.1**, after 9h26, or p. 8 of the Khmer version. (English translation: *"It is my knowledge that the people did not want to go but we had to force them to go in order to avoid the fighting."*, The French and English versions of the testimony of MEAS Voeun are incorrect, saying the opposite of what the witness said in Khmer. The Defence awaits the correction of the transcript of the hearing.
[416] Judgement, para. 124.
[417] Closing brief, **E295/6/4**, para. 124.

either ignored or attached inadequate weight to the context in which certain population movements (which it described as forced evacuations) took place.[418]

190. In conclusion, the Chamber did not rely on tangible, convergent and sufficient evidence to establish that there was a consistent pattern of conduct. In fact, a review of the inculpatory evidence relied on by the Chamber even suggests that certain evacuations may not have occurred. The significant differences in the way events unfolded in Kratie, Kampong Cham, Banam and Oudong negate what the Chamber defines as a consistent pattern of conduct.[419] Accordingly, the Chamber acted unreasonably in finding that these events, such as they were, prove that there was a planned and organised consistent pattern of conduct. Accordingly, its findings about the existence of a population movement policy prior to the evacuation of Phnom Penh are wrong. They must be invalidated.

191. ***Consistent pattern of movements of population between rural areas***. The Chamber committed an error of fact in holding that movements of population between rural areas before 1975 demonstrated a consistent pattern of conduct, defined as the movement of *"New People"* who were *"forced, coerced, or deceived to move"* without adequate means of transport, food and health arrangements.[420] In the eyes of the Chamber this pattern of conduct consisted in regularly targeting the *"New People",* but it dates the first use of the term *"New People"* to after 17 April 1975.[421] This is a serious anachronism because the behaviour of the Khmer Rouge vis-a-vis the *"New People"* was a decisive factor in the conviction of the Appellant, as it illustrated "*the widespread attack directed against the civilian population*". These findings of the Chamber are a miscarriage of justice and must be invalidated.

192. Moreover, in concluding that there was a consistent pattern of conduct, the Chamber distorted the evidence.[422] First, some of the witnesses cited made no reference to population movements before 1975 nor to a consistent pattern of conduct, but only testified about the

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[418] Closing brief, **E295/6/4**, paras. 34-37, paras. 44-53; paras. 65-69; T. 25 October 2013, **E1/234.1**, pp. 66-67.
[419] Judgement, paras. 791 and 794.
[420] Judgement, paras. 800 and 803.
[421] Judgement, para. 169 quoting the *Revolutionary Flag* of August 1975, **E3/5**, pp. 11-12, 26, 30-31
[422] Judgement, para. 800, footnote 2546 and 2547.

functioning of the mobile units and the establishment of cooperatives[423]-- matters that have been outside the scope of the trial since the severance.[424] Also, the other evidence quoted refers only to population movements warranted by military necessity, without describing the conditions under which they were effected.[425]

193. To support its findings, the Chamber also cites the contested evacuation[426] of Oudong.[427] Oudong is a town, and cannot be used to prove both the existence of a consistent pattern of conduct in the evacuation of towns[428] and a consistent pattern of conduct in the movement of populations from one rural area to another. By reasoning in this way, the Chamber committed an error by displaying a lack of the most elementary logic.

194. Furthermore, the Chamber drew parallels between events that took place during the war and other events that happened later. It is unreasonable to conclude that the rationale for the population movements and the circumstances under which they happened were identical, and constituted an undifferentiated whole, whatever the period. On the contrary, these movements were in response to different constraints and objectives depending on whether or not they were prompted by the war. To say that there was a continuum between them and identify common features among them is to gloss over the impact of the armed conflict on the situation before Democratic Kampuchea. This simplistic and biased reasoning must be totally invalidated.

195. The error of fact committed by the Chamber occasioned significant errors in law in the determination of the Appellant's responsibility. Indeed, the Chamber concluded, for example, that due to the existence of a consistent pattern of conduct in the population movements between rural

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[423] Judgement, para. 800, footnote 2546: Interview of PHY Phuon by DC-Cam, **E3/5815**, p. 2-3 (who speaks only of a mobile unit, never of population movements); Interview of KHO Vanny by DC-CAM, **E3/4660**, p. 1-2 (discussing a project to set up cooperatives to receive the Phnom Penh evacuees); see entire footnote 2547.
[424] See Decision on severance.
[425] Judgement, para. 800, footnote 2546: SHORT, T.6 May 2013, **E1/189.1**, pp. 90-91 (he discusses the population movements after 1973 aimed at moving people away from conflict zones), interview record of POV Sinuon, **E3/5545**, p. 3 (apart from the absence of clarity in the testimony, he only addresses the military reasons for his and his family's evacuation).
[426] See *supra* part **III.1.A.b.** Events which occurred between 1970 and 1975 *Consistent pattern of movements of population from the cities* (Oudong).
[427] Judgement, para. 800, footnote 2546 referring to para. 113.
[428] Judgement, para. 791.

areas before 17 April 1975, KHIEU Samphan was aware that crimes were being committed[429] at the time of movement of the population (phase two). The assumption that he knew about the population movements carried out according to the impugned consistent pattern of conduct also resulted in his conviction for planning crimes committed during movement of population (phase two).[430] These errors of fact and law have caused serious prejudice to the Appellant. All of the Chamber's findings concerning these population movements before 1975 must be invalidated.

196. ***Purposes of the population movements and "imposition" of collectivisation***. The Chamber committed an error of fact in its findings concerning the reasons and purposes of the population movements before 1975 and the *"imposition of collectivisation in the cooperatives."*[431]

197. To start with, the Chamber violated the terms of its Decision on severance by dealing with the establishment of cooperatives,[432] then it erred by holding that collectivisation was undertaken to meet an ideological objective although the evidence shows that it was not the only reasonable conclusion available.

198. Thus, the Chamber completely disregarded the evidence of NUON Chea and other witnesses who testified that cooperatives had been established to mitigate food shortages and contribute to the war effort.[433] NUON Chea explained that, before 1975, cooperatives were not as well organised as they were after the fall of Phnom Penh. At the time, only certain agricultural areas close to villages were planted with rice to meet the people's needs and as part of the reconstruction of the country.[434] NUON Chea's explanation corroborated the testimony of military personnel who testified about pre-1975 population movements.[435] Accordingly, by not explaining why it had disregarded the economic and military rationale for setting up cooperatives before 1975, the Chamber failed in its duty to give reasons.

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[429] Judgement, para. 956.
[430] Judgement, paras. 1025, 1027 and 1029.
[431] Judgement, paras. 106, 110, 113-116.
[432] See *supra* part **I.1**, *Temporal and subject-matter jurisdiction following severance of the charges.*
[433] See *supra* part **III.1.A.b.** 1970-1975, *Distribution and contents of Revolutionary Flag/Revolutionary Youth magazines*
[434] NUON Chea: T. 30 January 2012, **E1/35.1**, pp. 3 to 6 and 14.
[435] See *supra* part **III.1.A.b.** Events which occurred between 1970 and 1975 *Consistent pattern of movements of the population from the cities* and *Consistent pattern of movements of the population between rural areas.*

199. Further, the Chamber erred in fact in relying solely on SHORT's conjectures that the reason for creating cooperatives was ideological.[436] Apart from the fact that his conjectures were not based on any research nor any particular reliable source, the Chamber distorted what he said because, notwithstanding his opinion on the supposedly ideological rationale for the evacuations, SHORT pointed out that before 1975, they had practical and strategic purposes: fighting against the illegitimate regime in power and installing the population in areas near villages that were easy to defend[437].

200. Accordingly, the Chamber erred in law and fact by deciding that SHORT's statements contradicted the reasons advanced by POL Pot and later reported by KHIEU Samphan relating to the famine and the military risks, especially since the conversation reported by the Appellant[438] like the passage from SHORT's testimony quoted by the Chamber[439] concerned the 17 April 1975 evacuation and not previous ones.

201. In light of the evidence, the Chamber's conclusion that there was an ideological reason for the collectivisation of cooperatives, which justified the pre-1975 evacuation of the population[440] was not necessarily compelling beyond reasonable doubt. Accordingly, the Chamber could equally not take as the sole reasonable conclusion available that the *"leadership"* had decided to evacuate Phnom Penh on the basis of pre-1975 experience and an established policy of widespread creation of cooperatives throughout the country. Indeed, the Chamber could not do so particularly because the Chamber itself noted that there were numerous reasons for the evacuation.[441] Its poorly reasoned findings must be invalidated.

<u>Targeting Khmer Republic soldiers and officials</u>

202. In order to establish that there was a policy to target Khmer Republic soldiers and officials in 1970-1975, the Chamber relies on: five mass executions, education sessions, issues of *Revolutionary Flag*, FUNK/GRUNK speeches made before the victory and a "decision" to

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[436] Judgement, para. 115.
[437] SHORT: T. 6 May 2013, **E1/189.1**, pp. 90 to 92.
[438] Book by KHIEU Samphan, **E3/18**, pp. 55-57, ERN 00103750-51.
[439] SHORT: T. 6 May 2013, **E1/189.1**, pp. 29-31.
[440] Judgement, para. 116.
[441] Judgement, para. 534.

implement this policy that was taken and confirmed during the final assault[442]. None is established beyond reasonable doubt or stands as the only possible explanation.

203. ***Mass executions.*** The only source for the executions at **Phloeng Chhes** in 1972 is an anonymous refugee interviewed by HEDER[443] who did not sign a record of the interview. As a Khmer Republic soldier up to 1974, he could not have been present at the 1972 events in the liberated zone. HEDER's notes are nothing but double hearsay. They are not corroborated. With respect to the massacres in **Kampong Cham** in September 1973, the Chamber bases its conclusions on HEDER who relies on vague memories of hearsay interviews. The exact circumstances of the executions and the combatant or non-combatant status of the victims were not specified.[444] Kampong Cham was only partially occupied by the Khmer Rouge and nothing proves that what HEDER heard concerned people protected by the Geneva Conventions. As for **Oudong**, we shall see in detail below that these facts are unproven and are not the only reasonable conclusion available.[445] With respect to **Battambang** in July 1974, the two documents quoted do not establish the facts, nor does the family connection that is referred to,[446] and neither do the two American documents disclose their sources. Aside from the opening sentence of the 17 March 1975 memo: "*On July 1, 1974 approximately 700 civilians and surrendered soldiers were executed at Ta Hen",* the description does not establish that Khmer Republic soldiers were among the victims.[447] These two exhibits are vague and rely on anonymous unwritten statements collected by the United States, a party to the conflict. Finally, a US document addressed in March 75 to an ex-CIA agent in Vietnam (KENDALL) is supposed to prove that executions took place ***"in Khmer Rouge territory"***. The introduction makes it clear that the report, a synthesis of articles purportedly based on twelve interviews, is intended for political and military purposes. The identity of the interviewees, the originals of the articles or the circumstances of the events

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[442] Judgement, para. 830 (5 executions en masse), 120 and 818 (education sessions), 818 (*Revolutionary Flag*), 120, 820 to 826 (FUNK/GRUNK speeches), 817 (decision on final offensive).
[443] **E3/1714**, p. 67-68, ERN 00170758 - 00170759.
[444] For this paragraph: T. 10 July 2013, **E1/221.1**, p. 95-96, lines 15 to 21. and T. 10 July 2013, **E1/221.1**, pp. 98 to 99.
[445] See *infra* **III.1.A.c**. See detailed facts in 1974-1975 more particularly *Oudong*.
[446] **E3/3472**, 15 July 1976, pp. 14-15, ERN 00443171-00443172; **E3/4197**, 17 March 1975, p. 25-26, ERN 00443227-00443228. In **E3/3472 and E3/4197**, in the executions, there is no mention of selection on the basis of family ties.
[447] **E3/4197**, pp. 25-26, ERN 00443227-00443228.

described are either unavailable or unspecified.[448] It is a compilation of hearsay. Of the twelve "testimonies", only one allegedly concerns the events of 1975 and does not mention any Khmer Republic victims. None of the dates in the eleven other summarised accounts is consistent with the Chamber's conclusion, nor do any of them refer to the targeting of Khmer Republic soldiers and officials. The document is so sketchy that the Chamber gives an absurd list of victims in which the alleged targeting loses its specificity.[449] In the final analysis, even if it were established that they happened, these abuses do not demonstrate a consistent pattern of conduct because they differ in the methods used, the people targeted and the circumstances (when these are given). Finally, none of the evidence is suggestive of untruthfulness.

204. What is more, the Chamber does not ask itself if the alleged crimes were the result of war rather than a criminal policy. During a war,[450] it is legitimate to target the enemy in the sense of *jus in bello*. In fact, CHHAOM Sé, who was a Khmer Rouge soldier at the time, said that military concerns took precedence over ideology during their study sessions.[451] To the military operation version we can add the possibility of personal vendetta (the latter not being a criminal policy). The Chamber links the bombing and the mistreatment of Khmer Republic soldiers, albeit subtly.[452] The bombing by the US and the Khmer Republic profoundly traumatised the peasantry,[453] the pool from which the Khmer Rouge did its recruiting.[454] The situation militated in favour of the theory of isolated acts.

205. Instead of considering such options, the Chamber states that it had two exhibits proving the radicalisation of the so-called anti-Khmer Republic policy after 1972.[455] The **first** is the appeal by KHIEU Samphan, HOU Youn and HOU Nim[456] and, as we shall see below, this is not

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[448] **E3/4197**, 17 March 1975, pp. 24-26, ERN 0000443226-0000443228.
[449] Judgement, para. 830, *"including Khmer Republic officials, their agents and those who opposed the political line of the Party"*
[450] See part **III.1.A.b.** Events which occurred between 1970 and 1975: *Armed conflict and the Lon Nol regime*
[451] T. 11 January 2013, **E1/159.1**, p. 53, L.9-19 around 11h43m06s and p. 54, L.11- p. 55, L.3 after 11h44m39s.
[452] Judgement, para.121.
[453] See for example, **E3/1714**, ERN 00170758, *"I lived in the village with relatives. The village was bombed by T-28's, hit right on the village and all houses were burned ..."*.
[454] See for example, Judgement, paras. 96, 107 (footnote 297), 155, 156, 517; Book by SHORT **E3/9**, ERN 00396415.
[455] Judgement, paras. 121, 123 and 127.
[456] Judgement, paras. 121.

a matter of radicalisation but an echo of what was happening in the war.[457] IENG Phan also contradicts this inculpatory distortion of the evidence and the omission of the war context.[458] The **second** is the execution of Prasith.[459] Here, however, the evidence[460] pointed to the other reasonable conclusion which is an assassination ordered by Ta MOK (also proving that the leadership was not in control of everything). The implication of the Central Committee in that execution is based on SHORT's speculation by analogy.[461] The Chamber had no basis to conclude that *"[i]f violence was now appropriate for internal enemies, it would also be required against external enemies"*[462].

206. The Judgement refers to *"the uneven application of this policy"* saying that *"there was no initial written directive on the targeting of Khmer Republic soldiers and officials"*[463]. CHHAOM Sé also pointed to technical organisational difficulties which led to on-the-ground *de facto* autonomy for the Khmer Rouge.[464] All of this evidence should have led to the conclusion that there was no organised policy, but that these were isolated acts of violence. In the end, the Chamber clung to its theory, relying on the speculations of SHORT who believed that the sheer scope of the mistreatment automatically proves the existence of a policy.[465] His evidence in court does not support any such conclusion, given what he said,[466] the sources quoted[467], and because it is an interpretation.[468]

207. ***"Indoctrination sessions"*** are also used[469] by the Chamber but none of the testimony cited mentions pre-17 April 1975 sessions on any such policy.

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457 On this speech, see also part **III.1.A.b.** Events which occurred between 1970 and 1975 *FUNK and GRUNK speeches*
458 IENG Phan: T. 20 May 2013, **E1/193.1**, p. 65, L. 21, after [13.54.51] to p. 69, L. 9 before [14.05.31].
459 Judgement, para. 123.
460 Judgement, para. 118, footnote 338, Book by SHORT, **E3/9**, p. 259-260 (*"Prasith was not the first PK cadre to be liquidated. Mok had already eliminated a number of lower-ranking officials."*).
461 SHORT: T.6 May 2013, **E1/189.1**, p. 20 L.7-17 [09.55.54]-[09.57.41], T.7 May 2013, **E1/190.1**, p. 77, L.1-6, before [13.47.54].
462 Judgement, para. 123.
463 Judgement, para. 122.
464 CHAOM Sé: T.11 January 2013, **E1/159.1**, p. 51, L.17 to 11.36.24 to p. 52, L.7, and p. 53, L.9-16 before 11.43.06.
465 SHORT: T. 8 May 2013, **E1/191.1**, p. 99 to 101.
466 SHORT: T. 8 May 2013, **E1/191.1**, p. 98 L.25 to p. 100 L.15
467 SHORT: T. 8 May 2013, **E1/191.1**, pp. 96 L. 20 -97 L.2
468 See *supra* part **II.2** Principles for the assessment of the evidence *Experts.*
469 Judgement, para. 818.

208. ***Revolutionary Flag.*** The only issue quoted on pre-April 1975 events describes the military situation and the description does not qualify any of the acts as criminal in a manner that is beyond reasonable doubt.[470]

209. ***GRUNK and FUNK speeches.*** In order to establish the existence of the policy, the Chamber relies on FUNK/GRUNK speeches preceding the final assault.[471] The first part of its thinking on the matter is set out in the *"Historical context"* section, and the findings are then used in discussing JCE. The Judgement is self-contradictory, however, since it asserts that these speeches were designed to lower the guard of the Khmer Republic officials with false promises from reassuring figures, while also saying that they contained threats of reprisals against all Khmer Republic soldiers and officials (not merely the "seven traitors").

210. ***FUNK and GRUNK.*** The Chamber asserts that these statements and organisations *"were merely a façade, an attempt at plausible deniability on the international stage."*[472] SIHANOUK founded the GRUNK and was President of the FUNK[473] and the Chamber notes: *"In reality [...] NORODOM Sihanouk retained influence overseas and in diplomatic relations"*.[474] Moreover, many of the statements quoted in the Judgement were made by SIHANOUK.[475] The Chamber contradicts itself and does not explain what this *"façade"* was.

211. ***Plausible deniability.*** FUNK/GRUNK statements supposedly provided *"plausible deniability"* for an international audience which played witness to the integrity of the messaging directed at Khmer Republic soldiers and officials. In this regard, the Chamber relied on an April 1975 telex from a certain "Arnaud"[476] to the French Ministry of Foreign Affairs in which he described an interview with *"an official in NORODOM Sihanouk's office"*.[477] This is worthless anonymous hearsay. According to the official he met: *"People within the country are **not so***

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[470] Judgement, para. 818, footnote 2582: *ER* **E3/5**, p. 22, ERN 00401497 (After several months of fighting and sweeping them away, the enemy was smashed).
[471] Judgement, paras. 120, 127, 820 to 826.
[472] Judgement, para. 826.
[473] Judgement, para. 98.
[474] Judgement, para. 100.
[475] Judgement, para.120, footnote 243, 245. See also **E3/2680**, **E3/3341**, **E3/3338**, **E3/3339**, **E3/3336**, **E3/3337**, **E3/1287.**
[476] French Ministry of Foreign Affairs telex, no title, 17 April 1975, **E3/2718**.
[477] Judgement, para. 826.

***concerned** about the international repercussions of their acts".* The Chamber ought to have noted that this telex contradicts the claim that GRUNK/FUNK wanted to persuade the international community of the legitimacy of their actions. If the telex is anything to go by, they could not care less. Finally, this document does not refer to any particular FUNK/GRUNK statement.[478]

212. The Chamber makes much of FUNK appeals issued before the final assault giving Khmer Republic deserters a chance to switch sides. According to the Judgement they were *"a calculated attempt to reduce opposition to the Khmer Rouge advance and lull the Khmer Republic officials into a false sense of security".*[479] It goes on to say *"[t]he messages invited the Khmer Republic soldiers and civil servants to join the revolution, but warned implicitly that if they delayed in doing so, they would be in the same category as the super traitors."*[480] This is a contradiction. The idea of *"a conciliatory tone"* designed to *"lull the Khmer Republic officials into a false sense of security"* is absurd. When you are fighting a war, you do not give a false sense of security to the enemy by threatening to kill him. The Chamber also makes the inculpatory assumption that *"Khmer Republic officials"* were incapable of recognising this death threat. The tactic was, after all, aimed at the *"officials"* of the Khmer Republic who must have had a modicum of education. Having committed atrocities themselves,[481] the Khmer Republic leaders were no fools, as evidenced by the flight of five out of the seven "super traitors". Moreover, *"a calculated attempt to reduce opposition to the [...] advance"* of the enemy is standard military strategy in time of war.

213. ***A calculated attempt to lull the Khmer Republic officials.*** This finding is based on HEDER's testimony and a book he wrote[482] in which he bases his analysis on VICKERY, who was not cross-examined. A succession of experts and witnesses all quoting each other is dangerous and smacks of speculation.[483] HEDER did not appear as an expert and was not authorised to speculate. His book suggests another reasonable conclusion: that before Phnom

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[478] French Ministry of Foreign Affairs telex, no title, 17 April 1975, **E3/2718**, p. 2, ERN 00722362.
[479] Judgement, para. 120.
[480] *Ibidem.*
[481] *Conclusions finales*, T. 28 October 2013, **E1/235.1**, pp. 52-56 from [11.09.20] to [11.18.08].
[482] HEDER: T. 11 July 2013, **E1/221.1**, pp. 68 to 71 and Book: **E3/3169**, ERN 00002752.
[483] Book HEDER, **E3/3169**, ERN 00002752, *"In what appears to have been a calculated abuse of the trust".*

Penh fell, the inhabitants of the city hoped that things would get better afterwards.[484] PONCHAUD also alluded to that hope, adding that it was not the same as a feeling of security.[485] In any event, it is unlikely that the Khmer Republic officials had any such feeling. Even the Judgement refers to *"the concerns of the international community about possible massacres in the wake of a Khmer Rouge victory."*[486]

214. ***Immediacy of the surrender.*** On the stand, SHORT postulated that after the 26 February 1975 statement,[487] because some of the rallying calls included the word *"immediately",*[488] if the Khmer Republic officials did not give up straight away the guarantees offered would be null and void[489] and they would meet the same fate as the seven traitors. SHORT admitted to speculating by saying "*it certainly can convey that meaning"*.[490] His understanding is contradicted by the wording of the rallying calls. The 26 February 1975[491] communiqué calls on Khmer Republic officials to respond to the appeal to rise up and unite in *"a multiform struggle"* using all means available to the Khmer Republic officials to sabotage and destroy military installations, police stations, arms depots, etc. *"from inside"*. In order to sabotage, it is necessary to be on the spot, rather than fleeing *"immediately"*. The Khmer Republic officials would only cross over to the liberated zone *"if need be"*. It is thus apparent that the use of the term *"immediately"* is not a threat. To claim otherwise is an obvious distortion of the evidence for inculpatory purposes.

215. Moreover, in addition to sabotage, these texts call for strikes, demonstrations, signing of petitions, and so on. These are not activities than can be organized in the space of a few days. The use of the word *"immediately"* in some of these appeals is a pure stylistic flourish that emphasises the gravity of the situation but is not meant to imply to the Khmer Republic officials that they were all going die in any case. It should also be remembered that the case file contains

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[484] Book HEDER, "Pol Pot and Khieu Samphan", **E3/3169**, ERN 00002752.
[485] PONCHAUD: T. 9 April 2013, **E1/178.1**, p. 65-66, ERN 01001209-10, L. 13 to 23 and L. 1 to 3
[486] Judgement, para. 821.
[487] **E3/117**, ERN 00166772-73; **E3/118**, ERN 00166897 and 00166948.
[488] "Khieu Samphan Chairs NUFC Congress Session", 26 February 1975, **E3/117**, p. 3. GRUNK Telegram, 18 March 1975, **E3/189**, p. 3, ERN 00894299. See also Closing brief, **E295/6/4**, paras. 147-149.
[489] SHORT: T.7 May 2013, **E1/190.1**, p. 110 before [15.16.09], T.9 May 2013, **E1/192.1**, pp. 4-5 [09.09.28]-[09.11.56].
[490] T. 9 May 2013, **E1/192.1**, p. 5.
[491] **E3/488**: *"Khieu Samphan Chairs NUFC Congress Session"*.

neither the originals nor the audio recordings in Khmer of these appeals and that the exact word used in Khmer on the radio broadcasts cannot be verified.

216. Furthermore, the Chamber does not dwell on the conditions of the final assault on a capital city that was surrounded, without any option for the Khmer Republic officials to retreat. The battle would be bloody, and these rallying calls could be read as a ploy to facilitate the collapse of the Khmer Republic with a lower casualty toll. With the battle looming, the calls for defection were telling the Khmer Republic soldiers that if on the day of the final assault they did not lay down their weapons, they would be considered legitimate military targets. For non-military Khmer Republic officials, there is nothing to support the finding beyond reasonable doubt that if they did not cease to collaborate with the regime when the CNPLAF arrived, they would necessarily be doomed to summary execution like the "super traitors". To claim that the promise of an amnesty as well as appeals to leave the country *"did not demonstrate any policy on the part of the Khmer Rouge to spare them"*[492] is an unwarranted reversal of the burden of proof.

217. ***Final elements.*** The Judgement uses five further elements to claim that the decision to implement the policy to target Khmer Republic officials was ordered and affirmed by the leadership during the final offensive.[493] The first is a record of an interview of KHOEM Samhuon, who was not cross-examined, in which he mentions an order given by SON Sen in May 1975, in other words *after* the victory. The second is a US memo which has no probative value because it is made up of unattributed hearsay which does not detail the factual circumstances. The only temporal reference in the document is on 1 January 1976, i.e. *after* the offensive. The third is from the United Nations Commission on Human Rights which repeats the hearsay of an anonymous refugee on events *after* the victory. The fourth is the transcript of an interview with IENG Phan referring to an order to search for Khmer Republic soldiers *after* the 17th of April 1975. It does not establish that a criminal policy existed before 17 April 1975. The fifth is HEDER who says his comments refer to the second half of 1976. Moreover, the document on which it is based,[494] makes no mention of orders to execute Khmer Republic survivors.

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[492] Judgement, para. 826.
[493] Judgement, para. 817.
[494] **E3/789**, ERN 00742440-00742447.

None of the evidence examined above was capable of establishing beyond reasonable doubt that there were either directives ordering criminal massacres or consistent patterns of conduct. The Chamber's own conclusions negated this. This baseless finding has occasioned a miscarriage of justice in enabling KHIEU Samphan to be convicted.[495]

III.1.A.c. 1974-1975 more particularly

Oudong

218. In the Judgement, the Chamber says it *"finds"* that in March 1974 *"Khmer Republic soldiers, likely numbering in the thousands, were executed en masse immediately after the seizure of Oudong"*.[496] This finding is used throughout the Judgement and more particularly in passages concerning the key meeting of June 1974 at which the final offensive on Phnom Penh is supposed to have been decided.

219. In reaching its finding on mass executions at Oudong, the Chamber starts by drawing on statements by SHORT.[497] However, it did not scrutinise the quality of his sources.[498] First, he uses testimony from unidentified villagers the text of which has never been placed on the case file. This is therefore hearsay without probative value. SHORT was also incapable of remembering the number of people (he said *"one or two"*) he interviewed about Oudong or precisely what they said.[499] Equally, it should be noted that PHY Phuon, who was SHORT's principal source, discussed Oudong with him but only to say that the evacuation of the city went well and without mentioning a single execution.[500] SHORT said that he also based his claim that executions were committed at Oudong on Wilfred P. DEAC's book,[501] the only available source providing a detailed account of the capture of the town. However, DEAC does not describe several thousand *"officials and uniformed soldiers"* separated from the rest, led away and

[495] Judgement, paras. 127, 814, 835 to 836 and 995, 1043, 1046, 1051.
[496] Judgement, para. 127.
[497] Judgement, para. 124, *"Based on interviews with several villagers and other sources, Expert Philip SHORT reported that several thousand "[o]fficials and uniformed soldiers were separated from the rest, led away and killed ».*
[498] See *supra* part **II.2** on the evaluation of evidence *Experts*; SHORT: T. 7 May 2013, **E1/190.1**, p. 72, lines 9 to 13, before [13.37.35].
[499] SHORT: T. 7 May 2013, **E1/190.1**, p. 72, lines 14 to 18, between [13.37.35] and [13.38.54].
[500] PHY Phuon: T. 26 July 2012, **E1/97.1**, p. 31, L. 10 to p. 32, L. 10, around [11.01.32] to [11.04.31].
[501] Book by DEAC, *"Road to the killing fields – The Cambodian War of 1970-1975"*, **E3/3328**.

killed.[502] He describes heavy fighting but not executions. Driven to the corner, SHORT became very evasive about the fact of the executions: *"That is consistent with what had been happening before - what had started happening, at least - and with, of course, what happened afterwards".*[503] This answer was a clear admission of speculation which tainted Short's credibility on whether mass executions really occurred at Oudong.

220. The Chamber also relies on HEDER's testimony; he was unique in that he went to Oudong just after it fell (it will be noted that Oudong was taken and then re-taken, so it is difficult to say exactly when HEDER visited Oudong). In any event, HEDER's knowledge of executions at Oudong is based on a few interviews of unidentified individuals which he apparently conducted on the spot.[504] It is thus pure hearsay. HEDER also admitted that he did not remember seeing the corpses of Khmer Republic soldiers when he was there, nor even recall precisely how he had learned of the purported executions.[505] On the other hand, he did remember seeing a town that was "*largely destroyed*" by two weeks of fighting and coming across living Khmer Republic soldiers.[506] HEDER's testimony could therefore not be used to buttress SHORT's speculations.

221. Paragraph 125 of the Judgement, in the section entitled *"The 'Experience' of Oudong"*, then relies on Witness NOU Mao's testimony to conclude that at a commune committee meeting where the Oudong victory was discussed, *"there was no acknowledgement that soldiers were executed"*. It is apparent here that the Chamber is distorting the account of a witness to the point of claiming that since nobody spoke of executions, it probably means they did take place but were concealed. This approach is dishonest. There is nothing in NOU Mao's testimony to suggest that he refused to admit that executions had taken place. In fact, his testimony could only provide a basis for concluding that there was no acknowledgement at the meeting that there had been

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[502] Book by DEAC, **E3/3328**, ERN 00430777-78.
[503] SHORT: T. 7 May 2013, **E1/190.1**, p. 73, L. 7 to 9, after [13.37.35] and before [13.38.54].
[504] HEDER: T. 11 July 2013, **E1/222.1**, p. 5, L. 6 to 8, after [09.12.05] *".off the top of my head, my recollection of those specifics are less clear. I think I only went for a day or two. I didn't do extensive interviewing".*
[505] HEDER: T. 10 July 2013, **E1/221.1**, p. 86, L. 21 to 25 to p. 87, L. 7, between [14.35.46] and [14.36.56]: *"Q. Did you see anyone dressed in uniform, or a body in uniform? Or can you help on what may have happened to the Lon Nol soldiers? R. I don't recall anything specific about - I certainly don't recall seeing any bodies of Lon Nol Khmer Republic military personnel. I may have been told that there were executions. I don't specifically recall that I was."*
[506] HEDER: T. 10 July 2013, **E1/221.1**, p. 87, L. 24 to p. 88 L. 9, between [14.36.56] and [14.40.25].

executions at Oudong.[507] In addition, it must be pointed out that NOU Mao stated that at the meeting reference was made to the presence of *"prisoners of war"* at Oudong.[508] By definition, prisoners of war are alive… It should also be pointed out that NOU Mao's testimony was procedurally flawed.[509] The Chamber could equally not rely on this witness to buttress its finding.

222. The Chamber finished off its theory that the executions were carried out when Oudong fell by resorting to KHIEU Samphan's speeches reporting the outcome of a military operation consistent with *jus in bello*.[510] The figures quoted in these two texts are so high that they underscore their propagandistic nature and lose all credibility. The statement that "*5,000 enemies were eliminated, 1,500 of whom were captured*" does not provide any authority for the Chamber to conclude beyond reasonable doubt that these speeches were an implied admission that a mass execution had taken place at Oudong. Aside from the fictional spin on these figures, the Chamber itself acknowledges at paragraph 125 that these texts do not prove that executions had taken place: *"[h]e did not specify whether the enemies who were annihilated had been killed during the fighting or instead after they had been captured and disarmed"*. The Chamber should have drawn the objective conclusion dictated by that finding.

223. To conclude, none of the evidence cited by the Chamber in support of the claim that executions took place in Oudong in 1974 demonstrates beyond reasonable doubt that *"Khmer Republic soldiers, likely numbering in the thousands were executed en masse immediately after the seizure of Oudong*". This also undermines the Chamber's finding that these executions were cited as examples at meetings in June 1974 and June 1975.[511] This was not the only possible conclusion. It is an error of fact which has occasioned a miscarriage of justice because the Chamber relies on it to establish that there was a policy to target Khmer Republic soldiers and

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[507] NOU Mao: T. 19 June 2013, **E1/209.1**, p. 42, L.18 *"And those who were evacuated included the war captives, as well."*
[508] See Application of 10 July 2013, **E266/3/1**.
[509] See Application of July 2013, **E266/3/1**.
[510] Judgement, paras. 125 and 126 quoting **E3/167 and E3/114**.
[511] Judgement, para. 816.

officials[512] which, in turn, allowed the Chamber to find KHIEU Samphan criminally responsible.[513]

Situation in Phnom Penh on the eve of 17 April 1975.

224. The Chamber's conclusions about the situation in Penh on the eve of 17 April 1975[514] demonstrate its bias. It committed a series of errors when examining the reasons given to explain the evacuation. It bears repeating that the Appellant has always maintained that he took no part in that decision. It is nevertheless important to know whether the Appellant may have believed in the legitimacy of the arguments put forward by those who made the decision. On this point, the Defence also refers to its prior submissions.[515]

225. ***Combat.*** As explained above,[516] the Chamber minimised the context of the armed conflict in the pre-1975 period. It also erred in laying the blame for the disastrous health situation in Phnom Penh on the indiscriminate and pointless attacks by the Khmer Rouge, thereby downplaying the effects of the fighting by other parties to the conflict,[517] especially the impact of US bombing on the influx of refugees and the shortages.[518] However, the proceedings showed that the Khmer Republic army, even after the intensive US bombardments had stopped, continued to receive assistance from its allies and was carrying out air raids with anti-personnel napalm bombs up to the month of April.[519] The Chamber also showed bias in referring only to the shelling by the Khmer Rouge side or the injuries it attributed to the Khmer Rouge[520] as if the Khmer Rouge were the only ones fighting for Phnom Penh.[521] It also erred in considering the

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[512] Judgement, paras. 124 to 127, 830.
[513] Judgement, paras. 127, 814, 835 to 836 and 995, 1043, 1046, 1051.
[514] Judgement, paras. 153 to 156, 157 to 167, 527, 535 to 540, 541 to 543.
[515] Closing brief, **E295/6/4**, paras. 34-53; PF, T. 25 October 2013, **E1/234.1**, pp. 61-74;
[516] See part **III.1.A.b.** Events which occurred between 1970 and 1975 *Armed conflict and the Lon Nol regime*
[517] Judgement, paras. 153 to 156, 157 to 167, 527, 535 to 540, 541 to 543.
[518] Judgement, para. 737.
[519] SCHANBERG, T.6 June 2013, **E1/202.1**, pp. 49-50 around [10.53.40] and pp. 47-48 slightly before [10.47.47]; see also HEDER, T. 11 July 2013, **E1/222.1**, p. 75 after [13.53.31] and T. 16 July 2013, **E1/224.1**, p. 18 around [09.36.23].
[520] Judgement, paras. 163 and 166.
[521] This partiality was particularly in evidence during ROCKOFF's testimony. Al ROCKOFF, T. 28.January 2013, **E1/65.1.** The questions put by Judge Lavergne aimed to show a particular savagery within the Khmer Rouge movement by attempting to demonstrate their use of child soldiers during the fighting, and this by using photographs taken by the witness. These photos, which were not part of the case file but which Judge Lavergne had found on the internet, were shown to the witness. (T. 28 January 2013, **E1/65.1**, pp. 107-108, around [15.31.48] and [15.33.00]

Khmer Rouge blockade of the Mekong solely as a factor that aggravated the situation even though a blockade is a common military strategy to win against a better-equipped army.[522]

226. ***Risk of bombing.*** Clearly, the Chamber was compelled to acknowledge past American bombings,[523] but it erred in stating that it was not *"satisfied that the leadership believed that the claimed threat"* of further bombing after 17 April *"existed at the time."*[524] However, a review of the statements issued by FUNK/GRUNK representatives before 17 April 1975 do in fact demonstrate their fear of US reaction[525] and last-ditch Khmer Republic resistance.[526] The Chamber erred when it analysed the events from the vantage point of 2014, failing to take into account the Cold War context and its impact on the fears and decisions of the Khmer Rouge leadership in 1975 after five years of war and life in the jungle.

227. ***Reasons for shortages.*** The Chamber also erred in giving too little weight to the impact of US bombing on food shortages.[527] In fact, it limited itself to quoting a USAID report which

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and p. 109, around [15.35.51]). The latter explained that they were in fact pictures of Khmer Republic soldiers. This example is particularly telling of the way the hearings were inculpatory in nature, even to the extent of finding items from outside the case file.

[522] Judgement, paras. 537-538.

[523] Judgement, para. 537-538.

[524] Judgement, para. 534.

[525] The following is a list of the various speeches, communiqués, and statements from FUNK/GRUNK interviews before 17 April which refer to how the USA might react to a Khmer Rouge victory over LON Nol: **E3/1242**, ERN 00000055 (the US step up their military assistance to LON Nol and foresee increasing the number of their advisors to 10 000), ERN 00000056 (the US must end its support to LON Nol); **E3/167**, ERN 00280586 (the US mobilises its air force against the KR); **E3/30**, ERN 00166689-00166690 (the US supports LON Nol.), ERN 00166697-00166698 (the US gives weapons to LON Nol); **E3/488**, ERN 00166744 (SIHANOUK denounces the *"thousands of millions of dollars"* supplied to LON Nol by the US); **E3/48** , ERN 00166775 (Peace-loving American youth and public figures must support the struggle of the Cambodian people); **E3/120**, ERN 00166793 (the FUNK and the GRUNK are not seeking to interfere with or commit aggression against the American nation. They are fighting for their independence and their honour. American pacifists must support them); **E3/120**, ERN 00166838 (the US continues to support LON Nol. They should cease interfering); **E3/120**, ERN 00166820 (*"a lightning U.S. attack is not impossible"* or *"A combined operation by the U.S. Air Force and Saigon army is not impossible."*), ERN 00166807-00166808 (FUNK/GRUNK are not trying to attack the US. The US is a sensible country. They deserve full credit), **E3/120**, ERN 00166840 (the FUNK recalls that US legislation forbids the US from using its planes to bomb Cambodia and that the US should respect its own laws); **E3/189**, ERN 00894299 (urgent reminder that FUNK/GRUNK has no desire for interference, no aggressive aims against the US); **E3/3341**, 18 March 1975, ERN 00413198 (SIHANOUK declares that if the Americans intervene militarily in Cambodia, the GRUNK will never have official relations with the US) **E3/120**, ERN 00166870 (reminder of decisions by the American people), ERN 00166875 (despite opposition from the American people, the US leadership still wants to interfere in Cambodia. Warships from the US 7th fleet are in the Bay of Thailand and several thousand marines are ready to intervene), **E3/120**, ERN 00166885 (everybody in the US knows that LON Nol will fall).

[526] Closing brief, **E295/6/4**, para.40, see especially footnote 72-78.

[527] Judgement, para. 737.

"attributed the food crisis to 'the breakdown of security'"[528] and it committed an error in not drawing the relevant conclusions. In particular, it failed in its duty to reasonably give reasons for its finding by not addressing Defence arguments on the ambivalence of US humanitarian aid, the desertion of 80% of the agricultural land that had been destroyed by the war, the death of 75% of the livestock, an essential feature of Cambodian farming, and pre-existing malnutrition problems.[529] By disregarding this evidence on the various factors that prompted the CPNLAF to evacuate Phnom Penh, the Chamber omitted to make another reasonable finding.

228. Accordingly, the Chamber's finding that *"the evacuation of Phnom Penh was not justified on the basis of civilian security or military necessity"*[530] is an error of fact. First and foremost, the Chamber should have made it clear why the Appellant could not have considered the reasons advanced by the Khmer Rouge leadership to be valid and lawful in 1975. This error occasioned a miscarriage of justice since the rejection of this evidence contributed to the conviction of the Appellant for crimes committed during the population movements.

III.1.B. Legal characterisation

229. **Common purpose**. To conclude that a joint criminal enterprise existed, the Chamber reasoned as follows:[531] **1/** a plurality of persons shared a common purpose to *"implement rapid socialist revolution through a 'great leap forward' and defend the Party against internal and external enemies, by whatever means necessary;"*[532] **2/** *"Members of the Standing and Central Committees, government ministers, and Zone and Autonomous Sector secretaries,* [...] *were part of this group"* which included the two Accused;[533] **3/** according to the evidence *"this common purpose [was] to rapidly build and defend the country through a socialist revolution;"* **4/** this revolution was "*based on the principles of secrecy, independence-sovereignty, democratic*

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[528] Judgement, para.160, footnote 475.
[529] Closing brief, **E295/6/4**, paras. 51-53.
[530] Judgement, para. 549.
[531] Judgement, para. 804.
[532] Judgement, para. 777, quoting the Closing Order, paras. 156, 158, 1524 and 1528.
[533] Judgement, para. 777, footnote 2447 for the Accused and footnote 2448-2463 for the other members of the JCE.

centralism, self-reliance and collectivisation;"[534] **5/** according to the Closing Order *"[t]his common purpose was not in itself necessarily or entirely criminal. The Closing Order, however, alleges that participants implemented the common purpose through the Population Movement Policy" "and Targeting Policy" "which resulted in and/or involved crimes."*[535]

230. In analysing the errors cross-cutting the Judgement in part III of this Brief, the Defence has already demonstrated how the concept of democratic centralism had not been applied by the CPK and why this undermines the Chamber's conclusions. It also showed how the principle of secrecy casts doubt on exactly what type of information the Appellant was privy to at the time of the events. Neither of these first two principles are criminal, nor are the principles of independence-sovereignty, collectivisation and self-reliance. As for the purpose to "*implement rapid socialist revolution through a 'great leap forward' and defend the Party against internal and external enemies, by whatever means necessary"*, the Chamber acknowledges that it is not criminal.

231. Among all the facts which it scrutinises, from 1958 to 1979 in breach of the temporal scope, and all the five policies set out in the Closing Order, the Chamber never clearly states when and how it connects the Appellant to a common criminal purpose or to a criminal aspect of the common purpose. Such clarification is crucially important, given that the Chamber acknowledges that the common purpose is either not entirely, or not at all, criminal. That acknowledgement required the Chamber to be very specific for each conviction contemplated. Accordingly, the Chamber committed a serious error of law in stating at paragraph 694 that a mere demonstration of the Accused's participation in a common purpose suffices to establish his *mens rea*. Yet, to endorse the policy of a party whose purpose is not criminal is not a crime, nor is it enough to incur criminal responsibility. The Chamber was thus legally obliged to say which common criminal purpose KHIEU Samphan had contributed to. Rather than complying with that obligation, it merely amassed an impressive jumble of distorted facts and policies that fall outside the scope of the trial. This situation is especially harmful to the Appellant because the Chamber also manipulated JCE-1 law to argue that it provides grounds to convict an Accused who had

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[534] Judgement, para. 777.
[535] Judgement, para. 778.

joined a possibly non-criminal purpose (we do not actually know) merely because the said common purpose *implied* the commission of crimes, an interpretation which in fact falls under JCE-3. It should have explained how the Prosecution had established beyond reasonable doubt and as the only possible conclusion that the Appellant intended Cambodians to be killed or mistreated during the population movements, and executed at Tuol Po Chrey. This it did not do. The Chamber could not evade its duty to give reasons by shielding itself behind an expansive and catch-all common purpose, but which was still not criminal. In fact, the purported *mens rea* of the Appellant and his alleged contribution to the commission of crimes is central to the discussion of his criminal responsibility. That is why the demonstration of the Chamber's errors of law entails a prior finding as to its errors of fact. The Supreme Court must sanction this want of legal characterisation and legal basis.

The population movement policy

232. ***Pre-1975 population movement policy.*** The Chamber committed errors of fact and errors in law in finding that the evacuations from towns and cities to rural areas, and between rural areas, were part of a criminal policy designed to ensure that the common purpose would be achieved.[536] According to the Chamber's reasoning, as mentioned above,[537] the population movements were a policy *"undertaken"* as part of the common purpose and followed a consistent pattern of conduct in each case including and involving the commission of crimes.[538] It refers to all of its factual findings on movement of the population (phases one and two)[539] which, as we shall see below, the extent to which they are flawed. At this stage, suffice it to note that in this reasoning, the Chamber sets the foundations of the alleged criminal nature of the population movement policy in its analysis of the pre-1975 period, during which the consistent pattern of conduct was allegedly established. Without those postulates, the Chamber's legal argument in relation to movement of the population (phases one and two) does not stand.

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[536] Judgement, paras. 804 to 810.
[537] See *supra* part **III.1.B.** Legal characterisation *Common purpose.*
[538] Judgement, paras. 804 -805.
[539] Judgement, paras. 607, 584-588, 591-599

233. ***Criminal nature of the pre-1975 population movements.*** The Defence has already pinpointed the Chamber's errors in its assessment of the pre-1975 population movements.[540] On the one hand, the Chamber did not establish in law the criminal nature of the pre-1975 population movements because it could not exclude legitimate reasons for these movements within the context of the armed conflict. In fact, it did not establish beyond reasonable doubt that the pre-17 April 75 population movements, where proven, were effected in order to achieve an objective other than that of moving the population away from the combat zones as part of a military strategy and at the same time destabilising the Khmer Republic army in order to win the war.[541] The Chamber did acknowledge that forced transfers could be *"undertaken in the interest of civilian security or military necessity"*.[542] Before 1975, US bombings[543] and subsequent attacks by better armed Khmer Republic troops were tantamount to military necessity. In the face of such evident military logic the Chamber could not hold that the only reasonable finding concerning these movements was that they were a criminal "means" of "implementing the socialist revolution".

234. ***Consistent pattern of conduct***. As seen above,[544] the Chamber also did not establish beyond reasonable doubt that there was a consistent pattern of conduct before 1975, as the available evidence did not justify the exclusion of legitimate population movements or could not help elucidate the precise conditions in which these movements took place.[545] The Chamber failed in its duty to give reasons as it was unable to conclude that criminal methods had been used. It could therefore also not conclude that the evacuations from towns and cities to rural areas and between rural areas before 1975 were part of a criminal policy designed to ensure that the common purpose would be achieved. Since its conclusion was flawed, the premise of its

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[540] See *supra* part **III.1.A.b. b** Events which occurred between 1970 and 1975 *Consistent pattern of movements of the population from the cities* and *Consistent pattern of movements of the population between rural areas*.
[541] See *supra* part **III.1.A.b. b** Events which occurred between 1970 and 1975 *Consistent pattern of movements of the population from the cities* and *Consistent pattern of movements of the population between rural areas*.
[542] Judgement, para. 450.
[543] *Conclusions finales*, **E295/6,** para.49-50.
[544] See *supra* part **III.1.A.b.** Events which occurred between 1970 and 1975 *Consistent pattern of movements of the population from the cities* and *Consistent pattern of movements of the population between rural areas.*
[545] See *supra* part **III.1.A.b.** Events which occurred between 1970 and 1975 *Consistent pattern of movements of the population from the cities* and *Consistent pattern of movements of the population between rural areas* on the absence of evidence for these population movements.

argument that the population movements followed a consistent pattern of conduct, of which, it says, the Accused had "knowledge",[546] as part of its JCE theory, are accordingly false.

235. **Policy of targeting of Khmer Republic soldiers and officials**. The Judgement finds that a policy to target Khmer Republic soldiers and officials already existed prior to 17 April 1975, and that the aim of the policy was to ensure that the common purpose of the JCE[547] would be achieved.

236. The evidence used by the Chamber to reach this conclusion was either distorted or inadequate.[548] Accordingly, the Chamber committed errors of fact by validating that evidence in order to conclude that such a policy to target Khmer Republic soldiers and officials existed prior to 17 April 1975.

III.1.C. KHIEU Samphan before 17 April 1975

III.1.C.a. KHIEU Samphan before 1970

237. **Contacts with the CPK and its members**. The Chamber committed an error of fact in considering that before joining the CPK, KHIEU Samphan was in informal contact or in *"in close touch"* with senior Party members.[549]

238. ***Studies***. In order to anchor this finding, the Chamber gave a misleading account of his student days and misrepresented his political leanings through a biased and incomplete assessment of the evidence.[550] Firstly, the Chamber wrongly impugned KHIEU Samphan's credibility in stating that he *"was acquainted with POL Pot from their school days"*. While KHIEU Samphan and SALOTH Sar were at the same school for a certain time, they were not in the same class, nor were they friends. They "knew" each other in the same way as pupils in the same school "know" each other, which is totally meaningless. Accordingly, it was quite logical

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[546] Judgement, para. 944.
[547] Judgement, paras. 119 to 127 and 814.
[548] See *supra* part **III.1.A.b.** Events which occurred between 1970 and 1975: *Definition of an enemy, Targeting Khmer Republic soldiers and officials, GRUNK and FUNK speeches, Oudong.*
[549] Judgement, paras. 84, 92, 351 to 353, 356 to 358, 362, 364, 965.
[550] Judgement, paras. 351 to 353, 364.

that KHIEU Samphan should situate their first meeting at S-71.[551] SHORT did likewise, saying *"it was only then Khieu Samphan and Pol Pot came into contact with one another."*[552]

239. After that, the Chamber takes some sly short-cuts in summarising KHIEU Samphan's "acquaintances" while studying in France. It stated that he *"joined the 'Marxist Circle' founded and regularly attended by other Khmer students in France including IENG Sary, SALOTH Sar, IENG Thirith and SON Sen"* then added *"[l]ike other members of the Circle, KHIEU Samphan joined the French Communist Party."*[553] KHIEU Samphan thus appears as being associated with the future leaders of the CPK and their beliefs as of that time, although the evidence tendered disproves this. Oddly enough, the Chamber relegates to a footnote, buried in a mass of other references, the fact that SALOTH Sar had already left France by the time KHIEU Samphan arrived there, and that the Appellant did not renew his French Communist Party membership after one year.[554] What is more, without explaining why, the Chamber ignored the arguments which the Appellant drew from the same sources to describe his acquaintances and motivations at the time, which show his waning involvement in Marxist circles and his political independence.[555]

240. ***Career***. In the same vein, the Chamber speculates in its narrative of KHIEU Samphan's life once he was back in Cambodia, concluding that he was in informal contact with senior CPK members.[556] First, the Chamber based itself on KHIEU Samphan's recent writings on the subject of *"the Phnom Penh City Committee – an organisation that would gradually evolve to become the CPK Central Committee."*[557] These writings, however, show that the Appellant had no knowledge of this at the time and was relying on books by SHORT and CHANDLER.[558]

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[551] Judgement, paras. 351 and 364.
[552] Interview with *Radio Free Asia*, December 2007, **E3/713**, p. 17 ERN 00177980. SHORT: T. 6 May 2013, **E1/189.1**, p. 9 L. 6-7 around [09.25.44]; T. 6 May 2013, **E1/189.1**, p. 102, L. 24-25, p. 103 L. 1 around [15.23.50].
[553] Judgement, paras. 352 and 353.
[554] Judgement, para. 352 footnote 1057, 353 footnote 1062 and T. 13 December 2011, **E1/21.1**, p. 76 L. 5-7 around [14.33.47].
[555] Closing brief, **E295/6/4**, para. 209 footnote 351 to 355; T. 25 October 2013, **E1/234.1**, pp. 110-116 around [15.18.00]-[15.33.00]; Book **E3/18**, p. 34 ERN 00103740.
[556] Judgement, paras. 84, 356 to 358, 362.
[557] Judgement, para. 84 footnote 215, para. 362 footnote 1090. In footnote 215, the Chamber quotes extracts from the book by IN Sopheap **E3/4602**, which it should have discounted since the author did not appear to testify. What is more, the extracts do not corroborate SHORT, except for – in some degree – the remarks allegedly made by NUON Chea implying that KHIEU Samphan was a Party member in the days of *L'Observateur*. These remarks are at odds with other comments by NUON Chea according to which KHIEU Samphan became a member in 1963 (the

241. The Chamber then relies on SHORT according to whom this Committee *"assigned"* KHIEU Samphan *"the task of rallying intellectual support and reaching out to potential communist sympathisers in mainstream political life."*[559] This statement is pure supposition. It is not based on any source, as suggested by SHORT's courtroom answers to the Prosecution (referred to by the Chamber),[560] and as demonstrated by his answers to the Defence (not referred to by the Chamber).[561]

242. In addition, the Chamber assumed that *"some of [the] major financial backers"* of the *L'Observateur* newspaper were *"certainly"* aligned with the burgeoning communist movement.[562] There is nothing in its sources to support this assertion.[563] As SIHANOUK did before the Chamber, the Chamber is happy to label the newspaper, and KHIEU Samphan, as "communist".[564] But unlike the SIHANOUK at that time, the Chamber should have given careful thought to the specificity of KHIEU Samphan's political line to which it alluded, that is that his criticisms of the government were followed by attempts at reform within the government and in the Assembly.[565] The Appellant advocated gradual reform from the top down.[566]

243. ***In the maquis***. While the Chamber is right in stating that, following serious threats from SIHANOUK, KHIEU Samphan took refuge in the countryside in 1967 *"at the invitation of the*

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newspaper had already been closed), that were not picked up by the Chamber, which set the date for him joining the CPK at 1969 (Judgement, para. 362 footnote 1088).

[558] Book **E3/16**, p. 7 and footnote 77 to 79 ERN 00498226, p. 10 and footnote 83 to 85 ERN 00498229.

[559] Judgement, para. 84 footnote 216: Book by SHORT, **E3/9**, p. 132 ERN 00396332; Judgement, para. 362 footnote 1090.

[560] Judgement, paras. 84, footnote 216, 362 footnote 1090.

[561] T. 9 May 2013, **E1/192.1**, p. 53 L. 19 to p. 56 L. 8 around [11.16.45] to [11.23.32].

[562] Judgement, para. 356 footnote 1072.

[563] The only sources for such financial support are the testimony of KHIEU Samphan in court, and comments by IENG Thirith reported by BECKER. According to KHIEU Samphan: *"Even if there were some Communist supporters, the majority of them were the Assembly Representatives, namely Hou Youn, Hu Nim, Uch Ven, So Nem, etc. The two persons I mentioned last were former professors who were subsequently elected as the Assembly Representatives"* (T. 13 December 2011, **E1/21.1**, p. 78 L. 8-13 around [14.40.42]). According to the reported comments of IENG Thirith, she participated in the funding of the newspaper, without saying to what extent nor with whom (**E3/659 and E3/20**, p. 97 footnote 28). Since neither IENG Thirith nor BECKER testified, no probative value can be given to these uncorroborated remarks.

[564] Judgement, paras. 356 to 358. It is shocking to read in para. 356: *"KHIEU Samphan denied that the newspaper was communist, but at times it was subtly critical of NORODOM Sihanouk's then government"*.

[565] Judgement, paras. 356 to 360.

[566] See *infra*, III.1.C.a. *Wish to reform gradually from the top down.*

CPK,"[567] it wrongly asserts that it was NUON Chea who took him to the forest.[568] None of the sources mentioned corroborates this statement.[569] Moreover, the Chamber is determined to date the first meeting between KHIEU Samphan and NUON Chea back to this period on Mount Aural, relying therefore on Nuon Chea's words in order to contradict KHIEU Samphan who dates it later at S-71.[570] In fact, Nuon Chea's evidence does not warrant the assertion that they met at Mount Aural.[571] This is also contradicted by other earlier courtroom testimony that dated the meeting to after the liberation.[572]

244. ***Membership of the CPK***. The Chamber rightly acknowledged that KHIEU Samphan joined the CPK in 1969.[573] However, if KHIEU Samphan had been working discreetly for the Party and had been in close touch with its senior leaders since the early 60s, why would he have joined the CPK only two years later and not as soon as he reached the maquis? Why would he have been admitted to the Central Committee as a full rights member only in 1976 and never to the Standing Committee?

245. In the light of the foregoing, no reasonable trier of fact would have concluded beyond reasonable doubt that KHIEU Samphan was in contact with the leaders of the CPK from the early 60s and that as of 1969 he was *"well aware of the common purpose"* of the Party, and that he assented to it.[574] The only conclusion reasonably open based on the record was that KHIEU Samphan was acting fully independently and following his own political line to attempt to reform the SIHANOUK regime.

246. **Wish to reform gradually from the top down**. The Chamber committed an error of fact when it failed to take into account KHIEU Samphan's wish to reform gradually from the top down. This wish is evident across the different stages of his career as documented by the

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567 Judgement, para. 361.
568 Judgement, para. 92, footnote 250.
569 Judgement, para. 92, footnote 250, para. 361 footnote 1085.
570 Judgement, para. 364 and footnote 1097.
571 According to the Khmer language transcripts, NUON Chea said that he did not know KHIEU Samphan but had heard that it was him (T. 30 January 2012, **E1/35.1**, around [11.39.34]).
572 T. 13 December 2011, **E1/21.1**, p. 52 L. 24-25 around [12.01.56].
573 Judgement, para. 362. At para. 92, it is implied that KHIEU Samphan joined the Party before going to the forest, but his own words (on which the Chamber bases its finding in footnote 249) contradict that assertion.
574 Judgement, para. 965.

Chamber,[575] and from the extensive evidence tendered by the Defence.[576]

247. Rather than drawing from its findings inferences that were favourable to KHIEU Samphan, the Chamber negatively made claims with no basis other than a shameless distortion of the evidence. The Appellant's thesis is a perfect example.[577] The Chamber begins by rightly noting the differences between the ideas it contains and the later economic policy of the CPK.[578] However, it ended up using the thesis to suggest that KHIEU Samphan believed that the people had to be "coerced" to join cooperatives and *"that it was necessary for some of those the Khmer Rouge would later label as 'New People' (including landlords, retailers and usurers) to be driven from their unproductive activities to participate in production"*.[579] The thesis in fact never speaks of coercing anybody at all to join cooperatives, quite the contrary.[580]

248. Taken in its entirety, and without distortion, the evidence presented cast a reasonable doubt on the intentions of the Appellant and the extent of his involvement in the Party before and after he joined the CPK, and by extension on the nature and extent of his participation in policy-making.

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[575] Judgement, paras. 354 to 360, 783; see *supra*, III.1.C.a. *Contacts with the CPK and its members.*
[576] Closing brief, **E295/6/4**, paras. 209 to 212, footnote 353 to 366; T. 25 October 2013, **E1/234.1**, pp. 114-122 around [15.29.03]-[15.49.09]; T. 28 October 2013, **E1/235.1**, p. 27 L. 17 to p. 28 L. 4 around [09.57.50].
[577] The thesis is dedicated to SIHANOUK and to Cambodia: Thesis by KHIEU Samphan, **E3/123**, ERN 00750527-00750664.
[578] Judgement, paras. 354 and 355.
[579] Judgement, para. 783.
[580] Thesis by KHIEU Samphan, **E3/123**: *"For these reasons, the government must strive to mobilize the peasant masses for mutual aid (...) and, finally, to make peasants gradually accustomed to working cooperatively. The organization of mutual aid teams in which the instruments of production, tools and land, and the produce remain private property, though used collectively, is fully consistent with contemporary Khmer peasant thinking. (...) Methodical organization of the peasant force, into mutual aid teams and then into cooperatives, will magnify its effectiveness ten times over (...).New lands can thus be opened up without upsetting current technology and without absorbing too much capital which could otherwise be employed in the development of industry"* (p. 103-104 ERN 00750636-37). *"Let there be no misunderstanding of our proposition. We are not proposing to eliminate the classes having the highest incomes. (...) Rather, we believe ways can and must be found to bring out their contributive potential by attempting to transform these landlords, retailers, and usurers into a class of industrial or agrarian capitalist entrepreneurs. An effort will thus be made to deter them from unproductive activities and to encourage them to participate in production. (...) Reductions in rents and usury and the prospect of industrialization (...) would induce landlords to "reorganize" their property, gradually to replace outmoded techniques of cultivation with capitalist methods involving the use of capital and salaried workers."* (p. 74-75 ERN 00750607-08). *"[L]andowners, knowing that rent is lower and usury outlawed, and that an opportunity for even higher profit is available through industry and agriculture, might be persuaded to transform themselves into agrarian or industrial capitalist entrepreneurs. In this manner, one source of new energy can be generated."* (p. 100 ERN 00750633). *"It might also be useful to give landlords any explanation required to help them appreciate how they fit into the reform."* (p. 101 ERN 00750634).

249. **Defiance of SIHANOUK**. The Chamber also committed an error of fact by not taking account of the manner in which KHIEU Samphan defied SIHANOUK. This defiance is evident in his career path as described by the Chamber and reinforced by other evidence put forward by the Defence.[581]

250. In a nutshell, SIHANOUK kept KHIEU Samphan under constant watch, humiliated him by having him undressed and beaten in public, had him incarcerated without charge, had his newspaper shut down, exploited him by bringing him into the government while preventing him from working on reforms, and then forced him to resign. KHIEU Samphan stayed in the Assembly and was re-elected to the Assembly, SIHANOUK accused him of being a "traitor", tried to have him killed by threatening to bring him before a military tribunal and putting a price on his head, forcing him to escape to the maquis.

251. In such circumstances it is difficult to see how KHIEU Samphan could have earned the trust of, or held any sway with SIHANOUK, who had not the slightest respect for him and who always mistrusted him. The Chamber was well aware of this, even declaring that nothing that KHIEU Samphan did could prevent SIHANOUK from resigning from his position of head of State in 1976 (without having a shred of evidence that he did anything in this regard).[582]

252. The Chamber should have concluded that there was reasonable doubt about the extent of KHIEU Samphan's contribution in his role of liaison with SIHANOUK, and on the nature and scope of the information they shared in that context.

III.1.C.b. KHIEU Samphan between 1970 and 1975

253. **Liaison with SIHANOUK and diplomatic meetings**. The Chamber committed an error of fact when it inflated the liaison role that KHIEU Samphan had with SIHANOUK and the importance of his diplomatic activities between 1970 and 1975.[583]

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[581] Judgement, paras. 354 to 361; Closing brief, **E295/6/4**, paras. 210-211, footnote 357-363; T. 25 October 2013, **E1/234.1**, p. 120, L.3-20 around [15.42.48], p. 121 L. 16 to p. 123 L. 22 around [15.47.33]-[15.51.50].
[582] Judgement, para. 759.
[583] Judgement, paras. 97, 98, 100, 230, 364, 365, 368, 372, 731, 949, 950, 962, 988, 989, 992, 1008, 1047.

254. The Chamber merely says *"KHIEU Samphan [...] secured the support of NORODOM Sihanouk"* for the Khmer Rouge.[584] But there is no evidence for this. Very soon after he was deposed, SIHANOUK set up the FUNK.[585] His alliance with the Khmer Rouge was a necessary political manoeuvre to return to power. The message of support that he received from the Khmer Rouge between the establishment of the FUNK and of the GRUNK, even if it was signed by HOU Youn, HU Nim and KHIEU Samphân, was sent to him by POL Pot.[586] These three apparent co-signatories were appointed to high office within the GRUNK and all three became *"the public face of the opposition movement"*.[587] Thus, there is nothing to suggest that SIHANOUK ever knew that KHIEU Samphan had been assigned the task of acting as a "liaison" with him. Between 1970 and 1975, they met twice (in 1973 and 1974). SIHANOUK dealt more with IENG Sary who represented the movement in Peking and served as the real liaison with him.[588]

255. As the Chamber itself states, it was IENG Sary who accompanied SIHANOUK to Cambodia on his visit to the liberated zones.[589] Present with SIHANOUK on the visit were HOU You, HU Nhim, KHIEU Samphan and POL Pot,[590] and there is a video of SIHANOUK saying: *"Here I'm talking about my country with my collaborators, M. IENG Sary alias Van."*[591] Contrary to what the Chamber claims,[592] KHIEU Samphan did not visit Peking in 1974 to liaise with SIHANOUK. He and IENG Sary went to China as part of a foreign tour.[593] There, they met

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[584] Judgement, paras. 962, 988, 1008, 1047.
[585] Judgement, paras. 97, 364.
[586] Judgement, paras. 97, 365.
[587] Judgement, para. 364.
[588] SHORT: T. 6 May 2013, **E1/189.1**, p. 103 L. 4-9 around [15.25.25], p. 104 L. 12-16 around [15.27.34]; SUONG Sikoeun: T. 2 August 2012, **E1/101.1**, p. 70 L. 15-19 around [14.07.42], p. 73 L. 3-12 around [14.15.02], p. 78 L. 6-14 around [14.32.09]; NUON Chea: T. 14 December 2011, **E1/22.1**, p. 7 L. 18 – p. 8. L. 1 14 around [09.23.26]. See also statement by PHY Phuon quoted by the Chamber in footnote 772 of para. 247.
[589] Judgement, para. 100 footnote 280 referring to the Book by SHORT **E3/9**, pp. 242-244, ERN (En) 00396442-44;
[590] Judgement, para. 100 footnote 280 referring to and describing video **E3/3904R**.
[591] Judgement, para. 100 footnote 280 referring to and describing video **E3/3942R**. NUON Chea: T. 22 November 2011, **E1/14.1**, pp. 93-94 around [14.50.56], T. 14 December 2011, **E1/22.1**, pp. 24-25 around [10.43.45]. According to NUON Chea, POL Pot led the delegation to receive SIHANOUK. The testimony of SO Socheat on the Prince's reception is far from untrustworthy. Judgement, para. 139 footnote 404, where, in addition, the Chamber partially distorted the remarks of the witness).
[592] Judgement, para. 949.
[593] Judgement, para. 136 footnote 388, para. 368 footnote 1113. In para. 368, the Chamber wrongly states that *"With IENG Sary, KHIEU Samphan also led delegations on trips abroad"* There was only one delegation which they jointly led. See in footnote 1113 the testimony of SUONG Sikoeun and supporting document **E3/1242**. See also NOEM Sem: T. 22 September 2012, **E1/126.1**, p. 16 L. 1 to p. 18 L.11 around [09.49.42] - [09.55.24], p. 74 L. 15 to p. 75. L. 3 around [14.59.29].

MAO with SIHANOUK.[594] As for KHIEU Samphan's third and final appearance in diplomatic meetings prior to April 1975, the Chamber merely states that *"he received"* a delegation from South Vietnam that was visiting Cambodia.[595] However, the only item of evidence referring to that meeting provides very little information on it apart from the names of the participants, including HU Nhim who received the delegation with KHIEU Samphan.

256. With these facts in mind, along with its other conclusion that at the time of the FUNK/GRUNK *"NORODOM Sihanouk retained influence overseas and in diplomatic relations",*[596] the Chamber should have found there was reasonable doubt as to the extent of the Appellant's contribution to rallying support for the Khmer Rouge. Similarly, in the light of this evidence and in the absence of evidence on information exchanged between KHIEU Samphan and SIHANOUK or other diplomats,[597] a reasonable trier of fact would not have made any incriminating finding based on the information that KHIEU Samphan allegedly gathered from his diplomatic activities.

257. **FUNK speeches and propaganda**. The Chamber concludes that KHIEU Samphan participated by means of statements made before 17 April 1975.[598] It is alleged that his reputation allegedly helped to lower the guard of Khmer Republic officials by lending credibility to the guarantees on offer, and thus giving them a false sense of security.[599] The Defence refers to all of its submissions articulated above.[600]

258. ***Speeches***. The Defence has already shown that, because of SIHANOUK's participation in the FUNK and GRUNK, the Chamber erred in asserting that the statements of these organisations were nothing but a "*façade*". The Chamber did itself note that SIHANOUK also made speeches

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[594] Judgement, para. 136, footnote 388 (see, in particular, **E3/482**).
[595] Judgement, para. 368, footnote 1112.
[596] Judgement, para. 100.
[597] According to a document mentioned in footnote 388 (para. 100) and 1111 (para. 368): *"Khiem Samphan did not exchange one word with either Ceaucescu or his wife during entire ceremony of more than hour and half. Although presence of French interpreter implied some knowledge of French by Khiem Samphan, his failure to speak (despite frequent "visits" between party secretary Burtica and to lesser extent Ciora and Bodnaris with Ceaucescu, sometimes over Khiem's shoulders) cast doubt on his knowledge of French as well as his ability to carry off minimum social relationship with his hosts."* (**E3/3315**, p. 3, ERN 00412756).
[598] Speech by KHIEU Samphan, **E3/118**, ERN 00166897, 00166948.
[599] Judgement, para. 120, footnote 343 and 345.
[600] See *supra* part **III.1.A.b.** Events which occurred between 1970 and 1975 *GRUNK and FUNK speeches.*

before the fall of Phnom Penh.[601] In that case, either SIHANOUK was part of the conspiracy against Khmer Republic officials and was a willing party to the so-called "*plausible deniability*" façade, or he was manipulated. The Chamber did not explain the role it is ascribing to SIHANOUK here. It keeps things fuzzy. It stresses that he had no power but also claims that he contributed effectively in reassuring the international community.[602]

259. Moreover, the Chamber claims that these rallying calls addressed to Khmer Republic officials were meant to reassure the international community about the possibility of massacres of former Khmer Republic officials in the wake of a victory,[603] and that SIHANOUK had predicted that a blood bath of Khmer Republic officials would follow victory. As the Chamber sees it, a distinction should be made between the December 1974 appeal by SIHANOUK promising unconditional amnesty and later Khmer Rouge statements in which immediate surrender was a requirement for an amnesty. This reasoning is rejected in other parts of this brief.[604] There is, furthermore, no proof of a statement by SIHANOUK in December 1974 offering an amnesty. The French telegram quoted in footnote 2584 of the Judgement is not probative because it states that SIHANOUK offered clemency without requesting authorisation from the Khmer Rouge although the first rallying call by KHIEU Samphan dates back to 1972. Moreover, all of the calls for insurrection suggested that people should cross over to the liberated zone only *"if necessary"* and included assurances that Khmer Republic officials would be well received. It is therefore not easy to understand exactly what the Chamber means, but it is clearly inculpatory despite the fact that the statements attributed to SIHANOUK or to KHIEU Samphan are exactly the same (or even much harsher in the case of the deposed sovereign who called for 21 executions rather than only the seven traitors). It is so obvious that in March 1975, the US State Department described speeches by both SIHANOUK and KHIEU Samphan as *"standard language with little new"*.[605] The difference in the way the two men are treated is all the more unexplained and unfair since the

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[601] Judgement, para. 120, footnote 343 and 345.
[602] Judgement, para. 821.
[603] Judgement, paras. 820 to 822
[604] See *supra* part **III.1.A.b.** Events which occurred between 1970 and 1975 *GRUNK and FUNK speeches*
[605] **E3/3341**.

charisma of SIHANOUK among the Cambodian population was greatly superior to that of the Appellant.[606]

260. The Defence recalls that it has rebutted above the Chamber's conclusion about FUNK/GRUNK statements being a *"façade"*. The Chamber has not explained why the guarantees offered to Khmer Republic officials were not genuine.

261. Furthermore, the Chamber wilfully omitted to consider the context of the war in order to accommodate its unfounded conclusion about the use of KHIEU Samphan's reputation *via* these appeals. After five years of war, the Khmer Republic was about to collapse, shorn of its leadership which had already fled the country. Its forces were weak, especially because of the said appeals.[607] Accordingly, in that context of an absolute military debacle, to imagine that the guarantees offered to the Khmer Republic security forces might have been enough to give them a sense of security that would lull them to the extent that *"some of them allowed themselves to become sitting ducks for murder"*[608] is to distort the facts. Moreover, it should be pointed out that LON Nol used exactly the same strategy of issuing calls to defect. The American telegram quoted above shows that he was appealing to the deserters who had abandoned his army for the ranks of the CPNLAF to turn themselves in within ten days and receive an amnesty, pay, and the same rank.[609]

262. In reality, the Chamber opts for the idea that KHIEU Samphan's reputation as a moderate was significant. In doing so, the Chamber paid absolutely no heed to the context. The Appellant does not speak on behalf of FUNK/GRUNK because he has a reputation as a moderate, but because ever since the creation of those organisations and the outbreak of the armed conflict, he has been one of the visible leaders of the armed resistance to the Khmer Republic. For the "Khmer Republic leadership" he is therefore the chief of the enemy armed forces and certainly

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[606] See parts **III.1.C.a and III.1.C.b** KHIEU Samphan before 1970 and before 1975.
[607] Telegram, 18 March 1975, **E3/3341**, ERN 00413195, *"In a move to strike at a key cause of declining FANK combat power, President LON Nol announced that, beginning March 14, deserters would have ten days to turn themselves in under terms of general amnesty. [...] Comment: At least 3,500 front line troops deserted in January and February, and recruitment is not sufficient to cover both combat losses and these desertions"*.
[608] Judgement, para. 120, footnote 344.
[609] Telegram, 18 March 1975, **E3/3341**, ERN 00413195, *"President LON Nol announced that, beginning March 14, deserters would have ten days to turn themselves in under terms of general amnesty. Those who report in, he said, will forfeit neither rank nor pay"*.

not a reassuring moderate! This mistake led the Chamber to conclusions that were not the only reasonable ones available and has occasioned a miscarriage of justice by enabling KHIEU Samphan to be found criminally responsible.[610]

263. ***Propaganda/education sessions.*** The Chamber also committed an error of fact in holding that before 17 April 1975, KHIEU Samphan had helped to conduct political training sessions.[611] In fact, the only training session involving KHIEU Samphan before the victory was mentioned by PHY Phuon who said that the Appellant was one of the instructors and that, in generally, these sessions focused on *"the general situation within the country -- the local situation and outside situation -- outside here referring to the international situation."*[612] PHY Phuon added that KHIEU Samphan had advised that all the forces of the Front should come together, concentrating on every layer in society rather than merely the peasants and workers.[613] KIM Vun also referred to discussions with the Appellant in the jungle to say that he never advocated violence but rather respect for moral principles.[614] The Chamber's inference about the Appellant's involvement in many training sessions is thus not proven beyond reasonable doubt and, given the evidence relating to him, could not justify his conviction.

264. **Trust and collaboration**. The Chamber committed an error of fact regarding the *"trust"* in which KHIEU Samphan was held by the leaders of the CPK and their *"collaboration"*.[615] The evidence and the arguments advanced by the Appellant show that there were other possible reasonable conclusions that the Chamber should have considered.[616]

265. ***Fictitious roles***. According to the Chamber, despite KHIEU Samphan's status as an intellectual, his roles *"prove that he had the confidence and trust of the other members of the Party Centre"*. The Chamber relies on SHORT, who otherwise lends more weight to the

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[610] Judgement, paras. 981, 982 (JCE); 1046 (instigating); 1008, 1048 (aiding and abetting).
[611] Judgement, para. 367.
[612] PHY Phuon, T. 25 July 2012, **E1/96.1**, p. 76 after [14.25.02].
[613] PHY Phuon, T. 25 July 2012, **E1/96.1**, pp. 93-96 [15.41.07] to [15.48.15];
[614] KIM Vun, T. 22 August 2012, **E1/112.1** p. 90 before [14.35.09];
[615] Judgement, para. 408. See also: 949, 997, 1006, 1019.
[616] Closing brief, **E295/6/4**, paras. 212-215, 218-219, footnote 366 to 376, 385 to 387; T. 25 October 2013, **E1/234.1**, pp. 123-128 around [15.51.10]-[16.02.47]; T. 28 October 2013, **E1/235.1**, pp. 2-5, 8-12, 15-17 between [09.01.30] and [09.33.37].

Defence's argument that this "*trust*" was not without its limits.[617] In fact, and this was acknowledged by the Chamber, the roles assigned to the Appellant (without seeking his opinion) were symbolic roles without real power.[618] As SHORT said, KHIEU Samphan "*was a figurehead, an extremely useful figurehead for the Kampuchean Communist Party.*"[619] If he accepted these titles that were designed to bring all forces together, it was because he wanted to contribute to the war effort as far as he was able.[620] Given his background, his honesty and his ideals, he could be trusted to accomplish the tasks assigned to him. According to SHORT, he "*did exactly what he was told, and kept - followed the rules.*"[621]

266. ***Segregation***. As a result of his status as a petty bourgeois intellectual who had joined the Party at a late stage (which he did for his own protection rather than out of conviction) the trust that CPK members had in him never went beyond that limit.[622] Many witnesses attest to this, as does SHORT's analysis.[623] In a nutshell, KHIEU Samphan was confined to the "united front". Despite living in close proximity with the CPK leaders, he was made to keep his distance. The principle of secrecy and the compartmentalisation of tasks merely compounded the sense of segregation,[624] which would contradict the finding of "*close collaboration*". Furthermore, the trips he undertook to fulfil his representation roles (during which he was always accompanied) were restricted, he was only shown what he needed to see, and he was only told what he needed to know to do his job.[625]

267. ***"Advancement" within the Party***. The limits to the trust placed in KHIEU Samphan are borne out by his slow "advancement" within the Party, along with his appointment to fictitious

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[617] Judgement, para. 408, footnote 1253 (SHORT: T. 6 May 2013, **E1/189.1**, pp. 47-49; T. 8 May 2013, **E1/191.1**, p. 33).
[618] Judgement, paras. 98, 100, 365, 987, 1018.
[619] SHORT: T. 6 May 2013, **E1/189.1**, p. 47, L. 23-25 around [11.23.34].
[620] Judgement, para. 98. See also: KHIEU Samphan: T. 30 May 2013, **E1/199.1**, p. 18 L. 3-4 around [09.45.07].
[621] SHORT: T. 6 May 2013, **E1/189.1**, p. 47, L. 8-17 around [11.23.34].
[622] The Chamber repeatedly stated that intellectuals and petty bourgeois were viewed with mistrust: Judgement, paras. 169, 514, 544, 571, 613, 770, 784.
[623] Judgement, para. 408 footnote 1252; Closing brief, **E295/6/4**, para. 212, footnotes 368-370, 218 footnote 386, 265 footnote 482-486 (SHORT); SHORT: T. 7 May 2013, **E1/190.1**, p. 40 L. 25 to p. 41 L. 10 around [11.00.35].
[624] See *supra*, **III.0** Errors across the entire period. *The principle of secrecy*.
[625] See *supra*, **III.1.C.b**. *Liaison with SIHANOUK and diplomatic meetings*. There is no evidence about the infrequent visits to the liberated zones that indicates exactly what KHIEU Samphan would have seen on such visits It is thus impossible to infer that he had knowledge of the crimes. Still less if he was rallying support in order to reassure national and international observers. Judgement, paras. 368, 949, 1033.

posts. He joined the party at a late stage, without fulfilling the membership conditions and remained "new".[626] His strategic appointment to the Central Committee was solely intended to give his representation roles a veneer of legitimacy.[627] His presence at meetings was often for appearances alone.

268. In 1971, KHIEU Samphan became a candidate member of a Central Committee which was no more than a place for releasing decisions already taken by the Standing Committee.[628] There is no evidence of any "debate" within the Central Committee leading to a decision being taken. Even if we speculate, as the Chamber has, on the possibility of KHIEU Samphan[629] intervening in meetings, under the CPK Statute, a candidate member had no rights in the process.[630] As a petty bourgeois intellectual who was new in the Party, either before or after 1975, the Appellant could not influence the decision-making process. He never belonged to the inner circle.[631]

269. On the basis of all the evidence tendered, a reasonable trier of fact would have found that there were other possible reasonable conclusions as to the extent of the trust that the Appellant allegedly enjoyed, the level of his collaboration with the CPK leadership, and his participation in the decision-making process. The Chamber could not ignore these factors, and in doing so has occasioned a miscarriage of justice because this had an impact on its finding of guilt.

III.1.C.c. KHIEU Samphan between 1974 and April 1975

Attendance of a Central Committee meeting in June 1974.

270. The Chamber committed an error of fact in stating that "*the CPK Central Committee [...] decided collectively to forcibly evacuate Phnom Penh's inhabitants.*"[632]

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[626] Article 5 of the CPK Statute, **E3/130**, pp. 13-16 ERN 00184034-37; Interview of NUON Chea **E3/26**, p. 8, ERN 00329511.
[627] Closing brief, **E295/6/4**, paras. 214, 226, 278-279; SHORT: T. 6 May 2013, **E1/189.1**, p. 69 L. 16-22 around [13.45.28]; see *infra*, **III.5.C.** *Appointment to the Presidium.*
[628] See *supra*, **III.1.A.a**. Errors across the entire period. *Powers of the Central Committee.*
[629] Judgement, paras. 142, 997, 1006, 1019.
[630] Article 24 of the CPK Statute, **E3/130**, p. 19, ERN 00184045.
[631] See *infra*, **III.5.C.** Decision-making process and trust
[632] Judgement, paras. 132, 142, 807.

271. **<u>Date of the decision and the meeting of June 1974</u>.** The Chamber states that it is *"satisfied"* that the evacuation decision resulted from *"a series of meetings starting in 1973."*[633] Having reached that point of "satisfaction", it settles upon a supposed meeting of the Central Committee in June 1974, not because the evidence proves that this was the meeting at which the decision was taken but because *"the Chamber was only presented with detailed evidence of meetings starting in June 1974."*[634] The Chamber neglected its duty to give reasons by failing to respond to the Defence which had drawn attention to statements by CHANDLER and POL Pot putting the evacuation decision at February 1975.[635] The Chamber does not explain why the date of February 1975 was unreasonable. It prefers the theory that implicates the Appellant. To do this, it relies on, and distorts, a *Revolutionary Flag* issue of 1977, and statements by PHY Phuon, NUON Chea, SUONG Sikoeun and IENG Sary.

272. ***<u>Contents of the meeting</u>.*** The *Revolutionary Flag* of 1977[636] refers to a congress of the Central Committee in June 1974. There is no mention of the date, the duration, the place, or the participants at the meeting.[637] At no time does the word evacuation appear. The only decision reported concerns a *"the decisive offensive to liberate Phnom Penh and the entire country"* from the military angle. The *Revolutionary Flag* even sets out the tactics: "*[t]he plan of our offensive was as follows: to attack Phnom Penh, cut off the Lower Mekong....*"[638] There is no basis for the conclusion that the evacuation of Phnom Penh was addressed during the discussions of military strategy.

273. ***<u>PHY Phuon and confusion between two meetings</u>*** The Chamber uses PHY Phuon's testimony to conclude that KHIEU Samphan was present at the meeting of June 1974. As the Defence argued at some length, PHY Phuon's testimony was problematic in more ways than one

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[633] Judgement, para. 132.
[634] Judgement, para.132, footnote 376.
[635] Closing brief, **E295/6/4**, para.15.
[636] Judgement, para. 133, footnote 377, ER, **E3/11** p. 36.
[637] See also Closing brief, **E295/6/4**, para.17
[638] *Revolutionary Flag*, **E3/11**, p. 36. It should also be noted that several other *Revolutionary Flag* issues refer to the mid-1974 military discussions on the final assault of Phnom Penh and none of them mention the decision to evacuate the town at that date. **E169/4/1.1.2**, *Revolutionary Flag* Special Edition December 1975-January 1976 ERN FR 00865709; **E3/746**, ER July 1978, ERN FR 00428293, **E3/747**, ER August 1978 ERN FR 00499786.

and was far from corroborating the Chamber's version.[639] The witness identified two meetings : one in June 1974 to discuss the military strategy for the assault on Phnom Penh (not the evacuation)[640] and another, at B-5 in April 1975 where, he said, the evacuation decision was taken,[641] adding that it was *"only on one occasion"* that he heard this spoken about, and without the *"detailed aspect"* being discussed.[642] By conflating the two meetings despite the clear distinction made by the witness, the Chamber committed a serious error which nullifies its finding. To find that *"[t]hose attending the June 1974 meeting endorsed the evacuation of Phnom Penh,"*[643] the Chamber cites PHY Phuon's answers concerning the meeting of April 1975![644]

274. ***NUON Chea.*** The Chamber also erred by considering that NUON Chea was talking about the same meeting as PHY Phuon, namely the congress of the Central Committee. In fact, the duration of the meeting and the identity of the participants are both at odds.[645] More particularly, as the Chamber was obliged to note, NUON Chea pointed out several times that the Appellant was not present when the evacuation decision was taken.[646] He confirmed this in his closing statement when he explained that the participants were the members of the Standing Committee

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[639] Closing brief, **E295/6/4**, paras. 21-23; T. 28 October 2013, **E1/235.1**, pp. 62-76. In an interview with SHORT, PHY Phuon situated the Congress of the Central Committee at September 1974. See Judgement, para. 133, footnote 377.
[640] PHY Phuon T. 30 July 2012, **E1/98.1**, p. 56 L. 20 - 22 L. [13.37.44].
[641] PHY Phuon T. 30 July 2012, **E1/98.1**, p. 83 L. 13 - p. 84 L.1 around [15.22.43].
[642] PHY Phuon T. 31 July 2012, **E1/99.1**, p. 10 L. 24- p. 11 L. 1 around [09.34.10] and **E1/99.1**, p. 10 L. 24- p. 11 L. 1 around [09.34.10].
[643] Judgement, para.133, footnote 380.
[644] PHY Phuon:T. 26 July 2012, **E1/97.1**, pp. 15-16, PHY Phuon responds p. 17 to the question put by the National Co-Prosecutor p. 15 which begins as follows: *"Mr. Witness, if you look at ERN in Khmer 00228844, it was about early April 1975, concerning the evacuation of Phnom Penh from -- evacuation of people from Phnom Penh led -- the meeting [...] concerning the evacuation plan."*; T. 26 July 2012, **E1/97.1**, pp. 21-22, PHY Phuon responds to the following question from the International Co-Prosecutor: *"Q: (...)The meeting that you were talking about regarding the evacuation of Phnom Penh, when did that take place? To the best of your recollection, when was that meeting? A. I just stated that there was a meeting in early April 1975 in Office B-5."* The rest of the responses quoted by the Chamber always relate to that April 1975 meeting.
[645] Closing brief, **E295/6/4**, para.18; NUON Chea: T. 30 January 2012, **E1/35.1**, p. 15 L. 18 to p. 17 L. 6 after [09.47.46], T. 14 December 2011, **E1/22.1**, p. 2 L. 24 to p. 3 L. 7 around [09.09.59], T. 28 October 2013, **E1/235.1**, pp. 61-62.
[646] NUON Chea: T. 13 December 2011, **E1/21.1**, pp. 26-32. It should be noted that after [10.24.30] the translation in French says "CC" while in Khmer the term used by NUON Chea was "CP". The translation issues have been flagged by the Defence, transcript correction requests have been submitted, but the corrections are not official as yet. See also NUON Chea: T. 22 November 2011, **E1/14.1**, p. 103, 104, T. 14 December 2011, **E1/22.1**, pp. 2-6.

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along with certain members of the Central Committee who held responsibilities in the zones.[647] The Chamber thus omitted to give reasons for its rejection of the Defence's reasonable theory that the evacuation decision was taken by the Standing Committee in the presence of certain members of the Central Committee.[648]

275. ***Groundless assumption.*** In order to substantiate its theory, at any price, that KHIEU Samphan was present in June 1974 when a decision was being taken on the evacuation, the Chamber resorted to extrapolating. The Defence demonstrated that the Appellant was absent from Cambodia for a part of June because he was travelling in Asia,[649] which the Chamber could not contest.[650] Given that the dates of the meeting of the Central Committee and that of the Appellant's return to Cambodia are both unknown, the Chamber extrapolated. At paragraph 139 of the Judgement, it *"considers it **very likely** that the June 1974 meeting was scheduled to enable KHIEU Samphan and IENG Sary to attend and report to the members of the CPK Central Committee on the highly successful meetings with senior Chinese, Vietnamese and Laotian leaders."* This likelihood is not founded on any probative evidence. There are no witnesses or documents that have suggested the completion of discussions with the Chinese as a prerequisite for holding any kind of meeting in Cambodia. The Chamber quotes no source to corroborate this thesis, merely contenting itself with putting an inculpatory slant on statements by SUONG Sikoeun and IENG Sary.

276. ***SUONG Sikoeun.*** The distortion of his testimony starts with a puzzling reversal by Chamber when it accepted as evidence a telegram that it had initially rejected, on the grounds that it supported the alibi put forward by the Appellant for the month of June. This document, which mentions KHIEU Samphan's visit to Laos at the beginning of June, is of course not used for that precise reason; the Chamber aligns it with statements by SUONG Sikoeun to assert that the

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[647] NUON Chea: T. 31 October 2013, **E1/237.1**, pp. 23-24 around [10.22.35]. Here again the Defence called attention to an interpretation problem. NUON Chea said, in Khmer, that the participants at the meeting were *"all zone secretaries who were members of the Central Committee"* and not all the members of the Central Committee as in the French version. A request for correction has been submitted to the Transcription Unit.
[648] Closing brief, **E295/6/4**, para. 18; NUON Chea T. 14 December 2011, **E1/22.1**, p. 2 L. 1-5 around [09.05.46].
[649] Closing brief, **E295/6/4**, para. 32.
[650] Judgement, para. 136.

Appellant *"returned to Cambodia in June 1974 when the meeting occurred."*[651] However, SUONG Sikoeun does not actually mention the meeting and his notes, prepared a long time after the facts, do not specify the date when the Appellant and IENG Sary left nor how long their travels along the Ho Chi Minh trail lasted.[652] On the other hand, he does state unequivocally that the entire delegation returned to Vietnam and that it was from Vietnam that IENG Sary and KHIEU Samphan had to set off again. Accordingly, stating that it was *"satisfied that KHIEU Samphan was in Laos in the first week of June 1974 before returning to the liberated zone in Cambodia with IENG Sary"* was still not enough to establish the exact date of their return to Cambodia or their destination in Cambodia. In fact, it should not be forgotten that the wife of the Appellant said that he returned to join her because she had given birth while he was travelling.[653] In light of these uncertainties, the doubt should have benefited the Appellant.[654]

277. ***IENG Sary.*** IENG Sary does not corroborate the Chamber's version. While he does refer to a discussion with POL Pot on the possibility of evacuating Phnom Penh, he always denied attending a meeting on the subject, a claim supported by NUON Chea.[655] Thus, not only is the Chamber's statement that it is *"satisfied that this conversation occurred around the same time as, if not during, the [...] Meeting"*[656] contradicted by IENG Sary himself,[657] but it is a groundless assertion. None of the witnesses mentions a discussion between the two men during any meeting, and no document reports it. This is an extrapolation by the Chamber for the purposes of its theory.

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[651] Judgement, para. 136 footnote 391.
[652] SUONG Sikoeun, written notes, **E3/40**, ERN 00778992.
[653] Closing brief, **E295/6/4**, para. 32; SO Socheat T. 10 June 2013, **E1/204.1**, p. 61 L. 10 to p. 62 L. 5 around [14.20.14].
[654] It should be noted that the Chamber was particularly hasty in disregarding the testimony of SO Socheat, the wife of KHIEU Samphan. (Judgement, para. 140). She did offer evidence casting doubt on the presence of KHIEU Samphan at a meeting in June 74. She said that he came to join her as soon as he was back in Cambodia in order to see the son born while he had been abroad (T. 10 June 2013, **E1/204.1**). The double standard applied by the Chamber depending on whether elements are inculpatory or exculpatory is particularly apparent here: it is not afraid to set her statements against the *"clear testimony of PHY Phuon"* in para. 139 of the Judgement, and then use it for an inculpatory purpose in para. 140.
[655] Judgement, para. 134, footnote 381 and 382.
[656] Judgement, para. 134
[657] Interview of IENG Sary by HEDER, 17 December 1996, **E3/89**, p. 5: IENG Sary refers to his discussion with POL Pot saying that nothing precise had been decided in 1974: *"I responded by asking whether this meant a total evacuation or what, and he said to wait and see what the concrete situation would be at the time"*. He goes further on page 6: *"(...) I did not attend any decision-making meetings."*

278. Accordingly, the Chamber committed a serious error of fact by systematically distorting all of the evidence establishing that it was impossible to place KHIEU Samphan at a meeting in June 1974, at which the evacuation decision was allegedly taken. This is a miscarriage of justice which has led to his conviction. The finding must be quashed.

Attendance of a meeting at B-5 at the beginning of April 1975.

270. ***Meeting of April 1975 mentioned by PHY Phuon.*** The Chamber also committed an error of fact in finding that in early April 1975, KHIEU Samphan took part in a meeting at B-5 at which he added his voice to the agreement on the plan to evacuate Phnom Penh.[658] As seen above, PHY Phuon spoke of a meeting at B-5 in April 1975 at which the Appellant was allegedly present and the evacuation was allegedly discussed. He is the only person who mentions the meeting and his successive accounts of the event carry a number of contradictions which he refused to clarify in court.[659] Moreover, the evidence from other guards who were also present at B-5 demonstrated that his version of the facts should be treated with caution.[660] By failing to respond to the arguments of the Defence on this point, the Chamber failed in its duty to explain why its finding as to the truthfulness of the statements of PHY Phuon alone concerning this meeting was the only possible inference. Its conclusion must be quashed.

Knowledge of the evacuation of Phnom Penh and the related decision

280. The Chamber was not in a position to conclude that KHIEU Samphan had prior knowledge of the plan to evacuate Phnom Penh[661] and its details. By PHY Phuon's own admission, the details of how the evacuation was to be put into effect were not discussed.[662] His testimony, credible or otherwise, is at odds with the Chamber's version of what happened at the meeting. No reasonable judge could infer that KHIEU Samphan knew in what conditions Phnom Penh would be evacuated, and that it would be the occasion for crimes to be committed. Accordingly, the Chamber committed an error of fact which occasioned a miscarriage of justice

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[658] Judgement, paras. 144 to 147, 735, 751, 788, 816, 948, 966, 997.
[659] Closing brief, **E295/6/4**, paras. 22-23; T. 28 October 2013, **E1/235.1**, pp. 63-65.
[660] Closing brief, **E295/6/4**, paras. 29-32.
[661] Judgement, para. 147, 152.
[662] PHY Phuon: T. 31 July 2012, **E1/99.1**, p. 10 L. 22 - p. 11 L.1 before [09.34.10].

since that finding gave it the grounds to sentence KHIEU Samphan for crimes committed during movement of population (phase one). The finding must be quashed.

281. ***Participation in the decision and possibility of opposing it***. The Appellant has always denied taking part in the evacuation decision.[663] He says the discussion he had with POL Pot on the subject was after the fact.[664] Even if he were present at any particular meeting, the Chamber committed an error of fact in considering that he allegedly took part in the decision-making process[665] and allegedly supported it, electing not to oppose it although he could have done so.[666]

282. ***Collective decision***. The Chamber first committed an error of fact in finding that *"the CPK Central Committee [...] decided collectively to forcibly evacuate Phnom Penh's inhabitants."*[667] Yet the Chamber itself has noted that the Central Committee had decision-making power in theory alone, effective control being exercised by the Standing Committee *"an extra-statutory body."*[668] The Chamber contradicted its own conclusions in finding that by virtue of democratic centralism a collective decision was allegedly taken by the entire Central Committee. It has already been seen that democratic centralism, although used throughout the Judgement, did not exist in reality.[669] Also, throughout the Judgement, the Chamber concurs with the experts[670] that final decision-making authority rested with POL Pot and NUON Chea.[671]

283. ***Powers to make and oppose decisions***. The Chamber then committed an error in considering that at the various alleged dates of the evacuation decision (June 1974, February 1975 or April 1975) the Appellant had decision-making powers within the Central Committee or elsewhere. On these dates he was still only a candidate member of the Central Committee[672] without the right to vote. Even if there had been a collective decision by the Central Committee,

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[663] Closing brief, **E295/6/4**, para. 33.
[664] Closing brief, **E295/6/4**, para. 36; Book by KHIEU Samphân, **E3/18**, pp. 54-55, ERN 00103750.
[665] Judgement, paras. 147, 152.
[666] Judgement, paras. 133 to 142, 735, 751, 788, 816, 948, 966, 997.
[667] Judgement, paras. 132, 142, 807.
[668] Judgement, para. 203.
[669] See *supra* part **III.0** Errors by the Chamber across the entire period in its erroneous interpretation of the concept of democratic centralism.
[670] SHORT: T. 6 May 2013, **E1/189.1**, p. 45 L. 8 to p. 46 L. 9 around [11.19.58]: *"you could not object to the policies the leadership had laid down without exposing yourself to very serious trouble."*
[671] Judgement, paras. 348, 861, 884, 887, 893, 907, 908, 924, 926, 1079.
[672] See *supra* part **III.1.C.b** KHIEU Samphan between 1970 and 1975 *Development in the Party.*

the Chamber's finding would still be wrong. The interpretations of the video interviews of KHIEU Samphan and NUON Chea, which are quoted out of context,[673] are also wrong. Not only does the Appellant speak of disagreements within the Standing Committee *after* the evacuations, but we do not even know if he is referring to movement of the population (phase one) or movement of the population (phase two).[674] As for the NUON Chea interview, not only do his comments have nothing to with the evacuation decision, but he recalls that KHIEU Samphan was not a member of the Standing Committee and had no responsibility *"for inside the country."*[675] Accordingly, the Chamber erred in concluding that, if he had been present, KHIEU Samphan could have somehow vetoed the evacuation.

284. By not responding to the Defence on the Appellant's lack of decision-making powers,[676] the Chamber committed a gross error of fact and failed in its duty to give reasons for its decision. Its finding, concluding that there was criminal intent on the part of the Appellant, has occasioned a miscarriage of justice. We shall see below that the mere presence of the Appellant at a meeting did not suffice to find that there was culpable *mens rea.*[677]

285. Even if KHIEU Samphan were to have attended the meeting, which he contests, the Chamber could not conclude that he could have been a party to the decision without distorting the evidence. The Chamber erred, moreover, when it interpreted and distorted video interviews of KHIEU Samphan and NUON Chea that were taken out of context.[678] There is nothing in the

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[673] Judgement, para. 142, footnote. 410. The Defence refers to its objections on the admissibility of anonymous video recordings for which it is not possible to know where or how the video has been recorded and what questions the person interviewed is answering; T. 13 March 2012, **E1/47.1**, p. 16 around [09.50.56]; T. 15 March 2012, **E1/49.1**, pp. 41-42 around [10.22.21].
[674] Interview with KHIEU Samphan, undated, **E3/4051**, pp. 1-2, ERN 00788872-73, where he speaks of the *a posteriori* disagreements among the Standing Committee: *"Those in the Standing Committee who had agreed to the evacuations withdrew, pulled back, and this became a conflict. At that time, if there had been a single voice against the evacuations, there could have been no evacuations."* See also comments above on this interview part **III.0** Cross-cutting errors *Democratic centralism.*
[675] Interview of NUON Chea by a Japanese journalist, **E3/26**, p. 9, ERN: 00636872. The Chamber made selective use of NUON Chea's remarks. After explaining that KHIEU Samphan was not a member of the Standing Committee because *"he was new"*, he says: *"(...) But [he had] various and different duties. He was responsible for foreign affairs, those with me had responsibility."*
[676] Closing brief, **E295/6/4**, para.288; T. 28 October 2013, **E1/235.1**, pp. 9-11.
[677] See *infra*, **III.1.d** The criminal responsibility of KHIEU Samphan.
[678] Judgement, para. 142, footnote 410. The Defence refers to its objections on the admissibility of anonymous video recordings for which it is not possible to know where or how the video has been recorded and what questions the person interviewed is answering: see footnote 661 and Response du 19 December 2011, **E152/1**.

remarks of the Appellant, who talks of disagreements within the Standing Committee *after* the evacuation, to justify the inference that he had been a party to the decision.[679] As for the NUON Chea interview, not only do his remarks have nothing to do with the evacuation decision, but he also says that KHIEU Samphan was not a member of the Standing Committee and that he had no responsibility *"for inside the country."*[680] By failing to reflect the fact that it was impossible for KHIEU Samphan to play a part in the decision, despite the submissions of the Defence,[681] the Chamber committed a gross error of fact and failed in its duty to give reasons for its decision. No reasonable judge would have reached this finding which has occasioned a miscarriage of justice, given that it is used by the Chamber to conclude that the Appellant possessed criminal intent. In fact, the Chamber erred in law on this point, as we shall see below, by considering that the mere presence of the Appellant at a meeting was sufficient to find that there was culpable *mens rea.*[682]

III.1.D. The criminal responsibility of KHIEU Samphan

III.1.D.a. Knowledge and awareness "of substantial likelihood"

286. The Chamber committed an error of law and fact in holding that before 17 April 1975 KHIEU Samphan *"knew of the substantial likelihood"* that crimes would be committed during movement of population (phases one and two) and at Tuol Po Chrey.[683]

287. There already, it has infringed the principle of legality since this lesser degree of *mens rea*, borrowed from JCE-3, did not exist in customary international law or in Cambodian law at the time of the events.[684]

288. According to the Chamber, the Appellant acquired "knowledge of the substantial

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[679] Interview with KHIEU Samphan, undated, **E3/4051**, pp. 1-2, ERN 00788872-73, where he speaks of the *a posteriori* disagreements among the Standing Committee: *"Those in the Standing Committee who had agreed to the evacuations withdrew, pulled back, and this became a conflict. At that time, if there had been a single voice against the evacuations, there could have been no evacuations."*

[680] Interview of Nuon Chea by a Japanese journalist, **E3/26**, p. 9, ERN: 00636872. The Chamber made selective use of NUON Chea's remarks. After explaining that KHIEU Samphan was not a member of the Standing Committee because *"he was new"*, he says: *"(...) But [he had] various and different duties. He was responsible for foreign affairs, those with me had responsibility."*

[681] Closing brief, **E295/6/4**, para. 288; T. 28 October 2013, **E1/235.1**, pp. 9-11.

[682] See *infra*, **III.1.D.d** The criminal responsibility of KHIEU Samphan. *Intent.*

[683] Judgement, paras. 947 to 951.

[684] See *supra* part **II.1.B** Errors concerning applicable law *Modes of liability* (on the *mens rea*).

likelihood" of the crimes once the Party had left it to *"uneducated peasants"* strictly indoctrinated on class struggle to implement policies while *"'New People' and former Khmer Republic officials"* had been identified as *"enemies."*[685] This conclusion is deeply objectionable. For a start, there is no evidence to support it. Second, the policy to smash enemies falls under Case 002/02. Finally, the conclusion contains two inadmissible anachronisms: Khmer Republic soldiers became "former Khmer Republic soldiers" only after the fall of the regime on 17 April 1975 and the term "New People" had not yet come into use in Khmer Rouge semantics by that date. The conclusion, which combines lack of evidence with disregard for the severance, the adversarial principle and the presumption of innocence is perfectly symptomatic of the problems with this Judgement. It should be invalidated without hesitation.

289. The Chamber then relied on the following elements: the decision by the Central Committee to close down markets in the liberated zones in May 1972; a *Revolutionary Flag* issued in July 1973 reporting on the Party leaders' intention to continue the population movements; the existence of a consistent pattern of conduct in moving the population from the towns and cities to the rural areas and between rural areas, and a consistent pattern of conduct in the ill-treatment of Khmer Republic officials; the planning of population movements from the towns and cities decided at meetings in 1974 and 1975, using the experience of Oudong as an example; the close relationship between the Appellant and the leaders and the development of FUNK propaganda; his travels in the liberated zones, his diplomatic activities and his role of liaison with SIHANOUK.

290. However, as has been demonstrated,[686] none of these elements provided the basis for establishing beyond reasonable doubt that the Appellant had knowledge of crimes or criminal policies implemented before 17 April 1975, or that he knew that his acts were part of a criminal scheme. Since the existence of a consistent pattern of conduct was not established beyond reasonable doubt, it is also impossible to claim that the Appellant knew that crimes would ensue from its so-called implementation, or that this would likely occur at a later stage.

291. **Conclusion on knowledge.** These errors committed by the Chamber have occasioned a

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[685] Judgement, para. 998 and 1040.
[686] See part **III.1.C** KHIEU Samphan at the time of the facts between 1970 and 1975.

miscarriage of justice and invalidate its decision.

III.1.D.b. Substantial contribution

292. The Chamber committed errors of law and fact in holding that the Appellant's contribution had reached the necessary threshold for him to incur criminal responsibility for participating in a JCE, instigating, planning, and aiding and abetting.[687]

293. Already, it has infringed its temporal jurisdiction in convicting the Appellant for having planned and instigated the crimes committed during movement of population (phase one) and at Tuol Po Chrey, the elements of which it found in events that occurred prior to 17 April 1975.[688]

294. Furthermore, for the four modes of liability, the Chamber relied on different elements: attendance of meetings, training sessions, speeches, diplomatic activities, the reputation of KHIEU Samphan, and culpable omissions. However, none of these elements is sufficient to constitute the *actus reus* of each mode of liability.

295. The contribution required to convict the Appellant on each of the modes of liability varies. It has to be significant for JCE and aiding and abetting.[689] The required threshold for planning and instigating is higher, and the contribution must be substantial.[690] The terms *"significant contribution"* and *"substantial contribution"* sometimes used by the Chamber must be understood as being synonymous with the legal standards just described.[691]

296. **Meetings**. ***Planning and instigating***. The Chamber erred in considering that KHIEU Samphan's presence at the meetings of June 1974 and April 1975 substantially contributed to the crimes committed during movement of population (phase two) and at Tuol Po Chrey.[692]

297. The Defence recalls the issues it has raised regarding the presence of the Appellant at the

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[687] Judgement, para. 963 (JCE), 1001 (planning), 1011 (aiding and abetting), 1014 (instigating).
[688] See *supra* part **I.1.** *Temporal jurisdiction.*
[689] JCE: *Duch* Judgement, para. 508; *Brđanin* Appeal Judgement, para. 450. Aiding and abetting: Judgement, para. 704; *Duch* Judgement, para. 533.
[690] Planning: Judgement, para. 698; *Duch* Judgement, para. 518. Instigating: Judgement, para. 700; *Duch* Judgement, para. 522; Judgement of the IMT, pp. 361 to 364.
[691] Judgement, para. 692; Judgement, para. 1001.
[692] Judgement, paras. 997 and 1014 (movement of the population (phase one)), 1039 and 1045 (Tuol Po Chrey).

meetings cited above, at which the decisions to evacuate Phnom Penh and to target former Khmer Republic officials[693] were allegedly planned. There is otherwise no basis on which a judge can infer from the mere presence of a person at meetings the role that he played in developing the plans adopted there.[694] So long as there is no proof of what the Appellant allegedly said at those meetings his role remains unclear. The Chamber is in no position to establish in what manner his presence at these meetings would have constituted a substantial contribution to the commission of crimes in the eyes of the perpetrators. Bearing in mind the arguments that there was no unified chain for passing on decisions taken at meetings,[695] neither does the Chamber establish that the plan substantially contributed to the commission of crimes. Indeed, if the evacuation was carried out according to an established consistent pattern of conduct that had emerged empirically before 17 April 1975,[696] the Khmer Rouge soldiers would not have needed a plan to put it into effect.

298. ***JCE.*** The Chamber committed another error in considering that the presence of KHIEU Samphan at the above-mentioned meetings and at the 1971 Congress substantially contributed to the commission of crimes during movement of population (phase one) and at Tuol Po Chrey.[697]

299. There again, the Chamber has no evidence of what the Appellant said at these meetings. It is not possible to infer that he *"played a key role in formulating the content of the common purpose and policies"*.[698] Moreover, having stated that the common purpose of the Khmer Rouge *"was not in itself necessarily or entirely criminal,"*[699] it fell to the Chamber to establish that the acts ascribed to the Appellant substantially contributed to the criminal aspects of the purpose. By not doing so, it failed in its duty to give reasons.

300. **Training sessions.** ***Aiding and abetting and JCE.*** The Chamber erred in considering that KHIEU Samphan's presence at training sessions before 17 April 1975 substantially contributed to

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[693] See *supra* part **III.1.C.c** on the evacuation decision and the contradictions of PHY Phuon.
[694] *Mugiraneza* Appeal Judgement, paras. 136 to 141.
[695] See *supra* **III.1.A.b.** Specific measures **f***urther elements;* see also *infra* **III.3.A** Facts relating to movement of the population (phase one) *Imprecise and ambiguous terminology for Khmer Republic soldiers.*
[696] Judgement, paras. 790 and 791-794
[697] Judgement, paras. 965 and 966.
[698] Judgement, para. 972.
[699] Judgement, para. 778.

the crimes committed during movement of population (phase one) and at Tuol Po Chrey.[700]

301. Not only did the Chamber extrapolate on the nature and impact of these training sessions,[701] it was also never established that these sessions had an impact on the commission of crimes. In fact, none of the people present on such occasions went on to commit any of the crimes charged, nor claimed to have been influenced to do so. It is thus impossible to demonstrate the importance of the Appellant's contribution and, in particular, with regard to JCE, as the requirement for a sufficient nexus to the perpetrator of the crimes is not met.

302. ***Instigating.*** The Chamber again erred in considering that KHIEU Samphan's presence at training sessions before 17 April 1975 substantially contributed to the crimes committed during movement of population (phase one).[702]

303. It speculates that the Appellant *"knew that such indoctrination would inevitably lead to crimes"*. That has never been proven. Moreover, given that the threshold of the contribution required for instigating is higher than for aiding and abetting and JCE, it is not possible, having regard to earlier submissions, to meet the *actus reus* requirement of instigating.

304. **Speeches.** ***Aiding and abetting and instigating.*** The Chamber erred in considering that the Appellant's speeches during the final offensive substantially contributed (aiding and abetting) and (instigating) to the crimes committed during movement of population (phase one) and at Tuol Po Chrey.[703]

305. Apart from the Chamber's extrapolations about the meaning and impact of the speeches,[704] it does not establish what effect they had on the commission of the crimes. As with the training sessions, simply noting that no perpetrator of the crimes reported having heard the speeches, or having been encouraged or instigated by them to commit crimes, tells us much about their negligible impact. Since aiding and abetting requires a lesser contribution than instigating,

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[700] Judgement, para. 973 (JCE), 1047 (aiding and abetting).
[701] See *supra* part **III.1.C** KHIEU Samphan before 17 April 1975.
[702] Judgement, para. 1014.
[703] Movement of the population (phase one): Judgement, para. 1008 (aiding and abetting), 1014 (instigating); TPC: Judgement, para. 1045 (instigating), 1047 (aiding and abetting).
[704] See *supra* part **III.1.C.b** KHIEU Samphan between 1970 and 1975 *Speeches.*

the fact that it is not possible to determine the significance of these speeches on the commission of the crimes estops any finding as to their determinativeness.

306. ***JCE.*** The Chamber committed a similar error in considering that speeches made by KHIEU Samphan between 1973 and April 1975 and the collectively drafted FUNK propaganda documents substantially contributed to the crimes committed during movement of population (phase one) and at Tuol Po Chrey.[705]

307. The same submissions made above apply. Even taken over a lengthier period than for aiding and abetting and instigating, the evidence of the significance of the speeches in the implementation of a JCE has not been established. The same goes for the FUNK documents. The Chamber also disregarded the reasonable possibility that these activities were compatible with the non-criminal aspects of the common purpose. Finally, since the speeches neither instigated nor encouraged the commission of crimes, the sufficient nexus with one of the direct perpetrators of the crimes no longer stands.[706]

308. **Role as a liaison with SIHANOUK.** ***Aiding and abetting and JCE.*** The Chamber erred in considering this element as a substantial contribution to the commission of crimes during movement of population (phase one) and at Tuol Po Chrey.[707]

309. The Defence recalls that the Chamber is mistaken about the nature and impact of this role.[708] Once again, there is no evidence that this liaison role, and the travel it entailed to the countryside with SIHANOUK, ever contributed to the commission of crimes in any conceivable way. Moreover, speeches delivered by SIHANOUK "*whose praise of the Khmer Rouge reassured [...] observers*"[709] cannot be ascribed to the Appellant. In fact, the Chamber does not establish what it is alleging here.

310. **Diplomatic activities.** ***JCE.*** The Chamber erred in considering that these activities substantially contributed to the commission of crimes during movement of population (phase

[705] Judgement, paras. 981 and 982.
[706] Judgement, para. 963; see *supra* part Applicable law **II.1.B.c** Instigating **II.1.B.d** Aiding and abetting.
[707] Judgement, para. 988 (JCE) and 1008 (aiding and abetting).
[708] See *supra* part **III.1.C.** KHIEU Samphan between 1970 and1975.
[709] Judgement, para. 1008.

one) and at Tuol Po Chrey.[710]

311. The Defence recalls that the Chamber is mistaken about the nature and scope of these activities.[711] Nor is there the slightest evidence that they contributed to the commission of crimes. The Chamber confuses the exercise of legitimate political functions with the implementation of a criminal policy through a JCE. Again, it disregards the possibility that his activities may have been related to non-criminal aspects of the plan.

312. **Reputation.** ***Aiding and abetting and JCE.*** The Chamber erred in considering that the *"reputation"* of the Appellant substantially contributed to the crimes committed during movement of population (phase one) and at Tuol Po Chrey.[712]

313. There is no evidence to substantiate what the Chamber is advancing. No perpetrator of the crimes has testified to feeling bolstered in his criminal purpose by the presence of KHIEU Samphan. The assertion is also at odds with the Chamber's earlier determinations on the need to rally SIHANOUK to the Khmer Rouge cause. It is thus impossible to establish a sufficient nexus between the Appellant and the perpetrators of the crimes. This finding must be invalidated.

314. **Omissions.** The Chamber appears to consider that KHIEU Samphan's culpable omissions contributed to the crimes for which he incurs liability through all modes of liability.[713] This does not appear clearly for JCE, planning and aiding and abetting. However, it is a bit less obscure for instigating.

315. In the event that the Chamber took these omissions into account, it should be reminded that they were not punishable under customary international law in 1975. Moreover, having provided no legal definition of the notion of omission, it cannot go on to establish its materiality.[714] It must be invalidated on account of the failure to give reasons which permeates

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[710] Judgement, para. 989.
[711] See *supra* part **III.1.C.** KHIEU Samphan between 1970 and1975.
[712] Judgement, paras. 976, 980 and 988 (JCE); paras. 1009 and 1010 (aiding and abetting movement of the population (phase one)); para. 1048 (aiding and abetting Tuol Po Chrey)
[713] JCE: Judgement, para. 966; Planning: Judgement, paras. 999 and 1000 (movement of the population (phase one)); Instigating: Judgement, para. 1014 (movement of the population (phase one)) and 1045 (Tuol Po Chrey); Aiding and abetting: Judgement, para. 1034 ().
[714] See *supra* part applicable law **II.1.B.e** *Participation by omission.*

this type of reasoning.

316. **Conclusion on substantial contribution.** None of the elements used by the Chamber to establish the substantial contribution of the Appellant to the crimes was enough to constitute the *actus reus* of any of the modes of liability. The Chamber's errors invalidate its findings.

III.1.D.c. Intent

317. The Chamber erred when it found that the Appellant had the necessary intent to be convicted on the basis of each mode of liability for the crimes committed during movement of population (phase one) and at Tuol Po Chrey.[715] To begin with, given that the Appellant was not aware of the crimes committed, this flawed hypothesis cannot serve to prove his criminal intent.

318. **JCE.** The evidence of *mens rea* of JCE is found in the intent shared by all co-perpetrators to commit crimes.[716] However, since the common purpose is not entirely criminal, its simple endorsement by the Appellant is not sufficient to find criminal intent. The Chamber has to show that the Appellant contributed to the criminal aspects of the purpose. It did not do so. Accordingly, it cannot infer some criminal intent on the part of the Appellant solely from his alleged participation in the execution of the purpose.

319. Moreover, the Chamber bases itself solely on the contribution of the Appellant to the common purpose in finding that he possessed the requisite discriminatory intent for the crime of persecution on political grounds. This simplistic conclusion is once again at odds with its own findings on the non-criminal aspects of the purpose.

320. **Planning.** The Chamber finds that *"in planning the evacuation of Phnom Penh"* (movement of the population (phase one)) and *"in planning the final offensive to liberate the country"* (Tuol Po Chrey), the Appellant *"intended or was aware of a substantial likelihood of the commission of these crimes"*[717].

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[715] Movement of the population (phase one): Judgement, paras. 993 to 995 (JCE), para. 1002 (planning), para. 1012 (aiding and abetting), para. 1015 (instigating); TPC: Judgement, paras. 993 to 995 (JCE), para. 1042 (planning), para. 1046 (instigating), para. 1050 (aiding and abetting).
[716] *Duch* Judgement, para. 509; *Kvočka* Appeal Judgement, paras. 82 and 118.
[717] Judgement, para. 1002 (movement of the population (phase one)), 1042 (Toul Po Chrey).

321. On the one hand, the presence of KHIEU Samphan at meetings and his contribution to the development of plans were not the only reasonable conclusions. On the other hand, by remaining unspecific about the degree of intent required, the Chamber failed in its duty to give reasons.

322. **Instigating.** The Chamber considers that *"by making public statements encouraging Khmer Rouge soldiers"* (movement of the population (phase one) and Tuol Po Chrey), the Appellant *"intended or was aware of a substantial likelihood of the commission of these crimes."*[718]

323. First, the Chamber did not establish that these speeches demonstrated a direct intent to commit crimes. Second, by remaining unspecific about the degree of intent it is imputing, the Chamber failed in its duty to give reasons.

324. **Aiding and abetting.** The Chamber considered that the Appellant knew that crimes *"would likely be committed"*[719] (movement of the population (phase one) and Tuol Po Chrey). Such a low threshold is not sufficient to characterise the intent of its perpetrator.[720]

325. The Chamber also failed to establish that the Appellant knew the essential elements of the crimes committed during movement of population (phase one) and at Tuol Po Chrey. Accordingly, it could not conclude that he knew that his conduct would aid or facilitate the commission of the crimes.

326. **Conclusion on intent.** The Chamber having failed in its duty to give reasons and having failed to establish the *mens rea* of the Appellant, its findings must be invalidated.

III.1.D.d. General conclusion on responsibility before 17 April 1975

327. Given that the Chamber lacked jurisdiction and, moreover, that the requirements of the modes of liability were not met, the convictions of the Appellant for planning and instigating crimes committed during movement of population (phase one) and at Tuol Po Chrey must be quashed.

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[718] Judgement, para. 1015.
[719] Judgement, para. 1012 (movement of the population (phase one)) and 1050 (Tuol Po Chrey)
[720] See *supra* part Applicable law **II.1.B.d** Aiding and abetting.

328. Given that the requirements were not met, the Chamber's finding that, prior to 17 April 1975, the Appellant aided and abetted the perpetrators of the crimes committed during movement of population (phase one) and at Tuol Po Chrey must be invalidated.

329. Given that the requirements were not met, the Chamber's finding that, prior to 17 April 1975, the Appellant was a party to a JCE that resulted in the crimes committed during movement of population (phases one and two) and at Tuol Po Chrey must be invalidated.

III.2. CONTEXT OF THE FACTS FALLING WITHIN THE SCOPE OF CASE 002/01

330. The Defence also addressed these issues in its submission on the applicable law, its closing brief, its appeal against the second Decision on severance and its application for disqualification.[721] The Defence refers thereto.

331. The Judgement approached the characterisation of crimes against humanity in three stages. Paragraphs 168-174 recite the facts on which the Chamber bases its characterisation, then paragraphs 175-192 set out the applicable law. Finally, paragraphs 193-198 contain the Chamber's findings.

332. With respect to the facts, at paragraph 168, the Chamber refers to the limitation of the scope of the case to the factual allegations, but immediately adds that it will take facts into account that fall outside the scope, vaguely defining them as: *"the allegations concerning the larger context of the attack in which these crimes were committed"*. Astonishingly, the Chamber lays the blame for the extension of its jurisdiction on the Closing Order. We shall return to this. After these euphemisms, the Chamber spells out the *"allegations"* at paragraphs 169-174: forced marriages, rapes, disappearances, forced labour, 390 mass graves and almost two million deaths *"as a result of Khmer Rouge policies and actions during the DK era."*[722]

333. As to the applicable law, it will be recalled that the Defence stated above that it disagreed with the Chamber's failure to link the attack to an armed conflict or to show how the attack might have been carried out pursuant to or in furtherance of a policy of a state or organisation having

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[721] **E163/5/9:** paras. 1 to 32, **E 295/6/4:** paras. 94 to 200; Appeal of 5 May 2014, **E301/9/1/1/1;** Request of 25 August 2014, E314/1.
[722] Judgement, para. 174.

such an attack as its objective.[723]

334. With respect to the findings arising from the factual inquiry, at paragraph 193, the Chamber relies on the millions of victims and all the policies alleged in the Closing Order to find that the attack was widespread *"in both its **geographical scope** and **number of victims** "* and systematic *"insofar as crimes of such **scope** and **magnitude** could not have been random and **were carried out** repeatedly and **deliberately** in furtherance of, and pursuant to, Party policies"*.

335. As the Chamber sees it, this meant all of the facts contained in the Closing Order, including those not being adjudicated in Case 002/01, which were **"carried out"** and constitute the attack.

336. Regarding the targeted population, the Chamber proceeds in the same manner at paragraph 194 in saying that the former Khmer Republic officials only formed part of the *"millions of civilians"* attacked.

337. With respect to the discriminatory ground, at paragraph 196, the Chamber holds that it was based on political grounds resulting from the class struggle, the need to eliminate enemies and the obligation to take part in collectivisation. Surprisingly, it goes on to say that it will not be including attacks against Buddhists, Chams and Vietnamese because *"[t]hese portions of the attack fall outside the scope of Case 002/01"*. And yet, forced marriages, rapes, disappearances, forced labour, the 390 mass graves and all the two million deaths did not fall within *"the scope of Case 002/01"*.

338. Finally, the Chamber devotes only a few lines at paragraph 197 to the crucial questions of the nexus between the Appellant and the attack, and the elements of that attack that KHIEU Samphan allegedly knew at the time of the events. The Chamber does not spell out the acts of the Accused that link him to the attack within the meaning of the Closing Order. As to his knowledge, it merely states that considering *"the scope [...] of the attack"* (within the meaning of the Closing Order and thus partly outside the scope) and the fact that *"it was **undertaken in furtherance** of, and pursuant to, Party policies"*, the Accused knew.

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[723] See *supra* part Applicable law **II.1.A.a** Crimes against humanity.

339. For the sake of completeness in this regard, the Defence has to examine the explanations given by the Chamber in part 2.4.5 of the Judgement to justify its use of facts that are not within the scope of the case. In the Chamber's view, the Appellant had sufficient notice thereof. In truth, the Appellant was never adequately provided with notice of such a violation, because the legally valid judicial documents defining the scope of the trial are the Closing Order and the Severance order, not woolly announcements in obscure "memorandums" of indeterminate legal status, or vague trial management meetings at which dozens of subjects are discussed. Most importantly, the Defence has never been allowed to address the whole of Case 002 or lay out its case against it. In this connection, paragraph 47 echoes the Chamber's mantra that it will be possible to examine the "*development*" of the five policies without considering their *"implementation"*. Thus, the judges could draw support from the existence of a fact, policy or consistent pattern of conduct without addressing its implementation. This reasoning is absurd and flawed: if a fact provides the basis for an attack, if a policy exists, if a pattern of conduct can be considered consistent, it can only be because they have been implemented. Moreover, quoting paragraph 197 above, it was clear that the Chamber had in mind the *"implementation"* of all the policies. The violation decried here is not just a matter of *"generalised submissions concerning the scope and conduct of future trials in Case 002"* which *"cannot demonstrate any concrete impact on the fairness of the trial in Case 002/01."*[724]

340. After the release of the Closing Order, the Chamber itself ordered a severance. In consequence, while the Closing Order drew on the entire case file to characterise the attack, the Chamber could not because its severance announced that it would not. Additionally, under the severance, the Appellant was not allowed to lay out its case against Case 002 in its entirety, but only against Case 002/01.[725] Moreover, the facts falling outside the scope of Case 002/01 that are cited here do not fall within a prior historical background. These are facts contemporaneous with 002/01 which the Chamber considers proven and characterised and which it considers to be the *actus reus* of the crimes against humanity which it sanctions.

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[724] Judgement, para. 49.
[725] **E124/7.3**.

341. This is why it is abundantly clear that in using these facts which fall outside the scope of Case 002/01, which are not established, were not addressed in the trial and against which the Accused was not able to defend himself, in order to characterise the *actus reus* of crimes against humanity, the Chamber committed a miscarriage of justice. Similarly, by not providing reasons for finding a nexus between KHIEU Samphan and the attack within the meaning of the Closing Order, and by not demonstrating how the Accused knew of the attack within the meaning of the Closing Order, the Chamber did not give reasons for its decision, gave grounds that were excessively vague and based on elements partly falling outside the scope of the trial, and committed a further miscarriage of justice. These miscarriages of justice must be sanctioned by the Supreme Court because they have caused immense prejudice to the Appellant by violating the foundations of a criminal trial, namely the rights to legal security, to prepare one's defence in a calm and adequate manner, to the presumption of innocence, and to a fair and adversarial judicial process. Finally, they make a mockery of the essence, the raison d'être and stated objectives of the ECCC.

342. The Defence recalls that the Chamber's reasons on the characterisation of crimes against humanity decried here are identical to those the Chamber adopted to characterise the common purpose of the mode of liability through JCE. All the submissions set out here apply thereto for the purposes of rejecting it.

III.3. MOVEMENT OF THE POPULATION (PHASE ONE)

III.3.A. Facts relating to movement of the population (phase one)

343. **Armed forces**. The Chamber committed several errors of fact occasioning a misapprehension of the implementation of the evacuation of Phnom Penh, erroneous findings and a miscarriage of justice. It reasoned by first determining its conclusion, then giving preference to elements supporting its theory. It showed a lack of diligence by choosing to overlook evidence that pointed towards the diversity of the nature of the Khmer Rouge armed forces, how the evacuees were treated and by asserting that the evacuation of Phnom Penh was the implementation of a consistent pattern of conduct which in fact never existed.

344. The Chamber committed an error in analysing the structure of the armed forces that carried out the evacuation. It presented the Khmer Rouge forces as a single entity headed by the

"Party Centre" and obeying it without fault. According to the Chamber, several meetings were held "*with the Khmer Rouge forces to give orders to RAK division commanders to evacuate Phnom Penh.*"[726] The Defence has already demonstrated the errors of the Chamber in respect of these meetings.[727] Its understanding of the structure of the armed forces in charge of the evacuation is equally flawed.

345. ***Imprecise and ambiguous terminology applied to Khmer Republic soldiers***. Even though it recognises that the armed forces of the CPK *"were under the direct control of the Zones, not the Party Centre,"*[728] the Chamber overlooks this when examining how the order to evacuate Phnom Penh was given and in describing how the evacuation was implemented.[729] The Chamber's description of how the evacuation orders were supposedly given by the "*Party Centre*" to army commanders and their subordinates before and during the evacuation is imprecise. The Chamber's catch-all, all-embracing terminology includes "*the Khmer Rouge forces*", "*division commanders*", "*subordinates,*"[730] "*higher levels*", "*the ranks of the RAK*", "*troops*", "*battlefields*", "*Khmer Rouge soldiers*", "*sections,*"[731], "*cadres*", "*Khmer Rouge*", or "*Khmer Rouge units.*"[732] With this loose terminology underpinning a biased presentation of the evacuation, the Chamber fails to fulfil its duty to give reasons for its findings about the alleged orders of the *"Party Centre"* to the Khmer Rouge armed forces on 17 April 1975. This lack of reasons is all the more problematic because the Chamber had no alternative but to acknowledge that the zones were autonomous.[733] By not drawing the inferences from its own observations, while remaining intentionally evasive about the purported chain of command, the Chamber committed an error of fact. It did not explain why its own inference lay beyond reasonable doubt. Accordingly, its finding must be rejected.

346. ***Non-existence of a unified army***. The Chamber also committed an error by determining

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[726] Judgement, para. 148.
[727] See *supra* part **III.1.C.c** KHIEU Samphan between 1974 and April 1975 (evacuation decision, meetings, contradictions of PHY Phuon).
[728] Judgement, para. 240.
[729] Judgement, paras. 460-500, 512-524.
[730] Judgement, para. 148.
[731] Judgement, paras. 149, 460, 463, 503, 504.
[732] Judgement, paras. 150 ("cadres"), 501 ("Khmer Rouge"), 505 ("Khmer Rouge units").
[733] Judgement, para. 240.

that the Khmer Rouge forces that had taken part in the takeover of Phnom Penh belonged to the RAK although the RAK was established only on 22 July 1975.[734] Before that date, and during the entire war against the Khmer Republic, the Khmer Rouge troops were attached to several different armies within the FUNK and under the banner of the Cambodian People's National Liberation Armed Forces.[735] As the title suggests, these forces were a composite and diverse entity of several armies answering to different autonomous zone command structures. While the terms "Khmer Rouge army", "Khmer Rouge soldiers", "Khmer Rouge troops" may have been widely used in the proceedings, the "RAK" forces did not exist at the time as an official military entity. By this mistaken chronology, the Chamber committed an error which coloured its reasoning. The charade of calling the RAK forces the "new" RAK[736] as of July 1975, although no such name existed based on the evidence, is a clumsy attempt by the Chamber to shore up its flawed reasoning. It only makes the error all the more obvious.

347. ***Biased selection of soldier testimony***. The Chamber relies on the testimony of former Khmer Rouge soldiers in describing how the evacuation was prepared, how the order was relayed, and what instructions were given to the troops.[737] Although forced to acknowledge that some soldiers were not aware of the evacuation and that the armed forces sometimes offered food and assistance to the evacuees,[738] the Chamber nonetheless found that the evacuation was executed in a "*consistent*" manner.[739] The testimony of Khmer Rouge soldiers is widely used, but the Chamber erred in failing to take account of the geographical areas where the soldiers who testified came from. In fact, as the trial showed, the CPNLAF from different zones captured different parts of the city of Phnom Penh depending on which geographic zone they came from. Thus the troops fighting under different commands had differing visions of the military operation.

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[734] Judgement, para. 240.
[735] Some of these forces were more akin to guerrilla units than a real army. On the disparities of the troops, different clothing and behaviour: PONCHAUD: T. 11 April 2013, **E1/180.1**, pp. 40-42 around [10.25.57]; SUM Chea: T. 5 November 2012, **E1/140.1**, p. 97; PECH Srey Phal: T. 5 December 2012, **E1/148.1**, p. 20; ROCKOFF: T. 29 January 2013, **E1/166.1**, p. 20-21. Some Khmer Rouge soldiers testified to not having any military instruction and being trained on the job: UNG Ren: T. 11 January 2013, **E1/159.1**, pp. 10-11; CHOUK Rin, T. 23 April 2013, **E1/182.1**, p. 28.
[736] Judgement, para. 240.
[737] Judgement, paras. 148-151, 460, 468-471, 494-496.
[738] Judgement, paras. 150, 494.
[739] Judgement, par 151.

348. There is no escaping the fact that the bulk of the Chamber's sources came from armies of the Southwest Zone and North Zones. Out of 23 Khmer Rouge soldiers quoted,[740] 18 are from those two zones, and only five served in the armies of the Special and East Zones,[741] of whom only two testified.[742] Because it had only the testimony of soldiers who came, in the main, from two zones out of four, the Chamber erred when it drew on this base to make findings on the methods used for the entire city. For soldiers from the same zone and placed under the same zone command, it was normal and logical that their testimony would give an appearance of uniformity.

349. The Chamber erred when it found from this partial examination of the evidence that the CPNLAF appeared as a homogenous military entity. It did not explain how it found that to be the only reasonable conclusion, despite hearing differing testimony, and despite Defence submissions about varying practices depending on which zone was in charge of the evacuation.[743] This partial usage of the evidence was intended to give the Khmer Rouge armed forces an appearance of homogeneity on 17 April 1975, and to lend to the Khmer Rouge armed movement a degree of organisation and unity that it did not have. The Chamber also took care not to use SHORT's analysis who said quite unambiguously that the Khmer Rouge forces were not unified on 17 April and never were, right up to the end of the regime.[744]

350. On the basis of this partial and biased analysis of the evidence, the Chamber deduced that the Khmer Rouge forces were a single, uniform corps answering to a pyramid-like command configuration with all authority channelled systematically upwards to the Party summit. These conclusions, founded upon an erroneous reasoning, have occasioned a miscarriage of justice. This structural configuration was the only thing that enabled the Chamber to justify the link it had established between the perpetrators of the crimes committed during movement of population (phase one) and the otherwise undefined group known as the "Party Centre", the supposed core of the JCE. This was not a finding that was compelling beyond reasonable doubt, particularly since

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[740] The soldiers are the following: UNG Ren, CHHAOM Se, MEAS Voeun, CHUON Thi, CHHOUK Rin, SRENG Thi (zone Sud-Ouest); SUM Chea, KUNG Kim, TING Leap, PHUY Pork, PHACH Siek, SEM Hoeun, KHORN Brak, THA Sot, SAU Ren, HIM Hân, PRAK Yoeun, PEAN Khean who was not a soldier but the messenger of KOY Thuon) (North Zone); NY Kan, MIECH Ponn, AU Leang (Special Zone); KOY Mom, CHEA Say (Eastern Zone).
[741] NY Kan, MIECH Ponn, AU Leang, KOY Mom, CHEA Say.
[742] NY Kan (TCW-487) and CHEA Say (TCW-91).
[743] Closing brief, **E295/6/4**, paras. 55-56.
[744] Closing brief, **E295/6/4**, para. 56.

on 17 April 1975, to the diversity of the Khmer Rouge forces can be added major, significant disparities in the treatment of the evacuees.

351. **Disparities in the treatment of the population**. In addition to its errors on the existence of a consistent pattern of conduct in the evacuations,[745] the Chamber also committed an error of fact by attaching grossly insufficient weight, if any, to ample evidence of disparities in the treatment of the population of Phnom Penh during the evacuation. Although it found that Phnom Penh was not evacuated violently across the board,[746] it was *"satisfied that, overall, Khmer Rouge soldiers did not provide adequate food, water, medical treatment or accommodation."*[747] Accounts and testimonies of evacuees who received assistance certainly do not outnumber the rest. But the fact remains that they exist, and are corroborated and averred, as the Chamber itself agrees.[748] This testimony also comes from different sources,[749] which should give it even more weight.

352. While the Chamber has considerable discretion in deciding upon the weight that should be given to evidence put before it, it nonetheless has to validly justify the conclusions it reaches. It must also be consistent. No reasonable judge would have been "*satisfied*" that the Khmer Rouge did not provide the slightest assistance to the evacuees, and this in a deliberate and orchestrated manner on the order of the *"inner circle"*, while stating that the satisfaction was only valid in a general way, or "*overall*".[750] This approximation flies in the face of the conclusions that the Chamber then draws from its factual findings.[751]

353. **Consistent pattern of conduct.** Finally, in addition to these elements, the Chamber erred in holding that the evacuations followed a consistent pattern of conduct that was implemented in Phnom Penh. Indeed, the idea of a consistent, premeditated pattern of conduct implies that all

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[745] See *supra* part **III.1.A.b.** Events which occurred between 1970 and 1975 *Consistent pattern of movements of the population from the cities* and *Consistent pattern of movements of the population between rural areas*
[746] Judgement, para. 494.
[747] Judgement, para. 496.
[748] Closing brief, **E295/6/4**, para. 55 (noted); Judgement, para. 494 (as the Chamber agrees).
[749] Judgement, para. 494, footnote 1480 and 1481: the Chamber quotes the testimony of a monk, a high-ranking officer, and a Khmer Republic soldier, witnesses, civil parties, refugees.
[750] Judgement, para. 496.
[751] See *supra* part **III.3.B.** Legal characterisation of the facts relating to movement of the population (phase one) Policy linked to a JCE.

population movements were carried out in a similar, if not identical manner, not only throughout the country but also throughout the city.[752] Yet, as the Defence has demonstrated above, the evacuations from towns and cities before 17 April 1975 did not follow any consistent pattern of conduct.[753] Accordingly, the Chamber could not reasonably conclude that the evacuation from Phnom Penh was the implementation of this consistent pattern of conduct for ideological and political reasons.[754] What is more, the way the evacuation unfolded, and its motives, which the Chamber[755] wrongly disregarded, are at odds with the very notion of a consistent pattern of conduct. The highly diverse events that occurred during the evacuation range from extreme brutality to assistance to the evacuees, and prove the absence of any consistent and recurring pattern of conduct. The Chamber's finding on a consistent pattern of conduct as it applies to Phnom Penh must be rejected.

354. **Deaths of former Khmer Republic officials**. The Chamber erred when it concluded that checkpoints around Phnom Penh, searches in the city and radio announcements calling on Khmer Republic officials to identify themselves were the proof that "*there was a deliberate, organised, large-scale operation to kill former officials of the Khmer Republic, even if not all such officials shared this fate.*"[756]

355. Noting the presence of corpses of Khmer Republic soldiers, the Chamber concedes that *"[i]t is **likely** that some of them, and in particular the soldiers, were killed during the attack"*. There is testimony as to the presence of corpses in the combat zones, the epicentres of violent confrontations.[757] Their state of decomposition proves that the deaths occurred at an earlier time.[758] That being the case, the *likelihood* to which the Judgement refers is unfounded. The Chamber also asserts that there was a *"large-scale"* operation to exterminate Khmer Republic officials even though it also says that the decision to evacuate Phnom Penh was passed down

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[752] See *supra* part **III.1.A.b.** Events which occurred between 1970 and 1975 *Consistent pattern of movements of the population from the cities* and *Consistent pattern of movements of the population between rural areas.*
[753] *Idem.*
[754] Judgement, paras. 525-545, 984.
[755] See *supra* part **III.1.A.c.** Situation in Phnom Penh on the eve of 17 April; see also Closing brief, **E295/6/4**, paras. 34-36, 38-40, 44-52.
[756] Judgement, para. 561.
[757] Judgement, para. 500, footnote 1498 & DEAC, **E3/3328**, p. 187, ERN 00430767, p. 211-220, ERN 00430791-802
[758] See for example: PHY Phuon: T. 26 July 2012, **E1/97.1**, p. 59 L. 25 to 60, L. 1 to 2, before [13.57.07]; Denise AFFONÇO: T. 12 December 2012, **E1/152.1**, p. 74, L. 2 to 5, before [14.55.36].

"imperfectly."[759] It would be interesting to know how to reconcile operating "imperfectly" and on a large scale. In fact, this contradiction is an example both of the Chamber's speculation and the disorganisation of the CPNLAF, which is also evident in the order to assemble at the Ministry of Information being broadcast over public radio at the last minute, illustrating the poor military coordination to which KUNG Kim[760] testified. Then, at paragraph 511, the Chamber quotes 14 people, but 12 of them refer to events in the Southwest zone[761] where the troops were still under the command of TA Mok and not the Centre.[762] That geographical concentration of evidence weakens the idea of a *"large scale"* operation. Finally, the Chamber notes considerable disparities in the treatment of Khmer Republic officials.[763] As for the on the spot executions,[764] twelve testimonies are cited but the only eyewitness evidence of an execution of several Khmer Republic individuals is to be found in a civil party application.[765] Two people spoke of large-scale executions without mentioning how they acquired their knowledge and this is thus speculation.[766] The order to kill[767] is based on two records of interview,[768] one DC-CAM interview,[769] and one courtroom testimony based on hearsay.[770] For the executions carried out following radio or loudspeaker announcements,[771] the Chamber refers to 14 testimonies, only one of whom testified under oath, while two are civil parties.[772] The comments of the other 11[773] are either in records of interview or civil party applications, or in a book, or in the case of two others

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[759] Judgement, para. 251.
[760] KUNG Kim: T.24 October 2012, **E1/138.1**, p. 84 L.9-17 [14.14.18], p. 95 L.19- p. 3 L. 3 between [14.42.25]-[14.44.05].
[761] **E1/144.1**, **E3/1805**, **E3/5453**, **E3/1747**, **E3/4664**, **E3/5201**, **E1/138.1**, **E3/369.**
[762] MEAS Voeun: T. 9 October 2012, **E1/132.1**, p. 22, L. 8 to 22, between [09.55.15] and [09.57.33], Judgement, para. 240.
[763] See, for example: Judgement, paras. 502, 505, 510, 514, 554 and 555.
[764] Judgement, para. 507.
[765] Civil party application, EAM Tres, undated, **E3/4822**, p. 3, ERN 00906221.
[766] Complaint by PRUM Sokha, **E3/5392**, p. 7, ERN 00873795; Submission from the Government of Norway to the United Nations Economic and Social Council, 18 August 1978, **E3/1805**, p. 21, ERN 00087557.
[767] Judgement, para. 509.
[768] Record of interview of civil party LONG Mary, 31 August 2009, **E3/5540**; Record of interview de SEANG Chan, 23 October 2009, **E3/5505.**
[769] Interview of KHAT Khe by DC-CAM, 15 January 2005, **E3/5598**.
[770] SCHANBERG: T. 5 June 2013, p. 57 (quoting his diary **E236/1/4/3.1**, p. 99).
[771] Judgement, para. 511.
[772] Witnesses: SUM Chea; Civil parties: MEAS Saran and LAY Bony
[773] KONG Samrach, TUON Sameth, KHOEM Naterh, CHHOR Dana, SAM Sithy, SENG Mardi, NON Thol, KHOEM Samhoun, SENG Theary and KOY Mon

in a compilation of refugee testimony and a Norwegian report. Concerning the checkpoints,[774] the Chamber relies on eight civil party applications,[775] four civil party in court testimonies,[776] and two victim impact statements.[777] It uses two telegrams of the French Embassy in Bangkok which amount to hearsay[778] and one record of witness interview.[779]

356. The Chamber's finding about this *"large scale"* operation is built on weak foundations that do not prove matters beyond reasonable doubt. Accordingly, it was not the only reasonable conclusion available. It has occasioned a miscarriage of justice by enabling the judges to conclude that the CNPLAF intended to exterminate and discriminate against Khmer Republic officials during movement of population (phase one),[780] and that on 17 April 1975 there was a policy to target Khmer Republic officials.[781] This latter finding enabled it to conclude that Khieu Samphan had incurred criminal liability.[782]

III.3.B. Legal characterisation of the facts relating to movement of the population (phase one)

357. The Chamber committed an error of law in finding that during movement of population (phase one),[783] Khmer Rouge soldiers and cadres committed crimes against humanity of forced transfer, extermination, and persecution on political grounds.

358. The Defence recalls the errors committed by the Chamber when addressing the chapeau requirements for crimes against humanity. Given the material impossibility of establishing that the crimes committed were part of a state policy and were linked to an armed conflict, the characterisation as a crime against humanity does not apply.[784] The Chamber's finding that crimes against humanity were committed are particularly tenuous because it also failed to

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[774] Judgement, para. 513, footnotes 1532 to 1538.
[775] **E3/5425**, **E3/5431**, **E3/4719**, **E3/4773**, **E3/4823**, **E3/5788**, **E3/5402**, **E3/5590**.
[776] CHUM Sokha: T. 22 October 2012; LAY Bony: T. 23 and 24 October 2012; PECH Srey Phal: T. 5 December 2012; MEAS Saran: T. 22 November 2012.
[777] PO Dina, T. 30 May 2013; NOU Hoan, T. 30 May 2013.
[778] Telegrams from the Embassy of France in Bangkok, **E3/2666** and **E3/3004**.
[779] PECH Chim record of interview, 26 August 2009, **E3/4628**.
[780] Judgement, paras. 561 and 571.
[781] Judgement, paras. 831 and 834.
[782] Judgement, paras. 127, 814, 835 to 836 and 995, 1043, 1046, 1051.
[783] Judgement, paras. 553 to 574.
[784] See *supra* part Applicable law **II.1.A.a** Crime against humanity *Nexus with an armed conflict*

establish that there was a systematic and widespread attack as legally defined.[785] These legal errors invalidate all of its findings on the characterisation of the crimes.

359. The Chamber also committed other errors of fact and law that preclude a finding as to the existence of elements of the relevant crimes.

360. **Forced transfers.** The Chamber erred in concluding that the acts of forced transfer *"were intentional."*[786]

361. The requirement of intent in the crime of forced transfer implies that the accused must have intended all elements of the crime.[787] However, the Chamber never provides evidence that those in charge of the transfers knew that they were *"not justified by concerns regarding the security of the civilian population or military necessity."*[788] What is more, their unawareness of the reasons for movement of the population (phase one), in keeping with the Chamber's earlier conclusions on the principle of secrecy, precludes any finding against the Accused based on some hypothetical criminal intent on their part. Accordingly, the crime of forced transfer is not established. The Chamber's error invalidates its decision.

362. **Extermination.** The Chamber erred in finding that the requirements for the crime of extermination were met.[789] The Chamber distinguished the extermination of *"former Khmer Republic officials"* from that of *"victims who [...] died due to the conditions [...] during the course of their journeys"*.

363. As concerns the former Khmer Republic officials, the Defence recalls its submission concerning the existence of *"a deliberate, organised, large-scale operation to kill [former officials]."*[790] The Chamber's findings on the subject contain significant contradictions which discount the claim that any such operation existed. To the extent that the Chamber relies on this

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[785] See *supra* part **III.2** Context of the facts falling within the scope of Case 002/01.
[786] Judgement, para. 552.
[787] Judgement, para. 450, footnote 1328.
[788] Judgement, para. 450.
[789] Judgement, paras. 560 to 562.
[790] See part **III.3.A** Facts relating to movement of the population (phase one) Deaths of former KR officials, *supra*; Judgement, para. 561.

erroneous finding to find that *"Khmer Rouge soldiers intended to kill Khmer Republic officials on a massive-scale"*, its reasoning fails and its finding must be invalidated.

364. As concerns the victims, the Chamber considers the element of intent to be established, stating that *"the Khmer Rouge soldiers intended to create conditions of life that lead to death in the reasonable knowledge that such act or omission was likely to cause [...] death"*. It has already been submitted that in customary international law no lesser or subsidiary standard to the direct intent to kill a very large number of people has ever been accepted.[791] This finding must be invalidated.

365. **Persecution on political grounds.** The Chamber committed an error of fact and law in considering that the crime of persecution on political grounds had been established.[792] The Chamber distinguished between persecution against high-ranking Khmer Republic officials, low-ranking officers and 'New People' or '17 April people'.

366. The Defence's earlier submission that it was impossible to establish that crimes of forced transfer and extermination had been committed precludes any finding that persecution on political grounds was committed in the form of such crimes against the groups cited.

367. The *actus reus* of the crime of persecution on political grounds requires that the victim belongs to a sufficiently discernible group.[793] However, as concerns the "17 April people" or "New People" (check the exact date), the two designations relating to them came into existence after the commission of the crimes. It is therefore impossible to consider that one or the other of these two undefined entities constituted a discernible group at the time of the events. The *actus reus* requirement of the crime could not be satisfied on account of this error. The error invalidates the decision.

368. The Chamber committed further errors regarding the requisite intent to discriminate in fact. On the one hand, in its assessment of the *mens rea*, it conflated without distinguishing members of the first two groups it cited. This conflation which flies in the face of the principle of

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[791] See Applicable law. **II.1.A.c** Extermination, *supra*.
[792] Judgement, paras. 566 to 574.
[793] Judgement, para. 428.

intelligibility of judicial decisions precludes any finding that the requirements of the crime were met and to enter a conviction. On the other hand, aside from the above-mentioned impossibility to consider the "17 April people" and the "New People" as sufficiently discernible groups, the Chamber committed a serious error in its assessment of the *mens rea* requirement of the crime committed against those groups. For its findings, it relied on the differential treatment of members of the two groups in the base villages.[794] The allegations concern facts postdating the facts tried and, needless to say, cannot underpin a finding of guilt in respect of movement of the population (phase one). Accordingly, the alleged crime could not be established. The patent anachronism which undermines this reasoning must be sanctioned. It invalidates the decision.

369. **Population movement policy**. The Chamber committed an error of fact and law in holding that the "*Party leadership*" developed a criminal policy to move people from the cities to the countryside"[795] in order to implement the JCE common purpose.

370. ***Political line on population movement.*** The Chamber committed a first error in explaining the political line on the evacuation of cities by claiming that the *"leadership"* chose to make the evacuation of the cities which, according to the leadership, were inhabited by "enemies" and corrupt urban people a "*first priority*", because the suffering and sacrifice of the people moved "*would re-educate [...] and attack the class system"*[796] in the interest of a socialist revolution. However, as demonstrated *supra,* there was no evidence of any CPK advocated animus towards urban people.[797] The repetitively cited evidence of low probative value or which should be rejected fails to prove the existence of the political line,[798] the Chamber having erred by

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[794] Judgement, para. 571.
[795] Judgement, paras. 787, 788, 804.
[796] Judgement, paras. 787, 789. (corrupt urban people); para. 788 (first priority); para. 805 (re-educate).
[797] See **III.1.A.B.** Events which occurred between 1970 and 17 April 1975. *Hatred of city people and "class hatred", supra.*
[798] Judgement, para. 789, see, for example, footnotes 2507, 2508, 2511, 2512. (repetitive and low probative value) Most of the documents resulted from a communications campaign by Khmer Rouge Foreign Affairs officials and were destined for the media and diplomatic delegations; see for example: **E3/647**, **E3/621**, **E3/550**, **E3/480**, **E3/5713**, **E3/273**, **E3/4048**, **E3/4045**; Judgement, para. 789, footnote 2511 (should be rejected) Documents **E3/4048** and **E3/4045** are interviews of KHIEU Samphân regarding which no details are available. See also Objections to Admissibility, 14 November 2011, **E131/6**, para. 17: *"Mr KHIEU Samphan objects to all documents that are not directly connected with witnesses who may be called before the Trial Chamber (...)"*; paras. 22 to 23 (written records of witness interview). The Defence recalls that it is appealing Decision E299 by which those documents were admitted into evidence.

omitting the core humanitarian and security argument articulated in these documents. By disregarding the evidence which contradicted its theory,[799] the Chamber invalidated its legal findings on the JCE criminal policy.

371. ***Definition of the JCE criminal policy and consistent pattern of conduct.*** Given that the common purpose to *"implement a socialist revolution in Cambodia"* was lawful, the Chamber claimed that the population movements followed a consistent pattern of conduct *"in each case including and involving the commission of crimes (...)"* which *"confirms that these policies were criminal and had been adopted beforehand in order to ensure that the common purpose would be achieved".*[800] However, this reasoning cannot be accepted, since the Defence has demonstrated that no established consistent pattern of conduct existed.[801] Nonetheless, even if the alleged consistent pattern of conduct were established, the Chamber explains that it was characterised by inhumane conditions and lack of concern for the well-being or the health of the people being moved, as well as the use of force and terror which "*resulted in*" the commission of crimes.[802] By using the term "*resulted*", the Chamber demonstrated that it was unable to establish a closer nexus between the alleged policy and the crimes. In fact, whereas it considered that the evacuation orders were passed down to the lower echelons,[803] it was unable to conclude that the commission of the crimes was ordered taking into account the evidence concerning the decision to evacuate.[804] Accordingly, the consistent pattern of conduct theory raises the question of the applicability of JCE-1.

372. ***Foreseeability of the crimes in the context of JCE-1.*** The JCE-1 mode of liability under which the commission of the crimes was foreseen[805] precludes the Chamber from introducing exceptions to its factual findings that the evacuation was effected in a deliberately violent fashion. The reason is because, either the crimes were planned and ordered, and therefore the assistance

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[799] Judgement, paras. 540, 790.
[800] Judgement, para. 804.
[801] See **III.1.A.b.** Events which occurred between 1970 and 1975. *Consistent pattern of conduct during population movement from the cities and consistent pattern of conduct during population movement between rural areas*, and **III.3.A** Facts relating to movement of the population (phase one). Consistent pattern of conduct, *supra.*
[802] Judgement, paras. 804-05.
[803] Judgement, para. 151.
[804] See **III.1.C.c** KHIEU Samphân in particular between 1974 and April 1975 (decision on evacuations, meetings, PHY Phuon's inconsistencies and contradictions), *supra.*
[805] See Applicable Law **II.1.B.a.** Joint Criminal Enterprise, *supra.*

offered to the people being moved, as revealed in some testimonies, amounted to disobedience of the alleged orders, or the crimes were just a possibility, and therefore both their commission and the assistance offered in the course of their commission were simply an initiative of the lower echelons. Yet, in its reasoning, the Chamber suggests that the commission of the crimes resulted from the circumstances of the evacuation, including inhumane treatment, violence and terror, and should therefore have been foreseeable.[806] The fact that some neighbourhoods were not affected by the crimes also purportedly demonstrates this foreseeability.[807] There is no question that the Chamber's reasoning establishes a clear JCE-3 nexus using its consistent pattern of conduct theory as a guise.

373. The Chamber erred by its inability to establish that these crimes were planned and ordered by the members of the JCE. It was therefore compelled to concoct the fiction of a consistent pattern of conduct that was predetermined, and using it as a guise to artificially include the crimes of murder and attacks against human dignity in the policy to evacuate the cities through a JCE-3 criterion, which is not applicable to the instant case.[808] As a result, the Chamber committed an error of law which invalidates its findings on crimes of murder and attacks against human dignity. Accordingly, those findings must be quashed.

III.3.C. KHIEU Samphân at the time of movement of population (phase one)

374. **Presence at B-5 and at the Phnom Penh railway station.** The Chamber committed an error of fact in holding that while at B-5 and then at the Phnom Penh railway station, KHIEU Samphân had access to information concerning the commission of crimes, because he met with senior leaders, including Zone secretaries and military leaders.[809]

375. ***Meetings at B-5.*** The evidence the Chamber relied upon for this finding includes the alleged April 1975 meeting recounted by PHY Phuon.[810] The significant inconsistencies regarding this meeting have already been highlighted to demonstrate that it could not be

[806] Judgement, para. 805.
[807] See **III.3.A** Facts relating to movement of the population (phase one). Differences in the treatment of the population, *supra*.
[808] Decision (Pre-Trial Chamber), 20 May 2010, **D97/15/9**, para. 83, 87 to 88; Decision, 12 September 2011, **E100/6**, para. 29; KHIEU Samphân's Submissions Regarding the Applicable Law, 18 January 2013, **E163/5/9**, para. 34.
[809] Judgement, paras. 144, 739, 740, 946, 953.
[810] Judgement, paras. 144, 735.

established beyond reasonable doubt that the meeting in fact took place solely on the strength of PHY Phuon's evidence and the conditions he described.[811] In any event, PHY Phuon's testimony fails to support the Chamber's finding that the Appellant participated in the decision concerning movement of population (phase one). According to PHY Phuon, the men present at the meeting spoke *"about the evacuation of the city. No minor details were mentioned in that meeting"*.[812]Since no details were mentioned, the Chamber inevitably committed an error of fact in holding that at that meeting, the Appellant had *"access to information concerning the crimes"*.

376. The Chamber cited the Appellant's book in an attempt to corroborate this finding. However, while in his book KHIEU Samphân wrote that he was *"west of Oudong"* in March 1975 at a location he described as *"the CPK headquarters"* situated *"near POL Pot's headquarters"*,[813] he did not say that he attended any meeting concerning the evacuation. The Chamber also committed an error of fact by misquoting his trial testimony. Contrary to the Chamber's claim, the Appellant did not testify that POL Pot called him to *"participate in the discussions"*[814] but rather to *"listen to"* the soldiers from the various fronts and to the instructions about the ongoing fighting.[815] Moreover, he did not testify about instructions concerning the conduct of an impending evacuation. Accordingly, the Chamber clearly distorted his testimony.

377. Further, the fact that the Appellant wrote in his book that he *"followed the battles' progression on the radio,"*[816] provided no basis to conclude anything other than that he knew about the CPNLAF advance on Phnom Penh. Indeed, the Chamber took pains to avoid mentioning what the Appellant wrote a few lines further, namely that he was unaware of the evacuation until 17 April 1975.[817] Accordingly, the Chamber erred in holding that those statements showed that he had knowledge of the commission of the crimes. He could not possibly have had knowledge of the crimes, especially because SALOTH Ban, POL Pot's personal guard and nephew, who was at the headquarters until the fall of Phnom Penh, testified that he did not

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[811] See **III.1.C.c** KHIEU Samphân in particular between 1974 and April 1975 (decision on evacuations, meetings, PHY Phuon's contradictions and inconsistencies), *supra*.
[812] PHY Phuon, T. 30 July 2012, **E1/98.1**, p. 84 after [15.22.43].
[813] KHIEU Samphân's book, **E3/18**, p. 53, ERN 00103749.
[814] Judgement, para.739, footnote 2331.
[815] KHIEU Samphân: T. 13 December 2011, **E1/21.1**, p. 94 near [16.02.21].
[816] Judgement, para. 735, footnote 2302.
[817] KHIEU Samphân's book, **E3/18**, p. 54-55, ERN 00103750.

attend any major meetings, but met his uncle and *"one or two zone leaders"*, and *"guess[ed]"* that the purpose was *"to discuss the plan of the attack of Phnom Penh town"*, but did not personally have knowledge of a planned evacuation.[818] NUON Chea confirmed that B-5 was a secret venue where Zone leaders reported to POL Pot himself, and that he went there, but not to attend meetings.[819] Therefore, it was by cherry-picking through the evidence and misrepresenting it that the Chamber thought it could rely on KHIEU Samphân's alleged attendance of meetings at B-5 in March or April[820] for its finding that he knew of the future commission of crimes during movement of population (phase one). Its finding must be set aside.

378. ***Military Committee responsible for the evacuation.*** The Chamber committed a further error of fact when it held that KHIEU Samphân had access to information on the orders conveyed to the CPNLAF regarding movement of the population (phase one) because he attended other meetings. Indeed, according to paragraph 739 of the Judgement – which refers to paragraphs 148 to 151 – the Chamber relied in particular on the CPNLAF meetings and military reports for its finding that the Appellant, through his presence at B-5, had access to the orders transmitted to and received by the *"Zone leaders commanding the forces on the ground"*.[821] While the Chamber does not name KHIEU Samphân as the person issuing orders or receiving reports, it attempts to establish a link with him by blurring the line between CPNLAF military leaders and the Central Committee.

379. In fact, the Chamber committed an error of fact by extrapolating from NUON Chea's testimony. While he did testify about the creation of a committee responsible for the evacuation of Phnom Penh, which was headed by SON Sen,[822] he had clearly stated previously that "*the evacuation was under the control of the military*" meaning that the committee was indeed a "*military committee.*"[823] Accordingly, the Chamber erred particularly in holding that all the evidence it cited showing the orders given by the committee or the CPNLAF hierarchy or the

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[818] SALOTH Ban, T. 23 April 2012, **E1/66.1**, p. 55 L. 1 to 8 and p. 56 L. 1 to 18 before [11.58.36].
[819] NUON Chea, T. 30 January 2012, **E1/35.1**, p. 26 to 27 after [10.18.46]].
[820] The Chamber makes only brief reference to an evacuation likely to have occurred in February 1975, regarding which there is no evidence linking it to Appellant (Judgement, paras. 143, 735).
[821] Judgement, para. 739.
[822] NUON Chea, T. 30 January 2012, **E1/35.1**, p. 18 [09.57.01].
[823] NUON Chea, T. 14 December 2011, **E1/22.1**, p. 26 L. 12-18 around [10.47.51]; *Mémoire final*, **E285/6/4**, para. 54.

reports received from the Zone leaders[824] provided proof that they were somehow transmitted to the Central Committee. In an attempt to shore up its implausible reasoning, the Chamber also distorted the evidence, something no reasonable trier would have dared to do. For instance, it quoted abundantly from a DC-CAM document purportedly authored by KE Pauk in which the latter describes military decisions taken by the "Central Committee". However, aside from the fact that this so-called "biography" is from an unknown source, and would have been rejected by any reasonable trier, its Khmer original does not refer to the "Central Committee" but rather to the "Centre", a looser and general term.[825] Accordingly, the Chamber could not rely on that document to conclude beyond reasonable doubt that the Central Committee was involved in military decisions and especially in the organisation and implementation of movement of population (phase one), which was overseen by the military committee. Most importantly, the Chamber failed in its duty to give reasons. A mere allegation couched in *"general"* terms[826] is not enough to prove KHIEU Samphân's involvement in what went on at B-5 during the liberation of Phnom Penh, particularly as the allegation references sources in which his name is never mentioned.[827] To find on such a basis that KHIEU Samphân had knowledge of the conditions under which movement of the population (phase one) was effected was certainly not a compelling finding let alone the only reasonable finding. Accordingly, it must be quashed.

380. After noting that Phnom Penh was under *"the direct control of military units under the command of Zone secretaries,"* the Chamber committed the same error by thinking that it could infer from the *"procedures followed throughout military campaigns between 1970 and 1975"* that *"members of the Central Committee, at B-5"* had given instructions to military units.[828] First of all, the Chamber extrapolated the witnesses' testimony in holding that it concerned B-5,

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[824]Judgement, para. 460, footnotes 1357 to 1358 (nearly all the references concern CPNLAF military statements about the orders from their superiors and the movements of their troops during the attack on Phnom Penh).
[825] KE Pauk Statement, **E3/2782**, the English and Khmer originals employ the term *"Centre"* in Khmer which appears at ERN 00095549, 0009555, 00095551 and is translated as *"Central committee"* in the ECCC English version at ERN 00089710, 00089711, 00089712 whereas the DC-CAM English version **E3/2782**, in the same segments of the text, it is translated as *"Center"*, at ERN 0089704.
[826] Judgement, para. 739, footnote 2331:*"Generally, throughout the revolution, POL Pot, NUON Chea, SON Sen and the Central Committee oversaw military campaigns"*.
[827] Judgement, para. 739, footnote 2331: the sources concern events during the period from 1970 to 1974 and demonstrate the involvement of *"senior leaders"* in the conduct of the 1970-1975 war. They do not concern KHIEU Samphân.
[828] Judgement, para. 739.

because the witnesses mentioned POL Pot's headquarters, which were mobile.[829] Moreover, the evidence in support of the Chamber's claim that the Central Committee issued instructions does not provide support for that finding, insofar as none of the statements or speeches it cites refers to the existence or the details of the military instructions that the Central Committee allegedly issued.[830]

381. In any event, there was even less of a possible link to KHIEU Samphân as, aside from the fact that he was simply a candidate member of the Central Committee, it has also been clearly established,[831] and noted by the Chamber, that he *"never had direct military responsibilities"*.[832] Accordingly, the Chamber's unfounded finding that he could have had knowledge of the commission of crimes during movement of population (phase one) owing to his alleged meetings with Zone secretaries and military leaders must be invalidated.

382. ***Meetings at the Phnom Penh railway station.*** The Chamber also relied on KHIEU Samphân's alleged presence in Phnom Penh along with CPK leaders starting on 25 April 1975 in finding that he had knowledge of the crimes.[833] Yet, PHY Phuon's testimony does not show that KHIEU Samphân was personally involved in the development of the plans and policies for the country. From his vantage point as a security guard, he associated KHIEU Samphân with the *"leadership"* because he happened to be at the same location as POL Pot, NUON Chea and SON Sen. For example, he testified that KHIEU Samphân and the CPK leaders were at the Phnom Penh railway station for one week. He testified about a meeting, but said that he *"did not know [its] meaning or [...] content"*.[834] Accordingly, the Chamber could not reasonably infer from his testimony either that KHIEU Samphân attended the said meeting or that the discussions or the conduct of the meeting had afforded the Appellant access to information about the commission of

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[829] SALOTH Ban: T. 23 April 2012, **E1/66.1**, pp. 53 to 54 after [11.52.32]; PHY Phuon: T. 26 July 2012, **E1/97.1**, pp. 20-21 after [10.02.49], pp. 50 to 51 around [11.55.22], T. 31 July 2012, **E1/99.1**, p. 42 around [11.35.07]; NUON Chea: T. 30 January 2012, **E1/35.1** around [10.20.28].
[830] Judgement, footnotes 2331 to 2332. The Chamber makes particular reference to the testimony of PHY Phuon regarding the alleged April 1975 meeting and the meeting with POL Pot in connection with a February 1975 decision; however, nothing in PHY Phuon's testimony concerns the alleged instructions of the Central Committee (Judgement, paras. 118, 531 to 533). See also footnote 833 regarding KE Pauk, *infra*.
[831] *Mémoire final*, 26 September 2013, **E285/6/4**, para. 217.
[832] Judgement, para. 378.
[833] Judgement, paras. 739, 740, 946, 953, 954.
[834] Written Record of Interview of PHY Phuon, 5 December 2007, **E3/24**, ERN 00223582.

crimes during movement of population (phase one). Accordingly, the Chamber's finding must be invalidated.

383. **Access to information**. The Chamber committed a further error of fact in holding that during movement of population (phase one), KHIEU Samphân had knowledge of the crimes as they were being committed through foreign news reports, diplomatic reports in his role as liaison with SIHANOUK or through contacts with the leaders of the resistance abroad.[835]

384. ***Information from news reports and leaders of the resistance***. For this finding, the Chamber refers in particular to its finding that the communication structures enabled the monitoring of foreign news reports by the Ministries of Propaganda and Information, and Foreign Affairs.[836] However, it failed in its duty to give reasons by not specifying the evidence it relied on in concluding that KHIEU Samphân personally allegedly had access to information collected by these ministries even though he held no position there. The failure to give reasons in this instance is particularly troubling because the Chamber noted, on the one hand, that the request to the Ministry of Propaganda and Information to monitor foreign news broadcasts came from the Standing Committee.[837] In fact, the ministry's staff stated that they did know who the recipients of the reports were aside from the departments for which they worked.[838] On the other hand, the Chamber also noted that SUONG Sikoeun testified that Ministry of Foreign Affairs staff *"were instructed to report what they heard to IENG Sary"*.[839] In fact, SUONG Sikoeun's wife, Laurence PICQ, testified that he never discussed foreign news reports with her and that she only had access to official Democratic Kampuchea information until she left for China in 1979.[840] All of the evidence relied upon by the Chamber therefore confirms that information was monopolised by some members of the Standing Committee, of which the Appellant was not a member.

385. Further, according to the Chamber's own finding, the communication structures were not

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[835] Judgement, paras. 247, 251, 254 to 256, 267, 268, 365, 367, 372, 503, 789, 821, 953.
[836] Judgement, paras. 267-68.
[837] Judgement, para. 267 The Chamber refers to footnote 844 and the minutes of the 8 March 1976 propaganda meeting, **E3/231**: While the Appellant attended this meeting, because the March 1976 elections were on the agenda, it is clear that it was *"Angkar"* which made *"recommendations"* and requested *"a few analyses to interest the Central Committee and to take measures"* from the ministry. (p. 3 ERN 00528387).
[838] Judgement, para. 267, footnote 847.
[839] Judgement, para. 268.
[840] Written Record of Interview of Laurence PICQ, 31 October 2008, **E3/98**, pp. 1 and 2, ERN 00356359-60.

yet in place by then.[841] Moreover, the Chamber noted that information about the crimes against the inhabitants of Phnom Penh transpired long after the events,[842] since even reporters who were based in Cambodia learned about the events on the ground only *"much later"*.[843] Such being the case, the Chamber committed an error of fact in omitting to explain in what capacity, in which form and when the Appellant had access to information about the crimes committed during movement of population (phase one). This error alone invalidates its finding in its entirety and constitutes a miscarriage of justice.

386. ***Diplomatic contacts***. The Chamber erred in fact in holding that communications between SIHANOUK and the Appellant pointed to the fact that the latter had access to the diplomatic reports sent to SIHANOUK and PENN Nouth.[844] It failed to meet its duty to give reasons in holding that it was *"satisfied"* that *"GRUNK officials"* and *"leaders of the external resistance (...) such as IENG Sary and IENG Thirith"* would have had access to *"some of these diplomatic and public news reports,"* since the existence of communication structures did not relieve it of its duty to explain when and how the information was allegedly provided and received.[845] Indeed, it must be recalled that it has been established that the Appellant did not arrive in Phnom Penh until around 25 April and was in the jungle up until then.[846]

387. Further, it will be noted that the only evidence of a communication between the Appellant and SIHANOUK immediately after 17 April is a written statement by SIHANOUK to the effect that while in China, he received an *"official letter"* over KHIEU Samphân signature asking him to postpone his return to Phnom Penhh.[847] The use of this document for inculpatory purposes is

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[841]Judgement, para. 953, footnote 2898: the communications structures referred to by the Chamber (Judgement, paras. 267 and 268) date from 1976, i.e. after the DK institutions were in place.
[842] Judgement, para. 953, footnote 2898: para. 503 (see footnote 1510), cited by the Chamber, concerning senior Khmer Republic officials, and *post-facto* accounts of the events: the Bangkok Post report is from November 1975.
[843] Judgement, para. 503, footnote 1510: ROCKOFF, relied upon for the Chamber's finding that information filtered through during the events, confirms that although he was present, it was only much later that learned of the executions of the officials: T. 28 January 2013, **E1/165.1**, p. 58: *"I can't say we heard it while still in Cambodia. It was much later. And from other sources"*. Moreover, SCHANBERG - who is cited by the Chamber - testified that he did not receive confirmation of the executions of the Khmer Republic officials until *"the years that followed"*. (T. 7 June 2013, **E1/203 .1**, pp. 5 to 6)).
[844] Judgement, paras. 821, 953.
[845] Judgement, para. 953.
[846] Judgement, para.740, footnote 2333.
[847] Written statement by SIHANOUK, 28 March 2007, **IS.10.18**, ERN 00087636.

particularly problematic, because it was not placed on the case file in accordance with the rules of procedure.[848] Despite repeated requests by the Defence while time still permitted, the Chamber's reluctance to summon SIHANOUK to testify resulted in his not being questioned about the provenance of the letter.[849] Yet the written statement constituted a key piece of evidence, given that it only mentions a letter received purportedly from KHIEU Samphân which, in light of the Chamber's findings regarding documents signed by the Appellant but written by POL Pot,[850] raises more than reasonable doubt. By its reliance on such tenuous evidence, the Chamber failed to provide an adequately reasoned decision. Accordingly, its finding must be invalidated.

388. **Victory messages**. The Chamber committed an error of fact in holding that the 21 April 1975 Victory Message[851] and the purported "*congress*" held in the days that followed, and allegedly "*chaired*" by KHIEU Samphân, contributed to the commission of crimes.[852]

389. ***The 21 April 1975 Victory Message.*** The Chamber committed an error of fact in citing summaries of KHIEU Samphân's speech of 21 April 1975[853] that are stripped of context[854] in a bid to distort the tenor of the speech for inculpatory purposes.[855] Contrary to the Chamber's biased portrayal, a careful reading of the speech shows that the Appellant was simply giving a historical background to the fighting between the two armies and explaining the strategies they each adopted given their asymmetry. For example, he showed the contrast between the CPNLAF's military approach consisting in removing inhabitants from certain areas in order to drain the enemy army of its *"military, political, economic and financial strength" "food and rice"*[856] until it died in agony and, on the other side, *"[the enemy's] use of tanks, artillery, B-52's*

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[848] Judgement, para.789, footnote 2514: the Chamber attempted to justify another infringement of the right to a fair trial by its accepting Document IS.10.18 whereas the Prosecution relied on it during the documents hearings and it was challenged as by the Defence challenged for its inconsistencies. Here again, the Chamber accepted inculpatory material in breach of its duty to examine evidence impartially as required by the procedural rules.
[848] Witness Summaries, 23 February 2011, **E9/11.2**, p. 3.
[849] Witness Summaries, 23 February 2011, **E9/11.2**, p. 3.
[850] For example: Judgement, para. 97.
[851] Judgement, paras. 832, 982.
[852] Judgement, paras. 377, 742, 983, 1011.
[853] Victory message (Swedish Collection), **E3/118**, p. 107, ERN 00166994.
[854] Judgement, para. 982: *"KHIEU Samphan praised the army for 'liberating' the country, declared that all their enemies had died in agony; and noted the sacrifice of the people in the liberated Zones, and their efforts building dikes, canals and reservoirs"*.
[855] Regarding this speech, see also **III.4.D.b.** Substantial contribution. JCE. Tuol Po Chrey, *infra*.
[856] Victory message (Swedish Collection), **E3/118**, p. 1, ERN 00166994, 2nd paragraph.

and all types of modern aircraft" which [had] *"destroyed rice fields and villages, reducing them to ashes"*.[857] Accordingly, the Chamber erred in construing those statements as signalling support for the crimes committed in the course of movement of the population (phase one), whereas the Appellant was simply explaining the differences between forces during the five years of war. In fact, those excerpts show that the Appellant viewed the evacuations effected prior to 1975 as military tactics used in combat to destabilise the enemy, but not as policies *per se*.[858]

390. The Chamber also committed an error of fact in claiming that the recognition of the Cambodian people's war effort during the armed conflict *"in order to provide food and material for the troops on the battlefield"*[859] was evidence of a future political programme. In light of its date, the speech was quite clearly aimed at commending those who had in one way or another contributed to the CPNLAF victory. In fact, the Chamber carefully avoided mentioning that the Appellant's message was on behalf of the GRUNK and SIHANOUK[860] and that he had not yet arrived in Phnom Penh by 21 April .[861]

391. Accordingly, the Chamber's highly biased interpretation of the Appellant's speech must be sanctioned. The finding that the speech could be seen as an endorsement of the commission of crimes[862] was certainly not reasonable let alone the only possible inference. A reasonable trier would not have viewed the speech as anything other than a GRUNK official's celebration of the victory of the people as a whole. Accordingly, the Chamber's finding must be set aside.

392. ***The fictitious 25-27 April Congress.*** The Chamber relied in particular on a Special National Congress held on 27 April 1975 which was allegedly chaired by the Appellant for its finding that he supported the commission of crimes during movement of population (phase one). In this regard, the Chamber committed a particularly serious error in that it also held that it had not *"been convinced on the evidence that this Congress in fact took place"*.[863] It is difficult to

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[857] Victory message (Swedish Collection), **E3/118**, p. 3, ERN 00166994, last paragraph.
[858] See **III.1.A.b.** Events which occurred between 1970 and 1975. *Consistent pattern of movements of the population from the cities* and *Consistent pattern of movements of the population between rural areas*, *supra.*
[859] **E3/118**, p. 108, ERN 00166995, 1st paragraph.
[860] **E3/118**, p. 108, ERN 00166995, 2nd paragraph.
[861] Judgement, para. 740, footnote 2333.
[862] Judgement, para. 1011.
[863] Judgement, para. 742.

fathom how the Appellant's virtual attendance of a fictitious congress could be construed as proof that he supported a policy entailing the commission of crimes, a policy that was discussed at meetings which never took place! The Chamber's finding is all the more convoluted because, in a bid to justify reliance on the resolution adopted by this fictitious congress, it noted that it *"closely resembled"* the DK Constitution, which it had otherwise considered as never having been implemented.[864] No reasonable trier would seriously have relied on such evidence; the Chamber's finding must be invalidated.

393. **Meetings in May 1975.** The Chamber committed errors of fact concerning the meetings KHIEU Samphân allegedly attended in May 1975, the level of his participation and the type of information shared at those meetings.[865]

394. The only witness who testified that meetings were held at the *"Silver Pagoda"* over the course of several days in May 1975 was the very verbose PHY Phuon. However, while he claimed to have attended those meetings, nothing in his testimony supports the finding that the Appellant could have received information concerning the commission of crimes. PHY Phuon remembered that the discussions were about *"setting a new direction" "to move toward communism"*.[866] Nothing in his testimony relates to a discussion of the commission of crimes. It will be recalled that it was also PHY Phuon who stated that the bad behaviour of local officials was contrary to CPK policy;[867] that was more than ample proof that ill-treatment was not advocated at meetings or discussions[868] that he says he attended. As for SHORT, who was also cited by the Chamber,[869] he only testified that a policy change was discussed; however, not only

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[864] Judgement, paras. 233-34.
[865] Judgement, paras. 373, 743, 751, 967, 974.
[866] Written Record of Interview of PHY Phuon, 5 December 2007, **E3/24**, pp. 5 and 6 ERN 00223582-83: *"They talked about the situation inside and outside the country, the post-liberation situation, and setting a new direction. Before liberation there had been the National Democratic Revolution, and after revolution there would be what they called Socialist Revolution. The only person who gave presentations on the documents was Pol Pot. The leader of the discussion group was Nuon Chea who examined and led the joint discussions by the zones, but Pol Pot did not join in the discussions [...] During the meetings there was a decision that we had finished the National Democratic Revolution in 1975, and that we had to continue working on the Socialist Revolution line to move toward Communism."*
[867] *Mémoire final*, **E285/6/4**, para. 132.
[868] Judgement, para. 740, footnote 2234: referring to another episode of PHY Phuon's testimony regarding discussions in which the Appellant allegedly participated.
[869] Judgement, para. 740, footnote 2334.

did he not name his sources, he too also said nothing to indicate that the commission of crimes was discussed at those meetings. Accordingly, the Chamber erred in concluding that the Appellant's attendance of the meetings in May 1975 afforded him access to information concerning the commission of crimes. On the strength of this evidence, no reasonable trier would have reached such a conclusion. Accordingly, the finding must be quashed.

395. In general, with regard to the conduct ascribed to the Appellant during movement of population (phase one), the Chamber committed an error of fact and law in holding that owing to *"his general knowledge of the policies"* implemented by the Khmer Rouge, *"KHIEU Samphân had wide-ranging access to information concerning the crimes".*[870] However, the Chamber did not establish at what point the commission of crimes would have been envisaged during the general discussions concerning the establishment of a socialist state, in which discussions the Chamber claims the Appellant participated. Insofar as the political purpose itself was not criminal in nature, the Chamber was under a duty to explain precisely how and when the Appellant gained knowledge of the alleged crimes to which he contributed.

396. The Chamber's repeated references to other parts of the Judgement[871] suggest that it was referring to its definition of JCE criteria and inferring from the Appellant's knowledge of the common purpose, namely the liberation of Cambodia and the creation of a socialist society,[872] as well as his endorsement of the political policy that he was aware "*of the substantial likelihood of the commission of crimes."*[873] However, as noted *supra,*[874] the Chamber erred in law by applying the *"awareness of the substantial likelihood of the commission of crimes"* standard to JCE-1, whereas it only applies under JCE-3, a mode of liability which is not applicable in the instant case.[875] Accordingly, its findings must be invalidated in their entirety.

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[870] Judgement, para. 946.
[871] As concerns the various references, see paras.724, 556 to 558, 738, 354, 815, 785.
[872] Judgement, para. 724.
[873] In fact, it is the heading of section 16.1.1 of the Judgement, para. 947: *"Awareness of the Substantial Likelihood of the Commission of the Crimes".*
[874] See **III.3.C.**KHIEU Samphân at the time of movement of population (phase one); see also **III.3.B.** Legal characterisation of the facts relating to movement of the population (phase one) with the JCE, *supra.*
[875] See Droit applicable **II.1.B.a.** Joint Criminal Enterprise, *supra.*

III.3.D. <u>KHIEU Samphân's criminal responsibility at the time of movement of population (phase one)</u>

III.3.D.a <u>Knowledge</u>

397. The Chamber erred in holding that *"KHIEU Samphân had knowledge of the crimes concurrent with their commission [during movement of population (phase one)]"*.[876] It erred further in holding that the Appellant *"was (...) on notice of the crimes after their commission"*.[877]

398. As concerns knowledge concurrent with the crimes, the Chamber relied on the following evidence: the Appellant's proximity to the leadership which gave instructions to Khmer Rouge soldiers, the purported diplomatic reports communicated to SIHANOUK and PENN Nouth to which his role as liaison purportedly gave him access and the alleged communications with the leaders of the GRUNK and the internal resistance who were abroad at the time of the liberation and thereafter.

399. As concerns *post-facto* knowledge, it relied on the following evidence: the Appellant's public statements, his attendance of training sessions, congresses and conferences where crimes were allegedly discussed, his access to *Revolutionary Flag* and *Revolutionary Youth* magazines and the information collected by the Ministries of Foreign Affairs and Propaganda, as well as his diplomatic activities.

400. In view of the reasonable doubt surrounding each aspect of that evidence,[878] it was impossible to conclude that KHIEU Samphân had concurrent or *post-facto* knowledge of the crimes. The only finding a reasonable trier would have made is that during and after the liberation of Phnom Penh, the Appellant had no knowledge of the crimes committed during movement of population (phase one). This lack of knowledge also precludes any finding that he knew that his conduct contributed to the commission of the crimes.

401. **<u>Conclusion on knowledge.</u>** These errors of the Chamber occasioned a miscarriage of

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[876] Judgement, para. 953.
[877] Judgement, paras. 958 and 959.
[878] See **III.3.C.**KHIEU Samphân at the time of movement of population (phase one), *supra*.

justice, and invalidate its decision.

III.3.D.b Substantial contribution

402. The Chamber committed errors of law and fact in holding that the Appellant's contribution had reached the necessary threshold for him to incur criminal liability for participation in a JCE and aiding and abetting.[879]

403. For these two modes of liability, the Chamber relied on events that were contemporaneous with the facts: meetings, one speech and one Party document. It also relied on evidence post-dating the facts, including training sessions, other speeches and the Appellant's functions during the DK regime. However, none of that evidence satisfies the *actus reus* requirement of each mode of liability.

404. The Defence has recalled that for JCE and aiding and abetting, the contribution must be *"substantial"*.[880]

405. **Contemporaneous events: meetings.** ***JCE.*** The Chamber erred in holding that KHIEU Samphân's attendance of meetings on government premises from 25 April 1975 constituted substantial contribution and that he therefore incurred liability for committing crimes of during movement of the population (phase one) through a JCE.[881]

406. The Chamber failed to establish that the Appellant attended meetings which it also was unable to prove that they in fact took place.[882] Insofar as the Chamber cited no evidence to show that the Appellant made statements at these meetings, it is therefore impossible to infer that he participated in discussions on *"policies and plans"* or that he thus played *"a key role in formulating the content of the [common purpose] and policies"*.[883] Moreover, having noted that the common purpose of the Khmer Rouge was *"not in itself necessarily or entirely criminal,"*[884] the Chamber was under a duty to establish that the conduct ascribed to the Appellant substantially

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[879] Judgement, paras. 972, 976, 987 (JCE) and 1011 (aiding and abetting).
[880] See **III.1.B.** Legal characterisation of pre-1975 facts, *supra*.
[881] Judgement, para. 967.
[882] See **III.3.C.**KHIEU Samphân at the time of movement of population (phase one), *supra*.
[883] Judgement, paras. 967 and 972.
[884] Judgement, para. 778.

contributed to the criminal aspects of the common purpose. By not doing so, it failed in its duty to give reasons.

407. **Contemporaneous events: speech.** ***JCE and aiding and abetting.*** The Chamber erred in holding that KHIEU Samphân's speech of 21 April 1975 contributed substantially as a result of which he incurred liability for aiding and abetting, and commission of crimes during movement of population (phase one) through a JCE.[885]

408. The Chamber not only committed errors regarding the meaning and impact of the speech,[886] it also failed to establish the effect which the speech had on the commission of the crimes. The truth is that it had no impact, since none of the perpetrators of the crimes reported that they heard it or that it encouraged them to commit crimes. Accordingly, it is impossible to conclude that KHIEU Samphân provided moral support for the crimes any more than he endorsed the criminal policies of the common purpose.

409. **Contemporaneous events: published document.** ***JCE.*** The Chamber erred in holding that the release of a resolution *"allegedly approved at a National Congress chaired by KHIEU Samphân"* sometime after 27 April 1975 contributed substantially as a result of which he incurred liability for aiding and abetting and commission of crimes during movement of population (phase one) through a JCE.[887]

410. That a congress was in fact held and that the Appellant attended are not reasonable findings.[888] Moreover, the Chamber failed to demonstrate the impact of the document on the commission of the crimes or that it was reflective of the Appellant's endorsement of the criminal aspects of the common purpose. Here again, the Chamber failed to meet its duty to give reasons.

411. **Conclusion on substantial contribution.** None of the elements on which the Chamber relied, whether pre-dating[889] or contemporaneous with the events, to establish the Appellant's

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[885] Judgement, para. 982.
[886] See **III.3.D.b.** Substantial contribution. JCE. Movement of the population (phase one); **III.4.D.b.** Substantial contribution. JCE. Tuol Po Chrey, *supra*.
[887] Judgement, para. 983.
[888] See **III.3.C.** KHIEU Samphân at the time of movement of population (phase one) The fictitious congress of 25-27 April 1975, *supra*.
[889] See **III.1.C.** KHIEU Samphân prior to 17 April 1975, *supra*.

substantial contribution to the crimes satisfies the *actus reus* requirement of the two modes of liability.

412. Moreover, the Chamber held that *"assistance provided exclusively after the time of perpetration"* cannot satisfy the *actus reus* requirement of aiding and abetting.[890] The same goes for the *actus reus* of JCE.[891] Indeed, *post-facto* conduct alone cannot satisfy the *actus reus* requirement in the absence of a pre-dating or contemporaneous contribution to the crimes. In any event, it does not satisfy the "substantial contribution" requirement. Indeed, the Chamber failed to establish that the training sessions, the other speeches and the Appellant's functions during the DK regime provided encouragement or moral support to the perpetrators of the crimes, or that the Appellant thereby contributed to the criminal policies of the common purpose. The Chamber's errors invalidate its finding.

III.3.D.c. Intent

413. The Chamber erred in holding that the Appellant possessed the requisite criminal intent to be convicted under the two modes of liability for the crimes committed during movement of population (phase one).[892] Clearly, to the extent that the Appellant never had knowledge of the crimes, this wrong premise cannot be used to establish his criminal intent.

414. **JCE.** It has been noted that evidence of the *mens rea* of JCE lies in the intent shared by all co-perpetrators to commit the crimes, and that insofar as the common purpose was not entirely criminal, the fact alone that the Appellant joined the common purpose is not a sufficient basis to find that he possessed the requisite criminal intent.[893] The Chamber had to establish that the Appellant contributed to the criminal aspects of the common purpose. However, it failed to do so. Accordingly, it could not infer solely from the Appellant's participation in the implementation of the common purpose that he possessed any criminal intent.

415. Moreover, the Chamber relied on the Appellant's contribution to the common purpose in

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[890] Judgement, para. 713.
[891] See jurisprudence in the section on Applicable Law. **II.1.B.a.** JCE, *supra*.
[892] Judgement, para. 993 to 995 (JCE), 1112 (aiding and abetting).
[893] Judgement, para. 692; *Duch* Judgement, para. 509; *Kvočka* Appeal Judgement, paras. 82 and 118. See also jurisprudence; **III.1.B.** Legal characterisation of pre-1975 facts, *supra*.

holding that he possessed the requisite discriminatory intent of the crime of persecution on political grounds. This simplistic conclusion is yet again inconsistent with the Chamber's own findings on the non-criminal aspects of the common purpose.

416. **Aiding and abetting.** The Chamber held that the Appellant *"knew that"* the crimes committed during movement of population (phase one) *"would likely be committed."*[894] Such a low threshold is not sufficient to find that the perpetrator possessed the intent.[895]

417. Moreover, the Chamber failed to establish that the Appellant was aware of the essential elements of the crimes committed during movement of population (phase one). Accordingly, it could not find that he knew that his conduct would aid or facilitate the commission of the crimes.

418. **Conclusion on intent**. As the Chamber was unable to establish the Appellant's *mens rea*, its findings must be invalidated.

III.3.D.d. Overall conclusion on responsibility prior to 17 April 1975

419. Given that it is impossible to satisfy the requirements of the modes of liability, the Appellant's convictions for aiding and abetting and JCE for the crimes committed during movement of population (phase one) and at Tuol Po Chrey must go down the same route as the conviction for planning and instigating.[896] They must be quashed.

III.4. TUOL PO CHREY

III.4.A. The events at Tuol Po Chrey

420. The Chamber claims that crimes of murder and extermination were committed at Tuol Po Chrey in April 1975: *"The Northwest Zone Committee ordered the assembly and execution of former Khmer Republic officials"* and *"ROS Nhim, Secretary of the Northwest Zone, presided over the meeting at which this directive was issued"*.[897] ROS Nhim was a Zone leader and a member of the Standing Committee since 1963 and is therefore described as a participant in the JCE, whence the denunciation of a policy targeting former Khmer Republic officials through a

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[894] Judgement, para. 1012 (movement of the population (phase one)), *supra.*
[895] See Applicable Law, **II. 1.B.d.** Aiding and abetting, *supra.*
[896] See also **III.1.B.** Legal characterisation of pre-1975 facts, *supra*.
[897] Judgement, para. 835

JCE. However, no such policy existed.

Existence of a targeting policy between 17 April 1975 and the events at Tuol Po Chrey

421. It has been proven that no such policy existed prior to 17 April 1975.[898] The Chamber also claims that it existed between movement of population (phase one) and the events at Tuol Po Chrey.[899] That is an error of fact and law.

422. First of all, the Chamber forgets that the RAK was established on 22 July 1975 (if not 1976[900]) and that the CPNLAF was not under SON Sen's unified command prior to that.[901] Indeed, it mentions this fact elsewhere, adding that regions, sectors, districts and communes had each kept their own military forces.[902] Much evidence shows that in the aftermath of the victory, the autonomy of the zones was an impediment to the centralisation of power, hence the variations in the treatment of former Khmer Republic officials.[903] This is reflected in the many inconsistencies in the Chamber's characterisation of the targeting policy.[904] The reorganisation of the army on 22 July 1975 reflected the desire to place the armed forces under centralised State authority, but the Chamber disregarded this. It should have provided proof that the targeting policy did not come from the lower echelons and that the policy was the result of a joint decision of the leadership. In doing so, the Chamber failed to demonstrate that its finding was compelling beyond reasonable doubt.[905]

423. ***Evacuation of Phnom Penh.*** It has been demonstrated that the *"deliberate, organised, large-scale operation"* to kill former Khmer Republic officials during movement of population

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[898] See **III.1.A.b.** Events which occurred between 1970 and 1975, *supra*.
[899] For example: Judgement, paras. 829, 831 and 835.
[900] **E3/49**, ERN 00105137: *"The general staff did not really operate until 1975-1976", et seq.*
[901] See **III.3.A** Facts relating to movement of the population (phase one). Inexistence of a unified army, *supra.* See also: **E295/6/4**, paras. 55, 56 and 139; T. 25 October 2013, **E1/234.1**, pp. 76 to 78.
[902] Judgement, paras. 240 to 246.
[903] Judgement, para. 127; see **III.1.A.b.** Events which occurred between 1970 and 1975. Mass executions (execution of PRASITH ordered by Ta MOK), *supra*; KIERNAN **E3/1593**, ERN 00638827-30; **E3/49**, ERN 00724069-70, BECKER **E3/20**, ERN 00638447-49.
[904] See definitions in the Judgement at paragraphs 129, 829, 834 and 835.
[905] Judgement, paras. 835 to 36.

(phase one) was not established,[906] and this proves that no criminal targeting policy against former Khmer Republic officials existed between 17 April and the ensuing days.

424. The Chamber also committed an error of fact in holding that a decision to implement such a policy was specifically taken and confirmed by the Party leadership during the final offensive and throughout the DK era.[907] On this issue, the Defence refers to its submissions regarding Oudong which invalidate the Chamber's findings on the meetings of June 1974 and at B-5.[908] None of the indirect evidence supporting the *"decision"* shows that the only possible reasonable conclusion was that the policy was implemented between 17 April 1975 and the events at Tuol Po Chrey.[909] The US memo[910] consists only of a hearsay account from anonymous sources and nothing in it relates to decisions or orders to carry out *"arbitrary executions"*. Likewise, the ICJ document[911] consists of a hearsay account of an unnamed refugee, who committed crimes, but did not explain how he found out about the Central Committee's *"decision"* to that effect. The surprising inconsistencies of this witness, especially coming from a *"district chief,"* undermine his credibility.[912] As for IENG Phan,[913] his account only reveals that an order was issued to discriminate against civilians and soldiers of the LON Nol administration at the time of the attack on Pochentong. KHOEM Samhuon recounted an alleged order issued in May 1975, i.e. *after* movement of the population (phase one) and the events at Tuol Pol Chrey.[914] HEDER's testimony[915] relates to *"the latter half 1976" after* movement of the population (phase one) and the events at Tuol Pol Chrey. Finally, the order from the Centre which is referred to by IENG

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906 See **III.3.A** Facts relating to movement of the population (phase one). Killing of former Khmer Republic officials, *supra*.
907 Judgement, para. 817.
908 See **III.1.C.c** KHIEU Samphân in particular between 1974 and April 1975 (decision on evacuations, meetings, PHY Phuon's contradictions and inconsistencies), *supra*.
909 **E3/3962, E3/3472, E3/3327, E3/419.1,** T. 11 July 2013, **E1/222.1**, pp. 60-61 after [11.56.11].
910 **E3/3472**, p. 13-14, ERN 00443170-00443171.
911 ICJ: International Commission of Jurists, 20 December 1978, **E3/3327**, p. 2, ERN 00723700.
912 The refugee claimed that he was from the North Zone whereas Kompong Cham was split between the East and Centre zones. Moreover, it is unlikely that he personally participated in the executions, given that he was a district leader.
913 Written Record of Interview of IENG PHAN, **E3/419** and **E3/419.1**, p. 2, ERN 00910872.
914 See **III.1.A.b.** Events which occurred between 1970 and 1975. Targeting policy against former Khmer Republic soldiers and officials, *supra*.
915 HEDER, T. 11 July 2013, **E1/222.1**, pp. 60-61 after [11.56.11].

Sary and mentioned in the same paragraph[916] has no probative value in view of the speculation,[917] inconsistencies characterising it[918] and the fact that IENG Sary was inclined to be untruthful since he had recently been granted a royal pardon or amnesty and was the target of a smear campaign in the media.

425. The claim that the targeting policy resulted from a plot by former Khmer Republic officials to carry out a coup d'état following their defeat is merely speculation for inculpatory purposes.[919] IENG Sary was the only former leader who spoke about that threat.[920] His statements lack credibility and probative value.[921] No evidence was led to the effect that other members of the JCE had knowledge of that threat and that a decision was therefore made to target former Khmer Republic officials.

426. The heading of paragraph 829 is a good example of the violation of the Decision on severance, in that the Chamber ignored the finding that Khmer Republic officials had been sent to work in the countryside and made factual findings on the policies to smash enemies and the treatment of the evacuees in the cooperatives and worksites, although these issues are expressly excluded from its jurisdiction.[922]

427. At paragraph 332, the Chamber links the ill-treatment of former Khmer Republic officials and soldiers in provincial towns after 17 April 1975 to a speech the Appellant made on 21 April 1975[923] which the Chamber distorts[924] in order to misrepresent what he actually said.[925] The Chamber then states: *"[b]ut not all enemies were dead yet"*[926] as though the Appellant had ever

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[916] Judgement, para. 817, **E3/89**, p. 8.
[917] **E3/89**, p. 6: IENG Sary reports that he returned from Peking on 24/04 whereas the decision to kill Khmer Republic officials was allegedly taken on 20th; see also p. 7.
[918] Judgement, para. 829, footnote 2614.
[919] Judgement, para. 823: *"Thus any (...)"*; para. 831: *"Therefore, before they had a chance to (...) "*.
[920] Judgement, para. 526 and also 823 and 831 where the Chamber imputes the justification to IENG Sary and to him alone.
[921] **E3/89**, p. 6: IENG Sary reports that he returned from Peking on 24 April whereas the decision to kill Khmer Republic officials was allegedly taken on the 20th; see also p. 7.
[922] Judgement, para. 506. See also *supra*.
[923] Victory Message (Swedish Collection), 21 April 1975, **E3/118** p. 3, ERN 00166994.
[924] Judgement, para. 832: *"the enemy" [...] died in agony"*.
[925] **E3/118**, p. 107, ERN 00166994: *"successively attacking all enemy manœuvres, [by] relentlessly attacking [it] (...)"*.
[926] Judgement, para. 832.

made an appeal to kill survivors. In order to build a continuum of inculpatory evidence against the Appellant where none existed, the Chamber then lists the towns where a targeting policy was allegedly implemented. It should be emphasised that the evidence concerning the ill-treatment in the countryside is entirely unpersuasive. Nine out of the 16 pieces of evidence cited consist of hearsay accounts,[927] four are from civil parties only two of whom were cross-examined,[928] while five are written records of interview of witnesses who did not testify before the Chamber.[929] The Chamber did not ascertain whether the ill-treatment resulted from local directives. The Chamber thus ignored its own findings on the alleged killings, thereby violating its Decision on severance, which limited consideration of the policy to the events at Tuol Po Chrey.[930]

428. Finally, paragraph 818 of the Judgement adds to the mix *Revolutionary Flag* magazines which allegedly *"praised the elimination of enemies, including former Khmer Republic officials"*.[931] The Chamber omitted to mention the war situation and interpreted the article for inculpatory purposes. The truth is that none of the evidence, which it examined and distorted, proves beyond reasonable doubt that the policy existed, and therefore, the Chamber's finding that a targeting policy existed in the period between movement of the population (phase one) and the events at Tuol Po Chrey was not the only reasonable finding in this instance. This error occasioned a miscarriage of justice in that it permitted the Chamber to hold KHIEU Samphân criminally responsible for the commission of crimes against humanity as a result of his participation in a JCE, as well as for planning, instigating and aiding and abetting those crimes.[932]

Tuol Po Chrey

429. The Chamber committed an error of fact in considering that, according to the evidence, it was reasonable to conclude that 250 former Khmer Republic officials were transported to Tuol

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[927] **E3/5187**, **E3/5211, E3/2701**, **E3/3559**, **E3/2666**, T. 10.04.13, **E1/179.1**; T. 04.12.12, **E1/147.1**; T. 24.10.12, **E1/138.1**; T. 12.11.12, **E1/143.1**.
[928] **E3/4966** (THACH Saly); **E3/5329** (CHHEA Leanghorn.
[929] **E3/5187** (PRUM Sarun), **E3/5211** (CHUCH Punlork), **E3/5545** (POV Sinuon), **E3/5232** (KUNG Samat), **E3/4611** (YUOS Phal), **E3/5188** (CHEK Vannthang).
[930] See **I.1** Breaches of the Right to a Fair Trial. Subject-matter jurisdiction, *supra*.
[931] **E3/5**, p. 22, ERN 00401497; **E3/739**, 00499716-17; **E3/746**, p. 3-9, 13-14, ERN 006428291-96 and 00428301-02.
[932] Judgement, paras. 127, 814, 835-36 and 995, 1043, 1046, 1051.

Po Chrey and executed on 25 and 26 April 1975.[933]

430. The key witness regarding the events at Tuol Po Chrey was **LIM Sat**.[934] He was the only one who testified concerning the transmission of a criminal order by a participant in the JCE (RUOS Nhim). In order to invalidate LIM Sat's trial testimony, the Chamber claimed at paragraph 665 that while the evidence he gave in his OCIJ interviews was truthful, he lied in court in order to diminish his responsibility. An analysis of the entirety of his evidence reveals that in his in-court evidence, he simply sought to clear up any ambiguities in his pre-trial record. He never testified to attending the chiefs' meeting at which RUOS Nhim issued the order to kill or the gathering of former Khmer Republic officials at the Pursat provincial town-hall, or for that matter, to witnessing any execution at Tuol Po Chrey. On the stand, he confirmed these key points and gave further details about when and how he received certain information. During the events, LIM Sat was stationed in Po village situated 3-5 km from Pursat and 10 km from Tuol Po Chrey. There, he inspected trucks transporting former Khmer Republic officials to Tuol Po Chrey from a big gathering in Pursat. He could hear his chief speaking on the radio and receiving instructions to allow the Tuol Po Chrey-bound trucks to proceed. Before the Chamber, LIM Sat said that his testimony was based on hearsay and on what he understood after the facts. To the question as to where the orders to his superiors to *kill* Khmer Republic officials came from, he answered: *"No, they never told us about that."* and *"Actually, they assembled those soldiers and policemen, and I did not realize that those people were destined to be killed"*. A summary of his first interview was read to him, but LIM Sat was quite adamant, saying: *"We were told that the soldiers and officials would be gathered to attend a study session, and after the session, people were allowed to resume their functions. For example, whatever they did in the past, they would then resume the same tasks"*. He also said: *"I was not at the provincial hall. I was at a different location (...) about 5 kilometres from that place"*. To the question of how he found out that promises were made to Khmer Republic officials, he answered: *"I learned this from my commander, the commander of my regiment"*.[935] The above excerpts show that the Chamber

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[933] Judgement, paras. 117, 118, 151, 240, 460-62, 502-517, 526, 554, 555, 658, 663 to 665, 667, 669, 671, 676 to 680, 823.
[934] Three written records of interview: **E3/364**, **E3/4601**, **E3/5723** and T. 2 May 2013: **E1/187.1**, T. 3 May 2013: **E1/188.1**.
[935] For the five quotes, see: T. 2 May 2013: **E1/187.1**: p. 19 after [10.58.38] **then** p. 20 after [10.02.16] **then** p. 20

distorted his testimony and that it offended the *audi alteram partem* principle by claiming that LIM Sat lied on the witness stand. The reason why witnesses appear before the court is precisely for the parties and the judges to put questions to them so as to clear up any ambiguities in their interview records, as those records are only summaries of long interviews and do not necessarily reflect the witnesses' evidence in its entirety. LIM Sat never went to school and no one seemed to question his claim that 3,000 soldiers were transported in 15 trucks. This was way out of proportion, as his trial testimony demonstrated. The rest of his testimony followed the same pattern, but the Chamber was keen on validating the 12 lines of his interview record which served its purposes. It thus accused him of lying without providing any proof whereas in two days of testimony, he proved to be a robust and reliable witness. Based on its deliberate distortion of the evidence, the Chamber found that in the days following the capture of Pursat, Ta Nhim, Ta Khan and Ta Sot gave orders to *"Khmer Rouge commanders that soldiers and policemen from the LON Nol administration were to be assembled and killed"*, and this despite the fact that LIM Sat *"did not attend that meeting"*.[936] That claim was not proven beyond reasonable doubt and neither were those in paragraphs 663 and 666 where the Chamber claimed that LIM Sat was a member of the RAK in April 1975 whereas the RAK was established in July 1975. Most troubling, the Chamber claimed that LIM Sat's trial testimony would prove what happened at the meeting at the provincial town-hall even though he did not attend that meeting. Finally, it claims that *"LIM Sat, who guarded the subsequent meeting, was the only witness to testify about [those] orders"* even though LIM Sat did not guard the meeting at the Pursat provincial town-hall, since he was 5 km away…

431. According to the Chamber, **two elements** corroborate LIM Sat's testimony, namely the existence of a *"pattern of conduct"* and its findings on *"Communication Structures"*.[937] **As concerns the first element**, the Chamber claims that it was proven, because prior to the events at Tuol Pol Chrey, the Khmer Rouge would call former Khmer Republic soldiers and officials to attend *"meetings characterised as study sessions or as opportunities to meet Prince NORODOM Sihanouk, and* [those people] *"were subsequently executed"*. However, the paragraphs it cites in

after [10.04.37] **then** p. 21 after [10.08.00] then p. 23 after [10.14.23].
[936] Judgement, para. 663.
[937] See Judgement, para. 665.

support of this claim are entirely extraneous to its claim.[938] Paragraphs 117 and 118 are about a policy to smash enemies, and the facts underpinning it are outside the scope of Case 002/01 and do not relate to deception. Paragraph 503 concerns movement of the population (phase one), i.e. facts contemporaneous with the events at Tuol Po Chrey which do not amount to a pattern. Further, paragraph 503 concerns senior leaders of the LON Nol administration, and not provincial policemen. Finally, paragraphs 511 and 514 concern isolated facts that are of no probative value, as the Defence has demonstrated in the section on the treatment of Khmer Republic officials during movement of population (phase one),[939] **As concerns the second element**, given that LIM Sat was a member of the CPNLAF from 1971, it was to be expected that his inferences would be based on his knowledge of military communications. His evidence only validated his membership in the CPNLAF but not events that he never claimed to have witnessed (the meeting of his superiors, the gathering of Khmer Republic officials at the provincial town-hall, the executions).

432. LIM Sat's evidence is not corroborated by that of **SUM Alat** and **UNG Chhat** since neither of the latter witnessed the executions. Moreover, regarding the meetings with former Khmer Republic officials at the Pursat provincial town-hall, their number or the identity of the Khmer Rouge officials present are open to debate. SUM Alat testified about meetings held over the course of two days[940] while LIM Sat (who was not in attendance) and UNG Chhat testified about only one meeting which was held over the course of one day.[941] Additionally, in support of its claim that representatives from the (Northwest) Zone had attended the meeting(s) in Pursat, the Chamber cited only LIM Sat's testimony.[942] However, as noted *supra*, LIM Sat did not attend the meeting(s).[943] While his second written record of interview indicates that Ta Nhim and Ta Khan *"h[e]ld a meeting (...) with LON Nol military and policemen"*,[944] he did not say how he found out that they attended the meeting, since he testified that he was not in Pursat.[945] He did not

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[938] Footnote 2088 refers to the Judgement, paras. 117, 118, 503, 511, 514.
[939] See **III.3.A** Facts relating to movement of the population (phase one). Killing of former Khmer Republic officials, *supra*.
[940] SUM Alat, T. 4 July 2013, **E1/218.1**, p. 20, L. 2 to 6 after [09.58.06] and p. 25, L. 19 after [10.15.54].
[941] For example: UNG Chhat, T. 30 April 2013, **E1/186.1**, p. 36, L. 9 to 11 after [10.16.32]. LIM Sat, T. 2 May 2013, **E1/187.1**, p. 20, L. 18 to 22, around [10.04.37].
[942] Judgement, para. 666, footnote 2090 and para. 671, footnotes 2107 and 2108.
[943] LIM Sat, T. 2 May 2013, **E1/187.1**, p. 25, L. 6 to 11 around [10.20.22].
[944] **E3/4601**, p. 3, ERN 00412158.
[945] LIM Sat, T. 2 May 2013, **E1/187.1**, p. 23 (but only referring to a question in the second written record of

even know *"how many [...] of the former LON Nol police and soldiers attended this meeting"*.[946] In fact, LIM Sat testified that he did not meet anyone more senior than a sector leader.[947] His statement that Zone Committee members attended *"a number of"* meetings was in response to vague questions, and his answers were speculative.[948] Neither SUM Alat nor UNG Chhat contradicted LIM Sat's testimony on this point.[949] UNG Chhat, also a former Khmer Rouge soldier, did not know about a plan to kill former Khmer Republic officials. He too, like LIM Sat, was on guard duty on the day of the meeting in Pursat, and knew nothing about any such plan.[950]

433. Accordingly, the Chamber could not conclude beyond reasonable doubt that the Zone was involved in the meeting in Pursat. The finding at paragraph 681 was not the only reasonable finding. Accordingly, the Chamber committed a miscarriage of justice by considering the events at Tuol Po Chrey established on a wrongful basis and then linking them to the Appellant.

III.4.B. Legal characterisation of the events at Tuol Pol Chrey

434. **Targeting policy against former Khmer Republic officials**. In view of the foregoing, the Defence submits that the allegation that ROS Nhim ordered former Khmer Republic officials and soldiers to be assembled under false pretexts that they were going to meet Angkar and/or SIHANOUK in order to execute them at Tuol Po Chrey was never established beyond reasonable doubt. Indeed, nothing in LIM Sat's evidence supports the claim that he knew that the initial order conveyed by his commander came specifically from ROS Nhim.[951] In addition to the fact that it was not an order to kill, LIM Sat's evidence regarding its origin is purely speculative.

435. In fact, even if it were established that ROS Nhim had issued such an order to kill, that did not exempt the Chamber from establishing that the order was in furtherance of a "criminal

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interview of LIM Sat, 18 November 2009, **E3/4601**, p. 3, ERN 00434585).
[946] LIM Sat, T. 2 May 2013, **E1/187.1**, p. 24, L. 10-15 after [10.16.45].
[947] LIM Sat, T. 2 May 2013, **E1/187.1**, p. 81, L. 12 -15 before [15.34.43].
[948] LIM Sat, T. 2 May 2013, **E1/187.1**, p. 81, L. 16 to 25 after [15.32.58] and p. 82, L. 1 to 2 after [15.34.43].
[949] SUM Alat, T. 4 July 2013, **E1/187.1**, p. 18, L. 20 to p. 19 L 8 around [09:58:06]. UNG Chhat, T. 30 April 2013, **E1/186.1**, p. 66, L. 8 to p. 68, L. 10, from [14:01:50] to [14:09:51].
[950] UNG Chhat, T. 30 April 2013, **E1/186.1**, p. 34, L. 16 to 22 after [10:35:32].
[951] LIM Sat, T. 2 May 2013, **E1/187.1**, p. 17, L. 25 to p. 18 L. 4 after [09.53.54]: *"Did both of them mention anything concerning the authority or instruction they received from any level in the authorities that the policemen and soldiers from the Lon Nol administration had to be executed. A. No, they never told us about that."*

purpose" through a JCE.[952] Now, the Defence has already demonstrated that the targeting policy against Khmer Republic soldiers and officials prior to 17 April 1975 was not established.[953] Even if the alleged order did come from ROS Nhim (a fact in dispute), the Chamber was still required to establish: 1 – that a targeting policy was adopted sometime between 17 April and the date on which the alleged order was issued, and 2 – that the order was in furtherance of the said policy. The Defence has already demonstrated that the existence of the alleged policy between 17 April and the events at Tuol Po Chrey was not established. Moreover, no evidence was led about contacts between the other members of the JCE and ROS Nhim during this period.[954] As a consequence, the allegation that the crimes committed at Tuol Po Chrey resulted from the implementation of a targeting policy against Khmer Republic soldiers and officials was not established.

436. **<u>Crimes</u>**. There is no direct evidence about the events at Tuol Po Chrey.[955] With the exception of the handful of corroborative elements mentioned previously, the three indirect accounts contain too many inconsistencies.[956] The Chamber should never have inferred that the events at Tuol Po Chrey were established in reliance on such indirect and unpersuasive evidence. Accordingly, the Chamber committed an error of fact and law, because it could not conclude that the elements of murder, extermination and persecution on political grounds were established.[957] Its findings must be invalidated.

III.4.C. KHIEU Samphân at the time of the events at Tuol Po Chrey

437. On this issue, the Defence refers to its submissions in the section on contemporaneous events with movement of the population (phase one) (III.3.C, *supra*).

III.4.D. KHIEU Samphân's criminal responsibility at the time of the events at Tuol Po Chrey

III.4.D.a. Knowledge

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[952] See **II.1.B.a.** Applicable Law. JCE.
[953] See **III.1.A.b.** Events which occurred between 1970 and 17 April 1975. Targeting policy against former Khmer Republic soldiers and officials, *supra*.
[954] Judgement, para. 739.
[955] The Chamber was forced to recognise this: Judgement, para. 678.
[956] *Mémoire final*, **E295/6/4**, paras. 81 to 93.
[957] Judgement, paras. 682 to 687.

438. The Chamber acknowledged that *"there is no evidence that [KHIEU Samphân] knew of the specific nature of the crimes committed at Tuol Po Chrey"*.[958] That acknowledgement should have resolved the issue, in that it precluded a finding beyond reasonable doubt that the Appellant intended that crimes be committed.

439. Instead, the Chamber declared itself *"satisfied"* that the Appellant knew that some executions were being carried out because he was aware of a consistent pattern of targeting, because of his presence at B-5 and then at the Phnom Penh railway station.[959] However, there was no evidence establishing beyond reasonable doubt that KHIEU Samphân was aware of a consistent pattern of targeting while at those two locations.[960]

440. Accordingly, the Chamber erred in law and fact in holding that the Appellant had knowledge of the crimes committed at Tuol Po Chrey. The Appellant's conviction for those crimes must be set aside.

III.4.D.b. Substantial contribution

441. The Chamber committed errors of law and fact in holding that KHIEU Samphân's substantial contribution prior to and during the events at Tuol Po Chrey had reached the threshold necessary for him to incur criminal responsibility for participating in a JCE, as well as aiding and abetting.[961] Having already discussed the Appellant's alleged contribution up till 17 April 1975,[962] we will now turn to his alleged contribution between 17 and 26 April 1975 to the implementation of a targeting policy against former Khmer Republic officials, which was allegedly brought to fruition at Tuol Po Chrey. Given that the Appellant's contribution to the crimes allegedly committed at Tuol Po Chrey starting on or prior to 17 April 1975 has been impugned in the section on KHIEU Samphân's criminal responsibility prior to 17 April 1975, the only two events falling within the period between 17 and 26 April 1975 are his speech of 21 April 1975 and his presence at B-5 or, after 25 April, at the Phnom Penh railway station.

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[958] Judgement, para. 955.
[959] Judgement, paras. 954 to 955.
[960] See **III.3.C. KHIEU** during movement of population (phase one). Presence at B-5 and the Phnom Penh railway station, *supra*.
[961] Judgement, paras. 972, 976, 987 (JCE), and 1051 (aiding and abetting).
[962] See **III.3.C. KHIEU** during movement of population (phase one).Victory Message of 21 April 1975, *supra*.

442. **Speech.** ***JCE and aiding and abetting.*** The purpose of the speech he made on 21 April 1975[963] was to congratulate the CPNLAF units and the Cambodian people. Despite the wilful bad faith the Chamber manifested in singling out one sentence (paragraph 982) in the speech about enemies dying *"in agony"*, nothing in the speech relates to a targeting policy against former Khmer Republic soldiers and officials. It was a victory message outlining the key moments in the war, and it does not constitute a substantial contribution to a targeting policy that was allegedly implemented at Tuol Po Chrey. The Chamber never demonstrated that the speech constituted a substantial contribution engaging the Appellant's responsibility or the impact that it might have had on the perpetrators of the crimes committed at Tuol Po Chrey, since none of them testified to having heard the speech. Accordingly, the Chamber erred in concluding that the speech was sufficient to establish that the Appellant had substantially contributed to the criminal aspects of the common purpose.

443. **B-5 and the Phnom Penh railway station.** ***JCE and aiding and abetting.*** The same goes for the Appellant's presence at B-5 and at the Phnom Penh railway station between 17 and 26 April 1975. It has been noted in the factual submissions regarding movement of the population (phase one) and the events at Tuol Po Chrey, and in the section on the Appellant's responsibility at the time of movement of population (phase one)[964] that the Chamber was unable to establish that the Appellant attended meetings during that period or, for that matter, that those meetings concerned a targeting policy against former Khmer Republic soldiers and officials. Accordingly, the Chamber did not establish in this regard that the Appellant substantially contributed to the criminal aspects of the common purpose.

444. **Conclusion.** Insofar as assistance provided exclusively *post-facto* cannot satisfy the *actus reus* requirement of JCE, the Chamber failed to establish that those two elements had contributed sufficiently to the criminal policy of the common purpose against former Khmer Republic officials; the Chamber's finding must be invalidated.

III.4.D.c. Intent

[963] **E3/118**: ERN 00166994-96.
[964] See **III.3.C.**KHIEU Samphân at the time of movement of population (phase one). Presence at B-5 and at the Phnom Penh railway station; **III.3.D** KHIEU Samphân's criminal responsibility at the time of movement of population (phase one), *supra*.

445. The Chamber erred in holding that the Appellant possessed the requisite intent to be convicted under the two modes of liability in respect of the crimes committed at Tuol Po Chrey.[965] Insofar as the Appellant never had knowledge of the crimes, this wrong premise cannot be used to demonstrate his criminal intent.

446. **JCE.** It has been noted that proof of the *mens rea* of JCE lies in the intent shared by all co-perpetrators to commit the crimes. Moreover, insofar as the common purpose was not entirely or necessarily criminal, the fact alone that the Appellant joined the common purpose is not a sufficient basis to find that he possessed the requisite criminal intent.[966] The Chamber had to establish that the Appellant contributed to the criminal aspects of the common purpose. However, it failed to do so. Accordingly, no criminal intent could be inferred solely from the Appellant's participation in the implementation of the common purpose

447. Moreover, the Chamber relied on the Appellant's contribution to the common purpose in holding that he possessed the requisite discriminatory intent of the crime of persecution on political grounds. This simplistic conclusion is yet again inconsistent with the Chamber's own findings on the non-criminal aspects of the common purpose.

448. **Aiding and abetting.** The Chamber held that the Appellant *"knew that"* crimes *"would likely be committed."*[967] Such a low threshold is not sufficient to characterise the intent of its perpetrator.[968] Moreover, the Chamber acknowledged that the Appellant was not aware of the essential elements of the crimes committed at Tuol Po Chrey. Accordingly, it could not find that he knew that his conduct would assist or facilitate the commission of the crimes.

449. **Conclusion on intent**. The Chamber failed to establish the Appellant's *mens rea*, its findings must be invalidated.

III.4.D.d. Overall conclusion on responsibility at the time of the events at Tuol Po Chrey

450. Given that it is impossible to satisfy the requirements of the modes of liability, the

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[965] Judgement, paras. 993 to 995 (JCE), 1051 (aiding and abetting).
[966] Judgement, para. 692; *Duch* Judgement, para. 509; *Kvočka* Appeal Judgement, paras. 82 and 118.
[967] Judgement, para. 1050 (Tuol Po Chrey).
[968] See **II.1.B.d** Applicable law. Aiding and abetting, *supra.*

Appellant's convictions for aiding and abetting and JCE for the crimes committed at Tuol Po Chrey, as his conviction for planning and instigating, must be quashed.[969]

III.5. MOVEMENT OF THE POPULATION (PHASE TWO)

III.5.A. Facts relating to movement of the population (phase two)

451. **Consistent pattern of conduct**. The Chamber committed an error of fact in holding that movements of population between rural areas after 1975 followed a consistent pattern of conduct, whereby *"New People"* were often targeted for displacement by being steadily *"forced, coerced or deceived to move"* without being provided with adequate transport, food or hygiene facilities.[970]

452. Two preliminary observations are in order. On the one hand, the Chamber claimed that the consistent pattern of conduct existed at the time of the pre-1975 population movements. However, as the Defence has pointed out, the existence of a consistent pattern of conduct common to the population movements is highly questionable.[971] On the other hand, the Defence has also noted that the inconsistencies and contradictions in the definition of the term *"New People"* given by the Chamber[972] invalidate all of the Chamber's findings on the treatment meted out to this loosely defined group of people.

453. Its own failings notwithstanding, the Chamber held that *"[o]ften, "New People" were targeted for displacement."*[973] However, that conclusion is inconsistent with the Chamber's own findings. On the one hand, it held that *"the Party leadership instructed that only those people necessary for farming these areas would remain, and the rest would be moved"*.[974] This finding that the workforce was reorganised with a view to making it more efficient should logically have led the Chamber to the conclusion that people were not displaced based on whether they were "New People" or "Old People". By finding to the contrary, the Chamber failed to meet its duty to

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[969] See Applicable law **II.1.B.b** Planning and **II.1.B.c** Instigating, *supra.*
[970] Judgement, para. 803.
[971] See **III.1.A.b.** Events which occurred between 1970 and 1975. *Consistent pattern of movements of the population from the cities and Consistent pattern of movements of the population between rural areas, supra.*
[972] See **III.3.B.** Legal characterisation of the facts relating to movement of the population (phase one). Persecution on political grounds, *supra.*
[973] Judgement, para. 803.
[974] Judgement, para. 587.

make reasonable findings. On the other hand, the Chamber noted that "*[i]n some locations, exclusively "New People" were displaced while in others both "Old People" and "New People" were transferred"*.[975] Here again, the Chamber's reasoning suffers for logic. It should be recalled that a consistent pattern of conduct entails the systematic use of similar, if not identical, means to achieve the desired outcome. Therefore, after noting that in some areas all the people were transferred, the Chamber could not reasonably conclude that there was a consistent and continuous policy specifically targeting "New People", let alone that there was a consistent pattern of conduct to displace them.

454. Moreover, while at the same noting that in some locations people left voluntarily and those who did not want to leave did not face any consequences,[976] the Chamber thought it could conclude that based on a consistent pattern of conduct in the movement of the population *"people were steadily forced, coerced or deceived to move"*.[977] Having made that preliminary finding, no reasonable trier of fact would have reached this conclusion.

455. This was not the only reasonable inference available, especially because the Defence had highlighted it in its closing brief and final submissions that the zones (including the Northwest Zone) to which people where moved during movement of population (phase two) were deemed more fertile and that Khmer Rouge officials had reason to believe that those sent there would enjoy better living conditions.[978] However, while the Chamber noted these justifications in the Judgement,[979] it did not give reasons for its implicit rejection of the Defence's argument to this effect. Yet, the evidence put before the Chamber[980] points to a different conclusion than that of a systematic and widespread intent of Khmer Rouge cadres to deceive the people moved. By not providing proper reasons for its decision on this point and given the low probative value of the

[975] Judgement, para. 588.
[976] Judgement, para. 588.
[977] Judgement, para. 803.
[978] *Mémoire final*, **E295/6/4**, paras. 65 to 69.
[979] Judgement, para. 589.
[980] Judgement, para. 589, footnote 1779: T. 24 October 2012, LAY Bony, p. 33 (Everyone was very well aware that Battambang was a rich province); Interview of BUT Savan by SOAS, 29 August 2005, **E3/4659**, p. 1 (Many thought that things were a lot easier in Battambang); T. 15 July 2013, HEDER, **E1/223.1**, p. 66; T. 11 April 2013, PONCHAUD, **E1/180.1**, p. 28.

evidence it cited,[981] the Chamber could not reasonably conclude that a consistent pattern of conduct involving force, coercion and deception existed in support of its finding that the Appellant was responsible as part of a JCE. Its findings are not compelling beyond reasonable doubt, and must be invalidated.

456. Finally, the Chamber claimed that pursuant to a consistent pattern of conduct *"people were transported in crowded boats, trucks and trains".*[982] However, once again, the evidence cited by the Chamber reveals wide disparities in the methods used and the conditions in which people were moved.[983] Therefore, in view of the widely differing conditions, the Chamber could not conclude that a consistent pattern of conduct existed whereby people moved were systematically transported under inhumane conditions.

457. The Chamber also erred in holding that *"both during the movement or on arrival at their destination"* people were *"shot by their Khmer Rouge guards".*[984] On the one hand, the Chamber erred in law in that it violated its Decision on severance by making findings on events which would have occurred at the people's destination.[985] On the other hand, in claiming that people were shot, the Chamber relied on evidence of very low probative value,[986] or that of a single witness.[987] No reasonable trier would have relied on such isolated, marginal events in finding beyond reasonable doubt that a widespread criminal scheme resulted from the impugned consistent pattern of conduct.

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[981] Judgement, para. 589, footnote 1783: T. 29 May 2013, CHAN Socheat, p. 44 (this witness referred to "*Angkar Leader*", but it is not clear who/what he meant – on this point, see **III.0** Cross-cutting errors. "Party Centre" and "Angkar"); CHEA Leng's Interview Record, **E3/5231**, p. 3 (the Defence was not afforded the opportunity of questioning this witness); Refugee accounts, undated, **E3/4590**, pp. 163 and 167 (the written document is illegible, and also undated); BECKER's book, **E3/20**, p. 230 (unsourced general comments).
[982] Judgement, para. 803.
[983] The Chamber describes several means of transport: trucks (para. 591, footnote 1789: the witnesses only talked about being transported by truck, but did not say that it was under inhumane conditions; the Chamber considers its claim established); boats (para. 594: the Chamber notes that *"some boats were not overcrowded"* and that other people were transported in complete darkness); trains (para. 597: the Chamber notes that some trains were over-crowded while others were not).
[984] Judgement, para. 803.
[985] As concerns cooperatives. See **I.1** Breaches of the Right to a Fair Trial. Subject-matter jurisdiction following severance of the charges, *supra.*
[986] Judgement, paras. 593, 597, footnote 1838, Civil Party Application of DY Roeun, **E3/4656**, p. 2.
[987] Judgement, 595, footnotes 1817 and 1818: T. 29 May 2013, CHAN Socheat, pp. 43-44, 44-45, and 51-52. Judgement, para. 597, footnote 1838.

458. The Chamber's erroneous findings on the existence of a consistent pattern of conduct led to significant errors of law in the assessment of the Appellant's responsibility. Indeed, the Chamber held that owing to the existence of a consistent pattern of conduct in the movement of populations between rural areas, KHIEU Samphân knew that crimes were being committed during movement of population (phase two).[988] Moreover, he was convicted of planning the crimes committed during movement of population (phase two) on the basis of his alleged knowledge of the population movement effected according to the impugned consistent pattern of conduct.[989] Accordingly, insofar as those errors of fact and law caused the Appellant severe prejudice, the Chamber's findings on pre-1975 population movements must be invalidated in their entirety.

459. **The September 1975 policy document**. The Chamber committed an error of fact in holding that *"a September 1975 policy document"*[990] ("1975 policy document") – even though the document in question does not *"name its authors or those responsible for the [alleged] plans and policies"* or indicate *"when these plans and policies were decided"* – resulted from discussions within *"the Party leadership"* at a meeting which took place in *"early September 1975"*.[991] In light of the evidence put before it, the Chamber could not conclude that such a meeting took place without offending the *in dubio pro reo* principle.

460. In its attempt to determine the provenance of the 1975 policy document in order to make up for its lack of probative value, the Chamber cited some other evidence[992] claiming that it corroborates the impugned finding. However, the Chamber's deductive reasoning is variously flawed. Accordingly, its reasoning must be invalidated in its entirety.

461. First, in order to link the 1975 policy document to a hypothetical decision of the *"Party leadership"*, the Chamber relied on statements made by the Appellant;[993] it has been demonstrated above that those statements were distorted[994] and their distortion invalidates the

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[988] Judgement, para. 956.
[989] Judgement, paras. 1025, 1027 and 1029.
[990] **E3/781**, pp. 1 to 22.
[991] Judgement, paras. 748-49.
[992] Judgement, para. 749, footnotes 2353 to 2357.
[993] Judgement, para. 749.
[994] See **III.0** Cross-cutting errors. Powers and functions of the Standing Committee, *supra*

Chamber's reasoning. The Chamber then cited a 1996 interview of IENG Sary by HEDER concerning a meeting in September 1975 which he allegedly attended.[995] The Chamber committed a further error in holding that the 1975 policy document reflects the matters discussed at the meeting. However, even assuming that IENG Sary could clearly remember the events 31 years on, his account of the meeting does not adequately reflect the content of the 1975 policy document referred to by the Chamber. For example, IENG Sary claimed that he attended a Standing Committee meeting[996] at which the matters discussed included rejection of Vietnamese domination and fear of that powerful neighbour.[997] However, nothing in the 1975 policy document talks about that.[998] Moreover, when HEDER asked him if population movement (phases one and two) were discussed at the meeting, IENG Sary answered: *"That matter was not discussed"*.[999] Yet, movement of the population (phase two) was among the issues the Chamber singled out in the 1975 policy document.[1000] Insofar as IENG Sary and the Chamber were clearly not talking about the same meeting, the Chamber could not reasonably conclude that in his interview with HEDER, IENG Sary was in fact referring to the meeting from which the 1975 policy document allegedly resulted.

462. The Chamber could equally not rely on Philip SHORT's book as providing corroborative evidence after it had just stated that his *"source for [the book] [was] unclear"*.[1001] Accordingly, it could not reasonably conclude that the 1975 policy document resulted from the Central Committee meeting he described. This was especially so because according to SHORT, the meeting took place in *"mid-September"*[1002] whereas the Chamber claims by inference that it took place in *"early September"*.

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[995] Interview of IENG Sary by Stephen HEDER, 17 December 1996, **E3/89**.
[996] IENG Sary said that also present were: KHIEU Samphân, KOY Thuon, VORN Vet, CHEAT Neak, as well as a number of military leaders. Some other people were also present, but it is difficult to say who IENG Sary was referring to because of the static in the exchange. **E3/89**, pp. 2 and 3.
[997] Interview of IENG Sary by Stephen HEDER, 17 December 1996, **E3/89**, pp. 2 to 5 *Sary: "In September 1975 there was a meeting to decide what to do then to keep Viet Nam from coming to control Cambodia". Steve: "So was this decided at the Standing Committee level or by the Central Committee?" Sary: "It was the Standing Committee, not the Central Committee. The Standing Committee."*
[998] **E3/781**, pp. 1 to 22.
[999] **E3/89**, pp. 4 and 5.
[1000] Judgement, para. 748.
[1001] Judgement, para. 749.
[1002] SHORT's book, **E3/9**, pp. 304 to 308.

463. The Chamber also cited an October-November 1975 *Revolutionary Flag* magazine in an attempt to corroborate the impugned finding. However, while the magazine does report on an earlier *"Centre Party Congress"*,[1003] there is nothing to indicate that the Congress took place in early September 1975. The magazine also reports on one of the issues dealt with in the 1975 policy document, namely the production of three tonnes of paddy indicating that this was the target for 1976,[1004] whereas the September 1975 policy document describes this as a *"resolution"* for 1977.[1005] This is another inconsistency invalidates the Chamber's finding on the provenance of the 1975 document.

464. Finally, the Chamber cited CHANDLER's claim that *"the overall economic plan (...) which emerged in late 1975"*[1006] *"was a product (...) of the Central Committee"*.[1007] In view of the doubts concerning his claim and the fact that it is from an unidentified source, a reasonable trier could not rely on it alone to conclude that the 1975 policy document *"reflect[s]"* *"the economic policies"* discussed at a *"Party leadership"* meeting held *"in early September 1975"*.

465. Since it was impossible to identify the provenance and the authors of the 1975 policy document, it is clear that the document does not meet the minimum requirements for its admission into evidence.[1008] With the interests of a fair trial in mind, a reasonable trier of fact would have excluded that document from the record and, in any event, would not have relied on it in assessing the development of the CPK's economic policies. Thus, not only must the Chamber's findings on the probative value of the 1975 policy document be quashed, all the factual findings it made in reliance on it must also be invalidated, including the ones concerning KHIEU Samphân's

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[1003] *Revolutionary Flag*, October-November 1975, **E3/748**, p. 12.
[1004] *Revolutionary Flag*, October-November 1975, **E3/748**, pp. 10 and 15.
[1005] **E3/781**, p. 6.
[1006] Judgement, para. 749.
[1007] Judgement, para. 749, footnote 2357, T. 19 July 2012, David CHANDLER, pp. 86 to 90, and 94 to 97.
[1008] Since this document has no probative value, the Chamber should not have interpreted it for inculpatory purposes, by claiming, for example, that it refers to "*the need to reward the 'Old People', as the 'New People' could not be "guaranteed"*" (Judgement, paras. 748, 1026). The truth is the document contains no such message, instead, it indicates that the two groups worked together: "[TRANSLATION] both the Old People and the New People, everyone was working at a brisk pace with no hesitation whatsoever". (E3/781, p. 3). Therefore, even assuming that the document is genuine, the Chamber could not rely on it in concluding that the regime's efforts to improve the people's living conditions proved the Khmer Rouge's discriminatory intent which relied on resentment of "New People". Therefore, the Chamber yet again manifested its bias.

alleged involvement in the development of those policies.[1009]

Plans and goals of the division of people.

466. ***The 1977 plan developed in November 1976.*** The Chamber committed an error of fact in holding that the 1977 plan provided for *"the division of people according to their class"*[1010] although there was no evidence showing that this objective was affirmed when the plan was adopted. The documents it cited, namely *Revolutionary Flag* magazines from 1976 and 1977 and written statements, do not support its finding.

467. ***Revolutionary Flag magazines from 1976 and 1977.*** According to the November 1976 *Revolutionary Flag* report regarding the 1977 plan which was adopted on 17 and 18 November 1976, the 1977 plan did not envisage the division of people according to their class.[1011] This alone is sufficient grounds to invalidate the Chamber's finding. The only written record where for the first time the division of people is referenced – with no proof that it was discriminatory[1012] – is found in the April 1977 *Revolutionary Flag*.[1013] Not only does it not show that the division of people according to their class was decided six months earlier, it also reports on events in the cooperatives in 1977 which are outside the scope of the instant case. By its reliance on this issue of *Revolutionary Flag* magazine, the Chamber adjudicated upon facts which were not subjected to the adversarial process and erred by violating its own Severance order.[1014]

468. ***Reliance on written statements.*** The Chamber also erred in holding that written statements (records of witness interviews and civil party applications) are admissible in support of its findings. On the one hand, since the witnesses and civil parties concerned were not

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[1009] Judgement, paras. 751, 1023.
[1010] Judgement, para. 1026.
[1011] Judgement, paras. 610 and 770; *Revolutionary Flag*, November 1976, **E3/139**.
[1012] See **II.5.A** Facts relating to movement of the population (phase two). – Absence of discrimination against the "New People", *supra*.
[1013] Judgement, para. 621; *Revolutionary Flag*, April 1977, **E3/742**, p. 3.
[1014] See **I.1** Breaches of the Right to a Fair Trial. Subject-matter jurisdiction following severance of the charges, *supra*.

examined, the Defence was denied its right in regard to the examination of witnesses. On the other hand, their evidence only relates to events which allegedly occurred in 1977, i.e. outside the scope of Case 002/01. In any event, none of those statements provides a basis for establishing a nexus between those isolated accounts and any order of the CPK to divide people according to their social class.

469. ***Other evidence.*** Finally, the Chamber contradicted itself because elsewhere it cited much evidence which only reflected the Party's goal to allocate labour strategically.[1015] This evidence in no way reflects the impugned division of people. This error invalidates its decision even more. These repeated errors of fact occasioned a miscarriage of justice insofar as they contributed to the Appellant's conviction for planning the crimes committed during movements of the population. No reasonable trier would have relied on that evidence to conclude that there was a plan in 1977 to divide people according to a 1976 Party leadership decision.

470. **Control of means of transport**. The Chamber erred in holding that the "Party Centre"[1016] controlled the means and modes of transportation of those who were displaced. Overuse of the nebulous term "Party Centre" has already been impugned *supra.*[1017] In so doing, the Chamber failed to meet its duty to give reasons by identifying the individuals or organs in charge of the responsibilities it attributed to this shadowy entity. While such simplistic reasoning may seem convenient, here again, it is no guarantee for a reasonable decision.

471. Thus, the Chamber contradicted itself in claiming that the "Party Centre" had control of the modes of transportation. It claimed that the modes of transportation were under the management of the Train Unit from October 1975, and that from April 1976, the Train Unit was placed under the control of the Communications and Transportation Committee.[1018] However, neither of these organs ever featured in the Chamber's otherwise extensive definition of "Party Centre".[1019] Its finding does not even stem from its own logic. Moreover, the Chamber not having demonstrated the Appellant's membership in this nebulous "Party Centre", it could not rely

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[1015] Judgement, para. 610; footnotes 1907 to 1909.
[1016] Judgement, para. 1027.
[1017] See **III.0** Cross-cutting errors. "Party Centre" and "Angkar", *supra*.
[1018] Judgement, paras. 578 and 809.
[1019] Judgement, para. 206.

thereupon in finding that he was responsible for planning the crimes committed during movement of population (phase two).[1020] The Chamber's findings must be overturned in their entirety.

472. **Vietnamese border.** The Chamber erred in holding that people were relocated away from the Vietnamese border under the false pretext of *"re-education, grouping and screening ['of bad elements']"*.[1021] For its finding, the Chamber relied solely on evidence concerning 1978 events.[1022] However, the Defence recalls that such matters are squarely outside the scope of Case 002/01.[1023] Since those events were not subjected to the adversarial process, the findings based thereupon must be invalidated.

473. In any event, having noted that Vietnamese incursions occurred only in the period from "*the end of 1976 and into 1977*"[1024] – the Defence recalls that 1977 events are also outside the scope of Case 002/01[1025] – the Chamber could not rely solely on evidence relating to 1978 events – moreover having no link with those events – in finding that the relocations in connection with the incursions were effected under false pretexts. Such reasoning is patently anachronistic, and must be invalidated on that basis.

474. By proceeding in this manner, and in view of the evidence before it, the Chamber failed to make the only finding that a reasonable trier would have made, namely that the population movements from *"the end of 1976 and into 1977"* were effected on the basis of military necessity and for the sole purpose of protecting the population from Vietnamese attacks.

475. **Deliberate refusal to provide information.** The Chamber erred in holding that the deprivations of liberty during movement of population (phase two) were accompanied by *"a deliberate refusal to provide accurate information regarding the fate or whereabouts of the persons concerned"*.[1026] According to the Chamber, this is because the *"Khmer Rouge provided*

[1020] Judgement, para. 1027.
[1021] Judgement, para. 625.
[1022] Judgement, para. 625, footnote 1975.
[1023] See Breaches of the Right to a Fair Trial. **I.1.**, *supra.*
[1024] Judgement, para. 624, footnotes 1971 to 1973.
[1025] See Breaches of the Right to a Fair Trial. **I.1.**, *supra*
[1026] Judgement, para. 641.

no information or false information".[1027] The first scenario would be where affirmative requests were made and denied. However, the Chamber asserted that it did not identify *"any evidence that people affirmatively sought information from the Party as to displaced persons".*[1028] That therefore is totally inconsistent with the impugned finding. The second scenario requires characterisation of what the alleged deception entailed. Here again, nothing in the evidence cited by the Chamber shows[1029] that the Khmer Rouge deliberately provided information about displaced persons with a view to misleading anyone.

476. Realising that its reasoning was flawed, the Chamber committed a further error by invoking the principle of secrecy to support of its claim that *"the Khmer Rouge had created an environment in which people were afraid to question or to seek information from the Party".*[1030] That is pure speculation, since no evidence was provided to show that any such fear was expressed. Invoking the principle of secrecy – as it had done previously to justify *"the confusion and contradictions within the testimony"*[1031] of witnesses who appeared before it – cannot be used continuously to cover up the Chamber's failures to meet its fundamental obligations to give reasons and of impartiality.

477. Accordingly, absent tangible evidence of *"a deliberate refusal"* to provide information about displaced persons, the Chamber could not conclude beyond reasonable doubt that people were denied such information. Its finding must be invalidated.

478. **Definition of the term "New People"**. The Chamber erred in claiming that *"New People" "included officials of the Khmer Republic, intellectuals, landowners, capitalists, feudalists and petty bourgeois"*[1032] even though the term "New People" does not feature in any of the four issues of the *Revolutionary Flag* magazines it cited in support of that claim.[1033] Accordingly, it could not include these groups by using terms that were not part of the Khmer

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[1027] Judgement, para. 641.
[1028] Judgement, para. 641.
[1029] Judgement, para. 641, footnotes 2024 to 2027.
[1030] Judgement, para. 641, footnote 2028, referring to paragraph 199.
[1031] Judgement, para. 199.
[1032] Judgement, para. 613, the same the definition as in paragraph 169.
[1033] *Revolutionary Flag*, August 1975, **E3/5**, pp. 10 and 12; *Revolutionary Flag*, October-November 1975, **E3/748**, pp. 19 and 20; *Revolutionary Flag*, September-October 1976, **E3/10**, p. 29; *Revolutionary Flag*, July 1977, **E3/743**, p. 9. The same *Revolutionary Flag* issues cited at paragraph 169 (E3/5, E3/10, E3/743).

Rouge terminology used in the magazines it cited. In this instance, the Chamber failed to meet its fundamental duty to give reasons. Its findings must therefore be invalidated on that basis alone.

479. Further, the Chamber contradicted itself in claiming that in 1976 the Party *"still considered it essential to attack "New People", the remnants of feudalists and capitalists"*[1034] although up to that point, it had considered that "New People" included feudalists and capitalists. By shedding these categories from its definition, the Chamber once again demonstrated that its reasoning was tentative. That reasoning must be invalidated.

480. Also, in reliance on one of the aforementioned *Revolutionary Flag* magazines, the Chamber equates "New People" with "new peasants"[1035] although the members of these two groups differ in some respects. For example, in addition to the groups already cited by the Chamber, "new peasants" included *"other workers and labourers"*. Now, if it is true, as the Chamber claims, that "class struggle" referred to the Party's hostility against the "New People,"[1036] it is totally inconsistent to include "workers" among them, since, according to communist ideology, which the Khmer Rouge espoused, "class struggle" involves a revolution by the proletariat, which, obviously, included the working class, to bring down the oppressor classes. Accordingly, given the Chamber's claim that "New People" were targeted as a class, they could not include "workers" since the regime viewed the latter as one of its pillars.[1037] The term "other workers" is generic and does not provide any basis for identifying beyond reasonable doubt the entities it encapsulates. Accordingly, "other workers" cannot be considered "New People," and no reasonable trier of fact would have concluded that they were part of the "New People", or, for that matter, that they were likely to be related to former Khmer Republic officials, civil servants, intellectuals, landowners, capitalists, feudalists and petty bourgeois.

481. Finally, still in reliance on one of the *Revolutionary Flag* magazines as above,[1038] the Chamber created an unacceptable confusion between the two terms "enemy" and "New People" although, as already pointed out by the Defence, the *Revolutionary Flag* magazine never uses the

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[1034] Judgement, para. 616.
[1035] Judgement, para. 613, referring to *Revolutionary Flag*, September-October 1976, **E3/10**, p. 29-30.
[1036] Judgement, para. 613.
[1037] *Revolutionary Flag*, September 1977, **E3/11**, p. 22-23.
[1038] *Revolutionary Flag*, July 1977, **E3/743**, p. 9.

term "New People" and therefore "New People" could not be considered synonymous with "enemies". Moreover, the definition of "enemies" in this particular issue of *Revolutionary Flag* differs somewhat from the one found in another issue of the publication,[1039] and that raises reasonable doubt about the actual meaning of the term. Accordingly, the Chamber's findings – where it draws a parallel between the elusive term "enemies" and "New People", which does not feature in the documents cited – are not a compelling inference beyond reasonable doubt and must be invalidated.

482. In light of all of the inconsistencies and contradictions in the definition of the term "New People," the Chamber could not conclude that "New People" constituted a "sufficiently discernible group".[1040] This miscarriage of justice caused the Appellant prejudice since determining what constitutes a discernible group is among the elements of the crime of persecution on political grounds[1041] for which KHIEU Samphân was convicted.[1042] Accordingly, the Chamber's findings must be invalidated in their entirety.

<u>Absence of discrimination against the "New People"</u>

483. ***<u>Absence of differential treatment</u>.*** The Chamber committed an error of fact in holding that "Khmer Rouge soldiers and officials were ordered to administer the "New People" and "Old People" separately"[1043] even though the evidence it cited shows no such intent by the Party to discriminate.[1044]

484. For this finding, the Chamber referred to paragraph 621 of the Judgement and in particular to its holding that those who were deemed "less reliable" were assigned to perform "tasks secondary (to farming)" in the cooperatives.[1045] On the one hand, that is a clear violation of the Decision on severance, which excludes the functioning of cooperatives from the scope of Case

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[1039] *Revolutionary Flag*, September 1977, **E3/11**, p. 22-23, considering that the enemies were the imperialists, especially the US imperialists, but also included feudalists, land-owners and reactionary compradors. The text excludes petty bourgeois and home-grown capitalists from this category, because they were considered to be assets for the revolution.
[1040] Judgement, para. 653.
[1041] Judgement, para. 428; *Duch* Appeal Judgement, paras. 274 and 277.
[1042] Judgement, paras. 996, 1003, 1013, 1015, 1029, 1032, 1036, 1043, 1046, 1052.
[1043] Judgement, para. 653.
[1044] Judgement, paras. 621-22, footnote 1962 to 1966.
[1045] Judgement, para. 621.

002/01; moreover, those facts were not subjected to the adversarial process.[1046] On the other hand, the Chamber distorted the evidence. Thus, while the magazine *Revolutionary Flag* talks about the need for "[TRANSLATION] strategic redistribution of forces", including entrusting the management of the cooperatives to "poor" but experienced farmers,[1047] nothing in it supports the finding that an order was issued to treat the "New People" more harshly. The Chamber could not draw that conclusion on the basis of this evidence.

485. The Chamber also referred to paragraph 622 of the Judgement and cites the alleged division of people in the cooperatives in 1977. Among the documents it cited was an April 1977 *Revolutionary Flag* magazine,[1048] which presents the various members of the cooperatives that year. Once again, the fact that the functioning of the cooperatives is outside the scope of Case 002/01 is sufficient grounds to invalidate the Chamber's finding. In any event, the Chamber could not reasonably rely on this *Revolutionary Flag* to infer any injunction that might have been issued by the Party to treat "New People" differently from the rest of the population. It could not do so especially because Witness YUN Kim – whom it also cited – testified in court that this classification was not a precondition to instituting harsher living conditions for the "New People" and that *"*[TRANSLATION] *there were no differences between the different groups of people"*. He testified further that he *"did not know the actual reason for the classification of people"*.[1049] The Chamber therefore interpreted the documents inculpatorily by distorting them so as to make them say what they did not say. Therefore, on the strength of that evidence alone, a reasonable trier would not have found that an order was issued to treat the "Old People" differently from the "New People." This error of fact invalidates the Chamber's findings. Moreover, despite the reasonable doubt surrounding the meaning of the Khmer term applied to the third group of people, the Chamber elected to use the most pejorative term ("*destitués" [*depositee members]") instead of the more neutral term ("*confiés [not translated into English]*") which was used several times by YUN Kim.[1050] This flagrant failure to discharge its duty of impartiality further

[1046] Decision on severance, 26 April 2013, **E284**.
[1047] Weekly Report of Region 5 Committee, 21 May 1977, **E3/178**, pp. 4, 9, 10 and 14.
[1048] *Revolutionary Flag*, April 1977, **E3/742**, p. 14.
[1049] T. 20 June 2012, YUN Kim, p. 29.
[1050] *Revolutionary Flag*, April 1977, **E3/742**, p. 14; T. 19 June 2012, YUN Kim, pp. 65 and 90; T. 20 June 2012, YUN Kim, p. 30.

invalidates its findings.

486. Finally, the Chamber's finding was not the only reasonable finding, particularly because the Defence had identified a great deal of evidence[1051] which shows that, in fact, the CPK urged its local officials to treat the "Old People" and the "New People" without discrimination. The Defence made clear and detailed submissions to this effect both in its closing brief and final submissions.[1052] The Defence also highlighted the responsibility of local officials and the deviation from a political objective that was not meant to discriminate and was not criminal in nature. The Chamber failed to meet its duty to provide reasonable reasons by not excluding as unreasonable this other conclusion implying that the Appellant had joined a non-criminal political project. This error of law must be sanctioned and the Chamber's finding invalidated.

487. ***Khmer Rouge soldiers and officials possessed no generalised discriminatory intent***. The Chamber also committed an error of fact in holding that "Khmer Rouge soldiers and officials" possessed the intent to discriminate against the "New People" in that the forced transfers they effected specifically targeted the "New People."[1053] The Defence has already demonstrated that the inconsistencies in the Chamber's definition of "New People" invalidate all of its findings in this regard.[1054] The Defence has also indicated that on the strength of the evidence before it, the Chamber could not conclude beyond reasonable doubt that "New People" were specifically

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[1051] T. 8 May 2013, Philip Short, **E1/191.1**, pp. 49 to 54; T. 21 March 2012, DUCH, **E1/52.1**, p. 16-17; T. 31 January 2012, NUON Chea, **E1/36.1**, pp. 25 and 26; *Revolutionary Youth*, July 1975, **E169/4/1.1.1**, p. 9; *Revolutionary Youth*, July 1975, **E3/166**, pp. 33 to 34; T. 30 July 2012, PHY Phuon, **E1/98.1**, pp. 72 to 73; T. 31 July 2012, PHY Phuon, **E1/99.1**, pp. 46 to 47; T. 23 April 2013, CHHOUK Rin, **E1/182.1**, pp. 110 and 111; HEDER's Analytical Report, **E3/4527**, pp. 8 and 9, as he indicated in his testimony (T. 17 July 2013, HEDER, **E1/225.1**, pp. 36, 42 to 43), the witness relied on the following sources, which were admitted into evidence: "Record of the Standing Committee Tour of the North-West Zone", 20-24 August 1975, **E3/216**; "Examination of the Grasp of the Implementation of the Political Line on Restoring the Economy and Setting Up National Construction in Every Domain", 1975, **E3/781**; *Revolutionary Youth* magazine, October 1975, "Cambodian Youth Must Forge Themselves in the Movement to Strengthen and Expand the Production Cooperatives", **E3/729**, pp. 3 to 8; *Revolutionary Youth*, October-November 1975, "Strengthen the Stance of Fighting to Sort Out Popular Living Standards"; *Revolutionary Youth*, November 1975, "Completely Eliminate Private and Individual Property and Powerfully Strengthen and Expand Collective Property", **E3/750**, October-November 1977, pp. 9 to 14; *Revolutionary Flag*, "The Current Situation of the Cambodian Revolution and the Building of Every Level of the Party's Cadre", **E3/170**, pp. 3 to 20; *Revolutionary Youth*, **E3/760**, "Extract From the Instructions of the Comrade Party Representative at a Zone Conference, June 1976, pp. 8 to 32.
[1052] *Mémoire final*, **E3/295/6/4**, paras. 121 to 141; T. 25 October 2013, pp. 78 to 103.
[1053] Judgement, para. 656.
[1054] See **III.3.B.** Legal characterisation of the facts relating to movement of the population (phase one). Persecution on political grounds (definition of "New People"), *supra*.

targeted during movement of population (phase two).[1055] Accordingly, the Chamber's finding on the existence of an intent to discriminate against "New People" during movement of population (phase two) must be invalidated, insofar as it was based on the wrong premise.

488. The Chamber's finding is all the more open to criticism, because here again the Chamber contradicts its own findings. For example, it held that "in many locations, exclusively New People were forcibly transferred, while, in some locations, both "Old People" and "New People" were displaced."[1056] After having noted this, no reasonable trier of fact would have concluded that there was intent to discriminate against "New People." Moreover, in order to avoid making the only reasonable finding it should have made, namely that no discriminatory intent against "New People" existed during the movements of population, the Chamber claimed that only displacements of "Old People" and "New People" "occurred for specific reasons".[1057] This would seem to suggest that only the displacements of the "New People" were decided for discriminatory purposes only, with no rational objective. Here again, the Chamber distorted the evidence before it and adopted a simplistic reasoning which was not conducive to a reasonable finding. The Chamber erred especially in that, at the same time, it failed to meet its duty to give reasons by failing to explain why it ignored the Defence's submission that the displacement policy was devoid of any criminal discriminatory intent.

489. Indeed, the evidence led at trial was apt to show that there was a policy on nationwide transfer of population which was warranted by the need to re-distribute labour with a view to increasing agricultural production.[1058] Accordingly, the decision to relocate people was not based on their origin, but rather on a rational basis, namely that of making optimum distribution of the workforce.[1059] The Chamber's failure to state the reasons for its decision on this point amounts to an error of law and fact; its finding must be invalidated.

490. Finally, the Chamber also violated its own Decision on severance in claiming that "*Khmer*

[1055] See **III.1.A.b.** Events which occurred between 1970 and 1975. *Consistent pattern of movements of the population from the cities* and *Consistent pattern of movements of the population between rural areas.*
[1056] Judgement, para. 655.
[1057] Judgement, para. 655.
[1058] See **III.5.A** Facts relating to movement of the population (phase one). Consistent pattern of conduct, *supra.*
[1059] See **III.5.A** Facts relating to movement of the population (phase two). Consistent pattern of conduct, *supra.*

Rouge soldiers and officials intended to discriminate against the "New People" on political grounds by depriving them of their liberty and refusing to release information concerning their whereabouts (enforced disappearance)."[1060] The Chamber justified this finding by explaining that after having been questioned on their history, "New People" "were taken to be re-fashioned or re-educated at security centres. After some "New People" were identified at various cooperatives or work-sites, they were transferred and disappeared".[1061] Again, the Chamber relied on evidence that was not subjected to debate owing to its Decision on severance. It could not but commit errors of law in making inferences from facts relating to security centres, work-sites and cooperatives, since they are expressly excluded from the scope of Case 002/01.[1062] That alone is sufficient grounds to invalidate all of the Chamber's findings on the impugned intent of Khmer Rouge soldiers and officials to discriminate against the "New People".

491. All the errors committed by the Chamber occasioned a miscarriage of justice and caused prejudice to KHIEU Samphân. Intent to discriminate against the "New People" and the discrimination they suffered are requirements for the crime of persecution on political grounds for which the Appellant was convicted.[1063] Accordingly, the Chamber's reasoning must be invalidated and its findings quashed.

492. **Distribution/Content of *Revolutionary Flag* and *Revolutionary Youth***. The Chamber committed errors of fact concerning the distribution and content of the *Revolutionary Flag* and *Revolutionary Youth* magazines after 17 April 1975.[1064] For this finding, it relied in particular on a partial assessment of testimonial and documentary evidence.

493. **Distribution**. The Chamber cited the testimonies of three witnesses in this connection. It relied on the testimony KIM Vun in declaring itself satisfied that the above publications were delivered *"at the Zone, Sector, District and sub-district levels."*[1065] Yet, Witness KIM Vun was unable to say to whom those magazines were distributed or, for that matter, whether they were in

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[1060] Judgement, para. 655.
[1061] Judgement, para. 655.
[1062] Judgement, para. 506; Decision on severance, 26 April 2013, **E284**.
[1063] Judgement, para. 996 (JCE), 1029 (planning), 1032 (instigating) and 1036 (aiding and abetting).
[1064] Judgement, paras. 262 to 266, 613 to 623, 818, 958.
[1065] Judgement, para. 263.

fact distributed in the districts.[1066] The Chamber could not, without erring, find that the magazines were distributed to the people.[1067] YUN Kim's testimony concerning this specific point also raises doubt about the Chamber's finding that the magazines were delivered at the sub-district level.[1068] Finally, the Chamber relied on the testimony of PRAK Yut even though he testified that he had no specific recollection about these *Revolutionary Flag* magazines.[1069]

494. On the contrary, the Chamber was careful not to mention a key piece of information provided by this witness, namely that the peasants who became zone, sector or district heads were uneducated and illiterate. Yet, given that very few could understand the *Revolutionary Flag* and *Revolutionary Youth* magazines, that part of the witness' testimony runs counter to the Chamber's finding that ideas were widely disseminated and that the CPK communicated by means of those magazines. Moreover, the difficulties involved in distributing *Revolutionary Flag* magazines in the zones prior to 1975, as mentioned *supra*, persisted after 1975, because there were not enough copies for all Party officials.[1070] In view of the disparities between the districts,[1071] the aforementioned testimonies and the communication problems described in the minutes of a 1976 Standing Committee meeting,[1072] the Chamber could not conclude beyond reasonable doubt that those magazines helped in influencing or indoctrinating young people.[1073]

495. **Content**. Also, the Chamber could not rely on these post-1975 *Revolutionary Flag* and *Revolutionary Youth* issues in concluding that *"the class struggle referred to the Party's opposition to "New People."*[1074] Aside from the absence of a clear definition of the term "New People", as discussed *supra*,[1075] reference to the class struggle alone cannot support the conclusion that the magazines allegedly contributed to or instigated the commission of crimes. The *Revolutionary Flag* and *Revolutionary Youth* magazines cited by the Chamber in relation to

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[1066] KIM Vun, T. 21 August 2012, p. 95.
[1067] Judgement, para. 263, footnote 822.
[1068] YUN Kim, T. 19 June 2012, **E1/88.1**, p. 18 near [09.49.20].
[1069] Yut T. 26 January 2012, **E1/34.1**, p. 42 to 43 near [11.15.55].
[1070] See **III.1.A.b.** Events which occurred between 1970 and 17 April 1975. Distribution and content of *Revolutionary Flag* and *Revolutionary Youth* magazines, *supra*.
[1071] HAUD: T. 9 April 2013, **E1/178.1**, p. 106 [16:08:58], T. 11 April 2013, **E1/180.1**, pp. 45 to 48 [11:01:28].
[1072] Minutes of the 8 March 1976 Standing Committee Meeting, **E3/232**, p. 5, ERN 00323936.
[1073] Judgement, para. 265.
[1074] Judgement, paras. 613, 614, 621 to 623.
[1075] See **III.3.B.** Legal characterisation of the facts relating to movement of the population (phase one). Persecution on political grounds (definition of "New People"), *supra*.

the functioning of cooperatives are outside the scope of Case 002/01, and also, contrary to the Chamber's claims, do not show that a discriminatory policy against "New People" was adopted by the CPK leadership.[1076]

496. The Chamber also erred in relying on the *Revolutionary Flag* and *Revolutionary Youth* magazines for its finding that there was a policy to smash "enemies".[1077] In addition to the vagueness of the notion of "enemy", as described *supra*,[1078] the *Revolutionary Flag* magazines cited use a wide range of terms, consistent with the terminology used at the material time to refer to ideological enemies;[1079] this provided no basis to establish beyond reasonable doubt that a policy to smash enemies existed or that the Appellant knew that crimes would be committed.[1080] These erroneous interpretations of those magazines, effected in violation of the Decision on severance, were used by the Chamber to establish the crime of persecution on political grounds[1081] for which the Appellant was convicted,[1082] thereby occasioning a miscarriage of justice.

497. **Decision of 30 March 1976.** The Chamber committed an error of fact in holding that it was the Central Committee which produced the 30 March 1976 document referred to as the *"Central Committee Decision"*.[1083]

498. As noted *supra*, decisions were taken by the Standing Committee and not by the Central Committee, which was under the Standing Committee, seldom met and had no authority as such.[1084]

499. Moreover, a great deal of doubt surrounds the provenance and chain of custody of this document, of which the ECCC only has a copy. The Chamber did not address the Defence's

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[1076] See sections on discrimination against New People and movement of the population (phase two).
[1077] Judgement, para. 818.
[1078] See definition of the term "enemies", *supra*.
[1079] *Revolutionary Flag*, April 1977, **E3/742**, p. 11, ERN 00478502, regarding *CIA and KGB* agents; *Revolutionary Flag*, August 1975, **E3/5**, p. 22 ERN 00401497 regarding the loosely defined term *"enemies"*; *Revolutionary Flag*, April 1976, **E3/759**, ERN 00517852, regarding *"leading imperialists"*; *Revolutionary Flag*, August 1975, **E3/5**, pp. 7 to 8, ERN 00401482-83, regarding *"pawnbrokers"*.
[1080] Judgement, para. 958.
[1081] Judgement, paras. 653 and 655
[1082] Judgement, paras. 996, 1023 to 1029, 1031 to 1036.
[1083] Judgement, paras. 235, 237, 319, 381, 760, 763, 764; Decision of 30 March 1976, **E3/12**.
[1084] See **III.0.** Cross-cutting errors. Powers and functions of the Central Committee, *supra*.

submissions on the issue, and should have found the document to be of very low probative value.[1085] Be that as it may, the Chamber failed to discharge its duty of explaining why it decided to afford weight to this questionable and disputed document.

500. Further, even assuming that the document is a genuine copy of the original, many of those who have analysed it remain very sceptical; it does name the participants. For example, SHORT believes that it was produced by the Standing Committee rather than the Central Committee, and so does ETCHESON, as the Chamber itself noted in the *Duch* Judgement. It is therefore all the more shocking to note that – here again – the Chamber did not address the Defence's submissions in this regard.[1086]

501. No reasonable trier of fact would have concluded beyond reasonable doubt that the 30 March 1976 document was produced by the Central Committee. The Chamber failed to meet its duty to give reasons erroneously finding that this dubious document originated from the Central Committee simply in order to link KHIEU Samphân to the decision-making process in his capacity as candidate member and later full rights member of the Central Committee, but not of the Standing Committee. Accordingly, the Chamber's error occasioned a miscarriage of justice.

III.5.B. Legal characterisation of the facts relating to movement of the population (phase two)

502. **Crimes**. The Chamber committed several errors of law in holding that during movement of population (phase two), Khmer Rouge soldiers and officials committed crimes against humanity of other inhumane acts through forced transfers, enforced disappearances and attacks against human dignity, as well as crimes against humanity of extermination and persecution on political grounds.[1087]

503. ***Scope of Case 002/01***. These erroneous findings resulted in particular from the arbitrary definition of the temporal scope of movement of the population (phase two). Indeed, the Defence has already submitted that the Chamber could not, without violating its own Severance order,

[1085] For example: T. 16 January 2012, **E1/27.1**, pp. 120 to 121, T. 17 January 2012, **E1/28.1**, pp. 115 to 116.
[1086] *Mémoire final*, **E295/6/4**, para. 285, footnote 518-19.
[1087] Judgement, para. 639 (transfers), 643 (disappearances), 646 (attacks against dignity), 648 (extermination), 657 (persecution).

adjudicate post-1976 facts as it could also not adjudicate facts falling outside the scope of the instant case.[1088] The Defence has already indicated, on the one hand, that the Chamber has in very many instances relied on 1977 and 1978 events[1089] in making findings, and, on the other hand, that it has often adjudicated facts relating to security centres, cooperatives and mobile units even though such facts are expressly excluded from the scope of the instant trial.[1090] Owing to these errors, the Chamber's legal findings must be invalidated in their entirety. This must be done particularly because the Defence has never been afforded the opportunity of an adversarial debate concerning all of the alleged facts. Moreover, on the basis of its earlier errors of fact, the Chamber erred further in holding that the requirements for those crimes were satisfied.

504. ***Forced transfers.*** As the Chamber recalled, the crime of forced transfer involves, *inter alia*, forced displacement of individuals.[1091] The Chamber considers that this requirement was satisfied to the extent that Khmer Rouge soldiers and officials *"forcibly transferred people by various methods including force, coercion and deception"*.[1092] However, concerning the alleged existence of a consistent pattern of conduct during movement of population (phase two), the Defence has already submitted that the Chamber did not establish that deception was used to persuade people to relocate.[1093] Accordingly, the Chamber's reasoning must be invalidated.

505. ***Movement of population at the Vietnamese border.*** Further, there can be no crime of forced transfer where transfers are justified by the need to ensure the security of the civilian population or by military necessity.[1094] This holds true at least for the transfers at the Vietnamese border. Indeed, contrary to the Chamber's claim, those transfers were never undertaken under the false pretext of re-educating or isolating "bad elements" but rather, as all the evidence before the

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[1088] See **I.1.** Breaches of the Right to a Fair Trial. Subject-matter jurisdiction following severance of the charges, *supra.*
[1089] See **III.5.A**: Facts relating to movement of the population (phase two) – Absence of discrimination against the "New People", *supra*.
[1090] See **I.1** Breaches of the Right to a Fair Trial, Subject-matter jurisdiction following severance of the charges, *supra*.
[1091] Judgement, para. 450.
[1092] Judgement, para. 633.
[1093] See **III.1.A.b.** Events which occurred between 1970 and 1975. *Consistent pattern of movements of the population from the cities* and *Consistent pattern of movements of the population between rural areas.* **III.5.A** Facts relating to movement of the population (phase two) Consistent pattern of conduct, *supra*
[1094] Judgement, para. 450.

Chamber shows, were warranted by the absolute need to protect the population from the conflicts which were then raging in the area.[1095]

506. Moreover, even if, as hypothetically stated by the Chamber, this legal justification were accepted, the Chamber still claims that the requirement for the crime of forced transfer would still be satisfied, since *"in any event, [the transfers] were neither justified nor proportional."*[1096] However, on the basis of the same evidence, a reasonable trier would have found that the relocations were justified. As for the proportionality requirement, the Chamber considered that it is satisfied where those responsible for the transfers fulfil the obligation to *"transfer the people back to their homes as soon as the hostilities in the area have ceased."*[1097] Since the Chamber did not establish that the conflicts at the Vietnamese border had ceased, it could not consider that the Khmer Rouge soldiers and officials were under the aforementioned obligation. Accordingly, the transfers were in fact justified on the basis of military necessity and were therefore both necessary and proportional.

507. Moreover, the Chamber did not establish that the transfers at the Vietnamese border were not undertaken *"in satisfactory conditions of hygiene, health, safety and nutrition"* or that *"members of the same family [were separated]"* during the evacuations.[1098] Accordingly, the Chamber's reasoning must be invalidated in its entirety, given that it was impossible to satisfy the requirements of the crime of forced transfer in respect of these transfers.

508. ***Mens rea requirement of forced transfer.*** The Chamber also erred in considering that the transfers were effected intentionally. The *mens rea* requirement of forced transfer is proof that those responsible possessed the intent to commit all of the elements of the crime.[1099] The Chamber's erroneous finding on the absence of military necessity does not relieve it of its obligation to characterise the Khmer Rouge soldiers and officials' knowledge of the alleged false pretext of the transfers. The Chamber once again erred in law by its failure to fulfil this obligation. Its reasoning cannot be accepted. It must be invalidated.

[1095] See **III.5.A** Vietnamese border, *supra.*
[1096] Judgement, para. 636.
[1097] Judgement, para. 450.
[1098] Judgement, para. 450.
[1099] Judgement, para. 450, footnote 1328.

509. ***Enforced disappearances.*** Regarding the requirements of the crime of enforced disappearances, the Chamber recalled in particular that *"the deprivation of liberty is followed by the refusal to disclose information regarding the fate or whereabouts of the person concerned, or to acknowledge the deprivation of liberty, and thereby deny the [displaced person] recourse to the applicable legal remedies and procedural guarantees".*[1100] Yet, as the Defence has already noted, the Chamber's speculation alone cannot sustain the finding that there was a *"deliberate refusal"* – to use the Chamber's words – by the Khmer Rouge soldiers and officials to provide the displaced persons with such information.[1101]

510. Furthermore, the Chamber's definition of the crime of enforced disappearance virtually mirrors the one found in the Rome Statute.[1102] Therefore, pursuant to the standards applied at the international level, satisfying the *mens rea* of the crime requires demonstration of direct intent, defined as the perpetrator's intent to commit all the material elements of the crime. Insofar as the Chamber did not establish that there was a *"deliberate refusal"* to disclose information about the fate of the displaced persons, it also, by the same token, could not establish that Khmer Rouge soldiers and officials possessed the intent to refuse to disclose that information. By its letter, as adopted by the Chamber, the ICC definition is even more stringent in that, in addition to direct intent, it requires proof of a *specific intent* consisting in *"the intention of removing [displaced persons] from the protection of the law for a prolonged period of time".*[1103] Insofar as the Chamber did not establish that the Khmer Rouge soldiers and officials had such intent, its reasoning fails. Therefore, as neither the *mens rea* nor the *actus reus* of the crime of enforced disappearance was satisfied, a reasonable trier would not have made the finding that the Khmer Rouge soldiers and officials had committed the alleged crime.

511. ***Extermination.*** The Chamber considered that the *mens rea* requirement of the crime of extermination was satisfied in holding that Khmer Rouge soldiers and officials *"systematically and intentionally imposed conditions on people (...) that would likely lead to death on a massive*

[1100] Judgement, para. 448.
[1101] See **III.5.A** Facts relating to movement of the population (phase two). Deliberate refusal to disclose information, *supra*.
[1102] Article 7(1)(i) of the Rome Statute.
[1103] Article 7(1)(i) of the Rome Statute.

scale".[1104] Such determination of the perpetrators' intent is, at best, a characteristic of a *dolus eventualis*.[1105] Now, the Defence has recalled that by 1975, the *mens rea* of this crime could not be characterised otherwise than as the direct intent to kill a large number of people. This still holds true to today, since *dolus eventualis* has only iniquitously been admitted into the international standards applicable to the crime of extermination.[1106] To the extent that it did not establish that those responsible for the transfers were possessed of the direct intent to commit the crime, the Chamber could not conclude that the crime of extermination had been committed. A reasonable trier must invalidate such reasoning, as it seriously offends the principle of legality.

512. ***Persecution on political grounds.*** As concerns the *actus reus* of persecution on political grounds, the Chamber recalled that it requires proof of *"discrimination in fact"* against *"a victim targeted because of the victim's membership in a group defined by the perpetrator on specific grounds, namely on a political, racial or religious basis."* It also requires that the *"the victim belongs to a sufficiently discernible [...] group"*.[1107] However, as the Defence has demonstrated, the Chamber did not establish beyond reasonable doubt that there had been discrimination in fact during movement of population (phase two).[1108] The Defence has also demonstrated by pointing out the numerous inconsistencies in the Chamber's reasoning,[1109] that it did not establish that "New People" constituted *"a sufficiently discernible group."*[1110]

513. As concerns the *mens rea* of the crime, insofar as the Chamber failed to prove that there had been discrimination in fact against the "New People", it could not conclude that the requisite discriminatory intent for the crime of persecution on political grounds was satisfied.[1111] The Defence has already objected to this wrong premise.[1112] In any event, insofar as none of the

[1104] Judgement, para. 648.
[1105] Judgement, para. 417; see Applicable Law **II.1.A.c** Extermination, *supra*.
[1106] See Applicable Law **II.1.A.c** Extermination, *supra*.
[1107] Judgement, para. 428.
[1108] See **III.5.A** Facts relating to movement of the population (phase two). Absence of discrimination against the "New People". **III.5.A** Facts relating to movement of the population (phase two). Consistent pattern of conduct, *supra*.
[1109] See **III.3.B.** Legal characterisation of the facts relating to movement of the population (phase one). Persecution on political grounds (definition of "New People"), *supra*.
[1110] Judgement, para. 653.
[1111] Judgement, paras. 429, 656.
[1112] See **III.5.A** Facts relating to movement of the population (phase two). Absence of discrimination against the "New People"), *supra*.

essential elements of the crime was satisfied, the Chamber erred in concluding that "*the Khmer Rouge soldiers and officials*" committed it.[1113] Its reasoning must be invalidated in its entirety.

514. ***Persecution on political grounds through inhumane acts.*** The Chamber indicated that it relied on the fact that Khmer Rouge soldiers and officials *"intentionally discriminated in fact against* "New People" on political grounds in finding that Khmer Rouge soldiers and officials committed *"the crime against humanity of persecution through the other inhumane acts of forced transfer and enforced disappearance."*[1114] However, the Chamber committed an error of law which invalidates its finding by its failure to prove beyond reasonable doubt that discrimination in fact existed and that the "New People" constituted *"a sufficiently discernible group"*.

515. **Policy**. The Chamber committed errors of fact and law in holding that after 17 April 1975, a criminal policy of population movements existed which was aimed at furthering the common purpose of a JCE resulting in the commission of crimes in the course of movement of the population (phase two).[1115]

516. ***Criminal nature of movement of the population (phase two).*** The Chamber held that in furtherance of its common purpose, the CPK leadership planned to eventually transform *"Cambodia into a modern agricultural economy and later, an industrial state"* for example by giving priority to *"building irrigation projects, expanding the rice fields, and developing those industrial activities that served the development of agriculture."*[1116] It also recognised that *"in the face of drought in 1977, the construction of dikes, canals and dams was of special importance"*.[1117] Movement of the population (phase two) was justified by the plan to build the country's economy through agriculture and, therefore, could not be considered criminal in nature. By ignoring this, the Chamber erred by failing to make the only reasonable finding, namely that phase two of the population movement was consistent with the effort to ensure the wellbeing and security of everyone in the country in the face of the dire situation it was facing after five long

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[1113] Judgement, para. 657.
[1114] Judgement, para. 657.
[1115] Judgement, paras. 779 to 810.
[1116] Judgement, para. 782, footnotes 2474 to 2479.
[1117] Judgement, para. 797.

years of war. That would have been the correct finding, particularly because the Defence had made submissions to that effect[1118].

517. ***Consistent pattern of conduct***. In order to get around the fact that the economic goal [of the population movement] was not criminal in nature, the Chamber again – as it did in regard to movement of the population (phase one) – resorted to the theory of the consistent pattern of conduct that started prior to 1975 which necessarily resulted in the commission of crimes.[1119] The Defence recalls that the Chamber has not established beyond reasonable doubt that the population movements followed a consistent pattern of conduct, and thereby failed to meet its duty to give reasons why, in light of its purposes, its implementation and the wide range of methods used in its implementation, movement of the population (phase two)[1120] necessarily resulted in the commission of crimes.[1121] The Chamber could not rely on the existence of a consistent pattern of conduct in concluding that movement of the population (phase two) was inherently criminal.

518. ***Instructions issued by alleged members of the JCE to the principal perpetrators of the crimes.*** As the Chamber did concerning movement of the population (phase one), it attempted to conceal the flaws in its reasoning behind an alleged policy to discriminate against "New People" by claiming that the crimes were a means to *"attack the class system"* in order to achieve a socialist revolution.[1122] However, the Defence has already highlighted the many errors the Chamber committed in its findings on the alleged division of the population for the purpose of discriminating against "New People" both prior to and during movement of population (phase two).[1123] Moreover, the lawful reasons for the movements of the population (phase two) aimed at

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[1118] *Mémoire final*, **E295/6/4**, paras. 50 to 51, 65 to 69.
[1119] Judgement, paras.786, 805; see consistent pattern of conduct in regard to JCE and movement of the population (phase one).
[1120] The Defence is referring in particular to the transfers away from the Vietnamese border, which tend to disprove the existence of a consistent pattern of conduct. See **III.5.A** Facts relating to movement of the population (phase two). Vietnamese border, *supra*.
[1121] See **III.1.A.b.** Events which occurred between 1970 and 1975. *Consistent pattern of movements of the population from the cities* and *Consistent pattern of movements of the population between rural areas*, movement of the population (phase two). Consistent pattern of conduct, *supra*
[1122] Judgement, para. 805; see **III.3.B.** Legal characterisation of the facts relating to movement of the population (phase one). Policy in relation to JCE, *supra*.
[1123] See **III.3.B.** Legal characterisation of the facts relating to movement of the population (phase one). Persecution on political grounds (definition of "New People") and **III.5.A** Facts relating to movement of the population (phase two). Absence of discrimination against the "New People"), *supra*.

trying to alleviate food shortages in some areas by relocating people to areas that were considered more fertile constituted a finding that the Chamber could not reasonably exclude.[1124]

519. Further, the Chamber failed to establish that the *"forced transfers committed by Khmer Rouge officials and soldiers"* during movement of population (phase two) were undertaken *"pursuant to the Party leadership's express instructions, decisions and policy"*.[1125] Despite its invoking the communication structures and the information provided to the Standing Committee about the population movements in some areas,[1126] it was still unable to establish that the CPK leadership ordered the ill-treatment of the displaced during movement of population (phase two), as well as discrimination against New People.[1127] Accordingly, the Chamber failed to establish the existence of instructions enabling it to conclude that the commission of crimes had been planned as part of the policy.

520. ***Foreseeability of the crimes committed through JCE-1.*** Realising that it was unable to establish that crimes were ordered or planned by the members of the JCE, the Chamber used the same ploy as it did regarding movement of the population (phase one), i.e. it invoked the fiction of a consistent pattern of conduct in a bid to establish that crimes of murder and attacks against human dignity were a foreseeable consequence of the population movements between rural areas. However, the foreseeability requirement falls under JCE-3, which is not applicable in the instant case.[1128]

521. Thus, the Chamber committed an error of law which invalidates its findings in their entirety concerning the crimes of murder and attacks against human dignity through a JCE. Accordingly, those findings must be invalidated

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[1124] See **III.5.B** Legal characterisation of the facts relating to movement of the population (phase two. Policy. Error regarding the criminal nature of the population movements, *supra*.
[1125] Judgement. para. 805.
[1126] Judgement, para. 798.
[1127] See **III.5.A** Facts relating to movement of the population (phase two). Absence of discrimination against the "New People"); **III.5.B** Legal characterisation of the facts relating to movement of the population (phase two). Error regarding the existence instructions to the alleged participants in the JCE to the principal perpetrators of the crimes, *supra*.
[1128] Decision, 12 September 2011, **E100/6**; see **III.3.B.** Legal characterisation of the facts relating to movement of the population *Policy linked to a JCE.*, *supra*.

III.5.C. KHIEU Samphân at the time of movement of the population (phase two)

522. **Diplomatic functions and travel (until April 1976)**. The Chamber committed errors of fact concerning KHIEU Samphân's diplomatic functions and the information to which those functions afforded him access during movement of the population (phase two) up to when he was named President of the Presidium.[1129]

523. ***"Liaison" with SIHANOUK and trips***. KHIEU Samphân's *"trips abroad"* during that period boil down to just one trip in August 1975. He and others, including IENG Sary, travelled to China and then to North Korea where they met SIHANOUK. Nothing in the evidence regarding this trip shows that its purpose was to *"negotiate"* SIHANOUK's return to Cambodia. Moreover, there is no evidence that information was exchanged regarding the commission of crimes.[1130]

524. According to the evidence adduced, following SIHANOUK's return, KHIEU Samphân and SIHANOUK travelled to the countryside twice. From 15 to 17 January 1976, they toured various work-sites (a bridge construction site, a factory, manufacturing plant…).[1131] Sometime between 20 February and 5 March 1976, they *"travelled to the countryside"* with diplomats visiting Cambodia who were hosted by SIHANOUK. No details are available regarding the duration of their second trip and the actual places they visited.[1132]

525. Besides the fact that visits to work-sites fall outside the scope of Case 002/01,[1133] the evidence relating to them is not inculpatory. The only inference to draw therefrom is that during their visits, they saw labourers working at the work-sites. In fact, SIHANOUK made public statements to the effect that he saw nothing wrong during the tours.[1134] Moreover, the Chamber

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[1129] Judgement, paras. 374, 376, 380, 759, 774, 956, 957, 958, 989, 990.
[1130] Judgement, para. 374 footnote 1128; para. 758, footnote 2386. The reference to "negotiation" was simply speculation by diplomats and intelligence agencies, perhaps even rumours. Moreover, KHIEU Samphân could not possibly have had any influence on SIHANOUK. See **III.1.C.a**. Defiance of SIHANOUK, *supra*.
[1131] Judgement, para. 380; FBIS Collection, 21 January 1976, **E3/273**, p. 14; Interview of KHIEU Samphân, August 2007, **E289.1.1**, pp. 3 and 4; Written Record of Interview of THA Sot, 19 January 2008, **E3/464**, pp. 5 and 6.
[1132] Judgement, para. 762, footnote 2400; French Ministry of Foreign Affairs Note, **E3/490**, pp. 10 and 11; Judgement, para. 773, footnote 2437; book by SIHANOUK, **E3/1819**, p. 90.
[1133] See **I.1** Right to a fair trial. Subject-matter jurisdiction following severance of the charges, *supra*.
[1134] T. 28 October 2013, **E1/234.1**, before [11.01.47] (screening of a video clip: **E276.1.1**).

cannot claim without contradicting itself that the Appellant's diplomatic roles afforded him knowledge of crimes, which enabled him to win support for the Khmer Rouge so as *"to deflect attention and feared interference.*[1135] Also, the Chamber could not hold against KHIEU Samphân the fact that he *"prais[ed] the construction of dams and canals, and agricultural production"*[1136] on those visits.

526. ***Other diplomatic functions.*** According to the evidence put before the Chamber, KHIEU Samphân had a number of other diplomatic functions before he was appointed to the Presidium. He received a Chinese trade delegation from 5 to 12 March 1976. The visit focused on economic cooperation between the two countries.[1137] Finally, between 5 March and 3 April 1976, he met with diplomats from Mauritania, Senegal, Iraq and Cuba who were visiting Cambodia. The evidence shows that the Appellant had one meeting with the Mauritanian diplomat, but contains no details about the matters they discussed. The evidence does not show that they discussed the commission of crimes.[1138]

527. In conclusion, the evidence placed before the Chamber provides no basis to establish beyond reasonable doubt that matters about *"human rights violations"* were *"inevitably [...] raised"* during these various trips and meetings.[1139] In this regard, no reasonable trier of fact would have found that the Appellant contributed to the commission of crimes or had knowledge thereof. The Chamber's "satisfaction" was based on speculation, and occasioned a miscarriage of justice.

528. ***Access to foreign news reports and reports.*** The Chamber erred in holding that the Appellant had knowledge of the crimes because the Ministries of Propaganda and Foreign Affairs collected reports circulated by *"news agencies and various foreign States"* and provided them to *"senior leaders"*[1140] However, the Chamber did not establish that KHIEU Samphân personally received those reports during movement of population (phase one), during the events at Tuol Po

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[1135] Judgement, paras. 992, 1033.
[1136] Judgement, para. 990.
[1137] FBIS Collection, 5 March 1976, **E3/274**, pp. 1 to 3.
[1138] FBIS Collection, 5 March 1976, **E3/274**, pp. 3 to 5.
[1139] Judgement, para. 958.
[1140] Judgement, para. 958.

Chrey or during movement of population (phase two).[1141] Moreover, KHIEU Samphân's mere attendance of the Standing Committee meeting at which that Committee ordered the Ministry of Propaganda to send to the Committee the information it gathered[1142] does not prove that he had knowledge of the information processed by this Ministry. Accordingly, the Chamber could not reasonably infer that he had knowledge of the crimes through foreign reports. The Chamber's error occasioned a miscarriage of justice.

529. **Meetings and military matters**. The Chamber held that KHIEU Samphân attended meetings at which military matters were discussed.[1143] For this finding, the Judgement relied on the courtroom testimonies of PHY Phuon[1144] and SAO Sarun.[1145]

530. The Defence has demonstrated that PHY Phuon's testimony cannot be given any probative value whatsoever.[1146] Witness PHY Phuon claimed that over a period of three weeks, the Appellant met with military commanders at the Phnom Penh railway station and, later, at the Ministry of Commerce (Silver Pagoda). However, as noted *supra,* since Witness PHY Phuon did not attend the meetings at the railway station[1147] or at the ministry[1148] his testimony regarding those meetings, the people who attended them and the matters discussed there was pure speculation.

531. SAO Sarun testified about a meeting held in Phnom Penh in 1978, which he allegedly attended. The meeting was allegedly held in Pol Pot's office together with him, NUON Chea, SON Sen and KHIEU Samphân.[1149] However, the Chamber could not rely on the matters discussed at this meeting in concluding that the Appellant *"attended (…) meetings at which military matters were discussed."* First, the witness testified that he attended only one meeting

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[1141] See **III.3.C**. Access to information, *supra*.
[1142] Judgement, para. 267; Minutes of Standing Committee meeting, 8 March 1976, **E3/231**, p. 2.
[1143] Judgement, para. 378.
[1144] T. 26 July 2012, **E1/97.1**, pp. 65, 65, 67 and 68.
[1145] T. 7 June 2012, **E1/83.1**, pp. 55 to 57. T. 11 June 2012, **E1/84.1**, pp. 5 to 8.
[1146] See **III.3.C. KHIEU** Samphan during movement of population (phase one). Presence at B-5 and the Phnom Penh railway station, *supra*
[1147] T. 2 August 2012, **E1/101.1**, p. 47, before [11:27:25]; see **III.3.C. KHIEU** Samphan during movement of population (phase one). Meetings at the railway station, *supra*.
[1148] T. 2 August 2012, **E1/101.1**, p. 47, before [11:30:02].
[1149] T. 7 June 2012, **E1/83.1**, p. 55, before [11:46:55].

together with the Appellant.[1150] Second, he described a meeting where the only reference to military matters (among all the items on the agenda) was that POL Pot gave instructions to the witness, a sector official in Mondolkiri in 1978, about resisting Vietnamese invasions.[1151] With that in view, the Chamber could not rely on SAO Sarun's testimony in finding that KHIEU Samphân attended several meetings at which military matters were discussed. That meeting was an isolated event which took place in 1978 (after the facts tried in Case 002/01) and did not concern *"military matters"*. The Chamber therefore committed an error of fact and distorted the evidence in its possession in finding that KHIEU Samphân and other leaders attended meetings at which military matters were discussed.

532. **Political training**. As concerns the political training sessions the Appellant allegedly ran, the Chamber cited the courtroom testimonies of five witnesses,[1152] one civil party[1153] and one expert[1154] in finding that at the meetings or *"indoctrination sessions"* KHIEU Samphân disseminated the Party's policy regarding *"enemies"*.[1155] However, none of those testimonies provides the basis to conclude beyond reasonable doubt that the Appellant disseminated such a policy or, for that matter, that he possessed the intent to provide any support thereto. EK Chen testified that she attended two sessions in 1976 and 1978. According to her, the second session focused on enemies, but she could not say who spoke (whether it was NUON Chea or KHIEU Samphân).[1156] Her testimony about this key issue is riddled with inconsistencies and cannot be deemed credible and reliable. EM Oeun's testimony before the court is also riddled with all types of inconsistencies and is thus entirely unreliable.[1157]

533. The other testimonies listed in the Judgement only show the Appellant's minor participation, but contain no incriminating statements. For instance, as concerns KHIEU

[1150] T. 7 June 2012, **E1/83.1**, p. 58, after [11:54:08] to p. 59 before [11.57.51].
[1151] T. 11 June 2012, **E1/84.1**, p. 7, before [09:19:10].
[1152] ONG Thong Hoeung, T. 7.08.2012, **E1/103.1.** EK Hen, T. 3 July 2013, **E1/217.1.** CHEA Say, T. 20 September 2012, **E1/124.1**. PHY Phuon, T. 25 July and 1 August 2012, **E1/96.1** and **E1/100.1**. PECH Chim, T. 1 July 2013, **E1/215.1**.
[1153] EM Oeun, T. 23 August 2012, **E1/113.1**.
[1154] Philip SHORT, T. 6, 7 and 8 May 2013, **E1/189.1, E1/190.1**, **E1/191.1**
[1155] Judgement, para. 818.
[1156] EK Hen, T. 3 July 2013, **E1/217.1**, p. 77 after [14:04:42] to 99 before [15.28.01].
[1157] T. 28 October 2013, **E1/235.1**, p. 86 [14.00.47] to p. 87 after [14:04:32].

Samphân's level of participation, the Defence notes that CHEA Say,[1158] PHY Phuon,[1159] SUONG Sikoeun[1160] and SAO Sarun[1161] all testified that unlike all the other leaders, KHIEU Samphân's participation at those meetings was minor. They also testified to the same effect regarding his statements. Their testimonies do not show that a policy to smash enemies existed or that any inculpatory statements were made.[1162] Finally, SHORT's testimony also does not show that the Appellant disseminated a policy to smash enemies. In fact, SHORT's testimony did not touch on the matters discussed at those meetings…[1163]

534. As can be seen, the evidence concerning KHIEU Samphân's participation in the indoctrination sessions absolutely does not support the Chamber's finding that he contributed to the dissemination of a policy concerning enemies. By finding otherwise, the Chamber distorted the evidence and committed an error of fact.

535. In addition to the foregoing, the Defence observes that in one segment of the Judgement, which is referred to *supra*,[1164] the Chamber claims that the evidence shows that KHIEU Samphân justified the evacuation of the cities during indoctrination sessions. This isolated claim is based on hearsay.[1165]

536. **Speeches and public statements**. The case file contains four speeches that KHIEU Samphân made during that period[1166] and four documents relating to speeches he gave in

[1158] See for example, T. 20 September 2012, **E1/124.1**, p. 62, after [13:36:15].
[1159] T. 26 July 2012, **E1/97.1**, p. 71, before [14:32:42].
[1160] T. 6 August 2012, **E1/102.1**, p. 74, after [14:1534], to p. 75, before [14:18:22].
[1161] T. 6 June 2012, **E1/82.1**, p. 18, after [10:00:00].
[1162] T. 20 September 2012, **E1/124.1**, p. 32 after [10:26:16] to p. 34. ROS Suy, T. 25 April 2013, **E1/184.1**, p. 78, after [14.29.53]. T. 25 July 2012, **E1/96.1**, p. 96 after [15:48:15]. T. 31 July 2012, **E1/99.1**, p. 41 before [11.33.35] to p. 42 before [11.37.45]. ONG Thong Hoeun, T. 7 August 2012, **E1/103.1**, p. 99 after [15.35.52]. See also, T. 28 October 2013, **E1/235.1,** p. 89 after [14:09:30] to p. 93 after [14:18:33].
[1163] T. 6 May 2013, **E1/189.1**, pp. 74 and 75.
[1164] Judgement, para. 757.
[1165] See testimony of ONG Thong Hoeung. He recounted what he was told by his wife: T. 7 August 2012, **E1/103.1,** p 99, before [15.35.52]. See also SHORT: T. 7 May 2013, **E1/190.1**, p. 16 to 20 where his book **(E3/9)** is quoted. KIERNAN's book, **E3/1593**, p. 174, ERN 00385689 His account is based on hearsay.
[1166] **E3/118,** 21 April 1975 ERN 00166994-96; **E3/1695,** 22 April 1975: ERN 00166994-96, **E3/118,** 27 April 1975 ERN 00167012-13, **E3/261** ERN S 00003746-50 and **E3/1356** ERN 00167566 and **E3/273** ERN 00157802-05, 14 December 1975 concerning the new constitution,

diplomatic settings.[1167]

537. The only reference to facts that could have any relevance to the instant case is found in a speech the Appellant gave on 21 April 1975 congratulating CPNLAF units and the Cambodian people for the victory. The speech was about the war method consisting in removing people from enemy-controlled areas.[1168] As noted above (and hereinafter), this tactic is used in waging a war of attrition. That is the background to the only quotation from the only speech the Appellant gave on this question. In the segment quoted, the Appellant described the tactics employed by the CPNLAF to win the war. Nothing in his speech concerned the concurrent evacuation of Phnom Penh and obviously, even less, movement of the population (phase two).

538. As a matter of fact, other than to note that KHIEU Samphân supported the non-criminal common purpose of enabling Cambodia to make a great leap forward, none of the information contained in these eight documents is of relevance to the instant case. Accordingly, it is established that the Chamber distorted the evidence put before it and committed an error of fact in holding that between 17 April 1975 and his appointment as President of the State Presidium, the Appellant's speeches demonstrated in any way that he participated in the commission of the crimes charged.

539. As already stated in the Introduction, it is quite clear that the chronological presentation of the sections of the present brief differs from that of the Judgement. It is more precise and is designed to enable the Supreme Court Chamber to determine to what extent, by not adopting it, the Judgement conflated and distorted the evidence on the case file.

540. **Decision-making process and trust**. The Chamber committed errors of fact concerning KHIEU Samphân's participation in the decision-making process, the trust he enjoyed, as well as his influence and alleged authority and the information to which he might have been privy by reason of his proximity to the leadership.[1169]

541. ***Attendance of Standing Committee meetings* - Frequency**. On the basis of copies of 23

[1167] **E3/119**, 2 and 3 August 1975 (SIHANOUK and China): ERN 00167354; **E3/619**, 15 August 1975, **E3/711**, 9 September 1975 after SIHANOUK's return to Cambodia: ERN S 00003732.
[1168] **E3/118**: ERN 00166994
[1169] Judgement, paras. 203, 373, 385 to 389, 408-09, 747, 771, 960, 997, 1006, 1019.

Minutes of Standing Committee meetings from August 1975 to June 1976 (with 19 listing the participants, including 16 listing the name of KHIEU Samphân) to which the Chamber has access, the Chamber started out by noting KHIEU Samphân's *"regular attendance"* of Standing Committee meetings in 1975-1976, while stating that these minutes *"do not necessarily represent all of the* Standing Committee meetings held during *"[...] the DK era [...]"*. Even so, it *"infer[ed]"* that KHIEU Samphân *"continued to attend Standing Committee meetings on a similar regular basis thereafter"*.[1170] However, its "inference" is merely an impermissible statistical assumption, a baseless claim. There is no evidence to show that the Appellant attended meetings aside from the ones for which his presence is recorded in the copies of the 16 minutes of meetings.

542. The Chamber then went on to claim that its inference was *"consistent with the evidence of his 'repeated' visits"* to K-1 and with *"his own admission that POL Pot 'trusted' him."*[1171] However, there is no evidence to show that KHIEU Samphân attended Standing Committee meetings during his visit to K-1. Some Standing Committee meetings were in fact held at K-1,[1172] but none of the witnesses who testified about his visits there described their purpose.[1173] He may very well have gone there for other reasons, for example, for POL Pot (who lived there) to dictate his speeches to him.[1174] Moreover, when viewed in their proper context, KHIEU Samphân's statements simply show that he knew that POL Pot trusted him, because he was disciplined and was committed to the principle of secrecy. This is why he was not afraid of being purged.[1175]

[1170] Judgement, para. 386.
[1171] Judgement, para. 386.
[1172] Judgement, para. 386, footnote 1169.
[1173] Judgement, para. 386, footnote 1168. Only OEUN Tan testified about meetings. However, he indicated that he did not know their purpose; he also testified that KHIEU Samphân did not attend some of the meetings: T. 13 June 2012, **E1/86.1**, p. 47 L.12 to p. 48 L.6 near [11.34.36], p. 96 L.14-20 near [15.44.51], p. 96 L.10 to 16 near [15.44.19]; T. 14 June 2012, **E1/87.1**, p. 9 L.7 to 24 near [09.26.41], p. 12 L.13 to 23, p. 24 L.21 to p. 25 L. 4 near [10.15.24].
[1174] KHIEU Samphân: Written Record of Interview, **E3/37**, p. 4 to 5 ERN 0015755-56. LENG Chhoeung testified that he drove KHIEU Samphân to K-1 in half an hour or 2 to 3 hours (T. 17 June 2013, **E1/208.1**, p. 18 L.5 to 12 after [09.56.55], p. 89 L.6 to 22). OEUN Tan also testified about meetings held over the course of several days (see preceding footnote).
[1175] Judgement, para. 386, footnote 1170, Interview **E289.1.1**, p. 3 ERN 00923077*: "LDV: (...) Were you ever afraid of being purged, of becoming a victim of a purge? KS: Never. First of all, because I value discipline. And second of all, I was living in close quarters with the Cambodian leaders. They could see me. And Pol Pot trusted me I am telling you. (...) discipline required that everyone stay in his or her place; that everyone think about doing his or her duty and about not trying to look into what others were doing"*. (This Civil Party document does not satisfy the

Accordingly, there is no evidence "consistent" with the Chamber's initial inference/statistical assumption.

543. No reasonable trier of fact would have considered proven beyond reasonable doubt that the Appellant attended Standing Committee meetings other than those for which his presence is recorded in the 16 copies of minutes of meetings.

544. ***Attendance of Standing Committee meetings – "contributions".*** On the basis of the minutes of Standing Committee meetings, the Chamber claims that they prove that KHIEU Samphân *"actively participated in some Standing Committee meetings."* It claims that two copies of minutes of meetings *"prove"* that he *"contributed on at least two occasions"*.[1176] However, those two records prove only minor participation in two meetings, for example, when he reported to the Standing Committee about the elections and also when he reported about SIHANOUK's resignation.[1177] In fact, merely reporting proves subordination and hierarchy,[1178] and does not imply taking part in discussions or decision-making.[1179] Moreover, the subject matter of his two reports was quite unique and had no bearing on crime or criminal designs.[1180]

545. A careful reading of the 16 copies of meeting minutes where KHIEU Samphân's attendance is recorded[1181] shows that his participation was entirely passive in 14 instances and minor in two instances, and that it related to his functions within the FUNK/GRUNK and his service to the people. In fact, there is nothing in those minutes indicating that the Appellant made statements or otherwise contributed in any manner aside from making the two reports.[1182]

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requirements of Internal Rule 87(4) and should not have been admitted into evidence. See, **I.6**. *Demandes sur le fondement de la règle 87-4*), *supra*. See also *Trust, influence, authority, supra*.

[1176] Judgement, para. 387. footnote 1171. The turn of phrase *"despite his insistence to the contrary"* is unfair, unfound and biased. KHIEU Samphân has never tried to conceal or deny his attendance of "expanded" meetings of the Standing Committee.

[1177] Minutes of 8 March 1976 meeting, **E3/232**; minutes of 11-13 March 1976 meeting, **E3/197**. The two minutes of meetings cited in the documents do not even contain a single proposition. Only the facts.

[1178] SHORT: T. 6 May 2013, **E1/189.1**, p. 66 L.15 to p. 67 L.4 near [13.39.07].

[1179] After the report on the elections, *"Angkar"* issued directives (**E3/232**, pp. 1 to 2 ERN 00182628-9). After the report on SIHANOUK's resignation, *"Angkar"* made observations and *"[Super] Comrade Secretary"* decided which measures to take (**E3/197**, pp. 1 to 3 ERN 00182638-40).

[1180] In fact, after he reported it became clear that the elections were a sham. (**E3/232**).

[1181] Judgement, para. 386 footnote 1166, referring to paragraph 203, footnote 624.

[1182] Not even when matters of commerce were broached.

546. ***Trust, influence, authority*.** The 16 records show that KHIEU Samphân was not part of the decision-making process, and that he had no influence in that regard. It is beyond dispute that the Standing Committee was the ultimate decision-making authority.[1183] Accordingly, the Chamber's questionable definition of democratic centralism is of no relevance.[1184] Irrespective of whether decisions were made collectively, there is no evidence to show that KHIEU Samphân took part in the process. The only evidence of what transpired in those meetings is found in the copies of the Minutes of the Standing Committee meetings and the statements of those who were present. However, neither NUON Chea, nor IENG Sary, nor even POL Pot ever indicated that KHIEU Samphân participated in decision-making, was asked for an opinion or even that he was allowed to express an opinion. Also, despite being a candidate or full-rights member of the Central Committee,[1185] KHIEU Samphân was not named to the Standing Committee. His mere presence at some meetings and simply presenting two reports show that he enjoyed little trust.

547. Such being the case, the Chamber should not have discounted SHORT's testimony that KHIEU Samphân did not take part in the decision-making process.[1186] According to SHORT (and the testimonies to the same effect), the Appellant was *"not a member of the inner circle"* to which he was "[TRANSLATION] *very useful"*, hence "[TRANSLATION] *his being part of the entourage."* The reason why he played a unique role and held a special position – with no influence or authority - was "[TRANSLATION] *because in the final analysis, he was an intellectual". "He only had such authority as the Party was willing to grant him."*[1187] He was only provided with information that he needed to know.[1188] He could be trusted to remain faithful to this highly compartmentalised setup and to perform his duties in accordance with Party rules and regulations.[1189] Nothing more.

[1183] Judgement, para. 203.
[1184] See **III**. Cross-cutting errors. Democratic Centralism, *supra*.
[1185] See **III**. Cross-cutting errors. Authority of the Central Committee, *supra*.
[1186] Judgement, para. 152 footnote 442 (referring to, *inter alia*, paras. 385 to 387, which are impugned).
[1187] *Mémoire final*, **E295/6/4**, para. 265 footnotes 483 to 486.
[1188] SHORT: T. 6 May 2013, **E1/189.1**, p. 87, L. 23-25 around [14.24.52]; T. 7 May 2013, **E1/190.1**, p. 19, L. 2-5 around [09.52.21; see **III**. Cross-cutting errors, *supra*. *Principle of secrecy*. See also Judgement, para. 399.
[1189] SHORT: T. 7 May 2013, **E1/190.1**, p. 40 L.25 to p. 41 L.10; see **III.1.C.b**. Trust and collaboration and **III.5.**, *supra*; SHORT: T. 7 May 2013, **E1/190.1**, p. 40 L.25 to p. 41 L.10; see **III.1.C.b**.Trust and collaboration and **III.5.C.** Decision-making process and trust. Attendance of Standing Committee meetings. – Frequency, *supra*.

548. Both prior to and after 1975, being a new intellectual petty bourgeois within the Party, KHIEU Samphân was confined to positions, which, although prestigious, were just make-believe (and everyone knew this) and therefore devoid of any "authority".[1190]

549. ***Proximity and access to information***. In view of the foregoing, the Chamber could not conclude that KHIEU Samphân *"was trusted to live and work closely with the CPK senior leaders"*, and therefore had access to information.[1191] Living in close quarters does not imply close collaboration and sharing key information. Even less when one takes into account the principle of secrecy and compartmentalisation within the CPK. No evidence at all supports the Chamber's claim.[1192] Only the 16 copies of the minutes of the Standing Committee meetings provide some insight into the type of information to which KHIEU Samphân had access through his attendance of those meetings. However, nothing in the minutes concerns the crimes for which he was convicted.

550. In conclusion, based on the evidence on record, no reasonable trier of fact would have considered proven beyond reasonable doubt that KHIEU Samphân contributed to the decision-making process or that he could incur criminal liability as a result of the information available to him at that time. Accordingly, the Chamber's errors occasioned a miscarriage of justice.

551. **Office 870 and commerce**. The Chamber committed an error of fact in holding that KHIEU Samphân joined Office 870 in or around October 1975, and that he had oversight over commerce matters and an *"important"* role in the DK economy and possessed *"economic authority."*[1193]

552. **Membership of Office 870.** The Chamber rightly held that *"it [was] not satisfied that KHIEU Samphân ever served as the chairman of Office 870"*,[1194] but it committed an error of fact regarding the Appellant's collaboration with that Office concerning matters of commerce. For

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[1190] See **III.1.C.b.** Trust and collaboration, *supra*; see **III.5.C**. Presidium. Designation, *infra*.
[1191] Judgement, paras. 388, 408 to409, 747.
[1192] Moreover, the Chamber admitted that it was unable to say whether KHIEU Samphân saw all the documents passing through Office 870, *"in particular all of those which did not concern his specific areas of policy responsibility"* (Judgement, para. 399).
[1193] Judgement, paras. 390, 400 to 407, 409, 747, 751 to 753, 764, 771, 1020.
[1194] Judgement, para. 399.

instance, in reliance on the minutes of a Standing Committee meeting of 9 October 1975, it held that he was a member of Office 870 around October 1975.[1195] However, the minutes only show that the Appellant was assigned *"responsibility for the Front and the Royal Government and Commerce for accounting and pricing,"* and that the person responsible for *"Domestic and International Commerce"* was KOY Thuon (Comrade Thuch).[1196] Nothing in the minutes indicates that he was appointed to Office 870, because some other people were appointed there.[1197] Accordingly, the Chamber could not infer from that evidence that the Appellant *"joined Office 870 in or around October 1975"*. Accordingly, its finding must be invalidated.

553. The Chamber could no more rely on statements the Appellant made in 2004, in which he confusingly described all his functions in relation to pricing, responsibility for the distribution of goods in the zones and for export.[1198] He cites October 1975 in relation to all his functions, but his error is rectified in the minutes of the Standing Committee meetings dated 1976 where it is recorded that the Commerce Committee was formed on 13 March 1976 *"to make examinations and preparations for merchandise which must be purchased"*[1199] and it was not until 21 April that year that it was specified that *"On Commerce and Industry"* and only *"Regarding the Korean commercial delegation"*, the Appellant (Hem) was appointed to work alongside Vann (IENG Sary) and Touch *"as technical staff assistants"*.[1200] This goes to show that his appointment in that capacity was highly restricted. Therefore, the evidence did not permit the Chamber to infer that he *"joined Office 870 in or around October 1975."* Accordingly, its finding must be invalidated.

[1195] Judgement, para.390, footnote. 1189
[1196] **E3/182,** pp. 1 to 2, ERN 00183393. It should be noted that an important detail is missing in the French translation: *"Camarade Hem, responsable du front et du gouvernement royal, du commerce* ***pour ce qui est des listes et des prix"*** as evidenced by the Khmer original at ERN 00019108. That detail does appear in the English translation at ERN 00183393: *"Responsible for the Front and the Royal Government, and Commerce* ***for accounting and pricing"***.
[1197] **E3/182,** p. 1, ERN 0002183393. Doeun was named *"Chairman of the Political Office of 870"* while *"Comrade Yem"* was designated to Office 870.
[1198] Judgement, para. 390, footnote 1189: KHIEU Samphân's book, **E3/18**, p. 66, ERN 00103756. No date is mentioned in the other document cited by the Chamber: Written Record of Interview of KHIEU Samphan **E3/37**, p. 3.
[1199] *Mémoire final*, **E295/6/4,** para. 234.
[1200] Summary of the Decisions of the Standing Committee Meeting of 19-20-21 April 1976, **E3/236**, pp. 4 to 5, ERN 00183419-20.

554. **Economic authority.** At paragraph 409 of the Judgement, the Chamber held that *"KHIEU Samphan's decision-making power was primarily limited to matters of economics and foreign trade."* However, the Chamber erred in considering that it had evidence of *"his supervision of the Commerce Committee"*[1201] even though none of the evidence before the Chamber justified such a conclusion. It will also be noted that, contrary to what is asserted in general at paragraph 406 of the Judgement, the Appellant has never said that he was *"responsible for commerce"*, but rather that he *"work[ed] with the Department of Foreign Trade to ensure importation of specific products"*.[1202]

555. On the contrary, all DK official documents that the Chamber claims were sent or copied to the Appellant[1203] only attest to his limited function, namely *"the distribution of products in the zones and foreign export"*.[1204] This is a far cry from having oversight of the Commerce Committee and, moreover, the Appellant did not have general oversight of commerce matters. Indeed, on 7 May 1976, it was Doeun, and not KHIEU Samphân, who was assigned to form a foreign trade team.[1205] In fact, the aforementioned minutes of the Standing Committee meetings from 1976[1206] shed more light on the Appellant's limited role, and do not support the Chamber's conclusion concerning the Appellant's alleged economic authority.

556. Further, even after noting that the Appellant was never named chairman of the Commerce Committee, given that VAN Rith was named to that post in 1976 and held it until the end of the regime,[1207] the Chamber still erred by considering that he had much authority since the *"Commerce Committee frequently sought instructions and comments from [him]."*[1208] On this point, the Chamber committed a gross error of fact by relying on the testimony of SAKIM Lmuth

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[1201] Judgement, para. 409.
[1202] Book, **E3/18**, p. 66, ERN 00103756; Written Record of Interview, **E3/37**, pp. 3 and 5, ERN 00156754 and 00156756; VOA interview, **E3/204**, pp. 1 to 2, ERN 00656569-70; Letter **E3/112,** ERN 00170882-83.
[1203] Judgement, paras. 406, footnote 1238.
[1204] *Mémoire final*, **E295/6/4**, para. 242. See, for example, minutes of meeting of the Standing Committee on delegation of work: **E3/182**, p. 1, ERN 002183393 and **E3/234**, pp. 1 to 2, ERN 00182649-50; see also: Written Record of Interview of THUCH Sithan, **E3/378**, p. 4, ERN 00345543; SUONG Sikoeun T. 14 August 2012, **E1/107.1,** p. 101 L. 17 to p. 102 L. 7 above [15.37.13].
[1205] Record of Standing Committee Meeting of 7 May 1976 on Commerce Matters, E3/220, p. 1, ERN 00182706.
[1206] **E3/234**, p. 1-2, ERN 00182649-50; **E3/236**, p. 4-5, ERN 00183419-00183420.
[1207] Judgement, paras. 405-6.
[1208] Judgement, para. 406.

(alias SAR Kimlomouth), claiming that it showed that *"VAN Rith could not make certain decisions, and had to defer to VORN Vet and KHIEU Samphân."*[1209]

557. However, as the Defence amply demonstrated both during the proceedings and in its filings, this witness was only surmising when he commented on documents he had not seen until they were shown to him by the investigators![1210] Moreover, he admitted that he never worked with the Appellant during the DK era and did not even know the Appellant's exact functions with regard to commerce.[1211] A reasonable trier would never have considered that his evidence attested to the fact that the Appellant exercised "oversight" functions. The Chamber's finding must necessarily be invalidated.

558. Further, the Chamber's systematic examination of the evidence solely for inculpatory purposes led it to not only disregard evidence concerning the fact that the Appellant had no decision-making authority,[1212] but also to distort the evidence put before it. For example, how could one explain that the Chamber considered as proof of the Appellant's oversight functions the fact that he urged workers *"to be careful and attentive"* when arranging items in a warehouse![1213] In fact, a review of its reasoning shows that the Chamber had no evidence to support its claims.

[1209] Judgement, para. 406, footnote 1244.

[1210] SAKIM Lmut T. 5 June 2012, **E1/81.1**, p. 26 L. 12 to 18 after [10.14.29]: *"Q. Let me confirm that for what you have just stated: you did not know the actual fact of the relationship between the person by the name of Hem in relation to the Commerce or Economic Committee before you were shown the document by the investigator from the OCIJ; is that correct? A: Yes, that's correct. I made my conclusion relying on those documents."*; T. **E1/80.1**, 4 June 2012, p. 15 L. after [09.34.16]: *"Due to the communication letter, I concluded that it was so"*; T. 4 June 2012, **E1/80.1**, p. 17 L. 15-23 near [09.39.59]: "[RE-TRANSLATION] *(.)… I was shown documents by the OCIJ investigators regarding Brother Hem. It was from those documents that I learned that some documents had been sent to Brother Hem and Brother Vorn"*. The Defence voiced strong objection to the way the OCIJ investigators interviewed this witness and more generally, to the fact that the Chamber ignored the Defence's objections whereas, as this example this clearly shows, some interviews were biased in breach of the right to fair trial. See T. 31 May 2012, **E1/79.1**, p. 47 after [10.36.08]. See **I.4**, *supra*.

[1211] SAKIM Lmut: T. 31 May 2012, **E1/79.1**, p. 95, L. 24 to 25 and p. 96 L. 1 to 5 around [15.26.16]; T. 5 June 2012, **E1/81.1**, p. 30 L. 10 to p. 31 L. 2 around [10.30.52]; T. 31 May 2012, **E1/79.1**, p. 43 L. 20 to 25 and p. 44 L. 1 after [11.22.51].

[1212] *Mémoire Final*, **E295/6/4**; see for example, Equipment/Materials that Yugoslavia offered to sell, **E3/340,** p. 1, ERN 00681191: "[RE-TRANSLATION] *Brother Hem told us that Bang Vorn was not willing to purchase all that equipment and asked us to come up with excuses to respond to [the firm] Rudnap"*; see also Minutes of the 7 May 1976 Standing Committee meeting on commerce, **E3/220**, p. 1, ERN 00182706, clearly indicating that it was the Standing Committee which issued instructions: *"In accordance with our currency which the Standing Committee proposed to reconsider and examine the purchasing accounts, reducing the items to be purchased which are not necessary"*.

[1213] Judgement, para. 407.

Repeated claims in the Judgement regarding this alleged authority[1214] do not prove that it existed, especially because the Appellant's thesis and education – on which the Chamber relies – are not reflected in the policies implemented by the DK regime.[1215]

559. The findings on KHIEU Samphân's alleged economic authority are based on the extrapolation and distortion of the evidence. They are neither reasonable, nor the only findings the Chamber could have made. Accordingly, the Chamber failed in its duty to give reasons by its failure to explain why it did not reject as unreasonable the detailed submissions of the Defence in its closing brief and final submissions to the effect that the Appellant's role was quite limited.[1216] The erroneous findings it made in order to overcome the fact that the Appellant never substantially contributed to the JCE must be quashed.

560. **The 1976 and 1977 plans.** The Chamber committed several errors of fact regarding KHIEU Samphân's alleged participation in the development of the 1976 and 1977 plans.

561. ***Alleged knowledge of the meeting***. First of all, the Chamber erred in fact in holding that *"considering his economic authority, regular attendance at Standing Committee meetings and other organs of the Party Centre, and ongoing participation in developing Party policy throughout the democratic and socialist revolutions (...) soon after [the Appellant's] return to Cambodia he was notified of (...) the observations made and the plans made by the Standing Committee in late August 1975"*.[1217] No evidence was offered in support of that claim. No reasonable trier would have made that finding after noting that KHIEU Samphân was not in Cambodia in late August 1975 when the Standing Committee toured the Northwest.[1218] By relying on mere speculation, the Chamber infringed both its duty to give reasons and the presumption of innocence. Its finding must be invalidated on that basis alone.

[1214] Judgement, paras.751, 771, 1020.
[1215] Judgement, paras. 351 to 355. See **III.1.C.a** KHIEU Samphân before 1970 Studies (thesis) *supra*).
[1216] *Mémoire Final*, **E295/6/4**, paras. 228 to 257; T. 28 October 2013, **E1/235.1**, pp. 95 to 109 between [14.22.31] and [15.17.06].
[1217] Judgement, para. 745.
[1218] Judgement, para. 747.

562. ***Alleged authority.*** The Chamber's errors regarding the Appellant's alleged *"economic authority"* have been highlighted previously.[1219] It also failed in its duty to give reasons by its failure to respond to the Defence's argument that in the absence of all of the minutes of Standing Committee meetings, it could not possibly conclude that KHIEU Samphân regularly attended those meetings.[1220] Indeed, comparing the number of Standing Committee meetings to the number of minutes where the Appellant's attendance is recorded, a reasonable trier would have found that his attendance was, at best, occasional, but certainly not "regular". This goes to the issue of respect for the *in dubio pro reo* principle. Moreover, since no real meaning attaches to the term *"Party Centre",*[1221] and in the absence of concrete evidence upon which to rely in determining how often KHIEU Samphân attended *"meetings... [of] other organs of the Party Centre",* the Chamber erred in concluding that his attendance at those meetings was also *"regular".*[1222] Finally, no reasonable trier would have relied solely on the Appellant's *"ongoing participation in developing Party policy throughout the democratic and socialist revolutions"* in finding that he in fact had knowledge of the Party's intentions. The inherent sketchiness of such catch-all formulations undermines the extent of their truthfulness. By its course of action, the Chamber failed in its duty to give reasons. Its reasoning must be invalidated.

563. ***Information obtained.*** Further, the allegation that KHIEU Samphân was able to obtain inside information from the Party leadership by virtue of his functions is inconsistent with all the Chamber's earlier findings on the principle of secrecy which it assessed according to an impermissible double standard.[1223] For example, it conveniently held that adherence to the obligation of secrecy was such that it even accounts for the confusion exhibited by witnesses on the stand,[1224] and that it makes up for the lack of probative evidence and therefore relieves the Chamber of its duty to give reasons.[1225] At the same time, it did not hesitate to conclude that the principle of secrecy was infringed to such an extent that the Appellant was able to have full

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[1219] See **III.5.C**KHIEU Samphân at the time of movement of population (phase two), 870 and Commerce, *supra*
[1220] *Mémoire Final*, **E295/6/4,** paras. 259 to 271; T. 28 October 2013, **E1/235.1**, p. 25 after [09.52.28] to p. 27, L 1 to 10.
[1221] See **III.0** Cross-cutting errors *"Party Centre"* and *"Angkar"*, *supra.*
[1222] Judgement, para. 747.
[1223] See **II.2** Incorrect application of the principles underlying the assessment of evidence. Double standard, *supra.*
[1224] Judgement, para. 199.
[1225] See **III.5.A** Facts relating to movement of the population (phase two) – Deliberate refusal to provide information, *supra*

knowledge of the Party's decisions concerning Party policy when it wanted to find him liable. No reasonable trier would have adopted such a biased and inconsistent reasoning. The finding based thereupon must be invalidated.

564. ***The 1975 policy document.*** The Chamber also erred in finding that the Appellant, then *"a [...] member of the Central Committee, did take part in the development of the plans reflected"*[1226] in a September 1975 Party policy document.[1227] The Defence recalls its earlier submissions regarding the admissibility of this document, in that it does not name its authors, the circumstances in which it was produced or when the policies it describes were developed.[1228] In the absence of answers to those key questions for the purposes of assessing evidence, a reasonable trier would not have admitted the document into evidence. The Chamber's error in relying on it is all the more egregious given particularly that it was also unable to confirm KHIEU Samphân's attendance at the meeting at which it was allegedly produced.[1229]

565. ***Alleged attendance of meetings in 1974 and April-May 1975.*** Failing to draw consequences from the lack of probative evidence, the Chamber persisted with its erroneous reasoning by analogy in holding that KHIEU Samphân's attendance of meetings in June 1974 and late April or May 1975 showed that he took part in the development of the Party policy described in the 1975 policy document.[1230] In any event, the Appellant's alleged attendance of those meetings was not sufficient to establish beyond reasonable doubt that he in fact took part in the development of policies which were subsequently decided by the Party.[1231] This reasoning must be invalidated as it offends the *in dubio pro reo* principle.

566. ***The 1977 plan.*** Finally, the Chamber erred when it held that KHIEU Samphân *"took part in the development of the 1977 plan"*.[1232] Here again, realising the absence of evidence regarding KHIEU Samphân's attendance of the November 1976 Party meeting at which the alleged plan

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[1226] Judgement, para. 751.
[1227] Judgement, paras. 745 to 753, 801.
[1228] See **III.5.C**KHIEU Samphân at the time of movement of population (phase two). September 1975 document, *supra*
[1229] Judgement, para. 750.
[1230] Judgement, para. 751.
[1231] See **III.1.C.c** KHIEU Samphân in particular between 1974 and April 1975 and **III.3.C.**KHIEU Samphân at the time of movement of population (phase one), *supra*.
[1232] Judgement, para. 771.

was affirmed, the Chamber proceeded by inference in an attempt to establish the Appellant's alleged attendance of the meeting. Here again, its reasoning contains many errors. First, the Chamber relied solely on CHANDLER's claims from unnamed sources in holding that *"the Party Organisation" which decided upon this plan were members of the Party Centre, including members of the Standing and Central Committees"*.[1233] It is plain that this does not prove the Appellant's participation in the development of the Party's plan. Moreover, in view of the major ambiguity attaching to the term *"Party Organisation"*,[1234] the Chamber could not consider by extension that this indiscernible entity included both Standing Committee and Central Committee members. In fact, this analysis is inconsistent with the fact that the Central Committee had no decision-making power and that the Standing Committee was the ultimate decision-making authority, as noted by the Chamber[1235] and corroborated by SHORT.[1236] As a result of such a litany of errors, a reasonable trier would invalidate the Chamber's biased reasoning.

567. ***Statements concerning the Central Committee.*** The Chamber then reasoned by analogy in holding that KHIEU Samphân's statements regarding the role of the Central Committee show that he took part in the development of the 1977 plan. However, in making this finding, it distorted the Appellant's statements by quoting them out of context. The fact is that he was not referring to the role of the Central Committee but rather to suggestions it made[1237] which quite obviously were not taken into account since they do not feature in the 1977 plan.[1238] No reasonable trier would have conflated KHIEU Samphân's statements with the development of policies adopted at a meeting he did not attend. Moreover, he wrote that *"the Central Committee was not an executive organization. It discussed implementation of policies created by the Permanent Bureau [Standing Committee]"*[1239] and clearly explained the respective roles of the Standing Committee and the Central Committee.[1240] Accordingly, the Chamber could not reasonably conclude solely in reliance on his statements that his attendance at Standing

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[1233] Judgement, para. 771.
[1234] See **III.0** Cross-cutting errors. "Party Centre" and "Angkar", *supra.*
[1235] Judgement, paras. 202 and 203.
[1236] SHORT: T. 6 May 2013, **E1/189.1**, p. 62.
[1237] Judgement, para. 771, footnote 2432, referring to paragraph 384; KHIEU Samphân's book, **E3/18**, pp. 58 and 59.
[1238] *Revolutionary Flag*, October-November 1976, **E3/139**.
[1239] KHIEU Samphân's book, **E3/18**, p. 58, footnote 50.
[1240] *Ibid.*, **E3/18**, p. 139-140.

Committee meetings implies that he also took part in its decision-making. Its erroneous reasoning must be invalidated.

568. ***Economic authority.*** The Chamber also erred in relying on the Appellant's alleged responsibility in relation to the economy.[1241] The Chamber's errors on this point have already been discussed,[1242] and they invalidate its findings. The Appellant's limited role, as reflected by the evidence',[1243] was not a sufficient ground for the Chamber to conclude that a link existed between his functions and the goals set out in the 1977 plan.

569. ***Central Committee and Standing Committee meetings.*** Finally, the Chamber erred in holding that KHIEU Samphân's attendance at *"Standing Committee and Central Committee meetings (...) at which the 1976 plan was decided and affirmed, and elements of the 1977 plan were established"* proves that he took part in the development of the 1977 plan.[1244] On the one hand, the Chamber erred regarding the Appellant's attendance at the unproved early September 1975 meeting at which the 1976 plan was allegedly developed.[1245] On the other hand, it erred regarding the Standing Committee meetings which the Appellant attended and the minutes of which reflect discussions of the conflict at the Vietnamese border and DK foreign policy,[1246] but not of production goals or strategic re-allocation of labour, which were the main focus of the 1977 plan.[1247] This further distortion of the evidence for inculpatory purposes invalidates the Chamber's findings in their entirety.

570. The Chamber's errors regarding KHIEU Samphân's participation in the development of the Party's 1976 and 1977 plans and goals occasioned a miscarriage of justice in that they were the basis of the Appellant's conviction for participation in a JCE and planning the crimes committed during movement of population (phase two).[1248] Insofar as his alleged participations were not established beyond reasonable doubt, all its findings must be invalidated.

[1241] Judgement, para. 771.
[1242] See **III.5.C**KHIEU Samphân at the time of movement of population (phase two). 870 and Commer*ce*, *supra*
[1243] See **III.5.C** KHIEU Samphân at the time of movement of population (phase two). Errors regarding economic authority.
[1244] Judgement, para. 771.
[1245] See **III.5.A** Facts relating to movement of the population (phase two). September 1975 document, *supra*
[1246] Judgement, para. 768, footnotes 2423 to 2426.
[1247] *Revolutionary Flag*, October-November 1976, **E3/139**.
[1248] Judgement, paras. 966 (JCE), 1029 (planning).

571. **Full-rights member of the Central Committee**. The Chamber committed an error of fact in holding that KHIEU Samphân became a full-rights member of the Central Committee in *"January"* 1976.[1249]

572. The Chamber relied on KHIEU Samphân's statements and the testimonies of three witnesses.[1250] KHIEU Samphân often spoke of the year 1976 without specifying a month. When he did, he was referring to either January or June 1976.[1251] Among the three witnesses, HEDER was the only one who linked the Appellant's appointment and a Congress which took place in January 1976. For his part, SHORT (who was not cited by the Chamber), linked the Appellant's appointment to his *"promotion"* to the Presidium[1252] a few months after January. In light of those inconsistencies and contradictions, the Chamber could not conclude beyond reasonable doubt that the Appellant became a full-rights member of the Central Committee in January 1976.

573. **Presidium.** ***Appointment.*** The Chamber committed errors of fact in holding that KHIEU Samphân was appointed President of the Presidium by the Central Committee,[1253] and that the appointment proved the Party Centre's trust in him and vested him with authority.[1254]

574. It was solely in reliance on the 30 March 1976 document that the Chamber claimed that the Central Committee initiated the appointment. It has already been demonstrated that it could possibly have been initiated by the Standing Committee.[1255] In any event, KHIEU Samphân's "promotion" to an even more symbolic post, but again devoid of any authority, further highlights the fact that his "promotion" to full-rights member of the Central Committee the same year (five years after joining as candidate member) was a symbolic and strategic move. Coming in the wake of the resignation of SIHANOUK, who had become a non-entity by then, further highlights the

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[1249] Judgement, para. 755.
[1250] Judgement, para. 202, footnote 613; para. 363, footnote 1091 (the three witnesses are HEDER, Duch and SALOTH Ban).
[1251] Book **E3/18**, p. 139-140, ERN 00103793-00103794.
[1252] HEDER: T. 15 July 2013, **E1/223.1**, p. 43; SHORT T. 6 May 2013, **E1/189.1**, p. 69 L. 16 to 22 after [13.43.43].
[1253] Judgement, para. 408.
[1254] Judgement, paras. 235, 381, 764 (designation by the Central Committee), 408 (trust), 409, 1034 (authority).
[1255] See **III.5.C.** Decision of 30 March 1976*, supra*.

fact that KHIEU Samphân never enjoyed the trust of the CPK, just like SIHANOUK.[1256] Many testimonies show that he had no authority in that capacity.[1257]

575. The Chamber could thus not conclude beyond reasonable doubt that KHIEU Samphân's role within the State Presidium vested him with authority and was proof of the trust he enjoyed and, as such, infer that he could in any way take part in the decision-making process.

576. **Diplomatic functions**. The Chamber committed an error of fact by speculating on the nature of KHIEU Samphân's diplomatic functions at the Presidium and the information he received by virtue of those duties.[1258]

577. As the Chamber indicated, *"[a]s President of the State Presidium, KHIEU Samphân continued to perform diplomatic and ceremonial functions."* In this capacity, he, for example, *"welcom[ed] foreign delegations (...) and led DK delegations on trips abroad"*.[1259] However, the evidence regarding his roles proves nothing other than the discharge of legitimate ceremonial duties on behalf of the legally recognised State of Cambodia. The evidence does not show that he received information about the commission of crimes during these visits or receptions.[1260]

578. As indicated by the Chamber, as President of the Presidium, KHIEU Samphân also *"sent and received diplomatic messages on behalf of the DK regime"*.[1261] However, nothing in the documents it cites shows that KHIEU Samphân allegedly had knowledge of crimes. On the one hand, the documents sent by the Office of the President of Presidium make no reference to the existence of crimes.[1262] On the other hand, there is no evidence to show that the documents concerning the situation in Cambodia, such as the ones from Amnesty International, were in fact sent to the Appellant and that he did receive and read them.[1263]

[1256] See **III.1.C.b.** Trust and collaboration and **III.5.C**. Decision-making process and trust, *supra*; *Mémoire final*, **E295/6/4**, paras. 226, 278 to 83; SHORT: T. 6 May 2013, **E1/189.1**, p. 69 L. 16 to 22 after [13.43.43].
[1257] *Mémoire final*, **E294/6/4**, paras. 279 to 282, footnotes 499 to 508.
[1258] Judgement, paras. 290, 291, 382, 827, 956, 958, 991, 992.
[1259] Judgement, para. 382.
[1260] Judgement, para. 291, footnote 904, **E3/1406**, pp. 1 and 2; Judgement, para. 382, footnotes 1150, 1151, 1152, 1154.
[1261] Judgement, para. 382.
[1262] Judgement, para. 382, footnote 1153; FBIS Collection, 31 August 1977, **E3/143**.
[1263] Judgement, para. 290, footnote 902; 1975-1976 report, **E3/4520**; footnote 903, Press Release, 8 May 1977,

579. Accordingly, no reasonable trier of fact would have found that KHIEU Samphân contributed to the commission of crimes or that he had knowledge thereof in his capacity as President of the Presidium. The Chamber's error therefore occasioned a miscarriage of justice.

580. **Speeches**. ***11 April 1976 speech.*** According to the Chamber,[1264] KHIEU Samphân delivered the inaugural speech at the opening session of the People's Representative Assembly (PRA) in April 1976 *"claiming that fair and honest elections had been held and endorsing policies regarding work-sites, cooperatives and the ongoing class struggle."* In fact, the inaugural speech[1265] was delivered by the *"Chairman of the delegates"* of the PRA who was not mentioned by name, but was not KHIEU Samphân.[1266] The Appellant's name appears only once in the document in connection with his appointment as President of the Presidium and not as Chairman of the People's Representative Assembly. Moreover, the press release issued after the session does not refer to KHIEU Samphân as *"Chairman of the delegates"*.[1267] Further, when the DK Constitution was adopted, six days prior to the speech, a document cited by the Chamber reports a speech the Appellant made before the PRA.[1268] In that document, the Appellant is not referred to as *"Chairman of the delegates",* and, moreover, he began his speech by paying his *"respects to esteemed and beloved comrade chairman, to beloved comrade representatives of the Cambodian revolutionary army, (...)"*.[1269] Accordingly, the Chamber erred in fact in holding that it was KHIEU Samphân who made the speech on 11 April 1976. This error is especially flagrant, because the Defence had pointed out earlier during a documents hearing that there was a mistake resulting from a mistranslation.[1270]

581. Moreover, even if the Appellant did make the speech, that does not mean that he contributed to the population movement policy by endorsing the *"policies regarding work-sites,*

E3/3311 and 30 March 1978, **E3/3316**; Judgement, para. 827, footnotes 2605 to 2607.
[1263] Judgement, paras. 765 and 985.
[1264] Judgement, para. 765 and 985.
[1265] Document concerning the First Congress of the First PRAK Legislature, 11-13 April 1976, **E3/165**, pp. 5 to 8, ERN 00184052-55.
[1266] T. 5 February 2013, **E1/169.1**, from [10.17.35] to [11.32.20].
[1267] First Plenary Session of the First Legislature of the PRAK – Press Release, 14 April 1976, **E2/262.**
[1268] Judgement, para. 233, footnote 726.
[1269] "KHIEU Samphân Report", FBIS Collection, 5 January 1976, **E3/273**, ERN 00167633.
[1270] T. 5 February 2013, **E1/169.1** around [10.22.57] where the Defence points out a mistranslation and gives the references of the source in Khmer to highlight the difference between *"Chairman of the PRA delegates"* and *"President of the Presidium"*; see also original in Khmer, **E3/165** ERN 00053610.

cooperatives and the ongoing class struggle", since work-sites and cooperatives relate to policies that are outside the scope of Case 002/01. As for pursuing the class struggle, the Defence has demonstrated that the Chamber erred in linking it to movement of the population (phase two).[1271] Finally, nothing in the speech shows that KHIEU Samphân endorsed the criminal aspects of the common purpose.

582. **The 15 April 1976 speech.** According to the Chamber,[1272] KHIEU Samphân *"praised the Cambodian people and revolutionary army for their role in the liberation of Phnom Penh, the end of the feudalist-landowner regime, and the ongoing class struggle to "topple" and "uproot" the capitalists."* By misleadingly mishmashing the evidence, the Chamber arrived at the conclusion that the speech demonstrates the Appellant's contribution to the alleged targeting policy against former Khmer Republic officials. However, the speech was in fact aimed at commending the CPNLAF upon the victory it won on 17 April 1975 which resulted in the *"overthrow [of] the old and colonialism and other oppressive regimes"*.[1273] Nothing in the speech relates to *"uproot[ing]"* capitalists or the role of the army in the class struggle. The speech was about commemoration of the war and not the commission of crimes against former Khmer Republic officials or instigating anyone to commit such crimes. For its finding, the Chamber cites paragraph 616 concerning re-education in the cooperatives between September 1975 and December 1976; the content of that paragraph is squarely outside the scope of Case 002/01. The Chamber does not cite any statements by the Appellant. This manipulation aimed at imputing to the Appellant statements that he has never made must be invalidated.

583. ***Speech of 16-19 August 1976.***[1274] The Chamber claims that the Appellant's speech at the 5th Conference of Non-Aligned Countries endorsed the Khmer Rouge alleged targeting policies, in that *"referring to the Mayaguez incident and the Siem Reap bombing, KHIEU Samphan repeatedly appealed to the people and the army to search for and eliminate enemies he claimed would never give up"*.[1275] However, in light of the circumstances of the speech – made abroad

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[1271] See **III.5.A.** Facts relating to movement of the population (phase two). Definition of "New People", *supra*.
[1272] Judgement, paras. 985, 991. See also Judgement, paras. 383 and 387.
[1273] Speech **E3/275**, p. 3, ERN 00167632.
[1274] Speech at the 5th Conference of Non-Aligned Countries, 16-19 August 1976, **E3/549**.
[1275] Judgement, para. 828.

and mainly about the situation in the country in the aftermath of the war – his brief allusion to the Mayaguez incident and the Siem Reap bombing[1276] could not be considered as an appeal to eliminate enemies. Accordingly, the Chamber erred by considering that the speech supports its finding. Moreover, the other two speeches it cites to the same effect were from 1977-1978 and do not support its finding about a temporal nexus between the speeches and the crimes allegedly committed in 1975 and 1976.[1277]

584. ***The 15 April 1977 speech.*** According to the Chamber, the fact that *"[i]n contemporaneous public statements, KHIEU Samphân acknowledged that tens of thousands had been collected at various work-sites"*[1278] proves that he knew crimes were being committed during movement of population (phase two). However, a careful reading and cross-checking of the sources cited shows that the only contemporaneous record which was a public statement by the Appellant containing details about the number of people present at the work-sites is the 15 April 1976 speech.[1279] Now, work-sites are outside the scope of the first trial and cannot be relied upon for findings on the Appellant's knowledge of the facts in Case 002/01. Moreover, the letter of the speech contains nothing about any earlier population movements nor even a link to work-sites. Further, the Defence recalls that the Appellant was convicted of crimes against humanity of extermination, persecution on political grounds and other inhumane acts (forced transfers, enforced disappearances and attacks against human dignity) committed during movement of population (phase two). However, the speech at issue contains nothing to support the finding that any of the crimes had been committed or were being committed during movement of population (phase two). Accordingly, the Chamber committed an error of fact and law in holding that the speech proves KHIEU Samphân's awareness of the commission of those crimes both prior to and during movement of population (phase two).

585. The same speech allegedly proves that the Appellant shared the common purpose *"and*

[1276] **E3/549**, pp. 15 to 16, ERN 00644939: *"Besides, the enemy still carried out its attempt to destroy the results of the victory of our people, as shown by the affair of Mayaguez in May 1975 and the bombing of the City of Seam Reap in February 1976".*
[1277] Judgement. para. 828; see **III.6.**, *supra*.
[1278] Judgement, para. 956 also referring to paragraphs 383, 581, 610, 738, 783 and 785.
[1279] KHIEU Samphân's Speech at Anniversary Meeting, 15 April 1977, **E3/200**, ERN S 00004165-66.

policies to evacuate urban areas (…) and target Khmer Republic soldiers and officials".[1280] However, in all eight pages of the text of the speech, the only reference to population movements *per se* is that *"both the veterans of the liberated zones and the newcomers are alike".*[1281] The reference by the Chamber to the *"New People"* who allegedly *"[came] from Phnom Penh"*[1282] is simply a distortion of the evidence for inculpatory purposes. In fact, the Appellant only spoke of *"those of the other classes from Phnom Penh who are also patriotic"*[1283] and, moreover, never uses the term "New People." Here again, the Chamber committed an error of fact in holding that the speech proves the Appellant's endorsement of a criminal policy to move the population, since nothing in the speech relates to such a policy. Indeed, the Chamber was forced to rely on facts relating to how people were treated in cooperatives and at work-sites, because the speech itself contains nothing about the policy it alleges.[1284]

586. The speech also does not establish that the Appellant allegedly endorsed a policy to *"target Khmer Republic officials*";[1285] the Chamber therefore had to resort to a distortion of the evidence in order to arrive at such a conclusion. Not only was the Khmer Republic not specifically mentioned, no arrests, executions or disappearances of former Khmer Republic officials were directly or indirectly reported or endorsed. Finally, the Chamber ignored its own findings at paragraph 624 concerning the conflict with Vietnam at the time. Accordingly, insofar as the Chamber failed to establish that the call to maintain vigilance was not related to the conduct of the war at the border, it could not conclude beyond reasonable doubt that that call was an endorsement of the targeting policy against former Khmer Republic soldiers and officials.

587. ***The 30 December 1977 speech.***[1286] The Chamber erred in concluding that this speech was an endorsement of the criminal policy to move the population and/or targeting policy. In fact, the

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[1280] Judgement, paras. 986, 987.
[1281] "KHIEU Samphân's Speech at Anniversary Meeting", 15 April 1977, **E3/201**, ERN 00419515.
[1282] Judgement, para. 986.
[1283] KHIEU Samphân's anniversary speech, 15 April 1977, **E3/201,** ERN 00419513.
[1284] Judgement, paras. 986: the first part of the paragraph is outside to the scope of the case and unrelated to movement of the population (phase one) .
[1285] Judgement, paras. 986, 987.
[1286] "Khieu Samphân Statement", FBIS Collection, 30 December 1977, **E3/1359**, pp. 1 to 9, ERN 00169517-25. "Khieu Samphân Statement", Swedish Collection, 30 December 1977, **E3/267**, pp. 1 to 3, ERN S 00008729-316.

speech was quite clearly about the border conflict with Vietnam.[1287] The sentence *"[t]he Cambodian revolutionary army and the Cambodian people have already fought and defeated the US imperialist aggressors and their lackeys"*[1288] is taken out of context, because it was simply meant as an encouragement to the people in the eventuality of a future armed struggle. Also, the appeal to increase productivity cannot be viewed as relating to anything other the war effort. The finding that the speech was an endorsement of criminal polices must be invalidated.

III.5.D. KHIEU Samphân's criminal responsibility at the time of movement of the population (phase two)

III.5.D.a Knowledge and awareness of a "substantial likelihood"

588. The Chamber committed several errors of law and fact in holding that KHIEU Samphân *"knew of the substantial likelihood"* of the commission of crimes prior to movement of the population (phase two), and of the commission of crimes during and after movement of the population (phase two).[1289]

589. **Prior to movement of the population (phase two).** The Chamber erred in law and fact in holding that the Appellant *"therefore knew of the substantial likelihood"* by the beginning of movement of the population (phase two) that implementation of the policies would result in crimes being committed.[1290]

590. Here again, the Chamber offended the principle of legality in that the lesser standard of *mens rea*, imported from JCE-3, did not exist under customary international law or Cambodian law at the time of the facts charged.[1291]

591. First, the Chamber relied on evidence pre-dating 17 April 1975. The Defence has already

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[1287] See for example, **E3/267,** ERN S 00008729:*"The Cambodian revolutionary army and the entire Cambodian collective people, under the leadership of the CPK, will certainly totally repulse the aggressive expansionist and annexationist Vietnamese enemy from Cambodian territory."* ERN S 00008730: *"During the past two years, world opinion has discovered the ugly face and the ambitious, expansionist nature of the SRV. Because of this it has become even more isolated in the world arena"*.
[1288] **E3/267,** p. 2, ERN S 00858045 and **E3/1359**, ERN 00169524.
[1289] Judgement, paras. 951, 952, 956 and 958.
[1290] Judgement, paras. 951 and 952.
[1291] See **III.1.B.**, *supra*

impugned in fact and law the reliance on such evidence.[1292] Moreover, the Chamber did not establish that, because of these elements, the Appellant *"knew of the substantial likelihood"* of the commission of crimes during movement of population (phase two).

592. The Chamber then relied on the following evidence: knowledge of the people's living conditions, the development of plans for movement of the population (phase two) – which it then omitted –, the dissemination of those plans in the *Revolutionary Flag* and *Revolutionary Youth* magazines, the training sessions and a consistent pattern of conduct during the movement of people between rural areas.

593. However, as has been demonstrated,[1293] none of this proves beyond reasonable doubt that the Appellant knew of the crimes or criminal policies implemented prior to movement of the population (phase two) or that he knew that those crimes were part of a criminal scheme. Insofar as the existence of a consistent pattern of conduct was not established beyond reasonable doubt, it was also impossible to conclude that the Appellant knew that crimes would be committed as a result of the implementation of the alleged consistent pattern of conduct or that there was a *"likelihood"* that they would be committed afterwards.

594. **<u>During and after movement of the population (phase two).</u>** The Chamber erred in holding that *"KHIEU Samphân had concurrent knowledge of the crimes committed in the course of [movement of the population] phase two"*.[1294] The Chamber erred further in holding that KHIEU Samphân *"was (...) on notice of the crimes after their commission"*.[1295]

595. As concerns the Appellant's concurrent knowledge of the crimes, the Chamber relied on the following evidence: the existence of a consistent pattern of conduct during population movements between rural areas, communications between autonomous Zones and Sectors with the Centre, the existence of mass displacements, the Appellant's visits to the countryside, his public statements, training sessions, and the information collected by the Ministries of Propaganda and Foreign Affairs.

[1292] See **III.1.B.**, *supra*
[1293] See **III.5.C.**, *supra*.
[1294] Judgement, para. 956.
[1295] Judgement, paras. 958 and 959.

596. In view of the reasonable doubt regarding the above evidence, it is impossible to conclude that the Appellant had knowledge of the crimes concurrent with their commission. The only finding a reasonable trier would have recorded is that during movement of population (phase two), the Appellant had no knowledge of the crimes committed. This also means that the finding that he knew that his conduct contributed to the commission of crimes is unsustainable.

597. As concerns knowledge after the facts, the Chamber also cited the same evidence which has already been impugned in fact and in law.[1296] Moreover, the Chamber failed to demonstrate that its evidence supports the finding that the Appellant had *post-facto* knowledge of the crimes committed during movement of population (phase two).

598. **Conclusion.** The Chamber's errors occasioned a miscarriage of justice, and invalidate its findings.

III.5.D.b Substantial contribution

599. The Chamber committed errors of fact and law in holding that the Appellant's contribution had reached the required threshold for him to incur criminal responsibility for participation in a JCE, instigating, planning, and aiding and abetting.[1297]

600. As concerns the four modes of liability, the Chamber relied on various elements, namely, the Appellant's attendance at meetings, congresses and training sessions, as well as his functions, his speeches, reputation, diplomatic functions, role as liaison with SIHANOUK, trips in Cambodia and abroad and culpable omissions. However, none of these elements was enough to constitute the *actus reus* of each mode of liability.

601. The Defence has recalled the level of contribution required to entail responsibility in respect of each of the four modes of liability.[1298]

602. **Meetings.** ***Planning and instigating.*** The Chamber committed several errors in holding that the Appellant's attendance at the meetings of April 1975 and late 1975 and late 1976

[1296] See **III.3.B**; **III.4.B**, *supra*.
[1297] Judgement, para. 963 (JCE), 1027 (planning), 1032 (instigating), 1034 (aiding and abetting).
[1298] See **III.1.B**, *supra*.

substantially contributed to the crimes committed during movement of population (phase two).[1299]

603. The Defence recalls that it has challenged the evidence relating to these meetings and the presence of the Appellant thereat where the initial plan and the 1976 and 1977 plans were allegedly adopted.[1300] The Defence has also submitted that there is no basis for a judge to conclude simply based on an individual's attendance at meetings that that individual played a role in the development of plans which were adopted at those meetings.[1301] Insofar as no evidence showed that the Appellant allegedly made statements at these meetings, his role remains undetermined. The Chamber is thus not in a position to establish how his attendance at these meetings substantially contributed to the commission of crimes.

604. ***JCE.*** The Chamber committed another error in holding that the Appellant's attendance at the meetings already identified and at all the other ones cited substantially contributed to the commission of crimes during movement of population (phase two).[1302]

605. Here again, the Chamber had no evidence of statements made by the Appellant at these meetings. Accordingly, it was impossible to infer that he *"played a key role in formulating the content of the common purpose and policies"*.[1303] Moreover, having held that the common purpose of the Khmer Rouge *"was not necessarily or entirely criminal*,[1304] the Chamber was under a duty to establish that the conduct ascribed to the Appellant substantially contributed to the criminal aspects of the common purpose. By not doing so, the Chamber failed in its duty to give reasons.

606. **Training sessions.** ***JCE and aiding and abetting.*** The Chamber erred in holding that the Appellant's attendance at training sessions prior to 17 April 1975 and throughout the DK era substantially contributed to the commission of crimes through a JCE during movement of

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[1299] Judgement, paras. 1023 to 1026 (planning); paras. 1031 to 1032 (instigating).
[1300] See **III.3.A**; **III.5.A**, *supra*.
[1301] See **III.1.B**, *supra*; *Mugiraneza* Appeal Judgement, paras. 136 to 141.
[1302] Judgement, paras. 964 to 972.
[1303] Judgement, para. 972.
[1304] Judgement, para. 778.

population (phase two).[1305] As concerns aiding and abetting, it erred specifically regarding the sessions attended by Cambodians returning from abroad.[1306] The Appellant's attendance at those sessions does not constitute contribution to the commission of crimes.

607. The Chamber not only extrapolated upon the nature and impact of the training sessions,[1307] it has never been demonstrated that those sessions impacted the commission of the crimes. Indeed, none of the people who attended those sessions subsequently committed any of the crimes charged or indicated that they were influenced to do so. Accordingly, it is impossible to demonstrate the extent of the Appellant's contribution, especially for JCE for which the requirement of a sufficient nexus to the perpetrator was not satisfied.

608. **The Appellant's functions.** ***JCE and aiding and abetting.*** The Chamber erred in holding that the Appellant's functions within the GRUNK and the FUNK (only as concerns aiding and abetting) and the positions he held throughout the DK regime substantially contributed to the commission of crimes during movement of population (phase two).[1308]

609. The Defence reiterates its submission that the Appellant's roles and their nature are unduly overstated.[1309] Moreover it does not prove why his functions had any impact on the commission of crimes. There is no evidence in support of that claim.

610. ***Planning and instigating.*** The Chamber also erred in holding that the Appellant's functions within the "Party Centre" (planning) and the GRUNK and the FUNK (instigating) substantially contributed to the crimes committed during movement of population (phase two).[1310]

611. The Defence recalls its submissions regarding the misuse of the term "Party Centre".[1311] As used by the Chamber, the term encapsulates most of the functions in respect of which substantial contribution to the crimes was not established. The same also applies to the

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[1305] Judgement, paras. 973 to 976 (JCE).
[1306] Judgement, para. 1033.
[1307] See **III.1.A.b**; **III.5.C**, *supra*.
[1308] Judgement, paras. 977, 978, 980 and 991 (JCE), 1034 (aiding and abetting).
[1309] See **III.1.A.b**; **III.5.C**, *supra*.
[1310] Judgement, 1027 (planning), 1031 (instigating).
[1311] See **III.0** Cross-cutting errors. "Party Centre" and "Angkar". Means of transports, *supra*.

Appellant's functions within the GRUNK and the FUNK. Insofar as the contribution threshold is higher in this instance than previously, it was impossible to consider that the *actus reus* requirement of these modes of liability was satisfied.

612. **Speeches.** ***JCE and aiding and abetting.*** The Chamber erred in holding that the Appellant's speeches prior to and during movement of population (phase two) substantially contributed to the crimes committed during movement of population (phase two) and for which he incurs responsibility.[1312]

613. In addition to the Chamber's errors regarding the meaning and impact of the speeches,[1313] it failed to demonstrate the effect that those speeches had on the commission of the crimes. The mere fact that none of the perpetrators indicated that they heard those speeches or were encouraged to commit crimes after hearing them is clearly illustrative of the fact that they had no impact. Accordingly, it is impossible to conclude that moral support was provided to the crimes or that the criminal policies advocated by the common purpose were endorsed.

614. ***Instigating.*** The Chamber erred further in holding that speeches made before and during movement of population (phase two) substantially contributed to the commission of crimes during movement of population (phase two).

615. The same errors of fact as above taint the Chamber's findings regarding these speeches. Moreover, insofar as the contribution threshold is higher in this instance, these speeches do not constitute a substantial contribution to the crimes committed during movement of population (phase two).

616. **Reputation.** ***Aiding and abetting and JCE.*** The Chamber erred in holding that the Appellant's *"reputation"* substantially contributed to the crimes committed during movement of population (phase two).[1314]

617. There is no evidence in support of that claim. Indeed, none of the perpetrators testified that KHIEU Samphân's presence encouraged them to commit crimes. Accordingly, it is

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[1312] Judgement, paras. 980 to 987, 991 (JCE), 1033 and 1034 (aiding and abetting).
[1313] See **III.1.A.b**; **III.5.C**, *supra*.
[1314] Judgement, paras. 976, 980 and 988 (JCE); para. 1034 (aiding and abetting).

impossible to establish the sufficient nexus between him and the perpetrators. This finding must be invalidated.

618. **Diplomatic functions**. ***JCE.*** The Chamber erred in holding that KHIEU Samphân's diplomatic functions, including his trips abroad, welcoming diplomats and visits to the countryside, substantially contributed to the commission of the crimes committed during movement of population (phase two).[1315]

619. The Defence reiterates that the Chamber misconceived the nature and scope of these functions. Also, there is not one shred of evidence that they contributed to the commission of the crimes. The Chamber confused the exercise of lawful political functions with the implementation of the criminal policies of the JCE. Again, it failed to consider the possibility that his diplomatic functions could have been related to the non-criminal aspects of the common purpose.

620. **Role as liaison with SIHANOUK**. ***JCE.*** The Chamber erred in holding that KHIEU Samphân's role as liaison with SIHANOUK substantially contributed to the commission of crimes during movement of population (phase two).[1316]

621. The Defence reiterates that the Chamber misconceived the nature and scope of this role.[1317] Once again, there is no evidence to show that his role as liaison and, in that context, his visits to the countryside with SIHANOUK in any way contributed to the commission of crimes. Here again, the Chamber failed to prove what it alleges.

622. **Omissions.** The Chamber appears to consider that KHIEU Samphân's culpable omissions contributed to the crimes through all modes of liability.[1318] This does not appear clearly in regard to JCE, planning and aiding and abetting. However, it is a bit less obscure in regard to instigating.

623. In the event that the Chamber took those omissions into account, it has been recalled that omissions were not criminalised under customary international law in 1975. Moreover, insofar as

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[1315] Judgement, para. .
[1316] Judgement, paras. 989 and 990 (JCE).
[1317] See **III.1.A.b;,III.5.C**, *supra*.
[1318] Judgement, para. 1025 (JCE), 1025 (movement of the population (phase one), 1032 (instigating) and 1034 (aiding and abetting).

the Chamber did not provide a legal definition of "omission", it could not establish that they occurred.[1319] They must be invalidated on account of the failure to give reasons which permeates this type of reasoning.

624. **Conclusion on substantial contribution.** None of the elements on which the Chamber relied to establish the Appellant's alleged substantial contribution to the crimes satisfies the *actus reus* requirement of any of the modes of liability. The Chamber's errors invalidate its findings.

III.5.D.c. Intent

625. The Chamber erred in considering that the Appellant possessed the requisite intent to be convicted under of each of the modes of liability for the crimes committed during movement of population (phase two).[1320] From the outset, insofar as the Appellant had no knowledge of the crimes committed, this wrong premise cannot be used to demonstrate his criminal intent.

626. **JCE.** Proof of the *mens rea* of JCE lies in the intent shared by all co-perpetrators to commit the crimes.[1321] Nonetheless, insofar as the common purpose was not entirely criminal, the Appellant could not be held to possess the criminal intent solely on the basis of his having joined [the JCE]. The Chamber had to establish that the Appellant contributed to the criminal aspects of the common purpose. However, it failed to do so. Accordingly, it could not infer any criminal intent solely from the Appellant's alleged participation in the implementation of the common purpose.

627. Further, the Chamber relied solely on the Appellant's contribution to the common purpose in finding that he possessed the requisite discriminatory intent to commit the crime of persecution on political grounds. This simplistic finding is, once again, inconsistent with the Chamber's own findings on the non-criminal aspects of the common purpose.

628. **Planning.** The Chamber considered that having "*collectively with others*" continued *"to plan economic policies which relied upon forced population movements as a cornerstone,"* the

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[1319] See **II.1.B**; **III.1.B**, *supra*.
[1320] Judgement, paras. 993 to 995 (JCE), para. 1028 (planning), para. 1032 (instigating), para. 1035 (aiding and abetting).
[1321] *Duch* Judgement, para. 509; *Kvočka* Appeal Judgement, paras. 82 and 118.

Appellant *"intended, or was aware of the substantial likelihood"*[1322] of the commission of crimes.

629. First, KHIEU Samphân's attendance at meetings and his contribution to the development of the plans were not the only reasonable findings. Second, by remaining unspecific about the degree of intent it imputed, the Chamber failed yet again in its duty to give reasons.

630. **Instigating.** The Chamber considered that *"by making public statements encouraging Khmer Rouge soldiers"* the Appellant *"intended or was aware of the substantial likelihood of the commission of these crimes"*.[1323]

631. First, the Chamber did not establish that these speeches demonstrated a direct intent to commit crimes. Second, by remaining unspecific about the degree of intent it imputed, the Chamber failed yet again in its duty to give reasons.

632. **Aiding and abetting.** The Chamber considered that the Appellant *"knew that the crimes committed would likely be committed"*.[1324] Such a low threshold is not sufficient to characterise the intent of its perpetrator.[1325]

633. Moreover, the Chamber failed to establish that the Appellant knew the essential elements of the crimes committed during movement of population (phase two). Accordingly, it could not conclude that he knew that his conduct would assist or facilitate their commission.

634. **Conclusion on intent.** The Chamber having failed in its duty to give reasons and having failed to establish the *mens rea* of the Appellant, its findings must be invalidated.

III.5.D.d. Overall conclusion on responsibility at the time of movement of population (phase two)

635. Given that it is impossible to satisfy the requirements of the modes of, the Appellant's convictions for participation in a JCE, planning, instigating and aiding and abetting the crimes committed during movement of population (phase two) must be quashed.

[1322] Judgement, para. 1028.
[1323] Judgement, para. 1032.
[1324] Judgement, para. 1035.
[1325] See **II.1.B,** *supra*.

III.6. AFTER THE FACTS

636. **Undated and subsequent elements.** The Chamber committed errors of fact and law by its reliance on undated and/or subsequent elements to the facts of Case 002/01 in making findings about KHIEU Samphân's knowledge, contribution and intent to participate in the crimes charged.

637. Countless parts of the Judgement are based on elements that are either undated or subsequent to the facts tried.[1326] Movement of the population (phase one) and the events at Tuol Po Chrey are restricted to April 1975. The temporal scope of movement of the population (phase two) is as loosely defined as the facts on which it is based. The Judgement states that population movements continued until late 1977; however, it was also indicated during the proceedings that they ended in late 1976.[1327] However, the Chamber had to establish that the Appellant possessed the requisite intent concurrent with and not after the facts.[1328] The *actus reus* and *mens rea* must be contemporaneous. A reading of paragraphs 958 and 959 of the Judgement shows that the Chamber ignored this requirement.

638. Of course, reliance on subsequent facts generally concerns *mens rea*, but not always. For example, the Judgement did not hesitate to draw inferences from dodgy data on the number of Standing Committee meetings that the Appellant allegedly attended subsequent to movement of

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[1326] Judgement, **para. 80**: reliance on an undated interview of NUON Chea as a reliable historical background to the CPK; **para. 134**: reliance on a 1996 interview of IENG Sary for findings on movement of the population (phase one); **para. 142** and **footnote 410**: reliance on undated interviews of NUON Chea and KHIEU Samphân for findings on the June 1974 meeting; **paras. 84, 88, 110, 392, 526, 737**: reliance on two books published by KHIEU Samphân in 2004 and 2007 for establishing facts; **paras. 147, 225, 373, 389, 392, 536, 737, 783, 785, 789, 815**: reliance on an undated interview of KHIEU Samphân; **para. 143**: reliance on an October 1977 interview of POL Pot from Peking for findings on movement of the population (phase one) in April 1975; **paras. 133, 265:** reliance on *Revolutionary Flag* magazine, a propaganda tool which is *post-facto* to the facts under review; **para. 769**: reliance on a 1981 interview of IENG Sary for its finding on the division of society according to class; **para. 388**: reliance on a 1976 speech of the Appellant for the finding that he was on notice regarding deaths and food shortages, including during movement of population (phase one).

[1327] T. 18 July 2012, **E1/91.1**, p. 20: Judge CARTWRIGHT clearly indicated the time frame: *"Finally, in this trial, we're considering the first and second phases of population movements during the regime which are said to have taken place approximately from the beginning of the regime until mid to late 1976, so that's the chronological period, 1975 to mid to late 1976"*.

[1328] *Nahimana* Appeal Judgement, para. 313; *Simba* Appeal Judgement, para. 266; *Krajišnik* Appeal Judgement, para. 203; *Naletilić* Appeal Judgement, para. 114.

the population (phase one) and the events at Tuol Po Chrey.[1329] It is plain that for the Chamber, information subsequent to the facts could be used to prove that the Appellant had knowledge of those events, approved of them and intended to contribute to them.

639. Such reasoning entails an extreme risk of miscarriage of justice. This is because as the facts of the case become more removed in time, changes occur in personal, political, historical, diplomatic, contextual and judicial circumstances and may affect the meaning of a given act or statement. Such difficulties are particularly present in a case that is tried 40 years after the facts. It is regrettable and indeed wrong that the Chamber does not bother to explain why it accepted some evidence on the basis of documents post-dating the facts whereas the context of some speeches, some written articles, some interviews and published books is no longer the same as it was at the time of the facts charged. This applies to all the speeches made during the DK era and the excerpts from the *Revolutionary Flag* and *Revolutionary Youth* propaganda magazines after the outbreak of the conflict with Vietnam or the launch of internal purges. The same holds true for interviews granted by former leaders after 1979 and up until the early nineties when Khmer Rouge leaders still represented Cambodia at the UN. It also holds true for interviews granted by former Khmer Rouge leaders during the negotiation of a national pardon, an amnesty or while they were targeted by a media campaign because of their past conduct. It also applies to books which are essentially written with no judicial agenda in mind and are aimed more at contributing to the public's understanding of historical facts and not with a view to defending this or that individual. In short, in 40 years, a lot can happen to the body of subsequent evidence. Unfortunately, the Chamber did not bother to consider the circumstances in which certain statements might have been made years or even decades after the facts. This is a serious error, because the Chamber validates evidence without assessing its credibility.

640. Yet, customary international law does not permit, and in fact proscribes, *a posteriori* reliance on *dolus subsequens* in making findings on the existence of intent. Accordingly, whether as concerns its assessment of the evidence or the facts, the Chamber was wrong in relying on events and conduct post-dating the crimes with a view to implying that the Appellant possessed the requisite intent concurrent with the crimes. This is an error of law and fact, and it must be

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[1329] See **III.4.C**; **III.5.C**, *supra*.

sanctioned by the Supreme Court Chamber.

641. Still in regard to this issue, the Defence wishes to touch upon the Chamber's reliance on the Appellant's alleged intervention in 1978 to help his detained in-laws for its finding that the Appellant was aware of *"what was happening"* and exercised *"some degree of authority."*[1330] The Chamber started out by distorting the facts. In his testimony about a telegram he received from the Appellant, MEAS Voeun indicated that he had no contact with him thereafter.[1331] In fact, he clearly testified that it was POL Pot himself who sent him to Preah Vihear on assignment after hearing reports of ill-treatment of the people there.[1332] Indeed, DUCH's claims on this subject only relate to POL Pot's intervention.[1333] Accordingly, the Chamber could not conclude that the Appellant had *"some degree of authority"* as the mere fact that the arrest could be carried out indicated the opposite.[1334] In any event, the evidence in this regard only points to POL Pot's intervention and authority. Accordingly, the judges' conclusion is false. Moreover, the Chamber failed in its duty to give reasons by not explaining why events from 1978, i.e. just months before the end of the DK regime, can provide proof of the Appellant's knowledge of crimes committed during movement of population (phase one), the events at Tuol Po Chrey and movement of the population (phase two), which occurred in 1975 and 1976, respectively, or, for that matter, his authority at the time. In this and other instances, the Chamber's findings regarding the targeting policy against former Khmer Republic officials are based on this same serious error of law.

642. **Targeting policy and policy to smash enemies throughout the DK era.** According to the Chamber, a targeting policy against former Khmer Republic officials and a policy to smash enemies existed throughout the DK era.[1335] This erroneous holding is based on findings which amount to errors of fact and law.

643. ***Policy to smash enemies.*** Purportedly because they shared "*a common purpose*", the

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[1330] Judgement, para. 309 (what was happening); para. 409, 960 (some degree of authority).
[1331] *Mémoire final*, **E295/6/4**, para.79, footnotes 167 to 169.
[1332] MEAS Voeun T. 4 October 2012, **E1/130.1**, p. 71 L. 24 to 25 to p. 72 L. 1 to 8, after 14.07.34].
[1333] KAING Guek Eav, T. 5 April 2012, pp. 105 and 106, before [15.40.54].
[1334] In fact, the Chamber misquoted the Appellant, since contrary to its claim at paragraph 389, he did not "admit" that the detention would lead to the arrest of officials, but rather he said that those officials were released *"along with many other people"*, adding that following the arrest of *"'the regional Party secretaries', he knew that this was an act of individuals"*. See KHIEU Samphan's letter, **E3/205**, p. 4, ERN 00149526.
[1335] Judgement, para. 814.

Chamber incorporated the targeting policy against former Khmer Republic officials into the policy to smash enemies.[1336] While this does not cause prejudice, the fact that throughout the proceedings the Defence was not permitted to present evidence or to call witnesses regarding this policy is an infringement of the right to adversarial debate.[1337] This eleventh-hour improvisation contradicts other parts of the Judgement according to which "*evidence concerning the nature and implementation*" and the "*extent*" of the policy to smash enemies will be the subject of Case 002/02.[1338] The Chamber's breach of the scope of the case entails a violation of the right to a fair trial and, in particular, the right to an adversarial debate. It invalidates the many findings of the Chamber on the policy to smash enemies.[1339]

644. ***Targeting policy against former Khmer Republic soldiers and officials after the events at Tuol Po Chrey.*** At paragraphs 814, 817, 819 and 834, the Chamber explains that the treatment of former Khmer Republic soldiers *after* the end of armed conflict, i.e. *after* the events at Tuol Po Chrey, followed a consistent pattern of conduct which it cites at the end of paragraph 835 to characterise the JCE and to enter a conviction against the Appellant in respect of the events at Tuol Po Chrey. Reading this part of the Judgement makes one's head spin. The Chamber's reliance on a consistent pattern of conduct – its own invention – previously enabled it to rely on material elements *pre-dating* the temporal and subject matter scope of Case 002/01, but in this instance, it elected to rely on elements *post-dating* the subject matter and temporal scope of Case 002/01. The reader is lost in this jungle of disordered elements. The Accused likewise… This is another manifest breach of the scope of Case 002/01 which caused the Appellant severe prejudice. Indeed, with regard to the targeting policy against former Khmer Republic officials, KHIEU Samphân was not afforded the opportunity to present a defence regarding the period between the events at Tuol Po Chrey and 6 January 1979, and neither was he put on notice that the Chamber would – *retroactively use* – the subsequent implementation of a targeting policy against former Khmer Republic officials in characterising this policy which allegedly resulted in the Tuol Po Chrey events, his alleged knowledge of those events and contribution thereto. The

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[1336] See Judgement, para. 813, and also paras. 117-18, 829, 818.
[1337] See **I.2**; **I.4,** *supra*.
[1338] Judgement, para. 118.
[1339] For example: Judgement, paras. 111, 117, 118, 123, 169, 615, 622, 623, 769, 813, 815, 817, 818, 827, 828 and 833.

Defence would like to recall in this connection that an accused's intent, knowledge and contribution to a criminal purpose are to be assessed as they stood *at the time* of the events. In addition to its earlier submissions regarding the absence of evidence about the targeting policy against former Khmer Republic officials before and after the events at Tuol Po Chrey, the Defence submits that convictions based on subsequent facts alone are inadmissible. Hiding behind a smokescreen, the Chamber assesses the evidence by using a broad to narrow approach. For example, instead of stating that it would consider the events at Tuol Po Chrey as part of a contemporaneous policy, it claimed that it would consider *all* the policies *throughout* the DK regime, but only through the prism of the events at Tuol Po Chrey. This approach is not only illogical and disingenuous, it is also inconsistent with the Decision on severance. By its course of action, the Chamber left the Appellant stranded in a temporal vicious cycle. It completely distorted the evidence before it and violated the fundamental principles of criminal proceedings, namely the right to a fair trial, the right to be presumed innocent, the right to prepare one's defence and the right to adversarial debate.

645. The Chamber did not stop at manipulating the chronology of the facts and the criminal responsibility. It further manipulated and extended even more the scope of its Decision on severance. For example, at paragraphs 811 and 813, the Chamber incorporated the targeting policy against former Khmer Republic officials into the policy to smash enemies[1340] purportedly because they shared a common purpose and then proceeded to extract evidence from the policy to smash enemies after the events at Tuol Po Chrey to support of its findings on the alleged targeting policy against former Khmer Republic officials. Noteworthy are the lengthy footnotes 2567 to 2582, where nearly *all* the documents cited are outside the temporal scope, post-date the events at Tuol Po Chrey, concern the policy to smash enemies and are outside the subject-matter scope of Case 002/01.[1341] Needless to say, it is next to impossible in a brief of 210 pages for the Defence to address in detail the dozens of new elements and last-minute additions to the case file. Even after its illegal infringements of the Appellant's basic rights, the Chamber went even further – at paragraph 829 – to make findings regarding cooperatives, re-education of *"bad elements"* and security centres until the end of the DK era. As concerns the targeting policy against former

[1340] See Judgement, para. 813, and also paras. 117 to 118, 829, 818.
[1341] The Chamber pretends to recognise this in some instances: see Judgement, para. 1188.

Khmer Republic officials, it will again be recalled that the Appellant was not afforded the opportunity to present evidence or a defence concerning its existence or his knowledge of/contribution thereto, since the policy relates to facts post-dating the events at Tuol Po Chrey and especially post-dating the late 1976 (given that – at least during the proceedings – the Chamber considered that such material was within the confines of Case 002/001 and therefore accessible to the parties[1342]). Moreover, the Appellant was not permitted to present a defence against the policies listed in the Closing Order, but which are expressly excluded by the Decision on severance. He was again denied his right to a fair trial, his right to be presumed innocent, his right to prepare a defence and his right to the adversarial process.[1343] To put it in necessarily broad but firm terms, the Defence disputes those facts, their intrinsic and temporal cogency, their relevance, the policies they purportedly underpin (both within and outside the scope of the case) and the findings and convictions based on them. The Supreme Court Chamber is requested to invalidate those findings in their entirety, because they are unsustainable,[1344] in a truly hodgepodge of a Judgement with no rhyme or reason, which is nothing less than a miscarriage of justice.

IV. *IN THE FURTHER ALTERNATIVE*: SENTENCING ERRORS

646. By imposing the maximum sentence against the Appellant, the Chamber committed a discernible error in the exercise of its discretion as a result of errors of law and fact concerning sentencing.

647. **Purpose of sentencing.** The Chamber considers that it is duty-bound to *"reassure the surviving victims, their families, the witnesses and the general public that the law is effectively implemented and enforced, and applies to all regardless of status or rank"*.[1345] On the one hand, it seems to forget that the preventive aspect of a sentence is mainly aimed at the Accused. By deliberately omitting the key figure in the criminal case when considering the purpose of the

[1342] T T.18 July 2012, E1/91.1, p. 20, L.20 to 25 [after 09.52.22] and p. 21, L. 1 near [09.53.58] and p. 21, L.16-22 after [09.53.58
[1343] See, Appeal Brief, para. XX (severance & adversarial process).
[1344] For example: Judgement, paras. 111, 117, 118, 123, 169, 615, 622, 623, 769, 813, 815, 817, 818, 827, 828 (for example footnote 2612: reliance on the *"Phnom Penh Marks the 17 April Anniversary"* speech of 16 April 1978, **E3/562**), and 833.
[1345] Judgement, para. 1067.

sentence, the Chamber seriously misapprehended its duty. On the other hand, by de-emphasizing the importance of deterrence and retribution, it introduced a hierarchy between them whereas they should be considered on an equal footing.[1346]

648. Those two errors are emblematic of the Chamber's bias against the Appellant. The Chamber infringed its duty of neutrality by so openly manifesting its predisposition to hand down a judgement that is aimed at everyone except the Appellant.

649. **Individualised sentence.** The Chamber recalled that in determining the appropriate sentence, the gravity of the crime committed is the litmus test. Even so, it committed an error of fact by claiming that it considered *"the particular circumstances of the case, as well as the form and degree of the participation"* of the Appellant. Striking that balance is nonetheless crucial to pronouncing a proportionate and individualised sentence.[1347]

650. In assessing KHIEU Samphân's role, the Chamber could not ignore its earlier holding that he derived no authority from his symbolic functions and could absolutely issue no orders.[1348] His limited role in the commission of the crimes should have attracted a significantly less severe sentence. The Chamber should not have simply drawn an analogy to the *Duch* case.[1349] As it stands, the Appellant's sentence no longer *"reflect[s] [his] culpability"*.[1350]

651. A review of the sentences handed down at Nuremberg shows that the Appellant's sentence is too harsh. The IMT imposed maximum sentences only for those who had the most important roles and responsibilities.[1351] A case in point is that of the Accused FUNK. He was convicted of war crimes, crimes against peace and crimes against humanity for publicly advocating discrimination against the Jewish people and being a member of an organisation which deported people for purposes of performing forced labour. However, he did not play a major role in the various programmes in which he was involved. Accordingly, he received a fixed-term sentence commensurate with his actual role. Setting an example in regard to crimes

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[1346] Judgement, para. 1067; *Nikolic* Judgement, para. 132; *Delalić et al.* Appeal Judgement, para. 806.
[1347] Judgement, para. 1068.
[1348] Judgement, para. 1080, *versus* for example paras. 203, 230, 378, 381.
[1349] Judgement, paras. 1067, 1105 and 1106.
[1350] Judgement, para. 1067.
[1351] IMT Judgement.

commonly characterised as the worst known to humanity, the Nuremberg judges never wavered from their obligation to pronounce a sentence that adequately reflected the Accused's level of participation in the tragedy. The same principle should also apply here.

652. Finally, the ICTY has pronounced life sentences only against those who had the biggest roles and highest responsibilities, e.g. military and paramilitary personnel, and those who had effective control of the commission of the crimes.[1352] Again, the Appellant cannot be characterised as such.

653. **Aggravating factors.** ***Abuse of position of authority.*** The Chamber committed an error of fact and law in holding that KHIEU Samphân abused his position of authority.[1353] The case law on point is settled: *"a position of authority, even at a high level, does not automatically warrant a harsher sentence, the abuse of such may indeed constitute an aggravating factor".*[1354] In the *Šainović* Appeal Judgement, which the Chamber misinterpreted, account was taken not only of the Accused's position, but also of the extent of his *de facto* power.[1355] Here, the Chamber relied solely on KHIEU Samphân's symbolic functions for its finding that he abused his authority.[1356] KHIEU Samphân's circumstances are a far cry from Šainović's, given that KHIEU Samphân neither had any authority in the armed forces nor the authority to issue instructions.[1357]

654. ***Level of education.*** The Chamber offended the principle of legality in considering KHIEU Samphân's level of education as an aggravating factor.[1358] This has never been contemplated in international law or Cambodian law.

655. **Mitigating factors.** The Chamber committed an error of fact and law in claiming that it

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[1352] *Galić* Appeal Judgement, paras. 438 to 456; *Lukić* Appeal Judgement, (Milan Lukić was the leader of a Visegard-based Bosnian-Serb paramilitary unit called the "White Eagles" or the "Avengers").
[1353] Judgement, para. 1087.
[1354] *Milošević* Appeal Judgement, para. 302; *Katanga* Sentencing Judgement, para. 75.
[1355] *Šainović* Appeal Judgement, para. 1802.
[1356] Judgement, para. 203: *("Although the CPK Statute vested the highest level of operational authority in the Central Committee, effective control over the CPK was ultimately exercised by an extra-statutory body known as the Standing Committee")*, para. 230: *("the GRUNK [...] was a façade")*, para. 381: (*"the President [of the State Presidium] had no executive power; as head of state, KHIEU Samphan's role was largely symbolic")*.
[1357] Judgement, paras. 1004 to 1007, 1016 to 1022, 1030, 1037, 1038, 1044, 1052.
[1358] Judgement, para. 1089.

would *"consider all relevant aggravating and mitigating factors in determining a sentence"*.[1359] Yet, it did not consider the Appellant's good character, even though character is an established jurisprudential criterion.[1360]

656. It is not without significance that the Chamber unjustifiably disregarded the evidence of character witnesses in its assessment of mitigating factors. Yet, those testimonies which attested to KHIEU Samphân's probity and incorruptibility confirmed his good character. Accordingly, the Chamber should not have excluded them from its consideration of mitigating factors. Moreover, it erred by omitting without valid reason to consider the evidence of other witnesses who testified to the Appellant's qualities before the Chamber.[1361] This is a clear infringement of the duty of a reasonable judge to consider any and all evidence relating to character.[1362] The Chamber never doubted that those witnesses were credible. There was therefore no reason to overlook and ignore their unanimously laudatory testimonies in its sentencing.

657. Finally, the Chamber contradicted itself by characterising the Appellant's good character as *"purported"*.[1363] If the Appellant's character was not beyond doubt, it was therefore unreasonable to conclude that the Appellant's *"trusted and respected"*[1364] character allowed the crimes to be more readily committed. Otherwise, for the sake of fairness, it should be recognised that KHIEU Samphan's character was a non-factor and hence refrain from citing it incriminatingly in the assessment of the level of his contribution to the commission of crimes. A reasonable trier would not have been so expedient in dealing with the Appellant's qualities. Moreover, a reasonable trier would not have made a value judgement which reinforces the Defence's earlier submissions concerning the Chamber's bias.

658. Accordingly, all these errors committed by the Chamber invalidate its decision concerning the sentence.

[1359] Judgement, para. 1069.
[1360] *Sikirica et al.* Judgement, para. 242; *Krnojelac* Judgement, para. 518; *Banović* Judgement, para. 82.
[1361] *Mémoire final*, **E295/6/4**, para. 208, footnote 349; para. 275, footnote 491.
[1362] *Tadić* Sentencing Judgement, para. 61.
[1363] Judgement, para. 1103.
[1364] Judgement, para. 1080.

FOR THESE REASONS

659. Mr KHIEU Samphân's Defence requests the Supreme Court Chamber to:

- QUASH the Judgement;
- PRONOUNCE verdicts of not guilty on each count;
- ORDER Mr KHIEU Samphân's immediate release; or
- *In the further alternative*, REVIEW the conviction and IMPOSE a fixed-term sentence.

KONG Sam Onn	Anta GUISSÉ	Arthur VERCKEN
[signed]	[signed]	[signed]