



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber
Chambre de la Court Suprême

**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

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

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TRANSCRIPT OF APPEALS HEARING

Case File N° 002/19-09-2007-ECCC/SCC

18 August 2021

Before the Judges: KONG Srim, Presiding
YA Narin
Maureen Harding CLARK
SOM Sereyvuth
Chandra Nihal JAYASINGHE
MONG Monichariya
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List of Speakers:

Language used unless specified otherwise in the transcript

Speaker	Language
Judge KONG Srim	Khmer
Judge Maureen Harding CLARK	English
Judge Chandra Nihal JAYASINGHE	English
Judge MONG Moni Chariya	Khmer
Ms CHEA Leang	Khmer
Mr William SMITH	English
Ms Ruth Mary HACKLER	English
Ms Brenda J. HOLLIS	English
Mr KONG Sam Onn	Khmer
Ms. Anta GUISSÉ	French
Mr PICH Ang	Khmer
Greffier	Khmer

1 PROCEEDINGS

2 (Court opens at 0900H)

3 MR. PRESIDENT:

4 Please be seated.

5 The Supreme Court Chamber is now in session, and this is our third day, that is, the 18
6 August 2021.

7 There is a replacement of greffier from Mr. Sea Mao to Mr. Phan Theoun.

8 And greffier, could you please report the presence of the parties?

9 THE GREFFIER:

10 Mr. President, we have the National Co-Prosecutor, Chea Leang. We have the
11 International Co-Prosecutor, Brenda J. Hollis. For the Co-Lawyers for Mr. Khieu Samphan,
12 we have Kong Sam Onn and Anta Guisse. For the – and we have the Accused present
13 today, Mr. Khieu Samphan.

14 For the Civil Party Lead Co-Lawyers, we have Pich Ang and Megan Hirst.

15 We have participation of five civil party, Mr. VIT Vun, Madam MORK Phâlla, Madam Phen
16 Sâh, Madam BUN Sâh Oeun, and Madam BIT Lun.

17 Mr. President.

18 [09.03.16]

19 MR. PRESIDENT:

20 I would like now to invite the Co-Rapporteurs to read the Co-Rapporteurs' Report for the
21 session on grounds of appeals relating to Khieu Samphan's individual criminal
22 responsibility.

23 Thank you.

24 JUDGE CLARK:

25 Good morning, everyone. This is the report prepared jointly by Judge Som Sereyvuth and

1 me, Judge Clark.

2 The Trial Chamber found the Accused responsible for the crimes previously outlined under
3 two modes of liability, joint criminal enterprise, or JCE, as it's known, and aiding and
4 abetting the crime against humanity of murder outside joint criminal enterprise.

5 First he was convicted under individual criminal responsibility through his participation in
6 the common purpose and sharing the same criminal intent of a joint criminal enterprise.

7 Those convictions were for crimes perpetrated in the course of the implementation of the
8 five policies of the Communist Party of Kampuchea throughout the Democratic Kampuchea
9 regime.

10 [09.04.39]

11 These policies were: (1) the movement of population from urban to rural areas and within
12 rural areas; (2) the establishment and operation of cooperatives and worksites; (3) the
13 establishment and operation of security centres and execution sites; (4) the targeting of
14 specific groups, namely, the
15 Cham, Vietnamese, Buddhists and former Khmer Republic soldiers; (5) the regulation of
16 marriage.

17 The Accused's individual criminal responsibility for the crimes as a member of the joint
18 criminal enterprise was on the basis that he shared the direct discriminatory and specific
19 intent of other members of the joint criminal enterprise.

20 The Trial Chamber found that by the 17th April 1975 and continuing until at least the 6th of
21 January 1979, the Accused as a senior leader in the hierarchy of the Communist Party of
22 Kampuchea shared with other senior leaders of the joint criminal enterprise a common
23 purpose; to implement

24 A rapid socialist revolution in Cambodia through a "great leap forward" designed to build
25 the country, defend it from enemies and radically transform the population into a

1 homogeneous religionless Khmer society of worker peasants.

2 [09.06.15]

3 The Trial Chamber found that that this common purpose was not necessarily criminal in
4 itself, but its successful implementation ultimately determined the criminal character of that
5 common

6 purpose as it, to quote, "was contingent upon the execution of harmful policies and the
7 elimination of
8 all counter revolutionary elements".

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

14 [09.07.12]

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

18 The Accused has always denied that he had a senior position or role in the CPK or that he
19 had any knowledge of what was occurring in DK outside of his limited sphere of
20 responsibility for ordering and distributing essential goods such as medicines, as the liaison
21 between Prince Sihanouk and the CPK, and as titular head of the DK. He raises various
22 grounds of appeal in relation to his convictions under both modes of liability. Regarding his
23 liability under joint criminal enterprise, the Accused raises many arguments against the
24 Trial Chamber's approach to the evidence and to its findings, which may be grouped and
25 summarized as follows,

1 [09.08.19]

2 The first group of arguments relates to the legal foundation of the concept of Joint Criminal
3 Enterprise liability. The Accused argues that the Trial Chamber committed various errors.
4 The first error occurred when the wrong legal standard was applied to assess the link
5 between the direct perpetrators and the JCE participants. He submits that when such
6 participant is held responsible for acts committed by other perpetrators, a strict definition of
7 the common purpose is required.

8 It is not disputed that the purpose of a joint criminal enterprise can evolve over time so that
9 additional crimes may be included in that common purpose, but he argues that such
10 evolution
11 and the point at which the JCE members became aware of the commission of additional
12 crimes was not described with any precision by the Trial Chamber.

13 Second, the Accused takes issue with the concept that crimes committed pursuant to joint
14 criminal enterprise could be committed by omission. Third, he argues that the Trial
15 Chamber erred by lowering the standard of the necessary direct intent to commit a crime.

16 [09.09.42]

17 The second group of arguments relates to the common purpose. The Accused submits that
18 the Trial Chamber committed three errors. As the common purpose identified by the Trial
19 Chamber, the implementation of rapid socialist revolution, was not criminal in itself, the
20 Trial Chamber was in error when it found that the common purpose became criminal
21 because of the crimes committed during DK rather than by examining the non-criminal
22 CPK political projects.

23 Next, the Trial Chamber lowered the requirements for liability under that JCE as it
24 determined the criminal nature of joint enterprise on its policies rather than from its
25 common purpose.

1 The third group of arguments concerns the findings of the Accused's contribution to the
2 implementation of the common purpose.

3 First, he submits that the Trial Chamber erred in fact as there was insufficient evidence to
4 find that he significantly contributed to the crimes or that it failed to substantiate that
5 significant contribution, a necessary element of liability under Joint Criminal Enterprise.

6 More specifically, he argues that his association with members of the Standing Committee
7 is insufficient to establish significant contribution to the criminal aspects of the policies.

8 [09.11.16]

9 Secondly, he disputes the sufficiency of the evidence for the specific factual findings on his
10 role and his powers within the CPK and the DK regime.

11 Third, he submits that its assessment of evidence to establish his contribution to the JCE
12 was biased and selective. This Chamber welcomes specifics on the last issue.

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

22 [09.12.38]

23 Turning to his liability for aiding and abetting, he argues that the Trial Chamber's findings
24 are tainted by several errors of fact and law. He raises two main arguments.

25 First, the Trial Chamber incorrectly defined the mens rea of aiding and abetting. While it

1 adopted the standard that for an accused to be guilty of such accessory liability he must
2 know that a crime would likely be committed, the Trial Chamber then unjustifiably applied a
3 lesser degree of intent which was not covered by customary international law as it stood at
4 the time that the crimes were committed. He particularly disputes the Trial Chamber's
5 reliance of the ICTY Appeals Chambers' conclusions from Furundzija Akayesu and Blaskic
6 on aiding and abetting.

7 [09.13.35]

8 He challenges the Trial Chamber finding that the mens rea of aiding and abetting was
9 established. The finding that he was "at all times aware of the essential elements of the
10 crimes committed by the direct perpetrators" is rejected, and he submits that the evidence
11 supports his claim that he was not aware of the real likelihood that deaths would result from
12 the conditions imposed at the charged worksites and cooperatives, nor was he aware that
13 murders were committed at the charged security
14 centres and execution sites. The Accused may wish to direct the Chamber to this evidence,
15 which it is alleged supports his claim that he was unaware of deaths and killings at those
16 sites.

17 He then says the Trial Chamber erred in finding that the actus reus of aiding and abetting
18 murders with dolus eventualis was met at various worksites and security centres. The
19 Accused disputes the Trial Chamber's findings that moral support, implicit encouragement
20 or practical assistance to decision-making bodies of the CPK and visits to some of these
21 sites had a substantial effect on the commission of these murders.

22 Lastly, he argues that his mere attendance at meetings does not amount to aiding and
23 abetting. Again he disputes the lawfulness of the reliance the Trial Chamber placing on
24 Furundzija Akayesu and Blaskic decisions on aiding and abetting.

25 This concludes our report on the grounds of appeal relevant to individual criminal

1 responsibility.

2 [09.15.22]

3 But while I have the floor, I would like to remind the – sorry, the Defence team that on a
4 number of occasions in our report, we have specifically asked that the Defence would
5 focus on pointing at this Chamber the exculpatory evidence which it's alleged in very many
6 places was ignored by the Trial Chamber and I think we've asked the same questions in
7 this report, direct us specifically to the exculpatory evidence that was ignored.

8 And I'm not expecting you to answer now. Perhaps you'd be able to answer those
9 questions tomorrow.

10 Thank you.

11 [09.16.20]

12 MR. PRESIDENT:

13 I would like now to hand the floor to the Defence for Khieu Samphan to make submissions.

14 Thank you.

15 MS. GUISSÉ:

16 Mr. President, Your Honours, I thank you for giving me the floor for this extremely important
17 topic. And I must say that I am approaching this theme of the individual criminal liability of
18 Mr. Khieu Samphan with the clear awareness of how difficult this task is because it's not
19 easy to stand twice before virtually the same judges and, at the same time, hoping for a
20 result that would be different from the previous time they found on the same legal issue.

21 Furthermore, tackling the issue of the JCE, as I am about to do, similarly to that of murder
22 with *dolus eventualis*, also requires us to explain why we believe the Supreme Court erred
23 in Case 002/01. And it's never an easy matter to tell Judges who hold in their hands the
24 fate of the Accused that you represent that you think they've erred. And I'm reminded of
25 what was said by another magistrate, who summarized perfectly the kind of duty that is

1 mine today.

2 [09.18.10]

3 Justice Moloto, a South African Judge at the ex-Yugoslav Tribunal, said the following on
4 the importance of the role of the Defence. He stated the following when addressing the
5 attorneys:

6 "The main important function that the defence counsel must think of at all times is the very
7 obvious one: defend your client. Defend your client to the best of your ability. Refuse to be
8 browbeaten by anybody in the exercise of that duty to your client, whether that person be
9 from the Prosecution, be a Judge, or be any other counsel. Your job is to defend your client
10 and, at the end of the trial, whatever the result, if you can say, I couldn't do any better, then
11 you are entitled to peaceful sleep." (As read)

12 [09.19.01]

13 So I shall do my best not to be intimidated by my own misgiving and I keep in mind the
14 guarantee of your own freedom of spirit that was mentioned by the Special Judges Panel. It
15 is in that spirit that I shall now mention the different modes of liability retained by the
16 Chamber against Khieu Samphan in the JCE and aiding and abetting. I shall begin with the
17 JCE.

18 The Co-Prosecutors and magistrates of the Trial Chamber and of the Supreme Court were
19 faced with a dual difficulty when it came to the conviction of Khieu Samphan. First of all,
20 the common purpose as defined in the Co-Investigating Judges' referral order, that one
21 was not criminal. It was a political project. And secondly, the Pre-Trial Chamber had
22 concluded that the third category criminal enterprise was not part of international
23 customary law at the time of the facts.

24 For us, these two difficulties are central to all the mistakes that have been made in the
25 decisions handed down regarding the liability of Khieu Samphan at the trial or at the appeal

1 stage. Either there has been an attempt to get the crimes to fit into the shared political
2 aims, or to include the specific probability of JCE-3 included into the constitutive elements
3 of a JCE-1. That is what, in our final brief for 002/02, reference 457/5/4/1, paragraphs 430
4 to 516 – that is what we had called a hybrid Joint Criminal Enterprise.

5 [09.20.58]

6 Now, to overcome these two difficulties, the Trial Chamber, followed by the Supreme Court
7 Chamber, ventured into redefining the constitutive elements of a JCE. The Supreme Court,
8 in its ruling 002/01, broadened the moral element of JCE of the Type 1, to include the idea
9 of *dolus eventualis*.

10 The Trial Chamber, in its judgment 002/02, did not do that because redefining JCE-1 would
11 be contrary to the law. But to achieve the same result, the Chamber redefined the common
12 purpose.

13 So in both cases, Khieu Samphan is found guilty for crimes to which he did not directly
14 make a contribution for which he never had the necessary moral elements, *mens rea*, and
15 when those crimes were committed by persons over whom he had no control. We have an
16 argumentation on all this in our Appeal Brief, paragraphs 1947-1953.

17 [09.22.21]

18 First of all, and correctly so, the Trial Chamber did not follow the interpretation of the
19 Supreme Court. And I refer you to its Reasons for Decision, in paragraph 3715.

20 The Chamber stated in terms of the moral element of a JCE that it does not follow the
21 interpretation of the Supreme Court, explaining that consequently, and then in agreement
22 with the defence of Khieu Samphan, the Chamber believes that the degree of intent
23 required for the first category of JCE to be present is direct intent.

24 The Trial Chamber, returned to formulating a correct legal criterion by criticizing the
25 Prosecution's analysis of the notion of direct intent, and I refer you to the Reasons for

1 Decision, paragraph 3716, where reference is made to the final conclusions of the
2 Prosecution. And the Chamber states:

3 "Thus, the standard described by the Co-Prosecutors as second-degree direct – *dolus*
4 *directus* actually corresponds to a degree of intention that is below that of direct intent,
5 which is actually closer to notions of deliberate carelessness and *dolus eventualis*." (As
6 read)

7 [09.24.09]

8 Having that – having said that, it redefined the common purpose to characterize a project
9 implying crimes in the sense that it must be committed, meaning *dolus directus* of the
10 second degree. And here, I refer you to para 4068 of the judgement in Case 02/2.

11 The Chamber considered that it is an established fact that these policies were intrinsically
12 connected with the common purpose and implied the commission of crimes. It thus
13 considers that the common purpose was intrinsically of a criminal nature. It is important to
14 note that this is not what was stated in the Closing Order, which is the indictment. And so
15 we have a broader definition than what was contained in the indictment. In our Appeal
16 Brief, we criticized this idea of policies "intrinsically connected with" which once again are
17 in line with an attempt to broaden the common purpose, to include additional crimes from
18 outside of that purpose. And in our Appeal Brief, I would refer you to our paragraphs 1968
19 and 1980 and 1981 to 2007.

20 [09.25.45]

21 By way of response, the Co-Prosecutors contended that – this was in their response,
22 paragraph 954. They contended that the Defence, and I quote, "...is limiting its legal
23 analysis to a JCE in which the common purpose consisted of the commission of a crime,
24 instead of considering the JCE to which he actually did participate, which implied the
25 perpetration of crimes". End of quote.

1 So according to the Prosecution, the common purpose implies the commission of a crime,
2 even if the common purpose is not criminal, if a crime is a means of reaching your final
3 objective. So if there is a goal to establish a socialist revolution, this must be assessed as
4 an objective jointly with the means to achieve it. In other words, the policies of CPK which
5 are concerned by the second trial, in Case 002, that is still in paragraph 954 of their
6 response. But to that, we respond that the Prosecution's long enumeration of facts does
7 not demonstrate any direct causality link. That is, participation in a project of a socialist
8 revolution would inevitably involve the definition and implementation of policies as defined
9 by the Chamber in our case file.

10 It is not demonstrated by the Prosecution how such a means was the only possible means
11 that would make the crimes inevitable for the achievement of the goals pursued such as
12 forced transfers of people when the objective is, say, to forcefully or coercively constitute a
13 territory that is ethnically homogeneous.

14 [09.28.05]

15 Furthermore, in Case 002, it is clear that the means that could be used for a socialist
16 revolution were not unequivocal by any stretch. There is, thus, no direct link of causality
17 and inevitability between the objective, the project of a socialist revolution, and the means
18 defined by the Chamber and the Co-Prosecutors.

19 I am insisting on these points as they were defined by the Chamber, the Prosecution, and
20 obviously, the Co-Investigating Judges, because from the defence of Khieu Samphan, we
21 disagree with the notion that the policies of the CPK that were known to Khieu Samphan
22 and the project of socialist revolution familiar to him corresponded with what is defined in
23 this case.

24 Now, the Prosecution believes that separating the policies of the revolution itself would
25 involve an illogical and artificial distinction, as the shared purpose included both the

1 objective and the means. Paragraph 955 in their brief. According to them, and I quote:
2 "the fixation of the Appellant on an alleged project that would have been benevolent and
3 non-criminal, his fixation on the fact that the crimes potentially committed were only
4 undesirable consequences in the application of the joint project is abstract, irrelevant, and
5 divorced from reality." (As read)

6 [09.29.56]

7 What we see here is a lack of arguments for the causal link and inevitability between the
8 revolution and the policies. The Prosecution has not explained how the distinction is
9 illogical or artificial. Yet, that has been the position of the Defence of Khieu Samphan since
10 the beginning, that the policy, or at least, the project for a revolution that he believed in
11 does not correspond to what was described by the Prosecution and thereafter by the
12 Chamber. And this causal link and concept of unavoidability should have been at the heart
13 of the Prosecution's argument, at the heart of their demonstration, but the Prosecution did
14 not wish to do this because, in effect, it doesn't really believe in this position of the
15 Chamber because it had a different one throughout the trial. And here, I would like to refer
16 you to the Appeal Brief which was prepared by the Prosecution in Case 002/1 where,
17 throughout their submissions, including in that brief, they indicated, and that is in document
18 F11, paragraph 1, they objected to the Trial Chamber for having:

19 "committed an error of law by excluding the possibility that the Accused, high-level leaders
20 of the regime of Kampuchea Democratic, were recognized as being criminally responsible,
21 pursuant to the theory of joint criminal enterprise, for have perpetrated crimes given the
22 fact that they had contributed to the common project," and I would like to underscore, "of
23 which they could have reasonably predicted that crimes would flow that were not explicitly
24 part of its objective." (As read)

25 [09.32.02]

1 And so today, the Prosecution has not appealed the ruling in Case 002/2, which they could
2 have done. Today, they find themselves faced with the need to induce a theory and
3 argument of the Trial Chamber which they don't really believe in.

4 In its response to 002/2, the Prosecution at times concedes that the perpetration of crimes
5 was the result of simple probability. And here, I refer you to paragraph 914 of the rejoinder,
6 where the Prosecution says:

7 "It is, therefore, rightfully that the Chamber ruled that the Appellant was aware of the
8 preparation of plans, their implementation, and that there was a real probability that crimes
9 would be perpetrated." (As read)

10 And here, we see quite clearly the discomfort of the Prosecution, which is unable to
11 demonstrate the inevitability of crimes flowing from the project in the sense of a *dolus*
12 *directus*.

13 [09.33.13]

14 Therefore, at times, they stay on the position of the *dolus eventualis*, hoping that the
15 Chamber of the Supreme Court might say that they were right by reasserting its erroneous
16 definition of JCE-1, which was found in its ruling on Case 002/1. However, mode of
17 responsibility with *dolus eventualis* is incompatible with the perpetration of a crime requiring
18 *dolus specialis*, such as persecution or genocide.

19 By introducing *dolus eventualis* in JCE-1, the Chamber cannot convict for these crimes
20 and, therefore, our contention in this regard is that the Chamber of the Supreme Court
21 must abandon its definition of JCE-1 given in the ruling on Case 002/1. Why? Because the
22 definition of JCE-1 given by the Supreme Court Chamber in its ruling on Case 002/01 is
23 based on a partial and erroneous understanding of the post-war jurisprudence and the
24 Tadic jurisprudence, and this is what we said in our final submission for Case 002/02. And
25 the Chamber, in fact, agreed with us on this point.

1 [09.34.46]

2 It is interesting, because we talk about this notion and the notion of whether there was
3 *dolus eventualis* or not, and what category of JCE we are talking about, and it is interesting
4 to recall that architect of the JCE theory itself, and in her *amicus curiae* to the ECCC,
5 Professor Cassese, used the example of population transfers and armed robbery used by
6 the Supreme Court in its demonstration relating to the moral element of JCE-1, the *mens*
7 *rea* of JCE-1, and he also used the example of the displacement of civilians in the ruling on
8 Case 002/01. He used them to illustrate the moral component of the JCE of a third
9 category. And that is a means saying that the formulation and definition as they had been
10 offered in the ruling on Case 002/1, in fact, corresponded to JCE-3.

11 In the trial of Case 002/1, the Supreme Court explained, and that's paragraph 807 of the
12 ruling, that "it is important in the utmost to know the criteria which make it possible to
13 identify crimes which are part of a shared purpose."

14 [09.36.13]

15 And then it settled for saying that it was a purely factual appreciation, and I quote, in
16 paragraph 807:

17 "To know whether a crime is or is not taken into consideration in the common purpose is,
18 first of all, a question of fact which must be examined by taking into account all the relevant
19 circumstances, and particularly the overall objective of the common purpose and the
20 probability of achieving this objective exclusively at the cost of perpetrating crimes." (As
21 read)

22 In doing so, it opened the door for the Trial Chamber to characterize in the vaguest manner
23 possible which objectives imply or don't imply crimes. And as a former substitute of the Co-
24 Prosecutors in the ECCC clearly explained very well in an article that we included in our
25 new list of sources, and we must hear his intellectual honesty. And it was written in English,

1 and I'll quote it in English, and please excuse me because my accent is not necessarily the
2 best, but this is what he said by commenting the definition of JCE-1 as it is defined in the
3 ruling on Case 002/1.

4 "The Supreme Court fashioned a concept of common purpose liability which has the
5 potential to lower the standard of individual liability for group action below that one of the
6 most criticized aspects of international criminal law."

7 End of quote.

8 [09.37.56]

9 On another point, and which was underscored by the Supreme Court Chamber in
10 paragraph 789, it states, and I quote:

11 "The common purpose lies at the heart of this mode of participation, because it is the
12 element which binds the participants to the joint criminal enterprise and justifies that their
13 respective acts of the nature of such that it will commit their criminal responsibility, can be
14 imputed to each one of the members. However, for this mutual attribution to be justified, it
15 is not enough that those who agree to act with a common purpose satisfy themselves with
16 adhering to any common goal. In fact, it necessarily must be criminal." (As read)

17 And the Trial Chamber settled for asserting that the top leadership shared the common
18 purpose. And it states, and I will find the reference, I think I omitted it, it states, when
19 speaking about the JCE members' common purpose, and it states:

20 [09.39.13]

21 "...a group of several persons, among which were high levels of leadership, Pol Pot, Nuon
22 Chea, Khieu Samphan, Ieng Sary, Ieng Thirith, Son Sen and Vorn Vet (until he was
23 arrested at the end of 1978), and the zone secretaries, including Ta Mok, Ke Pauk, Koy
24 Thuon (until he was placed under house arrest in mid-1976), Chou Chet (until he was
25 arrested in March '78), Ruos Nhim (until his arrest in May-June 1978) and Sao Phim (until

1 his suicide in June '78) shared the same common purpose."

2 However, it has never been the case that there was evidence that Khieu Samphan shared
3 the objectives or the criminal intent of all of these people. However, it is solely on this basis
4 that one could justify imputing to Khieu Samphan crimes perpetrated by these other
5 participants in the JCE, either directly via their hierarchical authority or functionally, due to
6 their authority in regard of the material perpetrators of these crimes.

7 [09.40.35]

8 This approach, in fact, finds a shortcut by deducing a criminal intent from the sole quality of
9 being a member of the DK, and thus criminalizes the fact that one belongs to the DK
10 regime. And I wish to thank my colleagues who very efficiently showed the reference in the
11 Reasons for Decision I just cited on the identity of the leadership that might have taken part
12 in the common purpose, and it is paragraph 4069.

13 And so the problem with the reasoning of the Trial Chamber is as follows. Since Khieu
14 Samphan was a member of DK, he shared the criminal common purpose and must,
15 therefore, be held responsible for the entirety of the crimes perpetrated.

16 This is a hazardous reasoning because it substitutes the characterization of criminal
17 objective and the intent required to the objective fact of belonging to a political project.

18 And to paraphrase, the Brdanin ruling must be recalled here, I apologize for my
19 pronouncement, a ruling from the ICTY, from 3 April 2007, which is cited in paragraph 1949
20 of our Appeal Brief, this ruling in paragraph 431 explains that the Chamber could not simply
21 conclude that the appellant had been in contact with criminals. It also had to establish that
22 he "intended to commit a crime", that "he associated with other persons in order to achieve
23 this objective" and, furthermore, that he "broadly contributed to the crime". These are the
24 three conditions necessary to conclude that he participated in these crimes.

25 [09.42.36]

1 Yet, in these conclusions on the role and contribution to the allegations, the Chamber
2 essentially concluded that adherence to the criminal aspects of the politics of Khieu
3 Samphan based on the fact that he was connected to the members of the CP, and his
4 intent to commit crimes and contribute based on official speeches during the Democratic
5 Kampuchea regime or statements made after the fact, or his functions, despite their having
6 nothing to do with the criminal aspects of the project. Quite on the contrary, they were
7 linked to non-criminal aspects of the political project.

8 And being unable to determine a specific action of Khieu Samphan characterizing his
9 contribution to criminal aspects of the common project, the Chamber used what we
10 described as “artificial arguments” in our Appeal Brief to include Khieu Samphan in a
11 collective responsibility contrary to the need to determine his individual responsibility.
12 That’s paragraph 2008 in our Appeal Brief, and we will return to this in our response to the
13 questions of the Supreme Court.

14 [09.44.06]

15 The consequence of this definition selected for joint criminal enterprise in this case, is that
16 any individual having held any position at the time of the events that are being considered
17 can be considered as a co-perpetrator who was not indicted.

18 The legal basis and the constitutive elements of a mode of responsibility must be secure,
19 particularly that which could criminalize any type of conduct. If these are too broad or
20 insufficiently clear, there is too much room left for political considerations to replace rational
21 application of the law.

22 [09.44.53]

23 Constant evolution of the constituent elements of the JCE shows that several years after
24 the creation of that doctrine, it still leaves the door wide open to abuse. And in fact, the
25 proof of this is that the Trial Chamber, the Co-Prosecutors and the Chamber of the

1 Supreme Court retain, after 15 years of procedure in this case, do not retain same
2 definition of elementary JCE.

3 Indeed, in the case of Trial 002/1, the Chamber of the Supreme Court gave a definition of
4 the intent component of JCE-1 corresponding to the definition of the moral element given to
5 JCE-3 by the Co-Prosecutors.

6 The Trial Chamber then disagreed with the Supreme Court Chamber and gave up the
7 recognition of the fact that JCE-1 included the concept of *dolus eventualis* prior to removing
8 this notion by redefining the common purpose. Then, concerning the common purpose
9 itself, the Prosecution itself agreed that an accused cannot be held responsible for crimes
10 flowing from a project which was lawful at its origin. And the entirety of the argumentation
11 today stemming from the Trial Chambers' Reasons for Decision consists in demonstrating
12 the opposite.

13 And I would like to refer you to the complementary observations of the Co-Prosecutors on
14 Joint Criminal Enterprise, which is D97/8, of 31.12.2008.

15 [09.46.42]

16 Therefore, it appears obvious that, given the distortions of JCE-1 in the case of the ECCC's
17 apprehension of them, these constituent elements were not sufficiently precise in the sense
18 required to satisfy the requirements of the famous principle of legality, which we have cited
19 since the beginning of these proceedings, the beginning of Case 002, whether in the trial
20 for Case 002/2 or Case 002/1. And given the various evolutions of the definition, we see
21 that there is a need to make a type of responsibility that is cut to size in order to allow for a
22 conviction, that is the feeling we get on the Defence. And in any case, given the disparity of
23 the positions, it is hard for us to see how this mode of responsibility could have been
24 foreseen and accessible to Mr. Khieu Samphan between 1975 and 1979, while we are still
25 debating it in 2021.

1 [09.47.48]

2 A few words now concerning aiding and abetting, and I will be brief here and refer you to
3 paragraph 2020-2021.

4 There was a similar MO of the Chamber which we find in its definition of aiding and
5 abetting. The Chamber systematically lowered the *mens rea*, the moral element, because
6 there is no direct intent for the majority of the crimes listed in this case. This is particularly
7 true for murder with the *dolus eventualis*, and I insist again that there are a certain number
8 of sources, new sources, in the list supplied for this hearing and that it is fundamental to
9 refer to them in order to observe that at the time of these events, there was no *dolus*
10 *eventualis* either for the crimes or for the modes of responsibility.

11 And so this element of law having been recalled, I will now look at the questions of the
12 Chamber and, in effect, raise the factual issues which seem to us to violate the Chamber's
13 impartiality, that is, ignoring exculpatory elements in favour of Mr. Khieu Samphan. And in
14 doing so, I will respond to paragraphs 43, 44, and 52 of your report.

15 [09.49.44]

16 First of all, as I said earlier, and this was summarized in the paragraph which was in the
17 report mentioned by Judge Clark this morning, the fact that the role of the Accused for the
18 Chamber was to support, promote and publicly approve the objectives of the CPK that he
19 held positions of leadership during the regime of Democratic Kampuchea and held
20 education sessions. And this is what the Chamber relied on in order to define the
21 contribution to JCE.

22 Your second question relating to paragraph 52 had to do with which elements of evidence
23 confirm that the appellant was not aware of the deaths and murders committed in various
24 sites brought up during the proceedings, according to his statements.

25 Regarding the allegations of the Accused, I would like to clarify that on certain themes,

1 both aspects of knowledge and contribution are connected. Knowledge sometimes stems
2 from Khieu Samphan's contribution, according to the Chamber.

3 I'd like to recall, and this is important, what we had said regarding the definition of the
4 common purpose, as this appears in the Reasons for Decision. And I refer to our
5 paragraphs 1975 to 1980 in our Appeal Brief.

6 [09.51.38]

7 Knowing that there have been different ways of wording this during the judgment, in
8 paragraph 1980, which in corresponds to paragraph 3918 in the Reasons for Decision, has
9 to do with promoting the implementation of the common purpose of a quick socialist
10 revolution to achieve a "great leap forward", defending the country against the enemies
11 and radically transforming the population into a homogeneous society of peasant workers.
12 And to draw a parallel, I would like to say the definition of the "common purpose" in the
13 Closing Order in paragraphs 156 and 1524.

14 According to the Co-Investigating Judges, the common purpose was defined to implement
15 in Cambodia a rapid socialist revolution using all necessary means through a "great leap
16 forward" and by defending the country against enemies, both internal and external.

17 It's interesting to compare the two definitions because the additions introduced here by the
18 Trial Chamber.

19 I refer also to everything that I said just a moment ago on JCE, and I would like to recall
20 also the notion of the Prosecution of the real probability of crimes being committed as an
21 element that has to be taken into consideration.

22 [09.53.24]

23 I mentioned earlier the Appeal Brief in paragraph 2008. And there, we also summarized the
24 contribution of Khieu Samphan, according to the Trial Chamber, I quote:

25 "The Chamber has, in essence, found that there were criminal aspects to the policy of

1 Khieu Samphan through his connections with the members of the Permanent Committee,
2 his intention to commit the crimes and contribute through his official discourse during the
3 DK, his statements after the fact, and these are his functions which are connected with the
4 non-criminal aspects of the common purpose." (As read)

5 I cannot revisit all these errors, but I would like to illustrate a few examples, starting with
6 the Standing Committee. You find reference to this in our paragraphs 1730 and following of
7 our Appeal Brief.

8 [09.54.40]

9 There was a biased use by the Chamber of the minutes of the Standing Committee where
10 we find neglect and ignorance of the exculpatory aspects regarding Khieu Samphan. The
11 Chamber says in its paragraph 602 in its Reasons for Decision, it says that Khieu
12 Samphan had a "unique position" in the regime, that he knew everything that was
13 happening across the territory of Democratic Kampuchea because he was an "active
14 participant" in the meetings of the Standing Committee. Active participant.

15 In our Appeal Brief, our paragraph 736 to 7338 and 1745 to 1747, we recall that in the file
16 there are 16 sets of minutes from the Standing Committee available going up to 10 June
17 1976, but Democratic Kampuchea did not end before January '79. So the active
18 participation in the Standing Committee meetings for which we do have minutes, and that's
19 one thing, and then on what basis are we judging that there is active participant of Khieu
20 Samphan

21 The name of Khieu Samphan appears only twice, and not at least as is said by the
22 Chamber, and his appearance always has to do with reporting to the Standing Committee,
23 so first of all, perhaps the Chamber did not take sufficiently into account the fact that Khieu
24 Samphan was never a member of that committee. Further, as regards the reports, there is
25 absolutely no link between the reports from Khieu Samphan in the minutes available, as it

1 is a report on the substance, the GRUNK around the time of the resignation of Norodom
2 Sihanouk, and we only see him referring to his general activities of that type. There is no
3 other connection.

4 [09.57.09]

5 There is nothing in his reports that relates to his activities with trade and nothing that is
6 connected to criminal activities, so that's an aspect that has not been taken into
7 consideration. What then do you mean by "active participant" when you have reported
8 twice to a committee? It's not the same thing as active participation. Could the Chamber
9 have arrived at this conclusion based solely on this evidence? No.

10 Still on the same topic of the minutes of the Standing Committee, these minutes have been
11 used by the Chamber to conclude that Khieu Samphan was aware of what had been done
12 at the Kampong Chhnang airport. One of the sites within the scope of Case 002/2. And
13 here we have a proof of the extrapolation and bias of the Chamber in respect of the
14 Standing Committee minutes in which Kampong Chhnang airfield was addressed. I'm
15 referring to paragraphs 1741-42 of our Appeals Brief. What does the Chamber say here,
16 Reasons for Decision, paragraph 4258?

17 [09.58.24]

18 The Chamber draws the supposed knowledge of the crimes committed in the airport by
19 invoking the presence of Khieu Samphan in a meeting that mentioned the project and then
20 it says, "in later meetings," but we don't know which ones, where Son Sen, being in charge
21 of the army, would have spoken about the construction. What is the reality?

22 In our Appeal Brief, paragraph 1742, the reality is that three sets of minutes that mention
23 the Kampong Chhnang airfield, one 1975 set of minutes where participants are not named,
24 that is, they do not say whether Khieu Samphan was there, another one for 1976 where
25 they say that the construction issue is still under study, under review. I don't see how Khieu

1 Samphan could have been informed of crimes committed on the site in those conditions.
2 And another report from May '75 where there are technical considerations about gravel that
3 are mentioned, along with the need to make sure that it is not too hot.
4 So those are the three sets of minutes that are the basis for the conclusions of the
5 Chamber that Khieu Samphan knew about crimes being committed in Kampong Chhnang.
6 There is nothing to indicate that he would have been aware of the crimes taking place at
7 those sites.
8 If it's Son Sen who's talking about the airport, it's because it's a military airport, so it's under
9 the responsibility of the military authorities of DK. Consequently, Khieu Samphan was
10 never part of the military branch, and this has been acknowledged by the Chamber.
11 [10.00.12]
12 Further, the Chamber refers to the contribution of Khieu Samphan in his duties related to
13 trade. A number of discussions have taken place regarding the proof in the trials of Cases
14 002/1 and 002/2, but if the Chamber finds that Khieu Samphan had a supervisory role, he
15 was never at the helm of the Trade Ministry. And this is also very clear. This comes out of
16 the evidence in the case file, and I refer you to our Appeal Brief, paragraphs 1738, 1768,
17 1769 say clearly – sorry. I'll give you the correct references in a minute.
18 Anyway, the reference is very clear, we have the minutes of the Standing Committee
19 where references are made to trade and we know that the two major people in charge were
20 Vorn Vet and Van Rith.
21 [10.01.35]
22 So in each case, in particular when we're dealing with evidence on marriage, Khieu
23 Samphan is shown to be at the head of the Trade Ministry, but this is not true. This
24 appears nowhere in any of the evidence in the case file.
25 Further, the points of our Appeal Brief where we refer to trade are paragraphs 1463 and

1 following in our Appeal Brief.

2 As another function under his trade activities, Khieu Samphan is said to work
3 collaboratively in matters of trade with Doeun, who was in charge of Office 870. This has
4 been much debated during both trials and is very clear that Khieu Samphan never was the
5 successor of Doeun at the head of Office 870, but the Chamber does say that he was the
6 successor. And here, I refer you to our Appeal Brief, paragraphs 1768-69 where the
7 Chamber contradicts itself and says that Khieu Samphan allegedly succeeded Doeun at
8 the head of Office 870.

9 The Prosecution tells us, "Oh, that's probably a typo, a minor error". But at any rate, the
10 Prosecution agrees that this is not what the Chamber had understood earlier.

11 Anyway, in each case, basically what I want to point out is that we have very specific points
12 regarding the limited scope of the activities of Khieu Samphan, and they are extrapolated
13 there, stretched. They're expanded to draw them into the criminal aspects of a policy
14 defined by the Chamber.

15 [10.04.01]

16 Another aspect that is connected with Office 870 is in terms of the communication
17 structures. There is a very important witness statement of Norng Sophang who was in
18 communications, and he said that communications at Office 870 operated in a special
19 channel, and it was a different channel that dealt with Khieu Samphan's trade-related
20 activities, so on separate channels of communication.

21 Another point is the treatment – or the way that the few witnesses that referred to the Khieu
22 Samphan's alleged statements were handled. Much is said about this in our final
23 submission and our Appeal Brief, and we find here that we have two witnesses who come
24 up with major contradictions, but the Chamber nevertheless used the statements to put
25 words in Khieu Samphan's mouth that might indicate that he was aware of some arrests.

1 [10.05.37]

2 I am talking about witness Ek Hen and civil party Em Oeun. Ek Hen is referred to in our
3 Appeal Brief at paragraph 1759 and in our motion to submit additional evidence under
4 document F51 of 8 October 2019, paragraphs 17 to 38 and 39 to 54 where we analyze the
5 witness statement of Ms. Ek Hen, the fact that she provided different versions of the
6 education sessions that she attended with the presence of Khieu Samphan, during which
7 he allegedly spoke.

8 And here we have contradictions depending on whether it's the first or the second meeting.
9 There is confusion between Nuon Chea and Khieu Samphan. There are different versions
10 that should not normally allow the Chamber to retain this particular witness statement as
11 reliable, especially when the witness herself recognizes – and here you can look it up,
12 paragraphs 23- 25 in our motion, when she says that she can't remember clearly.

13 And nevertheless, the Chamber and the Prosecution ignore the important points in the
14 written declaration that contradict the earlier statements. So we had to wait for the appeal
15 stage to be able to see the latest statements, which are still different, because it is a
16 statement communicated following the end of the debate in Case 002/2, and the Chamber
17 did not reopen the hearing for us to be able to have access to those documents for
18 inclusion in our discussion.

19 [10.07.53]

20 On the same issue of education, there's also the case of Civil Party Em Oeun, and what he
21 attributes to Khieu Samphan during an education session. I would like to make it clear that
22 both Ek Hen and the civil party Em Oeun are not referring to the same education session.

23 For Em Oeun as civil party, there are huge contradictions in his witness statements
24 received. They are not minor contradictions, they're not minor issues.

25 This civil party cannot situate coherently and consistently important events within the same

1 witness statement. He has different versions of the death of his parents, saying that during
2 the education session, he allegedly found out that it was Khieu Samphan because his
3 father told him that this was the president of the Presidium where, in fact, elsewhere he
4 states his father was deceased before the advent of DK, so we've got a pretty extreme
5 contradiction here. Here you can look at our Appeal Brief, paragraphs 1757-58, our
6 response to the Prosecutor's appeal in terms of the marriage issue in paragraph 58 of
7 documents F50/1, our final pleading in Case 002/1, in hearing transcript E/235.1 after 2:00
8 pm, and most importantly, the contradictions which were acknowledged in the ruling of the
9 Supreme Court in 002/1 in paragraph 347.

10 [10.09.54]

11 So that is the kind of contradiction that the Chamber is leaving aside in its desire to have
12 inculpatory elements. When I say that in its ruling 002/1, the Supreme Court recognized the
13 contradictions, says this, but finds excuses, stating that there is an absence of prejudice for
14 Khieu Samphan throughout this trial 002/1. However, in Trial 002/2, the statements of the
15 civil party witness, Em Oeun, used by the Chamber to conclude that Khieu Samphan would
16 have been aware of certain arrests subsequent to the education session which he is
17 alleged to have taken part in. And I refer you to paragraph 1864 of our Appeal Brief. We
18 also specified that this paragraph contains all the references during which civil party Em
19 Oeun was used by the Chamber.

20 Another point on the issue of handling evidence, they're trying so hard to put words in his
21 mouth, trying to prove so hard that Khieu Samphan was aware of the alleged criminal
22 policies, the alleged contribution of Mr. Khieu Samphan to forced marriage, which we
23 challenge as well. This is based on a single testimony of the civil parties, Chea Deap.

24 [10.12.15]

25 In paragraph 1233 to 1242 and 2028 of our Appeal Brief, you will find that when the civil

1 party mentions Khieu Samphan for the first time even though he had already made a civil
2 party statement during the trial, it shows that these recollections come very late. And then
3 it's interesting to note as well that the Chamber uses this testimony and looks for ways to
4 corroborate.

5 And so let us be clear, this civil party, who is alleged to have worked at the Trade Ministry,
6 described a speech of Khieu Samphan where he stated that women above 19 years of age
7 and men of 25, I believe and more should be married and that marriages would be
8 organized at the Trade Ministry.

9 And so this is just one testimony by this witness from Commerce, and there were others.

10 Once again, I refer you to the paragraphs I just cited. No one else ever discussed training
11 or a speech of Khieu Samphan where he mentioned marriage. She is the only one.

12 [10.13.40]

13 After this, of course, there are people who spoke of marriage inside Commerce. We have
14 the testimony of Ruos Suy which was used extensively to determine Khieu Samphan's role
15 at Commerce, and he never mentioned Khieu Samphan on the issue of arranged
16 marriages in Commerce. And I would like to recall that, in any event, Khieu Samphan was
17 not part of the leadership of the Commerce Ministry. He collaborated with that Ministry, but
18 he was not the head of that Ministry. It was Van Rith and Vom Vet.

19 There are her elements I had begun to raise because we're still discussing arranged
20 marriages. Other elements which were totally overlooked are those of the "Revolutionary
21 Flag". Now, when I say they were ignored, it was not when the Chamber felt that the
22 evidence was useful, and then it would cite them frequently, but when things were written
23 in black and white, like the 12 Moral Principles, which had an impact on the regulation of
24 marriage for the Khmer Rouge, it totally ignored this and even gone as far as saying that
25 for the 12 Moral Principles, that these so-called moral principles were published in a

1 Revolutionary Flag issue from 1978 was too late, and it was just a means of pursuing
2 propaganda purposes, I don't know .

3 [10.15.27]

4 So first of all, the "Revolutionary Flag" was supposed to be distributed exclusively to CPK
5 members, so why would you want to make propaganda on the 12 Moral Principles in that
6 circle? And then, this brings me back to what the cadres said in the section on marriages,
7 as well as what François Ponchaud said, and we wanted him to be able to testify in neutral
8 fashion on this issue, and he would have said to the Chamber – we would have had this
9 element – that they were cadres and they had reason to lie. He was a Frenchman who
10 settled in Cambodia in 1975 and was a witness to the progression of the Khmer Rouge
11 prior to their seizure of power and followed what was happening, was perfectly aware of
12 these 12 Moral Principles which did not suddenly appear in the "Revolutionary Flag" in
13 1978.

14 [10.16.30]

15 And here I refer you to the Appeal Brief, paragraphs 1193 and 1195 also on issues also
16 concerning the "Revolutionary Flag" and obviously, various elements related to the
17 regulation of marriage in general which can be found in our Appeal Brief, but also other
18 statements that I've made notably on Duch's testimony that I described and various facts
19 that I also alluded to which, in their vast majority, alluded to this.

20 Another interesting element to show the manner in which the Chamber used various
21 elements by stating that they demonstrate a corroboration still on the marriage policy that
22 was used to corroborate the testimony of Chea Deap, the civil party again who was the
23 only person mentioning Khieu Samphan in relation to organizing weddings, and frankly
24 described the writings of Norodom Sihanouk, which were quoted at length and were used
25 on several occasions.

1 This is called corroboration, but only corroboration when they needed it to be negative. But
2 Norodom Sihanouk's writings, which are his memoirs, which tend to glorify the person who
3 wrote it and gives a very personal presentation with very personal recollections which could
4 not be verified or confronted to other evidence, so this is not only writings that are outside
5 of the scope of the legal proceedings. But of course, Norodom Sihanouk was dead. But at
6 the beginning of the proceedings in 002/1, he was still alive, and we asked him to appear. I
7 remind you that the National Co-Prosecutor had opposed that, but in any case, we used
8 the statements of Norodom Sihanouk to conclude that there was knowledge of crimes
9 relating to forced marriage when these were committed. And that is in the Reasons for
10 Decision, paragraphs 3571 3586, 4248, 4249.

11 [10.19.15]

12 And there, Norodom Sihanouk evokes alleged statements by Khieu Samphan on the
13 strong patriotic spirit of young ladies who were willing to take care of national heroes' well-
14 being by marrying disabled soldiers. And on the content, Khieu Samphan said that women
15 found heroic people even though these people suffered handicaps certainly cannot be
16 used to demonstrate that there was a policy of forced marriage on his part.

17 On top of it, this is a statement by Norodom Sihanouk in a document where there was
18 absolutely no possibility of cross-examination, all the more so since on this question, and I
19 refer you again to our motion 551, we have Chuon Thi who explained that, as a matter of
20 fact, in the aspect of celebration of revolutionary heroes, which is found in the excerpt cited
21 by paragraph 3571 of the Reasons for Decision, which itself quotes a publication of
22 Norodom Sihanouk, one cannot say that it was particularly respectful for veterans because
23 it must be recalled that they were fighting alongside the Khmer Rouge at the time when
24 they were working as a front with Norodom Sihanouk.

25 [10.21.06]

1 Another element which shows things which, in absolute fashion, can be considered to be
2 positive or transformed in order to make them negative – and I would like now to refer you
3 to paragraph 2023 of our Appeal Brief, there, we refer a speech used by the Chamber to
4 demonstrate, according to the Chamber, the discriminatory intent of Khieu Samphan
5 against Buddhists and we have to quote it because, otherwise, we can't better understand
6 the reasoning of the Chamber. It cites a speech where Khieu Samphan salutes and praises
7 some Buddhists and then says that he maintained, in a dishonest fashion, an impression of
8 normality in public all the while encouraging that marriages be organized that were
9 fundamentally incompatible with tradition.

10 This is, in fact, an attempt to demonstrate, prove, corroborate, I don't know, a
11 discriminatory intent by Khieu Samphan toward Buddhists. And we have also elements of
12 speeches and statements wrongly attributed to Khieu Samphan to conclude that he
13 participated in the development of the common purpose, which was not necessarily
14 criminal in itself, but that is what was used by the Chamber.

15 [10.22.55]

16 This is used by the Chamber to that effect, and we can prove that this is not attributable to
17 Khieu Samphan. We said it, and we were not the only ones. You said it yourselves.

18 Then here, we can go to paragraphs 1699 to 1701 of the Appeal Brief. You have at least
19 two documents which are wrongly attributed to Khieu Samphan, first of all, a speech of 11
20 April '76, E3/165.

21 And in your ruling in Case 002/1, F36, paragraph 1023, you clearly stated that it was not
22 Khieu Samphan. So let me repeat.

23 [10.23.42]

24 MR. PRESIDENT:

25 Please give the reference number of the document again. You are a little bit too fast for the

1 interpreter.

2 MS. GUISSÉ:

3 Let me repeat the number. Paragraph 1023 of the ruling in 002/1.

4 Similarly, we have document E3/608, which is an interview which we have brought up
5 several times, and which Mr. François Ponchaud, who did not come back, had also brought
6 up, stating that it was a forgery, and nevertheless it was used by the Chamber to conclude
7 that Khieu Samphan was aware of the crimes after they had been committed. And I go
8 back to our presentation at 1691 and 1701.

9 The Prosecution tells us it had no impact. But we cannot say there was no impact, I am
10 sorry, because it is very revealing of the Chamber's bias. When you say something
11 positive, it becomes negative. When something is written in black and white, it is false,
12 unless it is inculpatory. The 12 Moral Principles is an example of this .

13 And another example, still with Norodom Sihanouk writings, the writings of Sihanouk are
14 used to say that Khieu Samphan used incitement of hatred to mobilize against the
15 Vietnamese by stating that it was necessary to hate the Yuon a bit more every day.

16 [10.25.49]

17 That is, again, from the autobiography of Norodom Sihanouk, who we were not able to
18 cross-examine, with good reason. But this was used as an argument that there was, in fact,
19 encouragement and incitement of hatred against the "Yuon" in general.

20 These are the statements which were made by Norodom Sihanouk and published in 2000.

21 And here, the Chamber states that, given these paragraphs 4270 of its ruling, the Chamber
22 is of the view that not only did Khieu Samphan adhere to the common purpose, but he also
23 encouraged and incited its implementation via CPK policies, making use of his high level
24 functions in order to legitimize them, in this case, against the Vietnamese, whereas the
25 speeches that are used by the Chamber apart from these allegedly corroborating

1 statements by Sihanouk – we've always said that the speeches of Khieu Samphan, and
2 particularly the one of April '78, cannot be looked at without placing them in the context of
3 armed conflict with Vietnam and that Khieu Samphan never called on the population to
4 attack innocent civilians.

5 [10.27.10]

6 He was talking about the Vietnamese army, which in December '77 and early '78 had
7 crossed over into Cambodian territory.

8 And then I would like to refer to our Appeal Brief, paragraphs 1080 to 1082, to our final
9 submission in Case 002/2, in 457/6/4/1, paragraphs 801 to 811, where we had shown a
10 chronology of the armed conflict in order to show at what time each speech was made. And
11 it's clear that if you hear a speech made by any leader after an attack or after an armed
12 incursion of an enemy army into the country, they won't be sympathetic. And you can say
13 that statements were made against the military enemy, but certainly not against the
14 Vietnamese civilian population.

15 Again, connection with links with specific groups, and here if you look at our Appeal Brief
16 paragraphs 1836 to 1838 and 2046, in which the Chamber used a statement by Khieu
17 Samphan after the facts to claim that there were discriminatory intentions against the New
18 People. This was despite the fact that the Chamber itself had stated elsewhere that it had
19 to be careful about how used that statement, because in fact it was a collection of general
20 observations of elements which had been gathered after the facts. It was not specifically
21 about what Khieu Samphan was doing at the time of the facts. Again, I refer you to our
22 Appeal Brief.

23 [10.29.11]

24 The Buddhists, now, I mentioned that, this misleading appearance of normality. I don't
25 know how this significantly contributes to a JCE. No element on the Cham, and that is

1 important, because we're told that there was a discriminatory intent. But I would like to
2 remind you that Khieu Samphan was accused of Cham genocide. Why? If we look at the
3 Reasons for Decision, paragraph 4290, no evidence produced before the Chamber gives
4 us the probative value required to allow us to establish that Khieu Samphan had the
5 specific intent of destroying the religious and ethnic group Cham as such.

6 And it's hard to understand, then, what were the elements upon which the Chamber based
7 itself to say that there was the intention required for *dolus specialis* to conclude that there
8 was an intent to discriminate against the Cham attributed to Khieu Samphan even though
9 nothing can be found in the "Revolutionary Flag", which was extensively quoted. There is
10 nothing there that can demonstrate that there was such a policy against the Cham, again.

11 [10.30.40]

12 And the issue of work cooperatives, paragraph 4277 of the Reasons for Decision, which we
13 raise in the Appeal Brief in paragraph 2030 where it is explained to us that Khieu
14 Samphan, contributed and encouraged, I don't know, through silent incitement. So either
15 you incite and encourage, or you don't, but silent incitement is not incitement. And how
16 would you even prove that?

17 And now I come to the end of my presentation, and I would like to briefly respond as
18 regards Question 52 on the evidence that according to you, confirm the statement that
19 Khieu Samphan could not have not been aware of deaths or the murders committed at the
20 sites. That is for the mode of responsibility, via aiding and abetting.

21 So here again we draw a parallel between the declarations of Sihanouk and Khieu
22 Samphan, and the Chamber uses, in paragraph 4265 in the 2000 book by Sihanouk saying
23 that Khieu Samphan had perfect knowledge of what was going on, whereas Khieu
24 Samphan has always asserted, and this was elucidated from the evidence in the course of
25 the trial, that when there were official visits to see progress on the various rare worksites

1 that he visited, in the company of Norodom Sihanouk, by the way, who said very different
2 things publicly, as we also found in our debate, saying that what was being shown was not,
3 of course, the problem at the time. It was clear that the situation was not good during DK,
4 before DK. We have discussed this many times, and this is one of the reasons why Khieu
5 Samphan wanted a revolution, to change the situation.

6 [10.32.57]

7 But the goal was certainly not to abuse the population or to murder people. Here again the
8 Chamber voluntarily left aside the contradictory statements of Norodom Sihanouk on this
9 point, which was used to prove Khieu Samphan's knowledge.

10 In fact, in the final pleadings in Case 002/1, and I refer you to hearing transcript 234.1,
11 between 10:58 and 11:01, in the final conclusion of 002/2, I just gave the references, in
12 paragraph...

13 [10.33.48]

14 MR. PRESIDENT:

15 Defence counsel, please wait a little bit. The IT Unit needs to change a DVD.

16 (Short pause)

17 Defence counsel, you may continue.

18 MS. GUISSÉ:

19 I am being asked to once again give the references I had given.

20 In our Appeal Brief in paragraph 2021, we say that the Chamber did not take into
21 consideration our points regarding the contradictions in the writings of Sihanouk and an
22 interview he gave. All of the references are from our Appeal Brief, paragraph 2021, but I
23 was citing what we stated in the final pleadings, document E1/234.1 between 10:58 and
24 11:01 as well as our final conclusions in paragraph 1173, as well as our Appeal Brief
25 regarding living conditions, paragraph 1507.

1 And there are also the exculpatory aspects that have been completely ignored when they
2 were presented in Case 002/1 and 002/2, and in the appeal, and never have these points
3 been taken into consideration.

4 The first example a very eloquent case, that of Meas Voeun, which I've already referred to
5 in the last few days and I refer you to our Appeal Brief, paragraphs 1877-1878. The witness
6 testimony of Meas Voeun is interesting because he was a soldier sent to the zone of
7 Vihear.

8 [10.36.03]

9 His testimony was used to say that reported to, or he once he reported to Khieu Samphan,
10 and that Khieu Samphan was thus aware of the arrest of Kang Chap through this report.

11 But we also have the Defence's cross-examination of that witness, which did not allow the
12 Chamber to draw the conclusion that it did. I refer you to the statements by witness Meas
13 Voeun, at the 9 October 2012 hearing.

14 We mentioned this in our Appeal Brief in paragraphs 1876-1878. And what does Meas
15 Voeun say at the hearing on 9 October 2012, hearing transcript E1/1321? He explains how
16 he was asked to send the report to Khieu Samphan, which he did. And he stated that the
17 people in charge of the telegraph told him that this message could not be sent because of
18 issues with the lines. He said the following: "They told me that the message was not sent,
19 and I answered him," and this was between 2:00 and 2:15, he said, "I'm not sure whether it
20 was transmitted because I got no reply".

21 [10.37.36]

22 So that gives us a witness testimony that the Chamber uses to say he knew, and he
23 received reports. But the person who was in charge of sending the report says that "the
24 report could not be sent, and I do not know if it was received another way."

25 Another point. As regards the sites and Khieu Samphan's knowledge of them, Part V of our

1 Appeal Brief, particularly paragraphs 704 to 715, 1604 to 1615, in which we look site by
2 site at the different pieces of evidence that the Chamber could have used with regard to the
3 sites and Khieu Samphan.

4 I had also mentioned the witness statement of Duch on the issue of what Pang would have
5 told him regarding what Khieu Samphan allegedly may have known at the time of a
6 particular meeting, so it was hearsay about S-21, a place of torture where Duch was the
7 head of detention. And the Chamber says no, it has not been tainted by torture, because
8 they want to use this element to find that Khieu Samphan had knowledge.

9 So that is the evidence that was used to link Khieu Samphan with certain alleged policies.

10 I'm not referring to his presence in Phnom Penh and to his official positions that he never
11 challenged, but I'm referring to the extrapolations from testimonies given by non-
12 corroborated witnesses Ek Hem and Hem Oeun, with contradictions, Chea Deap, the only
13 witness who spoke about marriages, and who would have asked marriages to be
14 organized, Sihanouk's writings, which were used on the behaviour, the attitudes, and
15 actions of the Accused with contradictions that have never been mentioned despite being
16 available to the Chamber, questioning from Defence which is deemed non-existent, the
17 work of authors that did not appear. That is the evidence.

18 [10.40.15]

19 But there's also the essential point the idea that he couldn't have not known. And that is the
20 core problem of this trial.

21 That is, the idea that "he was in Phnom Penh, there is no way he didn't know". Yet in Case
22 002/01, as we have been recalling in 002/02 – and Mr. President, I'm about to conclude – I
23 know my time is already up. There is this moment where we are told he could not not
24 know.

25 We don't have any evidence indicating he knew what happened on this date at this

1 location, but we keep hearing about this general responsibility, because he was had
2 various roles in the government, in the Presidium, which we know meant that he did not
3 have any power, that he took part in certain meetings of the Standing Committee but once
4 again, not as a member. And then, they use statements that were made after the facts, and
5 I think that the Prosecution will be happy to show these to you, none of which demonstrate
6 any knowledge of the crimes at the time they were being committed.

7 [10.41.32]

8 And we will see it if we watch the videos on the different works, because one of the things
9 he did after the events was read and re-read various experts who spoke about these
10 topics, about Democratic Kampuchea.

11 But in reality, none of this takes away from the fact that the reason why the Chamber has
12 distorted the law on JCEs and aid and abetting has to do because they did not have
13 enough evidence to find that Khieu Samphan was responsible, that he had direct intentions
14 to commit the crime or any direct intent to contribute to the criminal aspects of the alleged
15 policies. This is the reason upon which we base our appeal and we ask you to reverse the
16 Chamber's conviction of Khieu Samphan.

17 This changes absolutely nothing to the fact that Khieu Samphan will die in prison, but at
18 least it would be important for the ECCC's judicial legacy.

19 Thank you, Mr. President.

20 MR. PRESIDENT:

21 The Chamber will have a short recess and we will return at 11.05.

22 The Court is now in recess.

23 (Court recesses from 1043H to 1108H)

24 MR. PRESIDENT:

25 Please be seated.

1 I would like now to hand the floor to the Co-Prosecutor to make submissions.

2 MR. SMITH:

3 Good morning, Mr. President, Your Honours, and Parties.

4 The Appellant challenges his conviction based on his commission, through a joint criminal
5 enterprise in three areas: the nature of the common purpose; his participation in the
6 common purpose; and his intention to participate in the common purpose and intent to
7 commit the underlying crimes.

8 [11.09.44]

9 I will address the common purpose and intent grounds, while the International Co-
10 Prosecutor will address his participation in the common purpose, and his liability for aiding
11 and abetting murder.

12 As to the nature of the common purpose, the Appellant's grounds are based on a
13 misconception of the law and a disregard for the totality of the evidence. He argues that the
14 common purpose pursued by the CPK leaders was the benevolent creation of a better
15 society through a Socialist revolution, arguing that all the crimes committed across DK
16 were beyond the CPK's leadership to control; a deviation of their policies, not the policies
17 themselves.

18 [11.10.40]

19 However, the extensive body of evidence supporting the Chamber's findings demonstrate
20 these crimes were integral to implementing their Socialist revolution.

21 Although the Chamber found that the primary objective of the common purpose was not
22 necessarily criminal in nature, they found the means to achieve that objective were, making
23 the common purpose criminal in character.

24 Such a construction of the common purpose is in line with Your Honours' definition that a
25 JCE common purpose must either have one of its primary objectives the commission of a

1 crime or must contemplate the commission of a crime as a means to achieve an objective
2 that is not necessarily criminal.

3 The Chamber found the common purpose to which the Appellant and other senior CPK
4 leaders belonged for the entire DK period was to rapidly implement a Socialist revolution in
5 Cambodia through a great leap forward designed to build the country, defend it from
6 enemies, and radically transform the population into an atheistic and homogenous Khmer
7 society of worker-peasants.

8 [11.12.14]

9 They found it was implemented across DK by the Party's entire administrative network,
10 zone, sector, district, and local secretaries, CPK cadres and RAK forces through the
11 execution of at least five policies. These policies being intrinsically linked to the common
12 purpose and involved the commission of crimes making the common purpose criminal in
13 character.

14 Fundamentally, the Appellant argues that the Chamber was in error by finding these
15 criminal policies were established. However, based on the extensive evidence before the
16 Chamber, no such error is made out.

17 [11.13.05]

18 For example, if we look at the Chamber's finding that the CPK senior leaders established a
19 policy to identify, arrest, isolate, and "smash" the most serious category of enemy at
20 security centres and execution sites, and re-educate "bad elements," the argument of the
21 Appellant that it was a deviation from and not a policy is in stark contrast to the
22 comprehensive and compelling evidence before the Trial Chamber.

23 The Chamber found that this policy involved crimes of imprisonment, enslavement, other
24 inhumane acts through attacks on human dignity and enforced disappearances, torture,
25 murder, extermination and persecution. They found it was implemented on a widespread

1 and systematic basis, finding that at least 200 security centres were established and
2 operated countrywide.

3 They found this enemy policy was ordered from the CPK's highest levels and was carried
4 out by the entire administrative network. They found it was intrinsically linked to the
5 common purpose, making it criminal in character.

6 Document E3/12 demonstrates the essential nature of the policy. It's a decision of the
7 Central Committee, the highest CPK Committee recognized in the Party Statute, to which
8 the Appellant belonged, dated the 30th of March 1976.

9 [11.15.07]

10 In this decision the Committee delegates to Zone, Party Centre and General Staff
11 Committees, I quote; "the right to smash inside and outside [the] Party ranks." It states the
12 purpose of this decision is to, "establish a framework to carry out our absolute revolution,"
13 to "strengthen our socialist democracy" and to "strengthen our state authority."

14 In other words, the decision gave the authority to murder so-called enemies issued from
15 the top of the Party to which Khieu Samphan belonged down the line to their offices
16 countrywide.

17 [11.16.03]

18 S-21 Security Centre is the clearest example of the implementation of this policy
19 nationwide because of the thousands of documents left behind and the former CPK and
20 victim witnesses who testified. The Chamber found that well over 11,742 registered S-21
21 prisoners were executed over the three and a half years of its operation. The prisoners
22 were arrested from most Zones, Military Divisions, DK ministries as a result of nationwide
23 purges of CPK enemies. The Chamber found it was supervised by Standing Committee
24 Members Son Sen and Nuon Chea through the General Staff.

25 The Appellant's argument that extrajudicial killings of Party enemies was not CPK policy

1 but a deviation lacks any logical, objective assessment of the evidence. His further
2 argument that the use of terms such as “elimination of enemies” in his and other CPK
3 leaders’ speeches and training and propaganda materials was simply Marxist rhetoric, to
4 eliminate ideological and political traits in others, is disproved by the evidence of the tens of
5 thousands of so-called CPK enemies murdered across the country.

6 I’ll turn now to the Appellant’s argument that the CPK policy to establish and operate
7 coöperatives and worksites did not involve crimes. Again, the Appellant disregards the
8 totality of the evidence.

9 [11.18.09]

10 The Chamber found that this policy involved the crimes of enslavement, other inhumane
11 acts through attacks against human dignity, and enforced disappearances, murder and
12 political persecution based on the scale and duration of these crimes at the charged crime
13 sites.

14 The Chamber found that Norodom Sihanouk compared these worksites to “concentration
15 camps” after visiting some of them with the Appellant. This observation accurately reflects
16 the extensive, diverse, and consistent witness and documentary evidence before the
17 Chamber establishing the CPK’s absolute control over every aspect of people’s lives.

18 The findings establish that CPK cadres in charge were solely focused on rapidly meeting
19 the leadership’s production goals, no matter the cost, forcing people to work long hours,
20 labour hard under appalling conditions.

21 [11.19.19]

22 Those who failed to meet the Party’s ambitious production quotas or did “not work hard
23 enough” were punished. People suffered and died from exhaustion, meagre food rations,
24 inadequate medical care and basic hygiene facilities, as well as sub-standard
25 accommodation. Families were separated and spouses could not meet freely.

1 The Chamber found this policy had multiple goals which were intrinsically linked to
2 common purpose. One, it was the driving force to build economic infrastructure, and food
3 for internal consumption and export to generate capital. Two, it was a means to destroy the
4 social class system, forcing city people to become worker-peasants, replacing private
5 ownership with collectivisation. Three, it was a control structure to identify “enemies” by
6 requiring biographies to be completed and to monitor counterrevolutionary behaviour,
7 which resulted in disappearances and killings.

8 The Appellant’s arguments that the Chamber was in error by attempting to criminalize the
9 policy by improperly using pattern evidence of crimes outside of those sites charged,
10 misinterpreting the CPK pre-DK terms to “control” and “capture” the population, and failing
11 to acknowledge the significance of not sending rice, all rice, for export are all
12 unsubstantiated.

13 [11.21.11]

14 First, it’s settled law that evidence outside of the temporal or geographic scope of an
15 indictment can be used to clarify context, demonstrate a deliberate pattern of conduct, and
16 establish elements of charged criminal conduct.

17 Second, the CPK terms “control and capture” were used by the Chamber as evidence to
18 support the criminal nature of the policy, not, as argued by the Appellant, as the sole basis
19 to find that it involved crimes.

20 Third, the Chamber did acknowledge some rice was kept for internal consumption yet that
21 still did not alter its view that the mistreatment continued at these sites

22 [11.22.06]

23 The Appellant’s argument that this policy was benevolent, chooses to ignore that CPK
24 accepted the cost of implementing it was through the systematic violations of the
25 population’s most fundamental human rights.

1 As my colleagues have addressed the Appellant's grounds relating to the targeting of
2 specific groups of enemies; Vietnamese, Cham, Khmer Republic officials and Buddhists,
3 and regulation of marriage policy yesterday, I will turn to issue of the Appellant's grounds
4 alleging the Chamber erred in law and fact by finding he intended to participate in these
5 crimes.

6 First, to prove intent or knowledge of crimes, contrary to Appellant's argument, it's not
7 required for the Appellant to intend or know of specific criminal incidents. The Appeal
8 Chambers in the cases of Prlić, Stanišić at the Yugoslavia Tribunal on the 29th of
9 November 2017 held as long as the Accused had the intent for crimes to be committed or
10 knowledge that crimes had been committed pursuant to the common purpose it's not
11 required to intend or know of specific criminal incidents occurring at specific places and
12 times or against specific victims to prove this element.

13 Indeed, it would be artificial, impracticable, and defeat the purpose of having JCE liability in
14 the first place to require the precise intent or precise knowledge of each and every crime
15 committed in the course of a large-scale, ongoing joint criminal enterprise. As long as the
16 Appellant intended or was aware of the general types of crimes being committed pursuant
17 to the common purpose that is all that is required.

18 [11.24.21]

19 Second, the Appellant's argument that the Trial Chamber determined his intent only on his
20 mere participation in the common purpose is not established as it's clear the Chamber
21 found it was based on his knowledge of crimes being committed pursuant to it and his
22 ongoing participation in the common purpose.

23 I will address the knowledge and intent aspects and the International Co-Prosecutor will
24 address the grounds relating to his ongoing participation.

25 [11.24.59]

1 The Chamber established the Appellant’s knowledge of the common purpose crimes
2 though an evidence analysis of the pre-DK and DK periods.

3 Addressing the pre-DK period, the Chamber concluded that on entering the DK period the
4 Appellant knew of the CPK policies and was aware of the substantial likelihood that crimes
5 would be committed pursuant to them. They based this on his prominent long-time CPK
6 membership; his support for a strict collectivist economy; and his calling for the elimination
7 of Khmer Republic officials by violent means.

8 They also based this conclusion on his knowledge that in liberated areas, CPK policies
9 were being implemented and were resulting in patterns of conduct involving crimes, such
10 as; coöperatives were being forcibly established to increase rice production; markets were
11 being closed; monks were being forcibly disrobed and were subjugated to collectivist
12 policies; marriages were being arranged as a matter of CPK practice; CPK political
13 opponents, especially those linked to Vietnam, were being executed; and the CPK was
14 conducting purges within its ranks.

15 The Appellant admits his knowledge of the criminal practices of the CPK regime coming
16 into the DK period in his book E3/18, where he states, and I quote, “I could not remain
17 neutral. At each crucial historical event at that time, I chose to side with the forces which,
18 despite their reputation and their contradictory acts, seemed, in essence, to support
19 Cambodian sovereignty.”

20 [11.27.18]

21 Your Honours, the Appellant was well aware of the criminal nature of his Party entering the
22 DK period, but he chose to continue to support them anyway.

23 In a separate assessment, the Chamber then addressed the Appellant’s knowledge of the
24 common purpose crimes committed during the DK period, finding he knew they were being
25 committed. The Appellant’s argument that this finding was in error is heavily contradicted

1 by the totality of their findings and the evidence supporting how this knowledge was
2 gained.

3 [11.28.05]

4 They found he gained his knowledge through the leadership positions the Appellant held;
5 his privileged daily access to the small group of the most powerful CPK leaders; his ability
6 to travel throughout the country; his regular attendance at Standing Committee meetings;
7 his and other leaders statements relating to the five policies; his access to policy and
8 training documents such as *Revolutionary Flag* and Youth publications; his attendance at
9 training and study sessions where the criminal policies were communicated, discussed,
10 and incited, including criminal conduct towards enemies; his receipt of reports from
11 international bodies of atrocities against Khmer Republic officials and other CPK
12 detractors; his public rejection of stories of massacres claiming the execution of traitors
13 was justified.

14 The Appellant's argument that the Chamber was in error in finding that the CPK principle of
15 secrecy only occasionally applied to him, and that the Appellant had access to the
16 *Revolutionary Flag* magazines is contradicted by the very findings they made based on his
17 high-level roles and functions given to him, and the contributions he made to the common
18 purpose.

19 [11.29.39]

20 The fact the Chamber found the *Revolutionary Flags* were not only printed and delivered to
21 DK ministries and offices of the Party Centre, but were written by members of the Standing
22 Committee makes the Appellant's claim all the more implausible. The evidence clearly
23 demonstrates the Appellant was required to keep Party secrets, not have them kept from
24 him.

25 I'll now address the Appellant's grounds alleging error in findings that he intended to

1 participate in the enemy policy which involved the commission of crimes. Again, his
2 arguments fail as they ignore the totality of the evidence.

3 [11.20.31]

4 In finding his intent to commit these crimes, the Chamber found that the Appellant
5 contributed to nationwide purges, which were intrinsically linked to the operation of the
6 security centres, by publicly advocating the identification of enemies, warning that traitors
7 would be killed. For example, on the 15th of April 1977, when he called for the “neat and
8 thorough wiping out of the enemy,” imploring cadres to uphold their, and I quote, “spirit of
9 revolutionary vigilance at all times against the enemies of all quarters [both at home and
10 abroad],” “whether from outside or from within.”

11 On 15 April 1978, he celebrated the “continuous victories over the enemy,” and pledging
12 those in the attendance to, and I quote, “maintain national unity in the struggle to
13 exterminate the enemies of all stripes.”

14 Whilst calling for killing of enemies, the Chamber also found he knew of high- and low-level
15 purges of alleged traitors were occurring. They found he supported and had “acute
16 knowledge” of the circumstances of his fellow leaders’ arrests due to his unique privileged
17 position in CPK and DK, and because of his active facilitation of arrest and purges.

18 At the same time, he also knew of the purges occurring at the lower levels as a result of
19 widespread arrests of people at the bases, founded on real or perceived affiliations with
20 enemies.

21 [11.32.42]

22 It’s clear from the Chamber’s findings and the evidence that he was well aware of the killing
23 of enemies’ policy, incited it, and knew it was being implemented. An example of his
24 knowledge and justification of killing so-called traitors in the DK period is evident in his
25 admissions, his many admissions, after the DK period. For example, in August 1980, he

1 told Steven Heder that all of the “Yuon” undercover agents had been, I quote, “dealt with”
2 and that, I quote, “not a single one of them was innocent.”

3 In 1987, as Vice President of Democratic Kampuchea for Foreign Affairs, the Appellant
4 acknowledged the death of 10,000 Vietnamese agents acting “in violation of State policy,”
5 as well as 8,000 organisers of the six “coups d’état and the chief traitors who in connivance
6 with the Vietnamese tried to take control of the Eastern Zone.” And, I quote, he states they
7 were “imprisoned” also stating that 3,000, I quote, “minor offenders or innocent civilians”
8 had “died from our mistakes.”

9 [11.34.10]

10 His argument that he is not responsible for these large-scale purges at the security centres
11 and execution sites because he states he was not aware of the specific incidents of crimes
12 is not relevant as addressed. The law does not require this level of particularity. As the
13 Appellant intended for the killings to occur, as seen in his incitement and support of them,
14 he does not need to know exactly where they were being committed. Yet, as the Chamber
15 found, he knew of the purges of specific high-level individuals, he knew of the widespread
16 arrests and killings, and knew of the existence and operation of the charged specific
17 Security Centres S-21 Kraing Ta Chan, Au Kanseng, Phnom Kraol based on numerous
18 sources.

19 For example, as for S-21, the Trial Chamber found that Appellant would have known of S-
20 21 due to his unique standing in the Party as part of the small group of well-informed CPK
21 leaders. Appellant had met Duch and instructed him that S-21 - Duch being the head of S-
22 21 - should continue working as normal in the face of Vietnamese advances into DK
23 territory. The Trial Chamber also reasonably established that the Appellant knew that grave
24 breaches were being committed against Vietnamese prisoners there.

25 [11.35.58]

1 As for Kraing Ta Chan, the Trial Chamber found that reports of deaths that were passed up
2 an established chain of command to the “party”; that Tram Kak District, where Kraing Ta
3 Chan was located, was awarded the “Honorary Red Flag of the Central Committee,” to
4 which the Appellant belonged as a model district; and that Appellant is likely to have visited
5 the district with Ta Mok, who was known to have visited Kraing Ta Chan and was “kept
6 apprised of its operation.”

7 As for Au Kanseng, the Trial Chamber found, that reports regarding the progress of internal
8 purges across the Zone and inside Division 801 were sent directly to the Party Centre.

9 [11.37.00]

10 As for Phnom Kraol, the Trial Chamber found, that Phnom Kraol Security Centre operated
11 under the control of sector authorities who reported directly to the Party Centre at Office
12 870, of which Appellant was a member. Further, it heard testimony that “[t]he Sector did not
13 have any discretion to decide on [the treatment of enemies] - or such instruction. It had to
14 come from the Centre.”

15 His argument that the Chamber misrepresented his words when it found he had “urged
16 cadres to identify enemies and incite hatred towards them” is unsupported and ignores
17 similar findings of his incitement to kill enemies at other rallies and meetings. His argument
18 that his knowledge of the arrests, detention, and mistreatment of residents of Preah Vihear
19 should be excluded because he is not charged with those incidents fails as pattern
20 evidence can be used to assist in proving intent and knowledge of charged crimes.

21 Lastly, his argument that his post-DK interviews cannot be used to prove his knowledge
22 and intent lack any legal basis. Of course, caution must be taken when using admissions to
23 assist in proving a crime; however, the contention that admissions used in their proper
24 context cannot be used to support any aspect of a criminal offence is meritless. He cannot
25 explain all of his admissions away from 1980 onwards in recorded written interviews and

1 video as information coming from someone else when the nature of the interview shows
2 otherwise.

3 [11.38.55]

4 Simply, the Appellant has not established any other plausible inference that the Trial
5 Chamber made an error in finding that he intended CPK real or perceived enemies to be
6 killed through the enemy policy.

7 As to the Appellant's grounds that the Chamber was in error in finding that he intended to
8 participate in the coöperatives and worksite policy which involved crimes, that is not
9 established as it disregards the totality of the evidence.

10 [11.39.27]

11 The Chamber found that the Appellant maintained his support for this policy by, one,
12 driving the policy by publicly promoting it whilst overseeing quotas and exports for rice and
13 other goods; two, by monitoring the policy; three, by being aware of the appalling living and
14 working conditions at the coöperatives and worksites; five, was aware of, supporting and
15 promoted the discrimination and identification of enemies at the worksites and
16 coöperatives; and, five, nonetheless continued to advocate that this policy continue at an
17 unrelenting pace due to an enthusiasm to achieve the CPK's unrealistic goals.

18 As to his argument that he wasn't aware of the specific incidents of the crimes as
19 discussed, such specific knowledge is simply not required. Nonetheless, the Chamber
20 found he had knowledge of these specific coöperative and worksites, Tram Kak, 1st of
21 January Dam, Trapeang Thma Dam, and Kampong Chhnang Airfield.

22 His argument that converting the population into a society of worker-peasants does not
23 demonstrate criminal intent is clearly wrong as on the evidence the CPK forced people to
24 the worksites, forced them to work, prohibited them from leaving, which is a key indicia of
25 the crime of enslavement.

1 His argument that he was not aware of the appalling working and living conditions at these
2 locations is not established as the Chamber found that the CPK leadership received
3 numerous reports of onsite diseases and food shortages. They found that the “systematic
4 vertical reporting regime” of the CPK, combined with evidence of sector committees;
5 numerous visits on locations; his factual knowledge of the workforce; his measures taken
6 to rectify “certain abuses,” as he himself called it; a report he received on the conditions in
7 Preah Vihear; statements he made, left no other possible inference that he knew of the
8 living and working conditions at the sites.

9 [11.42.08]

10 Yet despite all of this, he kept pushing the workers to achieve the rapid revolution, while
11 knowing, by his own admission, that they were coerced to do so.

12 As to his argument that he wasn’t aware of unequal treatment of New People at the
13 worksites, this fails as the Chamber did not solely rely on his book where the Appellant
14 admits to this, but they also explicitly refer to other evidence of his knowledge of this
15 unequal treatment. Such evidence, included the Civil Party testimony the Appellant had
16 urged cadres to give New People “a lot of work [and] little food.”

17 [11.42.09]

18 The Appellant has not established an error by the Chamber that would disturb its finding
19 that he intended to enslave the population under inhumane living and working conditions,
20 whilst individuals were being identified and targeted for execution at those worksites in
21 order to achieve the CPK’s rapid social revolution.

22 Lately, I’ll now address the Appellant’s argument that the Chamber made a factual error in
23 finding that he intended crimes of forced marriage and rape, as other inhumane acts, to be
24 committed pursuant to the regulation of marriage policy. Again, the allegations fail as he
25 ignores the totality of the evidence on which the findings were made.

1 Based on the evidence, the Chamber found the Appellant intended to participate in this
2 policy and intended to force people to marry and force consummations; one, by giving
3 instructions that all ministries should arrange marriages; two, by knowing of the minimum
4 quotas for forced marriages in the Commerce Ministry through his oversight role; three, by
5 encouraging in a speech the policy goal of the CPK to rapidly increase the population; four,
6 encouraging CPK cadres to put the interests of the revolution, class, and nation over
7 personal and family interests; and five, admitting that during DK that young women that
8 were forced to marry handicapped soldiers were, I quote, “fervently patriotic.”

9 [11.44.39]

10 In light of the highly coercive environment in which the Appellant would have been acutely
11 aware, where people were in fear of the consequences of disobeying the goals and
12 instructions of the Party and their supervisors, it was logical for the Chamber to conclude
13 that the Appellant knew his instructions and encouragement for marriages would occur,
14 and for the population to grow rapidly, that it would be done by force.

15 The Appellant has not established that the conclusion drawn by the Chamber that he
16 intended the forced marriages and rapes to occur was unreasonable.

17 [11.45.18]

18 To close, key to the Appellant’s failure to establish these grounds is the fundamental view,
19 based on the evidence, that during the DK period he and his fellow CPK leaders believed
20 they had the right to violate their population’s most basic fundamental human rights to
21 achieve their political cause.

22 I will now hand the floor to the International Co-Prosecutor to continue with our
23 submissions.

24 MS. HOLLIS:

25 Good morning, Mr. President, Your Honours, and Parties.

1 Before I discuss additional aspects of the Appellant's individual criminal responsibility, I
2 would like very briefly to address the question from the Bench regarding exculpatory
3 evidence and bias on the part of the Trial Chamber.

4 If we look at some of the evidence before the Trial Chamber, we realize very quickly that
5 these allegations are unfounded. For example, in the Judgment, paragraphs 1130 to 1136
6 and 1137, the Trial Chamber rejects evidence about Appellant's visits to certain locations,
7 finding that the evidence is not reliable.

8 [11.46.56]

9 Despite the, what we suggest is a typographic error relating to the Office 870 situation after
10 Duong was arrested, the reality is the Trial Chamber found the evidence was insufficient to
11 say that Appellant succeeded Duong at the Chairman of that office.

12 They also found the evidence insufficient to prove him guilty as a superior. They found the
13 evidence was not sufficient to find him criminally liable for the genocide of the Cham. And
14 in breaking out modes of liability into JCE and aiding and abetting, they did that because
15 the evidence, they found, was insufficient to include all of the crimes which had been
16 committed, to find him guilty of those crimes based on joint criminal enterprise, so instead,
17 as they had to do, they looked to the other forms of liability to determine if he was
18 responsible under those forms of liability and found the evidence proved he was guilty as
19 an aider and abettor of murder *dolus eventualis*.

20 [11.48.14]

21 Now, Mr. President, Your Honours, I will now address three aspects of Appellant's
22 individual criminal responsibility: his roles, functions, and close associations with other
23 senior CPK leaders; his significant contribution to the crimes of which he stands convicted
24 pursuant to JCE; and his aiding and abetting murder *dolus eventualis* at a number of crime
25 sites.

1 I rely on our written response for the full explanation of why Appellant fails to establish his
2 challenges to the Trial Chamber’s analyses and findings in relation to all three of these
3 aspects. I will highlight a few of those reasons in my remarks. Examples that I use in my
4 submissions are equally relevant to all three of these aspects.

5 Contrary to his submissions, Appellant’s many and diverse roles and functions, and very
6 close association with other senior leaders such as Pol Pot and Nuon Chea, are reflective
7 of his privileged, trusted, senior leadership position within the CPK, and gave him the
8 authority, *gravitas*, platform, and knowledge, to significantly contribute to the JCE crimes
9 and to aid and abet murder *dolus eventualis*. Therefore, I will first focus on why Appellant’s
10 piecemeal approach fails to establish any legal or factual errors worthy of Appellate
11 intervention regarding this aspect of his criminality. Fully briefed in our response section
12 8B, paragraphs 886 to 952.

13 [11.50.11]

14 Appellant cannot reasonably dispute that compelling evidence supports the Trial
15 Chamber’s findings on his roles, functions, and close associations. So instead he attempts
16 to minimize their importance. In so doing, very often he is arguing with himself. I will refer to
17 his admissions in his book, E3/18; his interviews with the Co-Investigating Judges, E3/27,
18 37, 557; his testimony before the Chamber, E1/21/1 and E1/198.1; his appeal brief at
19 paragraph 1710; and some of his out-of-court interviews, E3/108, E3/3198, E3/4201R,
20 E3/4043 and 4044.

21 [11.51.20]

22 So let us consider some of his admissions which support the associated Trial Chamber
23 findings. For example, he admits that he was a member of the Central Committee since
24 1971, a full rights member from 1976. He accepts that the Central Committee issued
25 directives; that he attended Standing Committee meetings where policy decisions were

1 made and directives were issued for their implementation. As the Trial Chamber found,
2 regular reports on that implementation were received by the Standing Committee.
3 Indeed, the Trial Chamber had before it, 31 sets of Minutes of Standing Committee
4 meetings. Appellant attended 16 of the 22 meetings for which attendance was reported, the
5 most frequent attendee, other than Pol Pot and Nuon Chea. There is no reason the
6 frequency of his attendance would be different for meetings where attendance was not
7 recorded.

8 Appellant noted that he attended these meetings so he would have information he needed
9 as Head of State to liaise with heads of state, and to be able to speak on current issues
10 with diplomats. This would be equally true for all meetings of this decision-making body,
11 not just those for which attendance was recorded.

12 [11.52.55]

13 So it is reasonable to conclude from his admissions and all the evidence that Appellant was
14 a frequent attendee at all Standing Committee meetings during the DK period. Any
15 attendance at these meetings, especially frequent attendance, again demonstrates his
16 trusted status as a DPK leader, as very few people were allowed to attend.

17 His attendance at these meetings and membership in the Central Committee must be
18 viewed in context to fully appreciate their significance or his knowledge of and assent to
19 decisions regarding criminal policies and their implementation, and the status of that
20 implementation at lower echelons.

21 The Central Committee appointed the members of the Standing Committee who were
22 drawn from Central Committee members. Appellant accepts that the Standing Committee
23 informed the Central Committee of its policies. The implementation of which the Central
24 Committee then discussed, and that it was a forum for the dissemination of Standing
25 Committee decisions.

1 [11.54.13]

2 It is reasonable to conclude from this context that no policies were implemented that were
3 contrary to Central Committee positions, and that Appellant was privy to Standing
4 Committee and Central Committee discussions and decisions, and at least at the simple
5 (inaudible) level, he had the right to speak and later to vote on, at the very least, the
6 implementation of these decisions.

7 Appellant also admits he was a member of Office 870, whose Chairman, he says, was
8 tasked to both implement Standing Committee decisions and to monitor suspected
9 members of the Party for the Standing Committee. The Trial Chamber rightly found
10 Appellant actually took part in such investigations, and also rightly found that the office, in
11 addition, transmitted information to and from the committee and monitored implementation
12 of its decisions.

13 [11.55.18]

14 After his colleague, Duong, was arrested in early 1977, Appellant remained in the office
15 and the office continued to operate and receive reports from lower echelons regarding, for
16 example, economic and military matters; work activities; food shortages; and smashing
17 internal enemies. It is reasonable to conclude the Appellant was privy to those reports as,
18 by his account, he and Duong were the only members of this office, at least at the most
19 senior level, and the information would have been important for him to have to carry out his
20 duties as head of the DK and diplomatic liaison.

21 [11.56.04]

22 As for his involvement in commercial matters, Appellant admits that part of his Office 870
23 responsibilities was to implement Standing Committee decisions regarding distribution of
24 products to zones and regions, and to import products. He also admits he was responsible
25 for procuring medicines, which he accepts were never sufficient to deal with the rampant

1 illnesses among the population.

2 Other evidence also establishes his significant oversight of commerce activities. For
3 example, commerce-related reports flowed to him, often as the primary recipient, and he
4 provided advice; that is, guidance, on commerce-related matters to lower echelons.

5 Appellant also admits to his close association with senior CPK leaders; in particular, Pol
6 Pot and Nuon Chea, once again, showing his unique standing, power, and authority in the
7 Party.

8 For example, he admits that Pol Pot invited him to Pol Pot's headquarters to participate
9 and listen regarding the last defensive on Phnom Penh, on which Pol Pot personally
10 briefed him on occasion. It was Pol Pot who took him to Phnom Penh after the city was
11 captured. He lived and worked with Pol Pot, Nuon Chea, and other leaders at various
12 locations after the capture of Phnom Penh; at the railway station, at the Silver Pagoda, at
13 K1 with Pol Pot for two or three months, and at K3 where most senior leaders live including
14 Nuon Chea. Pol Pot himself occasionally stayed at K3, and the Standing Committee
15 sometimes held its meetings there.

16 [11.58.08]

17 He says that during 1975 to 1978, he had contact with those within the CPK who had the
18 right to participate in its inner meetings. But, in fact, he participated in these meetings, such
19 as the Standing Committee meetings and the multi-day meetings at the Silver Pagoda in
20 April 1975 where policies and their implementation were discussed. His participation is no
21 surprise as he also admitted that between 1970 to 1975, he stayed permanently with
22 Khmer Rouge leaders. He followed Pol Pot all the time, like a shadow. That after he, Pol
23 Pot, and Nuon Chea relocated to Phnom Penh following the CPK victory, they did nothing
24 separately. And knowing each other well, would talk as normal.

25 [11.59.10]

1 So we say that his attempt to paint himself as a distrusted outsider with no power is proven
2 false by his own admissions and the evidence *in toto*. Appellant was chosen for his multiple
3 roles and functions because he was a valued, trusted member of the top echelon of CPK
4 leadership; Pol Pot's shadow, a man who would abide by the CPK criminal policies and
5 their implementation, advocate for them, and paint favourable pictures of them at home
6 and abroad.

7 I now turn to Appellant's erroneous challenges regarding his significant contribution to JCE
8 crimes, discussed in detail in our response section 8C2, paragraphs 1040 to 1095.

9 First, as my colleague, Mr. Smith, has noted, Appellant misapprehends much of the law
10 regarding common purpose and significant contribution. He ignores that common purpose
11 is comprised of both objective and means, and that whereas here the means are criminal,
12 the common purpose is criminal. So his arguments regarding a non-criminal part of the
13 common purpose are not relevant to the aspect of his criminality as the common purpose
14 herein was criminal.

15 He also misapprehends what is required to establish significant contribution; that, as he
16 did, Appellant participated in some way in the furtherance of this criminal common purpose,
17 and this participation had a direct or indirect effect on the commission of JCE crimes. His
18 contribution must have been more than that of just a mere bystander which the evidence
19 proves it was.

20 [12.01.10]

21 Furthermore, Appellant's participation need not have involved commission of a specific
22 crime but may take the form of assistance in, or contribution to, the execution of the
23 common purpose.

24 As this Chamber made clear in F36, paragraph 9A4, where, as here, the common purpose
25 was intrinsically linked to the identified criminal policies, even activities which on their face

1 are unrelated to the commission of crimes, may be considered as such activities may
2 support the commission of crimes, even if only indirectly.

3 [12.01.56]

4 The significance of his contribution is determined taking into account factors such as his
5 positions, the level and efficiency of his participation, and any efforts to prevent crimes.

6 Contrary to his arguments, the evidence in this case establishes Appellant's multiple
7 important positions and functions and his high level, efficient participation.

8 The evidence establishes only one instance where Appellant intervened to prevent any of
9 the crimes when he used his authority to get his wife's relatives released from confinement
10 in Preah Vihear. In so doing, he also learned of mass arrests, detention, and starvation
11 there.

12 Appellant's arguments also fail because in assessing the significance of his contributions
13 he did not consider the totality of his activities as he was required to do and as the Trial
14 Chamber did. His piecemeal approach ignores the Trial Chamber's extensive analysis of
15 his multi varied contributions in paragraphs 4257, 4278, in the context of his many roles,
16 functions, and close associations.

17 This extensive analysis also belies Appellant's claim that he is the victim of guilt by
18 association. The Judgment clearly establishes that his conduct was the basis of the Trial
19 Chamber's findings, not his associations.

20 [12.03.32]

21 His contributions must be assessed in light of the fact that, as he admitted, he was
22 considered the leader of the Khmer Rouge since the 1970 coup; he was the President of
23 the DK, the Head of State. Thus, as the Trial Chamber rightly found he was the face of the
24 DK; that is, of the CPK, because, as Appellant said, the CPK was the state. So his conduct
25 was perceived to be the actions of the DK and the CPK, giving those actions tremendous

1 impact on all with whom he interacted, directly or indirectly, at home and abroad.

2 This is true of both his positive acts and his silent assent to decisions and pronouncements
3 of CPK decision-making bodies and leaders. When he spoke, people listened. When he
4 remained silent, people noticed.

5 [12.04.36]

6 Highlighting a few examples of the various ways in which Appellant significantly contributed
7 to JCE crimes illustrates why his challenges do not warrant Appellate intervention. He
8 supported the criminal common purpose as a regular attendee of Standing Committee
9 meetings and as a member of the Central Committee by, for example, silently assenting to,
10 or affirmatively supporting, the Standing Committee's decision for state acquisition of 30,
11 50, or even 100 percent of rice production to be taken from the mouths of workers, despite
12 knowing it was the starving, ill, enslaved workforce that was being called on as the sole
13 source for achieving unrealistic production and construction goals. And to the Central
14 Committee decision my colleague, Mr. Smith, referred to, delegating lower echelons to
15 "smash"; that is, execute inside and outside CPK ranks.

16 He was informally named President of the State Presidium in the same document. For this
17 reason, and because he was a member of the Central Committee who would also require
18 this information to fulfil his duties as President and diplomatic liaison, it is reasonable to
19 conclude he was aware of and assented to this decision.

20 [12.06.06]

21 As a high level CPK leader, close associate of Pol Pot and Nuon Chea in a system with
22 democratic centralism he would have been heard had he spoken out against these
23 decisions, if not in the Standing Committee, then certainly in the Central Committee and at
24 other meetings.

25 Appellant publicly promoted, confirmed, and endorsed the criminal common purpose,

1 including by participating in the multi-day meeting of the Central Committee, other senior
2 leaders, and zone secretaries at the Silver Pagoda where displacement of populations was
3 justified, and establishment of coöperatives and quick construction of irrigation projects
4 were given priority.

5 [12.06.55]

6 He encouraged, incited, and legitimised the implementation of the criminal common
7 purpose through its policies, including by, as the head of the DK, and despite being aware
8 of the plight of the workers and those imprisoned in security centres, praising the
9 construction of dykes, canals, reservoirs, and dams by a labour force working day and
10 night without rest; celebrating the CPK target to build irrigation projects at a pace never
11 before attained, relying only on manual labour of tens of thousands of workers; pushing the
12 captive population and its cadre overseers to fulfil or overfulfil production plans to maintain
13 under all circumstances CPK production targets.

14 As my colleague mentioned, calling on the people to favour allegiance to Angkar over
15 parents as Angkar would take on the role of parents; inciting the population to hate “Yuong”
16 more and more every day; and to exterminate enemies of all stripes.

17 He instructed on the implementation of the criminal common purpose through its policies
18 by, for example, calling for the evacuation - deportation of all Vietnamese from Cambodia,
19 later saying that Cambodia should be free of Vietnamese; identifying broad categories of
20 people as enemies to be eliminated.

21 [12.08.35]

22 He enabled and controlled implementation of the criminal common purpose and its policies
23 by, for example, enabling the smooth functioning of the DK administration as a member of
24 Office 870 and overseer of DK trade and commerce by ensuring Duong’s commerce-
25 related responsibilities were carried out after Duong’s arrest, and by ensuring coöperatives

1 handed over rice for export while underfed workers suffered from these acquisitions
2 policies.

3 Considering Appellant’s activities *in toto*, as is required, refutes his challenges to the Trial
4 Chamber’s findings and firmly establishes that Appellant’s contribution to JCE crimes was
5 significant.

6 [12.09.29]

7 Finally, I turn to Appellant’s erroneous challenges in regard to his conviction as an aider
8 and abettor to murder *dolus eventualis* addressed in detail in section 8D of our response,
9 paragraphs 1247 to 1283.

10 Appellant fails in large part because he misapprehends the legal framework for aiding and
11 abetting. First, Appellant wrongly argues that the Trial Chamber erred by finding that he
12 must know that a crime would likely be committed, and arguing that this standard of intent
13 did not exist at the time of his acts.

14 In making this argument, Appellant misunderstands the *mens rea* requirements for aiding
15 and abetting. He erroneously conflates the requirement of knowledge of the likelihood a
16 crime would be committed with the requirement of knowledge that his conduct will assist or
17 facilitate the commission of a crime if it occurs.

18 An accurate understanding of these two knowledge requirements makes clear that the Trial
19 Chamber articulated and applied well-settled law that was part of international customary
20 law at the time of Appellant’s conduct, as we explain in more detail in our response at
21 paragraphs 1266 to 1270.

22 Nor is it required that he knew the precise crime to be committed. Only that he was aware
23 that one of a number of crimes would likely be committed, and a crime was, in fact,
24 committed. Appellant’s knowledge can be inferred from all the circumstances of this case.

25 Those circumstances are discussed in detail in our written response, and have been

1 elaborated upon during this oral hearing, and include his own admissions of knowledge of
2 the violence being done in his name by CPK cadre. As he says in E3/18, he could not bring
3 himself to raise his voice against that violence. And his knowledge of the murderous events
4 taking place.

5 [12.11.54]

6 We also would look to the Trial Chamber's Judgment, paragraph 4207, where the Trial
7 Chamber lays out for us the policies whose implementation had begun before 1975, during
8 a time that Appellant was a member of the CPK and was in close proximity to the leaders
9 of the CPK. And paragraph 4 - Your Honours, I may be mis-citing this. I think it is 4208,
10 where they talk about the fact that these policies continued into and through the DK
11 regime.

12 [12.12.47]

13 If we look at all the circumstances of this case, there's only one reasonable conclusion; that
14 he knew both that one of a number of crimes would likely occur and that his conduct would
15 assist or facilitate the crime if it did occur.

16 Appellant also misapprehends the requirement he was aware of the essential elements of
17 murder *dolus eventualis*, including awareness of the direct perpetrator's state of mind,
18 though he need not have shared that state of mind. And my colleague, Ms. Worsnop, has
19 spoken to you in detail about the state of mind for murder *dolus eventualis*. The
20 perpetrator's knowledge that the conditions would likely lead to death or the acceptance of
21 the possibility of this fatal consequence.

22 Awareness of the essential elements of this crime does not require that he was aware of
23 every criminal act, or that he had technical knowledge of the elements of the crime, nor that
24 he knew details such as time, location, and victims, while he also misapprehends the *actus*
25 *reus* element of aiding and abetting.

1 [12.14.05]

2 While his conduct must substantially contribute to the commission of a crime, it need not be
3 a condition precedent to its commission, nor does international customary law require that
4 his contribution have been specifically directed to the commission of a crime. Rather, proof
5 of his substantial effect on the commission of the crime is sufficient to show his culpable
6 link to the crime.

7 Also, contrary to Appellant’s argument, aiding and abetting by encouragement, including
8 implicit encouragement, does not require physical presence at the scene of the crime.

9 However, when considering Appellant’s implicit encouragement and moral support to...

10 THE PRESIDENT:

11 The Co-Prosecutor, please hold on. We do not hear any translation.

12 [12.15.11]

13 MR. KONG SAM ONN:

14 Yes, Mr. President, we do not hear Khmer interpretation.

15 MS. HOLLIS:

16 I’m not sure when it went off.

17 Let me go back to the misapprehension of the *actus reus* element of aiding and abetting,

18 Your Honours, because I’m not sure when the microphone went off.

19 While his conduct must substantially contribute to the commission of a crime, it need not be
20 a condition precedent to its commission. Nor does international customary law require that
21 his contribution have been specifically directed to the commission of a crime; rather, proof
22 of his substantial effect on the commission of a crime is sufficient to show his culpable link
23 to the crime.

24 THE PRESIDENT:

25 Co-Prosecutor, please wait; we need to change another DVD.

1 (Short pause)

2 THE PRESIDENT:

3 Co-Prosecutor, you may continue.

4 [12.17.28]

5 MS. HOLLIS:

6 Thank you, Mr. President.

7 Also, contrary to Appellant’s argument, aiding and abetting by encouragement, including
8 implicit encouragement, does not require physical presence at the scene of the crime.

9 However, when considering Appellant’s implicit encouragement and moral support to the
10 decision-makers who were planning and implementing the policies regarding coöperatives,
11 worksites, and enemies, we must remember his close proximity to them and that he was
12 present at meetings of these decision-makers, such as those of the Central Committee and
13 other leaders at the Silver Pagoda, and of the Standing Committee, where, for example,
14 decisions were made regarding implementation of criminal policies and unrealistic
15 economic plans and construction targets were set, and where purges of CPK cadre were
16 discussed and decided upon. Meetings where, again, his voice in opposition would have
17 been heard, as discussed previously.

18 [12.18.47]

19 The decision-makers were aware of his silent assent or active support at these meetings,
20 giving them additional confidence, encouragement, to continue on the same destructive
21 path regarding their criminal policies and implementation at coöperatives, worksites, and
22 security centres, as did his calls for the execution of those who betrayed the Party or
23 revolution.

24 To understand how his encouragement and support to the cadres substantially contributed
25 to murder *dolus eventualis* we must again consider that the because of his standing, his

1 voice was perceived to be the voice of the DK; that is, of the CPK, and required close
2 attention. His silence on the violence being committed in his name spoke as loudly as his
3 voice.

4 In this context, his conduct, including public pronouncements and statements, and silent
5 assent to the pronouncements of other senior leaders such as Pol Pot and Nuon Chea, in
6 addition to his failure to voice his opposition to the violence being committed in his name
7 substantially affected the conduct of the cadres who committed these crimes.

8 [12.20.17]

9 Some examples of his public pronouncements at mass meetings of workers and cadres,
10 and his public statements help to understand his substantial contribution. For example, as
11 my colleague mentioned, calling on the people to make all efforts to fulfil the task given him
12 by the Party, and in doing so, to put the interests of the nation and revolution first; directing
13 the cadres to transform their behaviour to meet Party goals, and also to identify enemies.
14 Lecturing them on the necessity of meeting production targets; encouraging them to fulfil
15 workplans, regardless of the cost to workers; telling attendees at these mass rallies to pass
16 on the contents of these meeting to their base.

17 [12.21.14]

18 At the same time, he was praising the workers for working day and night without rest to
19 achieve party goals; exhorting an underfed, overworked, ill, enslaved population to eat less
20 to achieve Party goals; and to meet or exceed production targets under all circumstances.

21 As late as 1977, continuing to advise cadres that the object of the revolution was to
22 eliminate Lon Nol regime members, capitalist, feudalists, intellectuals; telling cadres that
23 New People were to be fed less and given more work; that malingerers were enemies who
24 betrayed the Party and that those who betrayed the Party or revolution would be killed, and
25 those culled out in that way were no loss.

1 His public pronouncements and statements put cadres carrying out murder *dolus*
2 *eventualis* on notice that workers must achieve the CPK production targets at all cost, and
3 the cadres must take all necessary steps to ensure the workers did that. And made clear
4 those steps could include working them for long hours without rest, giving them less to eat,
5 and even those that were ill had to work; to be even harsher with the New People and to
6 others considered enemies. Also, that the cadres must ferret out and deal accordingly with
7 enemies; eliminate them, treat them harshly. If they died, their deaths were no loss.

8 [12.22.27]

9 In short, the message to cadres was; do whatever was necessary to implement Party
10 policies and goals, regardless the impact on workers and those imprisoned as enemies,
11 and all will be well with you. Fail to implement the policies, achieve the goals, you may well
12 become the enemy. And it was well known what happened to enemies of the CPK; they
13 were disappeared, tortured, and killed.

14 Considering these examples and the evidence *in toto*, as we must, not in the piecemeal
15 fashion as Appellant does, it is clear that his challenges to the Trial Chamber's findings
16 regarding his liability as an aider and abettor failed. The Grounds of Appeal relating to his
17 conviction for aiding and abetting murder *dolus eventualis* should be dismissed, as should
18 all the grounds of appeal relating to his individual criminal responsibility.

19 [12.23.58]

20 Mr. President, Your Honours, if there are no questions, this concludes the Prosecution's
21 submissions on Appellant's individual criminal responsibility.

22 THE PRESIDENT:

23 We will have a recess now and resume at 1405.

24 And security officer, please take the accused to his room and bring him back at 1350.

25 The court is now in recess.

1 (The accused Khieu Samphan leaves the dock)

2 (Court recesses from 1224H to 1403H)

3 THE GREFFIER:

4 All rise.

5 MR. PRESIDENT:

6 Please be seated.

7 The Court is now back in session.

8 For this afternoon, the Chamber has changed the Greffier. Mr. Sim Mow (phonetic) is

9 replacing Mr. Pon Toon (phonetic).

10 Please report the attendance, Mr. Greffier.

11 [14.04.35]

12 THE GREFFIER:

13 Mr. President, Your Honours, all parties are present.

14 [14.04.52]

15 MR. PRESIDENT:

16 We are proceeding to the questions posed by the Bench.

17 I would like to invite Your Honours, if you have any questions to post?

18 [14.05.15]

19 JUDGE CLARK:

20 Ms. Guisse, this is addressed to you in relation to your client, Mr. Khieu Samphan. I was

21 curious to know about the defence of the extreme secrecy of Khmer Rouge, which I think is

22 generally accepted. But how would that secrecy apply when one is sitting in the, or

23 attending, the standing committee, where surely the whole purpose of the standing

24 committee is to disseminate information at the very highest level to the highest level?

25 I was just curious to see how Mr. Khieu Samphan says that the secrecy affected the

1 dealings at the standing committee?

2 Let me get my -- yes.

3 [14.06.35]

4 MS. GUISSÉ:

5 Your Honour, I do not know if I understood your question, from the translation it seemed
6 like there might be a follow-up, but if I understood your question correctly, the issue is how
7 could secrecy apply in respect of people who were present at meetings of the Standing
8 Committee.

9 My first answer, but I have no reference material on hand, I may need to return to this later,
10 once I have had a chance to look at the references, but I believe that the witnesses
11 explained that meetings of the Standing Committee did not necessarily always take place
12 the same way and did not always include the same people, and depending on what was
13 going to be discussed, some people would come and talk about their topic.

14 And then secondly, the issue of the overall themes covered and then the people in charge
15 of each particular topic, people would concentrate on their particular field of expertise.

16 This is what I recall from memory. But I will come back with more specific references.

17 But the principle of secrecy was brought up very often during the trial for Case 002/1. I

18 think there must be references to this in our Appeal Brief in paragraph 1650, 1651, and

19 1678, notably with witnesses Sam Oen Bun, Eun Tan, and I also recall the witness Song

20 Seecoon (phonetic) who worked at the Ministry of Foreign Affairs, and who explained that
21 this was a general principle. Any information he might have from his job duties, he did not
22 share.

23 And it should also be said, and I said it this morning, but I will repeat it, that in the context

24 of general activities, when there were people who were entrusted by the Standing

25 Committee with a particular topic, such as trade for Khieu Samphan, had information

1 related to their specific area, he received it as trade information, but when it was
2 information, as I heard the Prosecution claim this morning that the information moved
3 toward the centre, that is our criticism to the Chamber. We're talking about the centre and
4 members of the Standing Committee who received information, but not every information
5 was disseminated at every meeting of the Standing Committee.

6 Further, there were groups, which is what I have understood from the different witnesses,
7 groups who were in charge of, say, security. You have reports on security matters which
8 were mentioned in 870, which would go to the people in charge of security, mainly Pol Pot
9 and Son Sen. Not all telegrams and all information were debated in the Standing
10 Committee. When you look at the minutes, you see there are different topics, different
11 reports, and on the two occasions when you see the name of Khieu Samphan, those
12 reports are highly circumstantial.

13 [14.10.16]

14 What I also heard from the Prosecution this morning is that there is an inference, they
15 deduce that since he said that he took part in certain meetings of the Standing Committee,
16 that means he was there consistently.

17 And this is an assumption. It is absolutely not proven beyond any reasonable doubt. That's
18 an important point that I wanted to make.

19 However, as regards to secrecy and how it was applied including at the highest levels, this
20 is, recall that in the Appeal Brief with the references I've just mentioned.

21 Further, and I shall return to you with specific references, it's important to say that we refer
22 to Duch and his encounters with, allegedly, with Khieu Samphan.

23 In the witness testimony of Duch, he talks of a meeting early January, during the escape of
24 the Government of DK, but he also said in his hearings that all affairs related to S-21 were
25 particularly secret and that he spoke directly about this with Son Sen, who was directly in

1 charge of security centres because he was in charge of military operations. That was the
2 private preserve of the head guard of a small group and their material was not shared with
3 all the members of the Standing Committee, and especially with people who were guests
4 and not members of the Standing Committee.

5 But I shall get back to you with more specific reference numbers, because I am speaking
6 with the assistance of my team.

7 As regards to Duch, you can look at paragraphs 1905 to 1906 in the Appeal Brief.

8 As for the rest, the references concern the role of Khieu Samphan in respect of the trial in
9 Case 002/01 with elements of evidence and witnesses that came up only in the trial for
10 Case 002/01.

11 Thank you.

12 [14.12.40]

13 JUDGE CLARK:

14 I can debate with you, but I get the point. It's repeated over and over again that Khmer
15 Rouge were very secretive. I don't think anybody disputes that.

16 People who were not members of the Standing Committee can confirm that.

17 Mr. Khieu Samphan himself says frequently that what was your business stayed your
18 business and Ieng Sary's staff said the same thing.

19 But what I'm talking about specifically, you might address it perhaps tomorrow, is how
20 could the Standing Committee, which was the highest authority in Democratic Kampuchea,
21 operate unless at least at those meetings, there was openness, and frankness, and
22 honesty? Perhaps you'll address it tomorrow when we have time for questions and
23 answers.

24 But thank you for answer.

25 [14.13.42]

1 JUDGE CHANDRA:

2 I have a question for the prosecutor. The evidence relied upon by the Prosecution is mostly
3 hearsay or circumstantial. There is a great body of evidence that is mostly inferential. How
4 much of reliance can you place on evidence that appears inferential and also
5 circumstantial?

6 [14.14.42]

7 MS. HOLLIS:

8 Thank you for that question, Your Honour.

9 I think we would apply the general rules of evidence.

10 And so first of all, in relation to the documentary evidence, hearsay evidence, we would
11 look to determine internal consistency and if it is consistent with other evidence on the
12 record.

13 There were indeed many witnesses who testified, as well as documentary evidence that
14 the Trial Chamber rightly found to be reliable and authentic. And so that would be the way
15 they would approach that.

16 And the amount of credibility that you would give to a particular piece of circumstantial
17 evidence would depend, in our submission, Your Honour, on applying those factors to that
18 piece of evidence. Is it internally consistent? Is there something internal that makes us
19 believe that it is what it purports to be? So if it's a document, is it of the same format and
20 the same content as other documents that we believe are from the same source? Is it
21 consistent externally with the other evidence that we have before us?

22 And I think that that is also the type of analysis that the Trial Chamber engaged in. So it
23 would be a piece by piece of evidence analysis based on those types of factors, Your
24 Honour.

25 [14.16.26]

1 JUDGE CHANDRA:

2 What you are saying is there is no direct evidence and you're purely relying on
3 circumstantial documentary and hearsay? Is that right?

4 [14.16.42]

5 MS. HOLLIS:

6 Well there is direct evidence in the form of witnesses who testified about what happened to
7 them and what they observed in the various locations based on the various policies.

8 There is what I would suggest is direct evidence of people who heard Appellant speak, I

9 think an admission of Appellant is if it is hearsay in your mind, a very special type of

10 hearsay, because, of course, we can't compel an Appellant to speak to it. So it's different

11 than other hearsay. And we have that type of evidence.

12 So I would say that we do have a significant amount of direct evidence in addition to, as

13 Your Honour notes, evidence that is indirect evidence.

14 [14.17.42]

15 JUDGE CHANDRA:

16 Thank you, but I still feel that yours is an uphill task.

17 [14.17.50]

18 MS. HOLLIS:

19 Your Honour, we would accept that any proof of elements is an uphill task.

20 We are of the view, of course, as the Trial Chamber was, that that challenge was met and

21 overcome by the evidence in this case.

22 [14.18.15]

23 JUDGE CHANDRA:

24 Pardon?

25 MS. HOLLIS:

1 I said, Your Honour, that of course, proof of any element beyond a reasonable doubt is a
2 challenge. But we believe that the evidence in this case, as the Trial Chamber found,
3 considered as a whole in its totality was credible evidence that indeed met the challenge
4 that you talk about, and that we indeed climbed that hill and reached the top and that the
5 Trial Chamber rightly entered the convictions based on reliable evidence looking at the
6 evidence in its totality.

7 [14.19.00]

8 JUDGE CHANDRA:

9 Thank you. I wish you well.

10 MS. HOLLIS:

11 Thank you, Your Honour.

12 [14.19.22]

13 MR. PRESIDENT:

14 If there are no more questions, I would like now to invite the Co-Rapporteur to read the
15 report for session on grounds of appeal related to the sentence.

16 [14.19.50]

17 JUDGE MONICHARIYA:

18 Good afternoon. According to the Brief of the accused, particularly the grounds of the
19 appeal related to the sentence, the Appellant mentioned 40 paragraph 2144 to 2184. And
20 the Appellant stated that the supplementary request.

21 On behalf of Judge Chandra Nihal Jayasinghe and I myself, I would like to report as
22 follows.

23 The Trial Chamber imposed a sentence of life imprisonment on the accused for the crimes
24 for which he was convicted. This sentence was to concurrently with a previous life
25 sentence imposed for crimes encompassed in Case 002/01 and confirmed by the Supreme

1 Court Chamber.

2 [14.21.09]

3 In his Grounds of Appeal, the Accused raises four main arguments against the fairness of
4 that sentence, which are summarized as follows.

5 Number one, the Trial Chamber was in error in stating that the primary objective of the
6 sentence was to reassure victims, witnesses, and the public that the law was being
7 effectively implemented and applied to all, regardless of their status.

8 The Accused argues that this was a secondary objective of punishment and demonstrates
9 bias. The sentence imposed was excessive and exemplary.

10 Secondly, the Trial Chamber committed errors of fact and law in its assessment of the
11 gravity of the crimes as it took into consideration crimes of which he was not charged or
12 convicted.

13 As an example, the Trial Chamber considered the rape of prisoners in security centres. As
14 only the matters proved beyond reasonable doubt, --

15 [14.22.50]

16 (Technical problem)

17 [14.23.42]

18 -- the Trial Chamber --

19 (Technical problem)

20 [14.23.58]

21 Number one, --

22 (Technical problem)

23 [14.25.36]

24 MR. PRESIDENT:

25 Now please leave some time for the technical teams to fix the issue.

1 (Technical problem)

2 [14.26.46]

3 JUDGE MONICHARIYA:

4 Thirdly, the accused submits that the Trial Chamber committed factual and legal errors in
5 its assessment of two aggravating factors.

6 Number one. The Trial Chamber considered the abuse of his position of authority and
7 influence as an aggravating factor, which is in contradiction to its finding that he did not
8 have sufficient authority to directly order the perpetration of the crimes.

9 His position of authority had already been taken into account for the gravity of the crimes
10 assessment.

11 Number two, the Trial Chamber failed to demonstrate the relevance and correlation of his
12 level of education as an aggravating factor.

13 Fourthly, the Accused views that the Trial Chamber committed factual and legal errors in its
14 assessment of mitigating factors.

15 [14.27.51]

16 First, the Trial Chamber failed to give due consideration to his cooperation with the ECCC,
17 including his active participation at trial, his exemplary attitude throughout detention, and
18 his acknowledgement of the sufferings endured by the civil parties.

19 Secondly, the Trial Chamber failed to accord sufficient weight to his age and state of health
20 and his inability to withstand long-term imprisonment.

21 The Trial Chamber erred by not conducting a new assessment of the value to be given to
22 his character witnesses and by failing to take account of all the elements of his personality
23 and in ignoring the unanimously laudatory accounts.

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

1 time limit.

2 This concludes the report on the Grounds of Appeal relating to the sentence and would like
3 to submit to the Bench for consideration. Thank you.

4 [14.29.28]

5 MR. PRESIDENT:

6 Next I would like to invite the Defence team to make submissions.

7 MR. KONG SAM ONN:

8 Thank you, Mr. President. My name is Kong Sam Onn. Allow me to make an oral
9 submission regarding sentencing.

10 Mr. President, Your Honours, I will not talk at length regarding sentencing. As you all know,
11 the most important thing is that we would like to now request the annulment of the
12 judgement and release Khieu Samphan.

13 However, even in relation to the announcement of the sentencing, the Trial Chamber
14 commits factual and legal errors so that the decision should be annulled.

15 There are numerous mistakes and it covers all aspects of the sentencing.

16 There is no single argument by the Co-Prosecutors that will make you, Mr. President, and
17 Your Honours, believe that the Trial Chamber did not make any mistake.

18 [14.30.52]

19 After we read the submissions by the Co-Prosecutors, I'd like to briefly mention the
20 grounds of our appeal submissions and provide brief arguments to the Co-Prosecutors on
21 certain points.

22 I would not describe the responses to the Civil Party Lead Co-Lawyer's submissions.

23 However, I would like to state that they should not make interventions in this regard, as we
24 reminded in our submissions on 12 March in 60/1, that our foundation for the criminal
25 adjudication, where there are civil parties. But in any case, civil parties cannot intervene in

1 the sentencing section part of the process because it is the sole responsibility of the Co-
2 Prosecutors to do so.

3 For that reason, as we have to first one single prosecutorial body, I will not respond to the
4 Lead Co-Lawyer's submissions and I hoped Mr. President and Your Honours would not be
5 influenced by the arguments which should not have been raised by the civil parties' lawyers
6 and that you would not consider those arguments.

7 [14.32.37]

8 As I have already mentioned, the Trial Chamber made errors in a lot of aspects in relation
9 to sentencing, in particularly in relation to the severity of crimes, the gravity of the offences,
10 as well as the objective as the announcement of the sentencing. I will briefly touch up on
11 each of these aspects.

12 First allow me to speak about the severity of the crime. The Trial Chamber made two
13 mistakes in this (inaudible).

14 The first mistake is this. In order to determine the severity of crimes committed, the Trial
15 Chamber considered the crimes which are not charged against Mr. Khieu Samphan, that
16 each rape committed at security centres where the investigating judges stated that, let me
17 quote:

18 "The officer policies in relation not to rape is to prevent crimes and to punish perpetrators."

19 (As read)

20 For that reason, the Co-Investigating Judges did not decide to send the accused to trial for
21 these facts.

22 The Co-Prosecutors, who did not appeal this decision, acknowledged that Mr. Khieu
23 Samphan was not responsible for those facts.

24 [14.34.21]

25 Despite all that, the Co-Prosecutors there claimed that this related to the commission of the

1 detention, which shall be presented beyond a reasonable doubt and the Trial Chamber
2 should consider those evidence.

3 This is -- surprisingly, this is a surprise effect. Since from when the criminal evidence where
4 the Accused was not charged was considered for the severity of the crime, where the
5 perpetrator did not commit, and then the sentencing followed? And based on the legal
6 response, there is no such thing.

7 [14.35.10]

8 This is illegal and could not be accepted that the Trial Chamber allowed facts which were
9 not charged to be part of this historical proceeding.

10 And to respond to the Co-Prosecutors, I trust you'll find previous jurisdictions, but we found
11 none.

12 And allow me to say that the Trial Chamber's mistakes are very strange. We only found
13 one jurisdiction in a similar circumstance.

14 In Bula Bootere (phonetic), the Appeal Chamber of the Rwanda Criminal Tribunal noticed
15 the errors made by the Trial Chamber on considering the primary role of the accused in
16 crimes where they were released in order to determine the severity of crimes that were
17 committed. This is in the Judgement of Bootere (phonetic), 14 December 2015 in
18 paragraph 3431.

19 I didn't know whether this is sufficient for the Co-Prosecutors to consider it, but I believe
20 that Your Honours know it clearly that any accused shall not be considered guilty for crimes
21 that he did not commit -- that he was not charged with.

22 Second mistake committed by the Trial Chamber, it is related to the severity of the crime.

23 The Trial Chamber failed to consider the indirectness of Mr. Khieu Samphan's participation.

24 Based on Nuremburg's jurisdiction and various other criminal courts, Mr. Khieu Samphan
25 should receive lighter sentences than those who directly participated in the crimes.

1 [14.37.30]

2 In addition, for the gravity of the sentencing, the Trial Chamber committed several errors.

3 The Trial Chamber argued that Mr. Khieu Samphan violated his authority. On the contrary,
4 the Trial Chamber acknowledged that he did not have any real authority or responsibility or
5 any military authority, but he had a broader symbolic authority.

6 The Trial Chamber also claimed that Mr. Khieu Samphan violated the influential authority
7 while the Trial Chamber considered this evidence already regarding the severity of the
8 crime. But the legal evidence shows that one element that cannot be considered for the
9 severity of a crime, as well as the gravity of the sentencing, only one can be chosen.

10 [14.38.45]

11 And in addition, the Trial Chamber accepted for the gravity of the crime without the
12 evidence regarding the educational background of Mr. Khieu Samphan so that they could
13 assess the scope and as well as his actions.

14 Anyone who is -- who has common sense can assess the scope of one's actions,
15 regardless of the educational background.

16 As for the other circumstances, the Trial Chamber committed three errors.

17 The first error is this. The Trial Chamber confused, in relation to the cooperation of which
18 the Court on the admission of guilt.

19 And number two, the Trial Chamber decided to give little value to the age and health
20 condition of Mr. Khieu Samphan. But it gave more weight to these factors in various other
21 decisions when they adjudicate the case of Mr. Khieu Samphan expeditiously before he
22 passes away.

23 And contrary to the jurisdictions and common sense, the Trial Chamber failed to consider
24 the development of these factors which of course could not lead to any improvement.

25 [14.40.39]

1 The Co-Prosecutors raised some points which were the excerpt from a decision from 2018,
2 including the facts that Mr. Khieu Samphan could walk without any supporting stick, that he
3 could exercise in the evening. But now he cannot do all this. The deterioration of his
4 physical fitness is according to his age, and that should be a factor for the consideration.

5 Third mistake, in relation to this circumstance, the mitigating circumstance, the Trial
6 Chamber did not have any intention to consider the good morality of Mr. Khieu Samphan
7 and that was attested by several witnesses who knew him personally or knew him
8 indirectly.

9 The Co-Prosecutors seem to believe through their argument, which shows that the honesty
10 of Mr. Khieu Samphan or the appreciation by the general public was only assisted in 1975.
11 Similarly to the jurisdiction of other criminal courts, considering good morality of the
12 accused for the consideration of the sentencing.

13 [14.42.13]

14 We have raised in our submissions, and allow me to refer to seven other judgements, of
15 course that I would not forward them here, but they are attached to the list of the authorities
16 for our submissions, which shows that the Trial Chamber should have considered these
17 points.

18 Finally, to conclude, in relation to the mistakes made by Trial Chamber in relation to the
19 purpose for the announcement of the sentencing, which is the beginning of various other
20 mistakes that I have just mentioned, and according to the Co-Prosecutors, our arguments
21 are vague and ambiguous, but they are easy to understand and very clear.

22 As in the summary announcement, the Co-Rapporteur is very precise. Although that Your
23 Honours understand clearly our submissions, the purpose of the punishment is to give
24 direction not to the Judges to determine the proper sentencing. In international criminal
25 law, the jurisdiction shall be persistent and recognize the two purposes of sentences that is

1 for the purpose of punishment and for them not to commit the crime again.

2 [14.44.04]

3 And based on the judgment of the Yugoslavia International Tribunal in paragraph 508, that
4 is for the backdrop curtain for the sentencing factor. And everyone to decide the sentencing
5 on Mr. Khieu Samphan, the Trial Chamber actually added that the main objective is to
6 show to the victims or the survivors, and the public that the punishment is done in
7 accordance to the law.

8 And when the survivors or the victims and the public, giving higher well do in error, then the
9 Trial Chamber cannot make a proper sentencing for the accused at all.

10 And if this curtain is incorrect, then everything else is going to be exposed incorrect.

11 The main error in regard to the announcement of the judgement and the sentencing by the
12 Trial Chamber is that the Trial Chamber gives a symbolic gesture about the law with its
13 bias in its nature.

14 And this shows that the way the judgement is pronounced, just as the sentencing, and the
15 entire judgement is not correct.

16 Thank you.

17 [14.46.15]

18 MR. PRESIDENT:

19 The Chamber will take a recess for 30 minutes starting from now.

20 The Court is now in recess.

21 (Court recesses from 1446H to 1514H)

22 THE PRESIDENT:

23 Please be seated.

24 Next, I would like to invite the Co-Prosecutor to make their submission. You have the floor.

25 MS. CHEA:

1 Thank you, Mr. President, and good afternoon, Mr. President, Your Honours.

2 [15.15.16]

3 Today, I will discuss why the Appellant's arguments, Khieu Samphân, do not show any
4 error that would reduce his sentence. He first challenges sentencing objectives by
5 attacking a finding that is identical -- finding that is identical to a Case 002/01 finding.

6 Although he uses somewhat different wording, he repeats his 002/01 erroneous argument
7 that the findings -- finding shows bias because it allegedly emphasizes sentencing
8 purposes aimed at general prevention rather than sentencing purposes relevant to the
9 Accused.

10 The argument should be dismissed, as it continues to be obscure, and even more
11 importantly, show no bias, just as Your Honours found in 002/01. And even more
12 important, the appeal raises nothing new that would warrant a different outcome.

13 Secondly, his claim that the gravity assessment erroneously included crimes outside the
14 scope of the case cites a single sexual assault at Kraing Ta Chan as a reason to reduce
15 his sentence. Even if Your Honours decide the Chamber erred by considering that rape to
16 show the brutality of security centres' conditions, the remaining evidence overwhelmingly
17 establishes that the crimes committed were extremely grave.

18 [15.17.54]

19 The Chamber noted that thousands of people were held without any legal protections in
20 security centres, where they were subjected to appalling conditions, meagre rations,
21 regular beatings, brutal torture, and execution. The Chamber also recalled that genocide
22 was committed against the Vietnamese; couples were forced to marry and consummate
23 their marriages; thousands of people at cooperatives and worksites were enslaved in harsh
24 conditions that resulted in numerous deaths; and all these crimes took a deep
25 psychological toll on the victims and their families. Setting the Kraing Ta Chan rape aside

1 would not invalidate the gravity finding, so the argument fails.

2 [15.19.19]

3 The Appellant's next claim wrongly asserts that his sentence is excessive because indirect
4 forms of participation, such as aiding and abetting, usually lead to a lighter sentence. There
5 are three problems with this claim:

6 First, the Taylor Appeals Chamber has held that it's an error of law to find that aiding and
7 abetting generally warrants a lesser sentence. For sentencing purposes, there is no
8 hierarchy for forms of criminal participation.

9 Second, the Appellant was also convicted of committing numerous crimes through his
10 significant contribution to a JCE, not just aiding and abetting.

11 Third, and perhaps most importantly, focusing on the form of participation in the abstract,
12 rather than on the actual conduct, is not the proper test. A sentence must be individualized
13 based on the conduct of the Accused.

14 The Trial Chamber's summary, and the underlying evidence, did precisely that. Detailing
15 how Khieu Samphan's Central Committee membership and attendance at the -- at the
16 Standing Committee's meetings meant he was privy to, and took part in, meetings in which
17 economic plans and the fates of enemies were discussed and decided.

18 [15.21.41]

19 It's also noted that in numerous speeches, interviews, statements and meetings, the
20 Appellant -- the Appellant disseminated, endorsed, and defended the common purpose
21 and CPK policies. More specifically, he actively spread CPK rhetoric calling for
22 discriminatory treatment of the Vietnamese in Cambodia; he openly called for the execution
23 of those who betrayed the Party or revolution; he instructed the Ministry to arrange
24 marriages so that couples could produce children.

25 (Short pause)

1 [15.22.57]

2 MS. CHEA:

3 He instructed the Ministry to arrange marriages so that the couples could produce children,
4 and he encouraged the CPK cadres to implement the policies at all costs despite knowing
5 that the people were being subjected to inhumane living and working conditions.

6 The Chamber also considered that because the Cambodian people trusted and respected
7 the Appellant, these public endorsements legitimized the policies and allowed the crimes to
8 be more readily committed.

9 After taking all of this into account, the Chamber found that the Appellant's involvement in
10 the crimes were extensive and substantial and befitting punishment and life imprisonment.
11 His abstract argument does not displace the concrete evidence that the Chamber properly
12 considered.

13 [15.23.47]

14 Turning to mitigating factors: The Appellant suggests that because he received the
15 maximum penalty, the Trial Chamber fails to properly consider mitigating factors in his
16 favour. It is settled law that a trial chamber has the discretion to decide what weight, if any,
17 it will assign to mitigating factors. Use of the words "if any" means there is no requirement
18 that any weight be assigned.

19 This comports with Article 93 of Cambodian Criminal Code, which says the Court may
20 grant the accused the benefit of mitigating circumstances if warranted.

21 The *Musema* appeal judgment also makes clear that even when there are mitigating
22 circumstances, a trial chamber may still impose the maximum sentence if the gravity of the
23 offences requires it.

24 The gravity of the crimes and the Appellant's culpable conduct warrant the maximum
25 penalty even if mitigating circumstances were present. But the appeal fails to demonstrate

1 that the Chamber erred in finding there were no mitigating factors of consequence. For
2 example, his claims of cooperation do not meet the threshold required by law to mitigate a
3 sentence.

4 (Short pause)

5 [15.26.25]

6 MS. CHEA:

7 My colleague stated that he could not hear the interpretation.

8 THE PRESIDENT:

9 The co -- National Co-Prosecutor, just please repeat a few sentences, a few sentences just
10 before you start because there was internet disconnection.

11 Could you please starting from the mitigating circumstances?

12 MS. CHEA:

13 For example, his claim of cooperation do not meet the threshold required by law to mitigate
14 his sentence. Cooperation must be exceptional, while good behaviour and compliance with
15 the law are expected of any accused. Even accepting his argument as true, the Appellant
16 merely asserts that he participated in his case, which is expected, not exceptional.

17 [15.28.07]

18 Similarly, his argument that he did not impede the work of the Court, despite his life
19 sentence from Case 002/01, is not enough to mitigate. In *Naletilić & Martinović*, Naletilić
20 argued that his sentence should be reduced because he -- when he felt ill, he had -- he had
21 not requested a recess.

22 The Appeals Chamber held that not hindering the trial was not enough to reduce the
23 sentence in light of the serious crimes for which Naletilić was convicted. The same holds
24 true here.

25 [15.29.10]

1 The Appellant's argument about his age also fails. The *Niyitegeka* appeals judgment states
2 that age does not automatically entitle an accused to a credit of his sentence; the Chamber
3 is simply required to consider proof of a mitigating circumstance when making its final
4 determination.

5 The Appellant acknowledged his age was given some minimal weight. In other words, the
6 Chamber did exactly what it was required to do. It considered the mitigating factor. The
7 Appellant's disagreement with the weight given does not negate the Chamber's proper
8 exercise of its discretion.

9 In regards to health, ill health is only to be considered mitigating in exceptional
10 circumstances. The *Milan Simić* case referenced by the Trial Chamber is instructive
11 because it notes that Simić's confinement to a wheelchair and the need for special
12 equipment and daily nursing care did not qualify as a mitigating factor but did constitute
13 exceptional circumstances.

14 [15.31.01]

15 However, the Appellant presented no evidence of ill health at trial, nor does he do so now
16 on appeal. He merely notes a statement in the 2008 report that his memory and cognitive
17 function would likely gradually deteriorate with age.

18 Under *Simić*, a medical condition that may affect life expectancy in the future does not
19 automatically reduce a sentence. The Appellant offers nothing more to satisfy the
20 exceptional circumstances threshold.

21 In sum, none of Appellant's arguments show any error in the Chamber's assessment. His
22 life sentence should be affirmed because he earned it through his conduct.

23 Thank you, Your Honours. I now yield the floor to the civil parties. Thank you.

24 [15.32.31]

25 THE PRESIDENT:

1 I'd now like to hand the floor to the lead co-lawyer for civil parties.

2 MR. PICH:

3 Mr. President, Your Honours. Good afternoon to Madam Co-Prosecutors, to the
4 Co-Prosecutor, and to everyone, including the colleagues from the civil parties' side, and
5 good afternoon to the general public.

6 In a relation to sentencing, I will highlight four points: First on the standing of the civil
7 parties; and second, in relation to the statements that the Trial Chamber is biased, I will
8 present the suffering suffered by the civil parties. As far as the -- finally, I will touch upon
9 the activities by Mr. Khieu Samphân.

10 First, in relation to the standing of the civil parties in regard to sentencing, the co-defence
11 counsel for the Accused, Mr. Khieu Samphân, said that the civil party lawyers or the civil
12 parties themselves has no right whatsoever in relation to the determination of a sentencing.
13 [15.34.26]

14 Such statement is a major blunder in relation to the right or participation of the civil parties.
15 In fact, Rule 105.1(c) of the ECCC Internal Rules clearly states that civil parties cannot
16 lodge an appeal in relation to sentencing.

17 However, we are not lodging any complaint in relation to sentencing, but instead, we are
18 responding to the appeal made by the defence counsel in relation to the sentencing. We
19 are merely responding, and there is no such provision in the Internal Rules

20 [15.35.28]

21 Otherwise, clearly stated by the Supreme Court Chamber in two separate decisions, one is
22 at 10/2, and F52/1, which states that civil parties can respond to the Appeal Briefs by the
23 defence counsel when the response is in relation to the reasons affected directly on the
24 right and benefit of the civil parties and the responses are not repetitive of the points raised
25 or mentioned already by the Co-Prosecutors.

1 In relation to this right, we can refer to the judgment, 001, in Case 001, rather, in which
2 there's a separate opinion by Judge Lavergne on the role of the civil parties. Civil parties
3 are a party of the proceeding, and unless it is clearly expressed in the Internal Rules
4 regarding the prohibition of the participation of the civil parties or restrict the right of the civil
5 parties, civil parties needs to be considered to have the right to enjoy the right and
6 obligations as enjoyed by other parties. And in fact, the civil parties' participation is to
7 support the Prosecution, and not merely to request a (unintelligible).

8 [15.37.26]

9 This is a means for the civil parties to participate in a proceedings to exercise their right to
10 know the truth and to receive justice, and this is also a means to achieve their -- the
11 objective of the ECCC that is on the national reconciliation. As Judge Lavergne
12 acknowledged, the national reconciliation can partly achieve through the punishment and
13 the measures to prevent the reoccurrence of the crimes.

14 This is also related to the statement of cruelty due to the burdens of the punishment as well
15 as on the characters of the Accused, et cetera, due to the crimes as well as the level of
16 their regret.

17 The role of the civil parties in its participation in the national reconciliation in the
18 proceedings before the ECCC means that they have all to provide testimonies on those
19 topics that are interrelated to the national reconciliation and the sentencing.

20 [15.28.57]

21 The national and international jurisprudence support this principle that civil parties shall be
22 allowed to provide a briefing regarding the punishment, and the criminal -- the criminal
23 procedure code does not restrict the rights of the civil parties to do so.

24 And victims who participate in a proceeding are allowed to make their brief before the
25 International Criminal Court, which is a special tribunal in Libya, as well as various other

1 special tribunals, including those of the (inaudible), and the E or AC -- witness for the East
2 Africa. And at this point, allow me to refer to the statement of the brief by the lead
3 co-lawyer for the civil parties in paragraph 862.

4 Although the Trial Chamber distinguished the different judicial systems, as compared to the
5 ECCC judicial systems, the civil parties receive or enjoys more entitlement to fully
6 participate in the proceedings. It means that they have more rights than those who
7 participate in various other international tribunals.

8 So it is rather surprising that if the ECCC, which is an international tribunal, with the
9 participation of the civil parties (unintelligible) the rights to participate or to respond to the
10 sentencing is receipted.

11 [15.41.00]

12 Second point, but is relation -- but is related to the allegations that the Trial Chamber
13 charges are biased, in particular, in relation to the statement made by Mr. Kong Sam Onn
14 that if there is a bias at the front curtain it means that whatever is inside behind the curtain
15 is also biased. That is not the case. The front curtain, with the simply the use of the word
16 "civil parties" as victims before the world and the public, does not indicate a bias made by
17 civil parties. In -- that is in reference to paragraph 43, 48 of the Trial judgment.

18 [15.41.58]

19 The bias cannot be presumed in this case. The -- we need to look at every instance, and if
20 -- of any case that the defence counsel claims that there is a bias there.

21 In relation to point number three regarding the right of the civil parties to participate,
22 regarding the content of the testimony of the civil parties, needs to be taken into account
23 for the aggravating or these mitigating the circumstances of the sentencing. The defence
24 counsel claims that the Trial Chamber erred due to giving more weight to the survivors,
25 who are the civil parties and their family members.

1 That is false, and we cannot say because of doing so the Trial Chamber is biased. And the
2 information of the civil parties, which can be a benefit for the consideration of the various
3 elements of crimes as far as the aggravating and the mitigating circumstances, needs to be
4 considered.

5 And I would highlight three points regarding the suffering of the civil parties, and I only
6 mention three civil parties' suffering but this is not the only civil parties who have suffered,
7 but many civil parties who suffered greatly and they continue to be suffered through the
8 present time.

9 [15.44.02]

10 For example, in our document, E1/418.1 of civil party, Chum Mey, who testified about the
11 suffering he received at S-21, he stated that when he was arrested he said, "Brother,
12 please look after my family. At that time, they kicked me and I fell to the ground, they
13 pulled my hair up, and they scolded me why I have to say so. 'Angkar will smash everyone
14 in your family.'"

15 And later on, Mr. Chum Mey testified that, "By one o'clock, I was relocated in Building A on
16 the upper floor, and I was beaten during the investigation. And I was asked to tell the truth,
17 and they scolded me how many of my accomplices that joined the CIA or KGB. And I said
18 that, no, I didn't know anyone. First, I said that no, I did not know anyone, no comrade."

19 [15.45.20]

20 Then they scolded me again, "Why, I -- they had to call them a "comrade"?", and then I was
21 hitten (sic) again. I tried to block it with my hand, and then my small finger was broken.

22 Later on, they pulled finger -- a nail from my toe, and I was almost became unconscious,
23 but they could not pull out the nail from my toe."

24 And civil party, Chum Mey, also spoke about torture by using the electric wire to shock him
25 in his -- in his ear.

1 And another civil party, Sunlay, also mentioned his suffering for the loss of his -- of several
2 members of his family in Kratie Province. In Document E1/394.1, where he mentioned that
3 he lost his family members, totalling 13, and that is true, "and these includes my father-
4 in-law, Chhay Kim Eng, as well as my wife and children. And my father, Uch Sunli, alias,
5 Ton Chey (phonetic), when he -- when he tried to find small leaves to pray to the Buddha,
6 and the ministry said that why he did -- why he had to do that. They arrested him and drag
7 him away. And he was dragged away by comrade Yeam (phonetic). And I was told that he
8 -- my father's life was so much into Buddhism, he disappeared since.

9 [15.47.23]

10 My wife, Sa Kim Ni, and -- was accused of being Vietnamese, and he was killed at Kaoh
11 Trong", and he said that, "I had (unintelligible) before the Party as I could eradicate those
12 elements for the party, but for my wife and children, they were collected and put aside
13 because they were the rotten flesh."

14 As for Ms. Un Ron, in Document E1/307.1, she mentioned about suffering when she
15 worked. She said that she worked under rain in the open. It was a very miserable. That first
16 she could not carry the soil due to the heavy rain, and the rain came up to the knee level.

17 [15.48.46]

18 "And also, frankly speaking, because I had a period, I tried to continue to work because I
19 was afraid that they would beat me to death. And we were never given any underpants or a
20 bra. And for me, as well as those who carried soil with us, our clothes were torn, we did not
21 have anymore clothes, and we had to dry our clothes on the tree branches. And the clothes
22 was stained with a red colour as a result of the period."

23 Four point number four, I'd like to touch upon the activities of Mr. Khieu Samphân.

24 THE PRESIDENT:

25 Lead co-lawyer, you are 10 minutes overtime. How much time do you need?

1 MR. PICH:

2 Mr. President, I need three more minutes.

3 THE PRESIDENT:

4 You can proceed then.

5 [15.50.08]

6 MR. PICH:

7 Thank you, Mr. President.

8 In relation to my point number four, which is the last point, which is related to Khieu

9 Samphân's activities.

10 In Case 002/02, Khieu Samphân had not shown any remorse or a sympathy. He did not
11 provide full and sufficient answers to help civil parties with their suffering.

12 Khieu Samphân never took personal responsibility for the suffering of the people of
13 Cambodia. He blamed the lack of food and medicine on the United States and war, arguing
14 that the Khmer Rouge never deprived anyone of food or medicine as a form of punishment.
15 He never recognized the atrocities or any genocide committed against the people of
16 Cambodia, but instead, blamed it all on Vietnam and other parties.

17 [15.51.29]

18 On the rapes of the prosecution of minorities, he claims ignorance, and on security centre
19 and purges, he said nothing at all. In an interview, he unconvincingly said that he was
20 ignorant of the atrocities being committed under Democratic Kampuchea. He argued that
21 the Khmer Rouge only encouraged the people to work hard in order to restore the country
22 and that they never forced the people to work, and that the evacuation of the cities was not
23 a form of punishment.

24 Khieu Samphân's statements that he wanted to bow to the memory of all innocent victims
25 is not an indication of sincere remorse or sympathy. His remarks made it unclear when he

1 considered to be an innocent victim, and he further bows to the memory of especially
2 Khmer Rouge soldiers.

3 And these are the activities that led Cambodian people to suffer. So the activities by Khieu
4 Samphân does not deserve him to any leniency of a sentencing.

5 Thank you, Mr. President.

6 [15.53.30]

7 THE PRESIDENT:

8 Next, I'd like to invite the judges of the Bench to put questions to the party, if you have any.

9 JUDGE CLARK:

10 Mr. President, I have a very short question on a point of information, and this is directed to
11 the Prosecution.

12 Can I take it that it is now accepted that the apparent inclusion of rape in the sentencing
13 announcement was in error? Is it accepted that that was an error?

14 [15.54.26]

15 MS. HACKLER:

16 Thank you, Your Honour. Obviously, that's for you to determine as the Supreme Court
17 Chamber. Our position is if it is an error it still doesn't invalidate the judgment.

18 JUDGE CLARK:

19 I just wanted on a point of information. It sounds as if you're admitting it's an error but not a
20 serious error; that's for us to decide. But it sounds as if you're both admitting it shouldn't
21 (inaudible).

22 MS. HACKLER:

23 Your Honour, it's not clear that it was proven beyond a reasonable doubt in the judgment,
24 so under jurisprudence it may very well be an error. But like you said, it doesn't meet the
25 second branch of the appellate standard if it is an error, and of course that's for you to

1 determine.

2 [15.55.24]

3 JUDGE CLARK:

4 It goes beyond that. What the -- what the Defence said was that he wasn't even charged
5 with that offence. How could he be convicted or the offence considered if he hadn't even
6 been charged? That's really what I want to know. Was that the error?

7 MS. HACKLER:

8 Your Honour, the Supreme, or the Trial Chamber looked at that evidence only in relation to
9 conditions at the security centre. It was going toward the inhumane treatment at Kraing Ta
10 Chan and the brutality. And that's one of the factors that they have to consider in the
11 gravity assessment, and so that's how they used it.

12 But if you find that it is an error there is still plenty of other evidence that shows the extreme
13 gravity of the crimes.

14 [15.56.34]

15 JUDGE JAYASINGHE:

16 My question is, again, for the Co-Prosecutors. Would you say there is justification for
17 imposing a life sentence on a 90-year old man who has already been committed to life?

18 Because in various jurisdictions there are if I recall sentencing policies. One is as a
19 deterrent; secondly, for societal needs.

20 What will you say would (inaudible) motivated? I know that you can't answer the question,
21 but what is your understanding why leave the Trial Chamber to impose a life sentence on a
22 90-year old man who is already sentenced to life? Thank you.

23 MS. HACKLER:

24 Thank you, Your Honour.

25 The primary determination in sentencing is the gravity of the crimes and the culpable

1 conduct of the -- of the Accused, and in this situation, both were extreme, they were
2 substantial and significant. So I believe that was the primary consideration that the Trial
3 Chamber used in determining the life sentence.

4 [15.57.59]

5 And as the *Musema* appeal judgment states in paragraph 396, when you have extreme
6 gravity of the offences, and the sentence requires it, even when you have mitigating
7 circumstances you're not precluded from imposing a maximum sentence. So I believe
8 that's what guided the Chamber's determination.

9 THE PRESIDENT:

10 We do not have any more questions so we -- the Court is now adjourned and we will
11 resume tomorrow at 9:00 a.m.

12 [15.59.09]

13 The security guards are instructed to bring the Accused to the detention facility and return
14 him to the courtroom at 8:45 a.m. to continue the hearings.

15 The Court is now adjourned.

16 (Adjourns at 1559H)

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