

Co-Rapporteurs' Report pursuant to Internal Rule 108(5)

**I. CO-RAPPORTEURS' REPORT FOR THE SESSION ON "GROUNDS OF APPEALS
RELATING TO FAIRNESS OF THE PROCEEDINGS"**

**CO-RAPPORTEURS: JUDGE CHANDRA NIHAL JAYASINGHE AND JUDGE MONG
MONICHARIYA**

1. The Accused's **Main Submission** is that by failing to issue Reasons for Judgment on the day the Judgment was announced the Chamber committed a serious error of law rendering the unlawfully announced Judgment void for procedural defect. The subsequent issuance of the Reasons did not cure the defect. His submission goes further, asserting that the Judges of the Trial Chamber were *functus officio* when the full reasoned trial judgment was delivered on the 28 March 2019 and the Chamber's action in delivering that reasoned judgment was an arbitrary act and *ultra vires*.

2. **In the alternative, the Accused submits that the entire trial was conducted in an unfair manner** such that throughout the trial his fundamental rights, as recognised under the legal framework of the ECCC, were not respected. This includes the Trial Chamber's biased approach to the guiding principles of criminal law and proceedings found in its previous adjudication of Case 002/01 and its biased approach to evidence, all of which had the cumulative result of rendering his trial unfair. He thus requests the reversal of his convictions and sentence. The Accused provides further specifics with regard to the biased approach and submits, for example, that the Trial Chamber violated the **principle of legality** by failing to apply the correct legal criteria in its examination of whether the crimes for which he was charged or the modes of liability found were sufficiently accessible and foreseeable to him in 1975. This includes whether the *chapeau* elements of crimes against humanity and grave breaches of the Geneva Conventions were met. In particular, he alleges that the Trial Chamber attached improper weight to the gravity of the crimes rather than applying the law existing at the time and concludes that these errors of law violated his right to be heard by an impartial tribunal. He submits that the Trial Chamber's incorrect approach amounted to errors of law, leading it to reach erroneous findings on which the convictions were based.

3. Further, the Accused challenges the Trial Chamber's unclear and expansive approach to the **scope of Case 002/02**, which led it to consider facts outside the scope

of the Case and facts that were irrelevant to the charges. He argues that these errors violated his rights to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence as provided by Article 14 of the ICCPR. These errors of law, he argues, demonstrate the Trial Chamber's lack of impartiality.

4. Related to his arguments concerning the right of an accused to be tried by a fair and impartial tribunal, the Accused submits that the Trial Chamber erred in law by not addressing his allegations of lack of impartiality, which arose as a result of the same Chamber having adjudicated Case 002/01 where he was a defendant. This resulted in the Trial Chamber rendering new convictions in Case 002/02 for facts on which a final judgment had already been delivered in the previous Case 002/01.

While this issue has been previously adjudicated and ruled, the Accused may wish to make further focused submissions to the Chamber.

5. The Accused argues that the Trial Chamber's bias is further demonstrated through its **re-characterisation of the crime of extermination to the crime of murder** with a reduced mental element of *dolus eventualis*. This, he submits, was without notice to him, thus violating his rights to be informed of the nature of the charge against him and to have adequate time and facilities for the preparation of his defence. **The Accused may wish to address the Chamber on why this issue requires to be re-litigated.**

6. Furthermore, the Accused alleges that the Trial Chamber inconsistently applied the principle that there should be no importation of criminal responsibility between the two cases. **He may wish to develop this submission in view of the Trial Chamber's approach and this Chamber's guidance that while Case 002/01 served as a foundation for a more detailed examination of the remaining charges and factual allegations against the Accused in later trials, it was made clear by the Trial Chamber and this Chamber that there shall be no importation of criminal responsibility between cases and that factual findings are not to be transposed from Case 002/01 to Case 002/02. Accordingly, while evidence remained formally common to the severed cases, this commonality did not extend to findings and common factual elements in all cases resulting from Case 002 must be established anew.**

7. The Accused submits that the Trial Chamber's refusal to accede to his request to **recall witnesses** from Case 002/01 was inconsistent with their decision to permit

the **introduction of hundreds of statements from Cases 003 and 004** later in the trial. These statements did not distinguish between exculpatory and inculpatory evidence and thus prolonged the trial, violating his rights to an adversarial trial and to be tried without undue delay. **The Accused may consider focusing here on what exculpatory evidence was overlooked.**

8. The themes of bias and unfairness are, it is alleged, further demonstrated in interlocutory decisions concerning evidentiary matters made during the course of the trial. These decisions amounted to discernible errors in the exercise of the Trial Chamber's discretion, causing prejudice to him. These decisions relate to:

- (i) the sequence of hearing witnesses;*
- (ii) the admission of evidence during trial pursuant to Rule 87(4);*
- (iii) the admission of evidence from researchers and historians who did not testify before the Trial Chamber;*
- (iv) the disclosure of evidence from Case Files 003 and 004;*
- (v) the Trial Chamber's failure to reopen the trial proceedings and admit statements of two specific witnesses, which were disclosed during the deliberation phase of the trial; and*
- (vi) the Trial Chamber's approach to evidence generally.*

9. The arguments of unfairness include the Trial Chamber's failure to apply the evidentiary standard of beyond reasonable doubt; the practice of allowing witnesses to review their prior statements before giving testimony in court; the prioritization of expeditiousness over the ascertainment of truth; the approach to certain specific types of evidence especially the use of the Accused's own statements and publications; the reliance on evidence obtained through torture; and the reliance on hearsay evidence and on documents of alleged questionable provenance. It is submitted that the Trial Chamber applied different approaches when dealing with inculpatory as opposed to exculpatory evidence and its approach to the probative value of civil party evidence. The cumulative effect of these violations rendered his trial unfair to such extent that the Supreme Court Chamber should intervene to reverse his conviction and sentence. **The Chamber would welcome specific references in relation to the alleged**

uneven treatment of evidence, particularly to the exculpatory evidence that the Accused considers was ignored or treated differently.

10. This concludes our report on the Accused's grounds of appeal relating to the fairness proceedings.

II. CO-RAPPORTEURS' REPORT FOR THE SESSION ON "GROUNDS OF APPEALS RELATING TO THE TRIAL CHAMBER'S JURISDICTION"

CO-RAPPORTEURS: JUDGE SOM SEREYVUTH AND JUDGE MAUREEN HARDING CLARK

11. The Accused raises several grounds of appeal challenging the **jurisdiction** of the Trial Chamber to adjudicate certain facts and the related findings. His submissions are summarised into four main categories.

12. First it is submitted that certain facts relied upon to establish crimes were **outside the scope of the judicial investigation/saisine of the Co-Investigating Judges** as they were not included in the Co-Prosecutors' Introductory Submission or in any Supplementary Submissions. The Accused argues that these included facts relating to crimes committed at Tram Kak Co-operatives; Trapeang Thma Dam and 1st January Dam Worksites; as well as Phnom Kraol, Kraing Ta Chan and Au Kanseng Security Centres. The submission also includes internal purges throughout Democratic Kampuchea apart from those which occurred in the North Zone in 1976 and in the East Zone in 1978; the treatment of Buddhists at Tram Kak Cooperatives and of facts concerning a nationwide policy towards Buddhists and the treatment of the Cham which went beyond the facts which occurred after 1977 in Kang Meas and Krouch Chhmar districts. The same argument applies to the treatment of the Vietnamese outside Svay Rieng, Prey Veng provinces and incursions into Vietnam.

13. The Accused challenges the consideration of all facts for crimes committed during these criminal episodes and at these crime sites that are alleged to fall outside the scope of the investigation, which include:

Crimes against humanity of murder, deportation, enslavement, torture, imprisonment, extermination, persecution on political, religious and racial grounds and other inhumane acts of enforced disappearances and serious attacks on human dignity as well as Genocide of the Vietnamese.

14. As a follow through to that appeal ground, the Accused disputes the rejection by the Trial Chamber when it found that his challenges to the saisine/jurisdiction over charges raised in his Closing Brief were untimely. He disputes the interpretation of Internal Rule 89 and submits that this erroneous interpretation of Rule 89 means that any findings of criminal liability reached in relation to the above crime sites and

criminal episodes insofar as they relate to facts that were not part of the Introductory Submission or Supplementary Submissions must be set aside. **The Chamber would like the Accused to explain why he did not raise these allegations, first before the Co-Investigating Judges and the Pre-Trial Chamber, and second when the trial commenced through preliminary objections and to provide specific references as to when he raised them at the Pre-Trial stage and they were not determined as asserted in his appeal submissions.**

15. Second: it is submitted that certain charges in the Closing Order lacked sufficiency or clarity to meet the minimum standard of proof to charge the Accused for those crimes. It is submitted that the Trial Chamber erred in law when it rejected his submissions challenging the lack of credible, serious and consistent evidence underpinning the charges. **The Chamber would welcome clarity between pre-trial findings by the Co-Investigating Judges, which relates to the charges in the Closing Order and then findings of guilt by the Trial Chamber of certain charges in the Closing Order. The Supreme Court Chamber was unable to follow the point being made in the Accused's Appeal Brief.**

16. Third: the Trial Chamber misinterpreted the Closing Order by considering crimes that were outside of the Trial Chamber's **subject-matter jurisdiction**. This error of law resulted in the Trial Chamber adjudicating facts outside its scope and led to findings which should now be reversed. Such findings include facts relating to the crime against humanity of persecution on political grounds of New People, Khmer Republic soldiers and real and perceived enemies at various worksites and security centres. All factual findings in relation to the genocide and crimes against humanity of murder and extermination targeting the Vietnamese in Democratic Kampuchea territorial waters and the crime against humanity of murder and political persecution of the Cham are impugned under this challenge to subject matter jurisdiction.

17. Fourth: facts that were **excluded through severance** were included by the Trial Chamber, which then adjudicated facts outside its jurisdiction. The Trial Chamber had no competence therefore to hear facts relating to the crimes against humanity of persecution on political grounds, other inhumane acts relating to forced movement of the Cham and enforced disappearances of the Vietnamese. In the same vein, he submits that the Trial Chamber was **not seized** of facts relating to the crime against humanity of other inhumane acts through **forced transfers of the Cham** during population movement phase two because he was **already convicted** of the

same crime in Case 002/01. **This Chamber would like specific references to the part of the particular severance decision that was misinterpreted.**

18. This concludes our report on the grounds of appeal relating to the Trial Chamber's jurisdiction.

III. CO-RAPPORTEURS' REPORT FOR THE SESSION ON "GROUNDS OF APPEALS RELATING TO THE CRIMES FOR WHICH KHIEU SAMPHÂN WAS CONVICTED"

CO-RAPPORTEURS: JUDGE FLORENCE NDEPELE MWACHANDE MUMBA AND JUDGE YA NARIN

19. The Trial Chamber found the Accused guilty of several crimes against humanity, grave breaches of the Geneva Conventions and genocide of the Vietnamese through his participation in the common purpose and sharing the same criminal intent of a 'joint criminal enterprise'. He was convicted of the following crimes that were committed in the course of the implementation of the five policies of the Communist Party of Kampuchea during the Democratic Kampuchea regime:

- (a) The crimes against humanity of murder, extermination, deportation, enslavement, imprisonment, torture, persecution on political, religious and racial grounds and other inhumane acts through attacks against human dignity, conduct characterised as enforced disappearances, forced transfer, forced marriage and rape within the context of forced marriage;
- (b) The crime of genocide by killing members of the Vietnamese ethnic, national and racial group;
- (c) Grave breaches of the Geneva Conventions of wilful killing, torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or a civilian the rights of a fair and regular trial and unlawful confinement of civilians under the Geneva Conventions at S-21 Security Centre.

20. The Trial Chamber also found that the Accused aided and abetted the crime against humanity of murder with *dolus eventualis* at the Tram Kak Cooperatives, 1st January Dam Worksite, Trapeang Thma Dam Worksite, Kampong Chhnang Airfield Construction Site, S-21 Security Centre, Kraing Ta Chan Security Centre and Phnom Kraol Security Centre relating to the deaths of workers and peasants at these cooperatives, worksites and security centres.

21. The Accused now challenges all the convictions of the above-recited crimes, raising both legal and factual errors. His arguments may be summarised as follows.

22. **Legal errors:** the Accused submits that the Trial Chamber violated the **principle of legality** by failing to apply the correct legal criteria in its examination of whether the crimes were sufficiently accessible and foreseeable to him in 1975. The Trial Chamber's reliance on three factors in its analysis is disputed: those factors were the existence of the crime or mode of liability in customary international law at the time of the alleged criminal conduct; the gravity of the crime and finally the positions occupied by the Accused as a member of Cambodia's governing authority. He asserts that the application of these criteria was an error of law which negates all the findings and convictions. **This argument relating to the legal error regarding the principle of legality is mentioned in several other places in the Accused's submissions. The Chamber believes that challenges to the legality of specific crimes properly fall to be argued in this section on Crimes.**

23. The Accused challenges the Trial Chamber's legal definition of **murder with *dolus eventualis*** and submits that no concept of murder with *dolus eventualis* existed in customary international law in 1975. All findings of murder with this intent must therefore fall. **The existence of murder with *dolus eventualis* in customary international law in 1975 was determined previously in the Appeal of Case 002/01. The Chamber would welcome some clarification on why this submission should be re-litigated.**

24. As an alternative to the many challenges to findings of criminal liability for deaths of people resulting from working, living and detention conditions at various worksites, cooperatives and security centres, the Accused argues that the Trial Chamber **failed to provide a legal definition of culpable omission** which thus led to erroneous findings relating to deaths at those various crime sites.

25. In addition, the Accused argues there was **insufficient evidence** for convictions beyond reasonable doubt for any crimes against humanity of murder committed against the Cham and against the Vietnamese.

26. Several related arguments challenge the sufficiency of evidence to establish either the *mens rea* and/or the *actus reus* for the crime of extermination including the mass killings of the Vietnamese in Svay Rieng, Kampong Chhnang, Wat Khsach, Kratie and in Democratic Kampuchea territorial waters and the Cham at Au Trakuon pagoda in 1977 and Trea Village.

27. The Accused challenges the Trial Chamber's definition of the constitutive elements of the crime against humanity of **persecution on religious grounds**, which,

he submits, led the Trial Chamber to make erroneous legal and factual errors relating to the treatment of Buddhists and of Cham. Specifically, he argues that the Trial Chamber erred its definition of the *mens rea* for those crimes.

28. The Accused challenges the sufficiency of the evidence for the convictions of crimes against humanity of **political persecution** of New People, former Khmer Republic soldiers, real or perceived enemies or that the Cham were specifically targeted and subjected to discriminatory treatment.

29. The Accused challenges the findings of the crime against humanity of **persecution** on racial grounds of Vietnamese living in Cambodia as he submits that Vietnamese in Democratic Kampuchea were not a discernible racial group. The same arguments are made in relation to convictions for persecution of the Vietnamese through acts of deportation, arrest and murder on the basis of their race and the requisite level of discriminatory intent.

30. Several arguments relating to legal errors are raised regarding forced transfer, enforced disappearances, attacks against human dignity, rape and forced marriage as crimes against humanity of “**Other Inhumane Acts**”. The primary challenge concerns (a) the Trial Chamber’s definition of the law applicable to “Other Inhumane Acts”, (b) its failure to consider whether the facts constituting the crimes were sufficiently foreseeable to the Accused by 1975.

31. With regard to guilty verdicts relating to **enforced disappearances** generally, the Accused challenges legal errors and factual findings in particular whether Vietnamese were victims of enforced disappearances in Tram Kak Cooperatives and at Phnom Kroal Security Centre.

32. It is disputed whether the Trial Chamber’s finding that the **Khmer Krom** could be victims of enforced disappearances as the facts relied upon were outside the scope of Case 002/02 and further that evidence of the treatment of the Khmer Krom was unlawfully used to convict the Accused of enforced disappearances of the Vietnamese.

33. Other Inhumane Acts, characterised as **forced marriage and rape** in the context of forced marriages, are challenged on the basis that those crimes were not sufficiently foreseeable to the Accused specifically in circumstances where neither act attracted criminal sanctions in Cambodian or international law at the time. He disputes the fact that consent to marriage was absent. Consent was a principle adopted by the Communist Party of Kampuchea and the marriages conducted during

Democratic Kampuchea approximated Khmer traditional arranged marriages. He therefore disputes the legality of his convictions under the title forced marriage.

34. Following on from the convictions of Other Inhumane Acts arising from forced marriages, the Accused submits that even if the facts alleged are proved, they do not rise to the requisite level of gravity to qualify as other inhumane acts. Without prejudice to that key submission, he disputes the existence of any Communist Party of Kampuchea policy to force people to marry and consummate their marriages to produce children for *Angkar*.

35. With respect to the crime against humanity of **enslavement**, the Accused challenges the Trial Chamber's jurisdiction to adjudicate facts in relation to particular sites comprising Phnom Kraol Security Centre. Further, he submits that the Trial Chamber erred in law by relying on insufficient and unreliable evidence to find that the crime was established. Similarly, regarding the crime against humanity of **torture**, he disputes the sufficiency of evidence to make a finding of torture against Cham detainees at the Security Centre of Trea Village. **The Chamber would welcome a focused argument on these challenges.**

36. With respect to the charge of the crime against humanity of deportation of the Vietnamese at Tram Kak, the Accused raises the same argument presented at trial that this charge was not contained in the French version of the Severance Annex. The Trial Chamber and the Supreme Court Chamber have already addressed the error of omission, which occurred in the French translation of the Annex but was present in the Khmer and English language versions. **The Supreme Court Chamber would be assisted by an explanation for why the same matter has been repeated in this appeal.** The Accused further challenges the sufficiency of evidence to convict for the crime against humanity of **deportation of the Vietnamese** to Vietnam and secondly, that the crime was committed with the requisite intent to forcibly displace victims over a national border.

37. He challenges all factual and legal findings relating to the **murders of Vietnamese and of Genocide**. The Accused disputes the findings that murders of Vietnamese had been committed in various cooperatives and in territorial waters and further that the crimes were carried out with the necessary intent to destroy the Vietnamese ethnic group.

38. Lastly, he argues that Vietnamese detainees held in S-21 and Au Kanseng Security Centres or at sea were not members of a protected group solely on the basis that they were Vietnamese nationals.

39. This concludes our report on the grounds of appeal relating to the crimes for which the Accused was convicted.

**IV. CO-RAPPORTEURS' REPORT FOR THE SESSION ON "GROUNDS OF APPEALS
RELATING TO KHIEU SAMPHÂN'S INDIVIDUAL CRIMINAL RESPONSIBILITY"**

**CO-RAPPORTEURS: JUDGE SOM SEREYVUTH AND JUDGE MAUREEN HARDING
CLARK**

40. The Trial Chamber found the Accused responsible for the crimes previously outlined under two modes of liability: joint criminal enterprise, or JCE, and aiding and abetting the crime against humanity of murder outside joint criminal enterprise.

41. First, he was convicted under individual criminal responsibility through his participation in the common purpose and sharing the same criminal intent of a joint criminal enterprise. Those convictions were for crimes perpetrated in the course of the implementation of the five policies of the Communist Party of Kampuchea throughout the Democratic Kampuchea regime. Those policies were 1) the movement of population from urban to rural areas and within rural areas; 2) the establishment and operation of cooperatives and worksites; 3) the establishment and operation of security centres and execution sites; 4) the targeting of specific groups, namely the Cham, Vietnamese, Buddhists and former Khmer Republic soldiers; and 5) the regulation of marriage. The Accused's individual criminal responsibility for the crimes as a member of the joint criminal enterprise was on the basis that he shared the direct, discriminatory and specific intent of other members of the joint criminal enterprise.

42. The Trial Chamber found that by 17 April 1975 and continuing until at least 6 January 1979, the Accused as a senior leader in the hierarchy of the CPK shared with other senior leaders of the joint criminal enterprise a common purpose to implement a rapid socialist revolution in Cambodia through a 'great leap forward' designed to build the country, defend it from enemies and radically transform the population into a homogeneous religion-less Khmer society of worker-peasants. The Trial Chamber found that that this common purpose was not necessarily criminal in itself but its successful implementation ultimately determined the criminal character of that common purpose as it:

"was contingent upon the execution of harmful policies and the elimination of all counter-revolutionary elements".

43. The Trial Chamber found that the Accused's role in the common purpose was through his significant contribution in publicly supporting, promoting and endorsing its objects through his senior positions within the CPK and Democratic Kampuchea and by his personal leading of sessions and rallies instructing, enlisting and producing support for CPK policies.

44. Secondly, the Trial Chamber found that in his senior positions within the hierarchy of the CPK the Accused had aided and abetted the crime against humanity of murder with *dolus eventualis* at various crime sites.

45. The Accused has always denied that he had a senior position or role in the CPK or that he had any knowledge of what was occurring in DK outside of his limited sphere of responsibility for ordering and distributing essential goods such as medicines, as the liaison between Prince Sihanouk and the CPK and as titular head of DK.

46. He raises various grounds of appeal in relation to his convictions under both modes of liability. Regarding his liability under **joint criminal enterprise**, the Accused raises many arguments against the Trial Chamber's approach to the evidence and to its findings which may be grouped and summarised as follows:

47. The first group of arguments relates to the legal foundation of the concept of Joint Criminal Enterprise liability. The Accused argues that the Trial Chamber committed various errors. The first error occurred when the wrong legal standard was applied to assess the link between the direct perpetrators and the JCE participants. He submits that when such a participant is held responsible for acts committed by other perpetrators, a **strict definition of the common purpose** is required. It is not disputed that the purpose of a joint criminal enterprise can evolve over time so that additional crimes may be included in that common purpose but he argues that such evolution and the point at which the JCE members became aware of the commission of additional crimes was not described with any precision by the Trial Chamber. Second, the Accused takes issue with the concept that **crimes** committed pursuant to a **joint criminal enterprise** could be committed by **omission**. Third, he argues that the Trial Chamber erred by lowering the standard of the necessary direct intent to commit a crime.

48. The second group of arguments relates to the **common purpose**. The Accused submits that the Trial Chamber committed three main errors. As the common purpose identified by the Trial Chamber – the implementation of a rapid socialist revolution –

was not criminal in itself, the Trial Chamber was in error when it found that the common purpose became criminal because of the crimes committed during DK rather than by examining the non-criminal CPK political projects. Next, the Trial Chamber lowered the requirements for liability under that JCE as it determined the criminal nature of a joint enterprise on its policies rather than from its common purpose.

49. The third group of arguments concerns the findings of the Accused's **contribution** to the implementation of the **common purpose**. First, he submits that the Trial Chamber erred in fact as there was **insufficient evidence** to find that he significantly contributed to the crimes or that it failed to substantiate that significant contribution, a necessary element for liability under Joint Criminal Enterprise. More specifically, he argues that his association with members of the Standing Committee is insufficient to establish significant contribution to the criminal aspects of the policies. Second, he disputes the sufficiency of the evidence for the specific factual findings on his role and his powers within the CPK and the DK regime. Third, he submits that its assessment of evidence to establish his contribution to the JCE was biased and selective. **This Chamber welcomes specifics on this last issue.**

50. The last group of arguments relates to the Accused's **knowledge** of the crimes. Recalling that JCE 1 requires direct intent and thus knowledge of the crimes, he argues that he has consistently submitted that he **did not have any knowledge of the crimes** and in particular, he was unaware of the working and living conditions imposed at the cooperatives and worksites. He submits that the Trial Chamber generally failed to appreciate the strict principles of secrecy under the Democratic Kampuchea regime and that the findings regarding his awareness or knowledge of the CPK communication system were in error. He argues that he had no actual knowledge of the crimes perpetrated across the country.

51. Turning to his liability for **aiding and abetting** he argues that the Trial Chamber's findings are tainted by several errors of fact and law. He raises two main arguments: First, the Trial Chamber incorrectly defined the *mens rea* of aiding and abetting. While it adopted the standard that for an accused to be guilty of such accessory liability, he must know that a crime would likely be committed, the Trial Chamber then unjustifiably applied a lesser degree of intent, which was not covered by customary international law as it stood at the time the crimes were committed. He particularly disputes the Trial Chamber's reliance of the ICTY Appeals Chambers'

conclusions from the *Furundžija, Akayesu and Blaškić* decisions on aiding and abetting.

52. He challenges the Trial Chamber finding that the *mens rea* of aiding and abetting was established. The finding that he was “at all times aware of the essential elements of the crimes committed by the direct perpetrators” is rejected as he submits that the evidence supports his claim that he was not aware of the real likelihood that deaths would result from the conditions imposed at the charged worksites and cooperatives nor was he aware that murders were committed at the charged security centres and execution sites. **The Accused might wish to direct the Chamber to this evidence which it is alleged supports his claim that he was unaware of deaths and killings at those sites.**

53. Second, the Trial Chamber erred in finding that the *actus reus* of aiding and abetting murders with *dolus eventualis* was met at various worksites and security centres. The Accused disputes the Trial Chamber’s findings that moral support, implicit encouragement or practical assistance to decision-making bodies of the CPK and visits to some of these sites had a substantial effect on the commission of these murders. Lastly, he argues that his mere attendance at meetings does not amount to aiding and abetting. Again, he disputes the lawfulness of the reliance the Trial Chamber placed on the *Furundžija, Akayesu and Blaškić* decisions on aiding and abetting.

54. This concludes our report on the grounds of appeal relevant to the individual criminal responsibility.

V. CO-RAPPORTEURS' REPORT FOR SESSION ON "GROUNDS OF APPEAL RELATED TO THE SENTENCE"

CO-RAPPORTEURS: JUDGE CHANDRA NIHAL JAYASINGHE AND JUDGE MONG MONICHARIYA

55. The Trial Chamber imposed a sentence of life imprisonment on the Accused for the crimes for which he was convicted. This sentence was to run concurrently with a previous life sentence imposed for crimes encompassed in Case 002/01 and confirmed by the Supreme Court Chamber. In his grounds of appeal, he raises four main arguments against the fairness of that sentence, which are summarised as follows:

56. First the Trial Chamber was in error in stating that the primary objective of the sentence was to reassure victims, witnesses and the public that the law was being effectively implemented and applied to all regardless of their status. He argues that this was a secondary objective of punishment and demonstrates bias. The sentence imposed was excessive and exemplary.

57. Secondly, the Trial Chamber committed errors of fact and law in its assessment of the gravity of the crimes as it took into consideration crimes of which he was not charged or convicted. As an example, the Trial Chamber considered the rape of prisoners in security centres. As only the matters proved beyond reasonable doubt are considered against an accused at the sentencing stage, the Trial Chamber violated the principle of sentencing. Second, Trial Chamber failed to consider the indirect and limited nature and extent of his participation in the crimes when assessing the gravity of the crimes thereby disrespecting the sentencing practice of international tribunals where secondary or indirect participation usually leads to lighter sentences.

58. Thirdly, the Accused submits that the Trial Chamber committed factual and legal errors in its assessment of two **aggravating factors**: (i) The Trial Chamber considered the abuse of his position of authority and influence as an aggravating factor, which is in contradiction to its findings that he did not have sufficient authority to directly order the perpetration of the crimes. His position of authority had already been taken into account for the gravity of the crimes assessment. (ii) The Trial

Chamber failed to demonstrate the relevance and correlation of his level of education as an aggravating factor.

59. Fourthly, he argues that the Trial Chamber committed factual and legal errors in its assessment of **mitigating factors**. First, the Trial Chamber failed to give due consideration to his **cooperation** with the ECCC including his active participation at trial, his exemplary attitude throughout detention and his acknowledgment of the suffering endured by civil parties. Secondly, the Trial Chamber failed to accord sufficient weight to his **age and state of health** and his inability to withstand long-term imprisonment. Thirdly, the Trial Chamber erred by not conducting a new assessment of the value to be given to his character witnesses and by failing to take account of all the elements of his personality and in ignoring the unanimously laudatory accounts.

60. In conclusion, the Accused submits that these errors invalidate the Trial Chamber's decision on his sentence, which he argues should be reduced to a prison sentence with a time limit.

61. This concludes the report on the grounds of appeal relating to the sentence.

VI. CO-RAPPORTEURS' REPORT FOR SESSION ON "THE APPEAL OF THE CO-PROSECUTORS"

CO-RAPPORTEURS: JUDGE FLORENCE NDEPELE MWACHANDE MUMBA AND JUDGE YA NARIN

62. The Co-Prosecutors have one ground of appeal. They object to the way in which the Trial Chamber addressed the effect of forced sexual intercourse within the context of forced marriage on those men; that is marriage arranged without their knowledge or consent with women who were not known to them. The Trial Chamber found that on those facts men could not be victims of rape. The Co-Prosecutors do not challenge that finding but dispute the lawfulness of the Trial Chamber's failure to assess whether men, in the context of those forced marriages, were subjected to sexual violence of such gravity that it could amount to the crime against humanity of Other Inhumane Acts. While the Trial Chamber acknowledged that men were subjected to sexual violence contrary to human dignity, it found that due to an absence of clear evidence concerning the level of seriousness of this kind of conduct on males it was unable to reach a finding on the seriousness of the mental and physical suffering endured by these men. They submit that both male and female victims of the same act of forced sexual intercourse should be properly recognised as victims of sexual violence as other inhumane acts of crimes against humanity.

63. The Co-Prosecutors appeal this exclusion of the male victims of sexual violence in the context of forced marriage from the conviction for the crime against humanity of Other Inhumane Acts through two primary arguments.

64. Firstly, they argue that the Trial Chamber erred in law by failing to correctly apply the legal requirements of the crime by not considering whether forcing someone to have sexual intercourse constituted a serious attack on human dignity. Secondly, the Co-Prosecutors argue that the Trial Chamber erred in law and fact by failing to find that forcing men to engage in sexual intercourse caused serious physical or mental suffering or injury to the male victims. They dispute the lawfulness of the Trial Chamber's failure to properly consider relevant evidence or to provide a reasoned judgment on its findings that Other Inhumane Acts had not been established. They submit that the Trial Chamber's legal and factual errors were of such gravity that they invalidate the decision which resulted in a miscarriage of justice.

65. They submit that the act or omission of Other Inhumane Acts is proven if the conduct *either* caused serious mental or physical suffering or injury *or* constituted a serious attack on human dignity. In this regard, the Co-Prosecutors argue that the task of determining whether the act constituted a serious attack on the human dignity of the victims is an objective test and had the Trial Chamber followed the correct approach, it would have found that the conduct amounted to a serious attack on the human dignity of the male victims.

66. The Co-Prosecutors submit that the Trial Chamber failed to consider evidence that was materially relevant in demonstrating the suffering of male victims caused by being both a victim of forced sexual intercourse and by being required to inflict that suffering on their spouse in coercive circumstances. In particular, the Trial Chamber ignored relevant expert testimony and civil party evidence of male suffering caused by forced consummation. They submit that the Trial Chamber's findings, including that men could not refuse to consummate marriage were in and of themselves sufficient to demonstrate the level of serious conduct and its impact on males.

67. **This Chamber invites the Co-Prosecutors to point out what fact evidence as opposed to opinion evidence was ignored when the Trial Chamber concluded that there was an absence of clear evidence concerning the level of seriousness of this kind of conduct and its impact on males.**

68. This concludes the report on the Co-Prosecutors' appeal.