



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

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ជាតិ សាសនា ព្រះមហាក្សត្រ

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Nation Religion King
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អង្គជំនុំជម្រះតុលាការកំពូល
Supreme Court Chamber
Chambre de la Cour suprême

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TRANSCRIPT OF APPEAL PROCEEDINGS

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Case File N° 002/19-09-2007-ECCC/SC

17 February 2016

Before the Judges: KONG Srim, Presiding
Chandra Nihal JAYASINGHE
Agnieszka KLONOWIECKA-MILART
MONG Monichariya
Florence N. MWACHANDE-MUMBA
SOM Sereyvuth
YA Narin

The Accused: NUON Chea
KHIEU Samphan

Lawyers for the Accused:
SON Arun
LIV Sovanna
KONG Sam Onn
Anta GUISSSE

Supreme Court Chamber Greffiers/Legal Officers:
Paolo LOBBA
Volker NERLICH
Sheila PAYLAN
PHAN Theoun
SEA Mao

Lawyers for the Civil Parties:
CHET Vanly
Marie GUIRAUD
HONG Kimsuon
LOR Chunthy
PICH Ang
TY Srinna
SIN Soworn
VEN Pov

For the Office of the Co-Prosecutors:
CHEA Leang
Vincent DE WILDE D'ESTMAEL
Nicholas KOUMJIAN
Dale LYSAK
SENG Bunkheang
SENG Leang
William SMITH
SONG Chorvoin
SREA Rattanak

For Court Management Section:
UCH Arun

List of Speakers:

Language used unless specified otherwise in the transcript

Speaker	Language
The GREFFIER	Khmer
Ms. GUISSÉ	French
Judge KLONOWIECKA-MILART	English
The President (KONG Srim)	Khmer
Mr. KOUMJIAN	English
Mr. LYSAK	English
Judge MWACHANDE-MUMBA	English
Judge SOM Sereyvuth	Khmer

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1 P R O C E E D I N G S

2 (Court opens at 0902H)

3 MR. PRESIDENT:

4 Please be seated.

5 Today, the Supreme Court Chamber continues our appeal hearing.

6 Greffier, please make a report of the attendance of the parties

7 and other individuals to today's proceedings.

8 [09.03.50]

9 THE GREFFIER:

10 Good morning, Mr. President. Good morning, Your Honours. And good

11 morning, everyone in and around the courtroom. I would like to

12 report the presence of the parties to the appeal proceeding.

13 On the Prosecution side, there are Madam Chea Leang and Mr.

14 Koumjian.

15 As for the accused -- as for the defence teams, we have defence

16 team for Khieu Samphan and Mr. Khieu Samphan himself. And Mr.

17 Nuon Chea, another accused, requests to follow the proceedings

18 remotely from the holding cell downstairs.

19 The defence team for Nuon Chea include the national counsel, Son

20 Arun. However, the international counsel, Victor Koppe, is

21 absent.

22 For Khieu Samphan's defence, we have Kong Sam Onn, the national

23 counsel, and Madam Anta Guisse, the international counsel.

24 [09.05.02]

25 We also have Lead Co-Lawyers for civil parties, including Pich

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1 Ang and Marie Guiraud.

2 We also have 14 civil parties present in the courtroom, including
3 Madam Huo Chantha, Mr. Chhim Morn, Mr. Seang Chan, Mr. Chhom Hun
4 alias Peou, Madam Khouy Muoy, Madam Hem Savann, Mr. Sen Sophon,
5 Madam Chao Lang, Mr. Man Sles, Mr. Chau Khim, Madam Suh Nas,
6 Madam Khuth Voeurn, Mr. Nguon Eng alias Ath, and lastly, Mr. Em
7 Oeun.

8 Thank you.

9 [09.05.56]

10 MR. PRESIDENT:

11 Thank you, greffier.

12 One of the Accused waives his right to be present in the
13 courtroom, and the waiver is attached with the medical
14 certificate stating that the Accused has back ache and cannot sit
15 in a courtroom. For that reason, the Supreme Court Chamber grants
16 the request of the Accused so that he can follow today's
17 proceedings remotely from the holding cell downstairs.

18 The AV Unit personnel are instructed to link the proceedings to
19 the room downstairs so that the Accused can follow.

20 We are now moving into the third thematic session regarding the
21 appeal hearing, and the third thematic session is on the grounds
22 of appeal related to the crimes for which the Accused were
23 convicted.

24 And I'd like to hand the floor now to the co-rapporteurs to
25 present the reports.

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1 [09.07.16]

2 JUDGE MWACHANDE-MUMBA:

3 Thank you, Mr. President.

4 The report on grounds of appeal related to the crimes for which
5 the Accused were convicted.

6 The Trial Chamber found that Nuon Chea and Khieu Samphan
7 committed a number of crimes.

8 MR. PRESIDENT:

9 (No interpretation)

10 MR. KOUMJIAN:

11 Mr. President, I believe there's a problem on the English
12 channel. We're getting the Khmer instead of getting the English,
13 and maybe the channels are mixed up.

14 So I apologize for the interruption, but the translation was not
15 coming through.

16 [09.07.55]

17 JUDGE MWACHANDE-MUMBA:

18 Maybe we can now start.

19 The report on grounds of appeal related to the crimes for which
20 the Accused were convicted.

21 The Trial Chamber found Nuon Chea and Khieu Samphan committed a
22 number of crimes against humanity in the course of population
23 movements phases one and two, and at Tuol Po Chrey.

24 In particular, Nuon Chea and Khieu Samphan were convicted of
25 murder, extermination, persecution on political grounds and other

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1 inhumane acts encompassing forced transfers, attacks against
2 human dignity and enforced disappearances.

3 [09.06.41]

4 The two Accused challenged their convictions for all these
5 crimes, raising both legal and factual errors. Their arguments
6 may be summarized as follows.

7 First, it is argued that the Trial Chamber erred in relation to
8 the so-called contextual element of crimes against humanity. The
9 Accused maintain that the Trial Chamber was incorrect in deciding
10 not to require that the crimes in question be linked to an armed
11 conflict or to a state policy.

12 The Accused also submit that the existence of a discriminatory
13 attack against a civilian population has not been established
14 given that the only individuals who were discriminated against
15 were Khmer Republic soldiers and, as such, not civilians.

16 Another argument of general nature challenges the foreseeability
17 of the crimes and modes of liability.

18 [09.09.45]

19 Second, Nuon Chea and Khieu Samphan raised several arguments
20 regarding the legal definition of the crime against humanity of
21 murder and the Trial Chamber's factual findings in this regard,
22 including whether it has been established beyond reasonable doubt
23 that murder was committed during phase one of the population
24 movement and at Tuol Po Chrey.

25 Related thereto are a group of arguments that challenge the Trial

1 Chamber's definition of the crime of extermination and the
2 relevant factual findings, including that death on a massive
3 scale occurred during phase one and two of the population
4 movements.

5 Third, in relation to the crime of persecution on political
6 grounds, Nuon Chea and Khieu Samphan argue that the Trial
7 Chamber's definition of the crime of persecution was flawed, both
8 in respect of its actus reus and mens rea.

9 [09.10.47]

10 Contrary to the Trial Chamber's finding, they alleged that New
11 People did not constitute a political group that could be victims
12 of persecution and that the Trial Chamber made various factual
13 errors when finding that political persecution had occurred
14 during the population movements and events at Tuol Po Chrey.

15 Fourth, Nuon Chea and Khieu Samphan raised arguments relating to
16 the crime against humanity or other inhumane acts which,
17 according to the Trial Chamber, comprised forced transfer,
18 enforced disappearances and attacks against human dignity.

19 In respect of forced transfer, the Accused challenge the Trial
20 Chamber's approach, which is said to have failed to analyze
21 whether, in the specific circumstances, the movement of the
22 population amounted to an inhumane act.

23 They also submit that, at the time of the charges, the transfer
24 of people within an unoccupied country was not unlawful and did
25 not attract criminal sanctions.

6

1 [09.11.58]

2 In addition, the decision to evacuate Phnom Penh was taken in
3 light of security threats from foreign powers and Khmer Republic
4 soldiers as well as food shortages in the city.

5 With regard to enforced disappearances, it is submitted that such
6 acts were not criminalized at the time of the facts and that, in
7 any event, there was insufficient evidence that the enforced
8 disappearances occurred during phase two of the population
9 movement, in particular since the Trial Chamber relied on facts
10 that were actually outside the scope of Case 002/01.

11 In respect of attacks against human dignity, Nuon Chea submits
12 that the Trial Chamber's factual conclusions regarding attacks
13 against human dignity that occurred during phases one and two of
14 the population movements were not based on the evidence and were
15 exaggerated.

16 This concludes the report on this aspect of the pending appeals
17 by Nuon Chea and Khieu Samphan. Thank you, Mr. President.

18 MR. PRESIDENT:

19 I would like now to hand the floor to the defence team for Khieu
20 Samphan to present their submission. You have 35 minutes.

21 [09.13.34]

22 MS. GUISSÉ:

23 Thank you, Mr. President. Good morning, first of all.

24 Yesterday, we talked about the issue of the rules of a fair trial
25 and the bias and partial approach to evidence adopted by the

1 Trial Chamber. However, this biased general approach does not
2 reflect the facts of the case, and it is also found in the legal
3 analysis of the Chamber.

4 Again, the partiality of the Chamber in the analysis of the
5 crimes violates the rules of a fair trial, which is the very
6 basis of a criminal trial.

7 Then we have the problem of the manipulation of the facts, the
8 manipulation of law. And in criminal law, if there is doubt, it
9 must always benefit the accused.

10 [09.14.50]

11 And the original sin committed is with regard to the law
12 applicable in 1975. We looked at the temporal jurisdiction of the
13 tribunal which sets the rules -- the body of rules applicable at
14 trial. It is true that the temptation is great when the accused
15 are tried long after the effects when you try to apply new legal
16 concepts and, furthermore, when you want to convict someone in
17 light of the rules that existed at the time of the events, you
18 have to be very careful.

19 So the only standards applicable were those that existed in -- on
20 the 17th of April 1975.

21 And what does the law in 1975 tell us regarding the chapeau
22 elements of crimes against humanity?

23 The law in 1975 provided that there must be a link with armed
24 conflict -- paragraphs 52 to 54 of our appeal brief. And the
25 crimes must be committed as part of a state policy.

8

1 In customary international law as defined -- as it existed in
2 1975 and the definition of crimes against humanity demanded that
3 there should be a link with crimes against peace and crimes
4 against humanity, and there must potentially be a link with armed
5 conflict.

6 [09.16.32]

7 Your question, as it was posed, calls for initial consideration.
8 If we demand a link with crimes against humanity, the demands of
9 crime against peace or war crimes, according to the definitions
10 that existed in 1975, as far as we are concerned, the answer is
11 obvious. There is necessarily a link with a state of
12 belligerence, whether we call it war crimes or crimes against
13 peace or armed conflict. As far as we are concerned, there is a
14 state of belligerence.

15 And I refer to Article 6 of the Nuremberg statute in which the
16 war crimes and crimes against peace are linked, and there is a
17 link with an armed conflict and is the issue of potential
18 opposition.

19 With regard to the link with armed conflicts, there is no
20 opposition as far as we are concerned.

21 The link that flows from this -- the question that flows from
22 this is whether the link with armed conflict is a condition for
23 the characterization of crimes against peace in 1975, and the
24 answer, of course, is yes.

25 [09.17.48]

1 We are not the only ones who hold this view. The Pre-Trial
2 Chamber also stated, and I refer you to the decision D427/1/30,
3 paragraphs 306 to 311.

4 And you, yourselves, ruled in your Duch Appeal Judgment at
5 paragraphs 72 to 76:

6 "The nexus with armed conflict was part and parcel of the
7 definition of crimes against humanity."

8 I refer to this because may I remind the Supreme Court Chamber
9 that the crimes of Nuremberg were defined by the Nuremberg
10 Commission, what does a Prosecution say. There is no link with an
11 armed conflict.

12 Furthermore, we have Law No. 10 of the Advisory Council which
13 states the contrary.

14 Law No. 10 of the Advisory Council applies only to German
15 territory under the control of the Allies at the time, and it is
16 therefore a law which was an instrument of internal procedures.
17 Furthermore, this is something that is limited to national law or
18 domestic law. And when we look at the statutes of the Tokyo
19 Tribunal, they retain the Nuremberg definition as it stemmed from
20 the Nuremberg case law -- that is, the necessary nexus with armed
21 conflicts. And I also refer the Chamber to the case law which the
22 Co-Prosecutors did not mention when they referred to the
23 Nuremberg jurisprudence.

24 [09.19.55]

25 What does the Flick case law say? I will have to quote that case

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1 law in English, my approximate English. So it is a 1946 judgment,
2 and this is what it states:

3 "In all of this chartering legislation is the purpose to provide
4 for fit punishment of crimes committed during the war or in
5 connection with the war. We look in vain for language evincing
6 any other purpose. Crimes committed before the war and having no
7 connection therewith were not in contemplation." End of quote.

8 So in 1947, the Flick case law says the contrary of what the
9 prosecutor stated.

10 [09.20.50]

11 And then we have the issue of what happened between 1946 and '75.
12 That is the range given by the International Law Commission. From
13 1946 to 1975, there is no clear or uniform definition.

14 And I would also refer you to the findings of the Pre-Trial
15 Chamber, which rightly applied the jurisprudence of the
16 International Court of Justice on -- in the case of the right to
17 asylum.

18 It points out that the Court is so lacking in consistency in the
19 succession of conventional text ratified by certain states and
20 rejected by others that it is not possible to come up with a
21 consistent and uniform jurisprudence in the law. So we see that
22 there is no clear or uniform definition and so cannot say, as the
23 Chamber stated, that there was no nexus with armed conflict.

24 And I would like to follow this up with one of the sources
25 provided by the Prosecution.

11

1 [09.22.14]

2 The Co-Prosecutors presented to us an obscure decision of the
3 15th century and it is a matter that we will talk about later.
4 And it's stated that in the 15th century, there was no need for
5 the link with an armed conflict, and they cited an article by
6 Guenael Mettraux and they said that in the Von Hagenbach case, it
7 was a crime against humanity, against -- contrary to all
8 doctrines.

9 We've provided the documents that we presented yesterday, and we
10 provided a commentary on this same decision by Von Hagenbach in
11 which Mr. William Schabas talks of war crimes.

12 So according to him, there is, indeed, a nexus with an armed
13 conflict in this hypothesis. However, if we look at the situation
14 in modern times, Judge Meron of the ICTY in a book he wrote and
15 published in 1994, it talks of the evolution of international law
16 during that period, and he says the following. And I quote again
17 in English:

18 "Now in the work of the International Law Commission can one find
19 a consistent position on the nexus requirement."

20 [09.23.44]

21 It is therefore wrong that, in the face of such doubt and such
22 interpretations that vary on this particular point that the
23 Chamber concluded that the nexus was not called for in 1975.
24 And when I say that there was a doubt and that the Chamber
25 reached that finding wrongly, it is because I am recalling this

1 general principle of criminal law, that doubt must always benefit
2 the accused, including in the interpretation of law. I will talk
3 about this issue in dubio pro reo.

4 [09.24.32]

5 On the second point made by the Co-Prosecutors, I will respond by
6 saying that since they supported another error by the Chamber in
7 saying that there was no need for a state policy to establish the
8 existence of crimes against humanity, we would say the contrary.
9 And I would refer you to paragraphs 55 to 58 of our appeal brief.
10 And the Co-Prosecutors tried to corroborate the error of the
11 Chamber using several arguments.

12 One of their paragraphs, paragraph 129 of their response, is that
13 the principle in dubio pro reo would apply only to the
14 observation of facts, and not to the interpretation of rules of
15 international law.

16 This assertion is false, completely false, and we reiterated this
17 in our appeal brief. And I refer you to the relevant paragraph.

18 [09.25.32]

19 The Pre-Trial Chamber also recalled in decision D427/2/15,
20 paragraph 144, and if in the case law we have cited, the
21 Co-Prosecutors talk about an isolated Stakic judgment, the
22 prosecutor also cites the Renzaho appeal decision. And this
23 appeal decision says the contrary of what the prosecutor is
24 saying because in paragraph 474 of that appeal decision, and I
25 quote what is stated:

1 "The in dubio pro reo principle envisages that every doubt must
2 be resolved in favour of the accused. The Appeals Chamber wishes
3 to point out that this principle, which is a corollary of the
4 presumption of innocence and the burden of proof beyond
5 reasonable doubt, applies to conclusion or findings that would
6 lead to a conviction like that which establishes the elements of
7 the crimes at bar." This is very clear

8 [09.26.47]

9 Another inaccuracy as regards the discussions that took place
10 with regard to this nexus as to whether it's necessary or not in
11 customary international law, one of the arguments of the
12 Co-Prosecutor is that the Rome Statute does not state
13 international law since we've explained the evolution of the
14 nexus. And the prosecutor says that the Rome Statute does not
15 spell out international customary law because it would be an
16 agreement negotiated between state parties. And to support this
17 opinion or this point, it relies on a dissenting opinion and
18 refers us to Article 10 of the statute.

19 The first remark is that we observe the reversal in the position
20 of the Co-Prosecutors since, to date, they are telling us that an
21 agreement negotiated between states does not allow for the
22 establishment in international customary law but, at the same
23 time, when we have to discuss the nexus between armed conflicts
24 and crimes against humanity, the same prosecutors have no problem
25 in arguing that treaties between state parties don't have

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1 anything to do with the issue and they're signed by a restricted
2 circle of states that constitute international customary law.

3 [09.28.40]

4 The second criticism advanced is that since you say that that law
5 was only applicable in 1975 that can be discussed today, why
6 would you take the example of the Rome statute?

7 Let me make it clear that we are not saying that this statute of
8 Rome which is applicable -- the only thing we say in our
9 arguments is that the pre-condition for a state policy in the
10 definition of crimes against humanity existed before 1975, and
11 that it still exists today in the Rome Statute. That is the only
12 argument we advanced.

13 Another inaccuracy coming from the Prosecution, we are told that
14 the state policy was only there to found the widespread and
15 systematic nature of the attack. Here again, given the time that
16 I have, I will refer you to paragraph 55 to 58 of our appeal
17 brief, and I will refer you as well to paragraph 180 of the
18 Judgment in which the Chamber does not hide behind the fact that
19 there were several interpretations and that it chose -- and that
20 it chooses the interpretation that is the least favourable to the
21 accused. So there is no application of the in dubio pro reo
22 principle.

23 [09.30.03]

24 Fourth point, a faulty reading of jurisprudence of the Nuremberg
25 Tribunal because we should recall that in the jurisprudence that

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1 they provide themselves, it is their new source, document number
2 5, authority 3, if I understood properly, in the U.S. v.
3 Altstoetter case of 5 March 1947, and I quote once again here:
4 "As we construe it, that section provides for punishment of
5 crimes committed against German nationals only once there is
6 proof of conscious participation in systematic, government
7 organized or approved procedures amounting to atrocity and
8 offences of the kind specified in the Act and committed against
9 populations are amounting to persecutions on political, racial or
10 religious grounds."

11 I apologize for my pronunciation, for my accent.

12 So "government organized". I'm not saying it. That is said by the
13 jurisprudence, the jurisprudence that is quoted by the
14 Co-Prosecutors.

15 [09.31.30]

16 Another criterion that we should retain with regard to crimes
17 against humanity is the notion of an attack targeted at a
18 civilian population. On top of the two conditions of the nexus
19 and of the existence of a policy, law says that crimes must be
20 committed against a civilian population, which leads me to answer
21 your question -- which leads me to answer the second question
22 that you put in the preparation of this hearing regarding the
23 notion of soldiers who are hors combat.

24 Your question is the following. Insofar that, according to the
25 Trial Chamber, crimes were allegedly committed against soldiers

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1 who were hors combat from the Khmer Republic, were these crimes
2 committed in the context of an attack directed towards a civilian
3 population? That is the question.

4 So we can understand in your question that you analyzed the
5 Judgment as having concluded that, as of 17 April 1975, crimes
6 were committed specifically against soldiers of the former Khmer
7 Republic that were characterized as hors combat in the sense of
8 the Geneva Convention.

9 [09.32.41]

10 However, under this hypothesis, there's one point that we must
11 strength -- that we must stress. There is one clear obstacle. We
12 can only speak about hors combat soldiers when we are speaking
13 about a conflict that is in the process; that is ongoing. So if
14 the attack targeted soldiers who were hors combat, we cannot
15 speak about an attack against a civilian population, logically.
16 And by the way, jurisprudence such as quoted or used by the
17 Co-Prosecutors says the same thing, and I'd like to refer you to
18 the Martić appeal judgment, paragraph 311 and paragraph 313 where
19 it is said, basically speaking, that the presence of victims who
20 are hors combat removes nothing from the civilian characteristic
21 of the targeted population under the condition that the attack
22 was directed towards civilians and not towards hors combat
23 soldiers.

24 And the difficulty -- the specific difficulty in this Judgment is
25 that the Judgment is completely muddled with regard to this

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1 issue, and this is why your question is legitimate because in
2 paragraph 194 of the Judgment, which is -- characterizes the
3 confusion here, it is said the following:

4 "The conflict between the Khmer Republic and the Khmer Rouge
5 movement took -- ended on 17 April 1975 with the capture of Phnom
6 Penh."

7 [09.34.30]

8 And further on, it says:

9 "After that date, all soldiers from the Khmer Republic who were
10 not participating directly in the fighting had to be considered
11 as civilians or at least as people who were hors combat and,
12 therefore, they were to benefit from the same guarantees as
13 civilian people."

14 And here, this is illogical. This reasoning is illogical because,
15 as I said earlier, when a conflict ends, there's no longer any
16 fighting and we can no longer speak about people who are hors
17 combat or who are in combat.

18 So second, and this is where we see that the confusion is even
19 worse and where we see that the Chamber's -- the Trial Chamber's
20 position, legally speaking, is even more wavering because if the
21 hors combat soldiers benefit from the same guarantees as
22 civilians, as the Chamber states, it is only when crimes are
23 specifically committed against them that this applies. And here
24 we're speaking about the protection guaranteed by the Geneva
25 Conventions.

18

1 [09.35.22]

2 So we have two positions here that are contradictory that the
3 Chamber, in the articulation of its Judgment, did not settle, but
4 we have to be clear about this. Either we have hors combat
5 soldiers who are collateral victims or they are targeted by a
6 specific policy.

7 And if we can speak about hors combat, we're still, in that case,
8 speaking about an armed conflict. Otherwise, they are just simply
9 former soldiers.

10 And here again, it's important because we can't, at the same
11 time, say that the civilian population was the target of the
12 attack and that the ex-soldiers of the Khmer Republic are
13 collateral victims and accidental victims and, at the same time,
14 sustain that there was a specific policy against the former
15 soldiers of the Khmer Republic and convict Khieu Samphan on that
16 basis.

17 [09.36.20]

18 And the Chamber's erroneous reasoning culminates in paragraph 515
19 -- 510 and 554 of its Judgment because we are told here that, a
20 few days after the 17th of April 1975, apparently there were
21 Khmer Rouge troops who searched Phnom Penh and who found Lon Nol
22 soldiers. So if we're after 17 April 1975, we're speaking about
23 former Lon Nol soldiers. And here, I'm not even speaking about
24 the problems of fact.

25 But in any case, here it is also said that we cannot consider

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1 that the deaths resulting from these search missions cannot be
2 considered murders because these people were in a combat
3 situation. That's paragraph 510 of the Judgment.

4 So once again, there is a problem of legal logic here. If we're
5 talking about the period after 17 April 1975 and, therefore, no
6 longer within an armed conflict, so there is no longer any nexus
7 and, therefore, it's impossible to characterize the murders of
8 the ex-soldiers of the Khmer Republic as crimes against humanity
9 or the Chamber decided that the conflict was continuing beyond
10 and then this should be based on clear evidence and, in that
11 case, we can say that all soldiers of the Khmer Republic were
12 considered as fighting in combat or hors combat, and here we're
13 no longer speaking about crimes against humanity. Here, we're
14 speaking about the application of the Geneva Convention.

15 [09.37.55]

16 So that was the point for me to answer your question, and this is
17 Khieu Samphan's defence's position with regard to this point.

18 Then there is the issue of crimes of murder and extermination.

19 And here, I would like to get back to what I was explaining to
20 you yesterday regarding the Chamber's construction of facts and
21 of the law in order to convict because the problem during this
22 entire trial with regard to the modes of liability is that each
23 time we speak about the constitutive elements, we have the actus
24 reus and the mens rea, so careful.

25 [09.38.29]

20

1 And since we have a hard time finding a direct intention -- a
2 direct intent to kill on the part of Khieu Samphan in the
3 evidence that is available to him, the Chamber is going to lower
4 the threshold and the Chamber's going to say it's no point to say
5 that there was an intent. No. This accidental recklessness is
6 enough.

7 But accidental recklessness is not sufficient, and this brings us
8 to answer the Co-Prosecutors with regard to the issue of
9 extermination.

10 And here, it's true that they did not -- I did not see that, in
11 terms of extermination, possible recklessness was something that
12 could be considered in 1975. So of course we can refer to
13 jurisprudence from the ad hoc tribunals and -- but these
14 tribunals happened way after and we cannot say that this possible
15 form of recklessness existed in 1975, so I do not tell you how
16 possible recklessness can exist with regard to extermination.

17 [09.39.32]

18 In any case, here we're speaking about jurisprudence from ad hoc
19 tribunals that happened afterwards.

20 Then the Co-Prosecutors also interpret in a new way the Celebici
21 appeal judgment. And here, they refer us to paragraph 420 and 439
22 of this judgment except that here, once again, there is confusion
23 between actus reus and mens rea.

24 In Celebici, it is never said and there is no mention of possible
25 recklessness, which is defined as the perpetrator's knowledge

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1 that his actions could lead to these incidents. This is not what
2 the Chamber supported by using mens rea at a lower level.
3 And in order to remind the facts in the Celebici case, we should
4 remind you that this was a detention camp in which the prisoners
5 were victims of torture, rape, etc., and the only guilty intent
6 in this case was the direct intent or indirect intent -- I do not
7 see how there can be any possible recklessness here. And I see
8 this even less so because these facts should be compared to the
9 S-21 facts that were tried in the Duch case and that will be
10 tried again in 002/02, so I do not believe here that the
11 Co-Prosecutors support that there is possible recklessness in
12 these facts supporting the intent of the guards at S-21.
13 [09.41.23]
14 Now I would like to come up to address your third question
15 regarding the segment.
16 You are asking -- you are saying that in order to convict an
17 accused of the crime of extermination, including the crime of
18 murder, the Trial Chamber -- should the Trial Chamber have the
19 "intime conviction" that each one of the crimes were perpetrated
20 or otherwise, should it have the "intime conviction" in view of
21 the evidence that voluntary murders were committed.
22 And your question such as it is formulated raises issues.
23 First of all, the question of the review of the evidence and
24 then, in both cases, in any case, we have to speak about all of
25 the evidence and then there is the problem raised by the issue of

1 what encompasses -- what is encompassed in crimes of murder.

2 [09.42.16]

3 And the "intime conviction" on -- regarding the commission of
4 homicides is interesting in our trial because of -- in particular
5 with regard to population movement two, no characterization of
6 murder was retained by the OCIJ nor by the Chamber for DP II,
7 population movement two. And that's why the Chamber refers to it
8 or relies on its "intime conviction".

9 And the problem here is that the factual findings, of course, are
10 erroneous. There's a problem of absence of corroboration,
11 distorted evidence. That was an -- that is an important point.
12 But despite anything in the population movement one, the Chamber
13 tried to establish the existence of isolated murders because it
14 was necessary at least to determine the fact that they were --
15 that murders apparently happened. But this is not the case when
16 we speak about population movement two in which no murder was
17 debated in the Judgment.

18 [09.43.28]

19 So what is the state of jurisprudence to retain extermination
20 without including murder?

21 We would like to refer you to the Krajišnik judgment of 2006
22 before the ICTY regarding the way -- or regarding the reasoning
23 the Chamber followed in this case. And the point here is to
24 examine things in an extremely minutious (sic) and careful way
25 and to demonstrate in depth the reality of each one of the

1 committed murders. And it is the contrary of what's happening in
2 the Judgment in paragraph 575 and 657 where they're speaking in
3 general terms, where there's a vague chronology and where there
4 are many, many inaccuracies regarding the alleged locations of
5 the crimes.

6 The process has to be rigorous, once again, when we adopt this
7 process of -- once we rely on your "intime conviction" with
8 regard to facts that apparently happened. And Bagosora also
9 follows another rigorous approach where -- in which the crimes of
10 murder and extermination have to be proven when crimes were
11 committed on different -- in different locations.

12 [09.44.46]

13 And the prior characterization for murder that is necessary -- is
14 necessary in order to later on speak about its massive nature.

15 So this is here or -- well, here I am answering your question
16 very briefly speaking because I feel that my time is soon going
17 to run out.

18 I would like to recall the errors in the Judgment that show the
19 total absence of rigour with regard to population movement one --
20 population movement two in order to charge Khieu Samphan only for
21 extermination without regarding murder and regarding the absence
22 of evidence of murder and extermination in population movement
23 one and Tuol Po Chrey, and extermination for population movement
24 two.

25 More generally speaking, it is -- what's missing is the evidence

24

1 of all of these crimes, and here I will refer you to our appeal
2 brief.

3 And finally speaking, and especially -- and this is the crucial
4 point -- the inability to make a nexus through tangible evidence
5 between the crimes and the accused person.

6 [09.46.04]

7 In any case, I was speaking about the ICC jurisprudence, and you
8 distorted the evidence regarding population movement one,
9 population movement two and Tuol Po Chrey. And I would like to
10 refer you to paragraph 343 to 373 of our appeal brief for
11 population movement one and 401 to 406 for Tuol Po Chrey, and 451
12 and 521 for population movement two.

13 And now, regarding the issue of population movements one, I have
14 a few remarks and, in particular, issues, issues regarding the
15 factual findings of the Chamber.

16 In paragraph 553 to 559 of the Judgment, the Chamber finds that
17 the people who were shot or who died because of the conditions
18 can be characterized as murders, and it identifies three groups
19 here as well as victims, the former leaders of the Khmer
20 Republic, the former officials and soldiers of the Khmer
21 Republic, and the other civilians or people who resisted the
22 population movements.

23 [09.47.30]

24 The -- when I speak about the former leaders of the Khmer
25 Republic, we're speaking about the seven people, the famous seven

1 traitors who have been designated in various speeches.

2 And here, the Chamber examines these murders in an individual
3 manner. And the problem here is that, in paragraph 559 in the
4 Judgment, this is what the Chamber says regarding the
5 disappearance of the former officials of the Khmer Republic. The
6 Chamber says in -- consequently, the Chamber says that the demise
7 of the victims who were shot during the evacuation of Phnom Penh
8 or who died in -- because of the conditions that were imposed
9 upon them represent or can be characterized as a murder.

10 So here we're speaking about two hypotheses, two people who were
11 shot or people who died because of the conditions of the
12 transfer.

13 [09.48.18]

14 The problem here is that the Chamber never established that the
15 execution of the former senior leaders of the Khmer Republic in
16 Phnom Penh had happened -- that they had been shot to death. On
17 the contrary, they -- it's only one element of evidence that
18 eventually describes the fate that was meted out to these former
19 leaders of the Khmer Republic. It is in footnote 1510 under
20 paragraph 503 of the Judgment in which it -- Alan Rockoff is
21 mentioned. And Rockoff says from hearsay that he learnt about the
22 death of these former officials and soldiers of the Khmer
23 Republic and that had been brought to the sports stadium, where
24 they were clubbed to death.

25 [09.49.08]

26

1 So what the Chamber says in paragraph 559 does not correspond to
2 the evidence that is put forth and on which it relies.

3 And because of its negligence, the Chamber excludes the demise of
4 these high -- of these senior officials as falling under the
5 category of murder.

6 So, very, very briefly, there is no evidence showing that there
7 was an order to kill in population movement one. And here, I'd
8 like to refer you to the -- our discussion about the different
9 zones and when we said that sometimes the orders received in one
10 zone to another were different.

11 [09.49.47]

12 And in any case, we have a multitude of witnesses who testified
13 before the Chamber to say that there was never an order to kill
14 and so, therefore, we cannot use these elements to prove that
15 there was extermination.

16 Another element -- and I'm obliged here to go fast. I'm sorry.

17 And I'd like to refer you as well to our appeal brief regarding
18 this point. But Tuol Po Chrey is the proof of an absolute lack
19 and deficiency of evidence because here we have no eyewitness of
20 the alleged executions at Tuol Po Chrey.

21 There is no body linked to these facts and no witness who came
22 closer than a few kilometres from Tuol Po Chrey, so the Chamber,
23 however, is going to use these elements -- these deductive
24 elements, I must say, by speaking about trucks circulating or
25 whatever without having any of the witnesses speak about what

1 really happened there.

2 [09.50.47]

3 JUDGE KLONOWIECKA-MILART:

4 We quickly decided that if you're in need of additional 10
5 minutes, we will extend it over all the parties to the hearing if
6 they so need. So you can slow down and the translator perhaps
7 will follow with greater ease.

8 MS. GUISSÉ:

9 Indeed, Your Honour, and Mr. President, with your leave, I will
10 ask you for a few extra minutes. I think that 10 minutes, indeed,
11 will be enough.

12 It's true that it's a bit more technical here, and if I go at the
13 same speed as yesterday, it's going to be very, very difficult in
14 order to understand me. So with your leave, I will ask for 10
15 extra minutes, Mr. President.

16 Thank you, Mr. President. I see that you accept my request.

17 So a few points regarding other crimes and other criticisms that
18 we leveled:

19 [09.51.52]

20 The issue of forced disappearances: The Chamber concluded that
21 the crime of forced disappearance was part or occurred during
22 population movement two, and our grievances regarding this error
23 are the following.

24 First, the Chamber did not demonstrate of any specific refusal to
25 deliver information regarding the people who had disappeared, and

1 this is a necessary condition. And here, I'd like to refer you to
2 paragraphs 475 and 477 of the Judgment.

3 And then the Chamber deems or judged facts violating the
4 Severance Order. The Chamber came up with its Severance Order and
5 which it followed and which we note later on, or we could have
6 noted this during the -- the proceedings was not practical, but
7 there is here a violation of the temporal scope and of the scope
8 that it followed in 002/01 because in order to speak about these
9 facts of forced disappearance, it is speaking about life in the
10 cooperatives.

11 But life in the cooperatives are elements that we're discussing
12 right now in Case 002/02, so this -- these are our two
13 grievances.

14 [09.53.02]

15 The Co-Prosecutor's answer regarding the violation of the
16 Severance Order is to say that it would be illogical and
17 arbitrary to exclude the disappearance for the simple reason that
18 the disappearance occurred when people arrived in the
19 cooperatives. I accept that it's illogical because the Severance
20 Order was illogical, of course.

21 However, the Chamber is bound to the Severance Order, and the
22 Chamber, therefore, could not go look for facts that we haven't
23 yet examined to convict -- to convict.

24 We cannot use factual elements that are going to be examined in
25 the future to convict in the first case.

1 And what is arbitrary here for us is to deem that we can go from
2 here to there before -- after 1975, before 1975, after 1979
3 outside of the scope of the trial, outside of the scope of the
4 Severance Order simply because it suits us in order to convict
5 the accused. That is not law.

6 [09.54.04]

7 And finally, this would mean that Khieu Samphan would be
8 convicted in Case 002/01 on the basis of these facts and would be
9 convicted again on the same facts in Case 002/02, non bis in
10 idem, once again, another principle that is trampled underfoot if
11 we follow the Chamber's logic.

12 Now, regarding the issue of the absence of deliberate refusal to
13 provide information regarding people who disappeared in the
14 context of the material elements of the actus reus in the crimes
15 of forced disappearance, what do the Co-Prosecutors say?

16 The Co-Prosecutors say that, regarding the context of terror of
17 Democratic Kampuchea, "It was absurd to condition the existence
18 of disappearance to the evidence that such information had been
19 explicitly requested." End of quote.

20 So what the Co-Prosecutors are telling us is that we can change,
21 of course, they're telling us, the actus reus of a crime because
22 it's easier for us to prove it.

23 [09.55.08]

24 Here, once again, this cannot work. There -- we have to follow
25 the law, *dura lex, sed lex*.

30

1 Now, regarding the absence of mens rea, once again, if we
2 continue with this reasoning from the Co-Prosecutors, we are told
3 -- the Co-Prosecutors tell us as well that it would be even more
4 so unreasonable to believe that false information could have been
5 given at such a scale without having the intent to deceive.
6 So here, we're saying that we have no material elements to tell
7 you that there was this desire or will to deceive. We have -- we
8 do not have enough evidence to establish the mens rea, but
9 however, if possibly in -- if - here we're speaking about legal
10 fiction. Do we have the elements, yes or not, in order to speak
11 about forced disappearance? Is the actus reus there? Is the mens
12 rea there? If that's not the case, well, then, we have to acquit
13 the defendant regarding these points.

14 [09.56.15]

15 Now, regarding the political motives for population movement one,
16 we'd like to refer you, given the time that we have, to paragraph
17 365 to 368 of our appeal brief. We should recall regarding the
18 issue of the former soldiers of the Khmer Republic what I said
19 earlier, that is to say that there cannot be persecution against
20 former soldiers of the Khmer Republic if we do not demonstrate
21 that there were specific measures that were designed against
22 them. That is clear evidence.

23 Now, regarding the forced population transfer two, we are told --
24 they tell us about crimes of persecution vis-à-vis what the
25 Chamber and the Prosecution usually call the New People.

31

1 And here, it's interesting to note that -- and I was speaking
2 about forced population transfer two, but however, I'd like to
3 speak about phase one as well.

4 If we are speaking about the absence of a group that's
5 sufficiently identifiable, if we're speaking about the absence of
6 actus reus regarding the crime of persecution because the group
7 is not sufficiently identifiable, then we have to acquit.

8 [09.57.32]

9 And an important element we should recall is that the word
10 itself, "New People", or the expression itself, "New People",
11 most people in -- in most cases, people did not use that
12 expression. They spoke about the 17 April People, the 17 April
13 People, who, by definition, could not exist before 17 April. So
14 this is also an extremely important element to note.

15 And we cannot speak about discrimination that apparently was
16 devised before the evacuation of Phnom Penh and regarding
17 population movement one or that was linked to life in the
18 cooperatives, which is outside of the scope of 002/01 and which
19 will only be examined in 002/02.

20 So I will conclude by saying that here, once again, regarding the
21 way that the law and the crimes were dealt with by the Chamber,
22 we can see that the reasoning was fabricated to arrive at a
23 conviction.

24 [09.58.34]

25 The Chamber's mistakes are not innocent. There's a reason. Why do

32

1 we have to lower the mens rea? Because there's not enough
2 evidence to attribute mens rea constituted above these crimes to
3 Khieu Samphan, so they go look for posterior jurisprudence in
4 order to apply this crime to Khieu Samphan. We will see that, in
5 the -- that the same logic was followed with regard to liability
6 that was applied by the Chamber and that we condemn and that we
7 ask you to reject.

8 MR. PRESIDENT:

9 You can proceed now, Co-Prosecutors.

10 MR. KOUMJIAN:

11 Mr. President, Your Honours, thank you.

12 I will start by trying to address the three questions that Your
13 Honours posed for this section of the appeal hearings, and a
14 little apology to the members of the audience. These are very
15 complex and important legal questions and, by necessity, the
16 answers will have to go into some complexity and jurisprudence
17 from cases around the world and over a great period of time. So--

18 [10.00.00]

19 JUDGE KLONOWIECKA-MILART:

20 Thank you, Mr. Prosecutor. The audience will be surely a grateful
21 audience at the press briefing after the hearing. We'd really
22 appreciate it if you'd treat us as your main audience.

23 MR. KOUMJIAN:

24 Of course.

25 Your Honours, the first question that Your Honours posed was

1 about customary international law in 1975, whether the definition
2 of crimes against humanity required a nexus to a crime against
3 peace or a war crime as opposed to an armed conflict.

4 Now, it appears to us that the question comes at least partly
5 from the Charter for the International Military Tribunal at
6 Nuremberg, in particular, Article 6 which defined the crimes that
7 were under the jurisdiction of that Tribunal.

8 [10.00.56]

9 What's important is to look at the statute, the Charter of that
10 court in total. What Article 6 says is that:

11 "The Tribunal established by the Agreement hereof is for the
12 trial and punishment of the major war criminals of the European
13 Axis countries and that the court shall have the power to try and
14 punish persons who, acting in the interests of the European Axis
15 countries, committed the following crimes."

16 And paragraph (c) is crimes against humanity. It lists crimes,
17 including "enslavement, deportation, murder, extermination and
18 other inhumane acts committed against civilian population, before
19 or during the war;"-- there followed a -- originally a
20 semi-colon, later replaced after a little discussion because it
21 was different in different language versions of the text, with a
22 comma: "or persecutions on political, racial or religious grounds
23 in execution of or in connection with any crime within the
24 jurisdiction of the Tribunal, whether or not in violation of the
25 domestic law of the country where perpetrated."

1 [10.02.28]

2 So Your Honours, what we see is that the statute -- I would say
3 that the more reasonable reading is that the -- would have been
4 that the limitation on whether or not -- excuse me -- in
5 connection with any crime within the jurisdiction of the
6 Tribunal, even with a comma, applied to persecutions. But that's
7 not how the Tribunal itself interpreted it.

8 So looking at the language as the Tribunal interpreted it, what
9 the Charter said is crimes against humanity before the Nuremberg
10 Tribunal, which was set up specifically for one war for people
11 from the countries of the Axis countries, that that required a
12 linkage with a crime within the jurisdiction of the Tribunal.
13 If crimes against humanity in 1975 required a nexus to a crime
14 against war or a crime against peace, that language would have
15 been unnecessary, would have been explicit. Instead, it's put
16 into the language of the Nuremberg Tribunal because it was a
17 court set up for a specific purpose. It was set up to try the
18 major war criminals from the Second World War.

19 [10.03.57]

20 It would have been impossible -- and, in fact, I think it ended
21 up trying 20 individuals, top leaders, over a course of two
22 years, the Tribunal limited to find its own jurisdiction in those
23 terms, just as other tribunals have defined their own
24 jurisdiction limiting the temporal scope or the geographic scope
25 of the crimes that would be covered or, in the individual crimes,

1 the jurisdiction of individual tribunals for individual crimes.
2 The further evidence that this was not part of customary
3 international law is basically the same group of countries then
4 established Control Council Law No. 10, which was meant to deal
5 with the trial of others not at the very top leadership, but
6 others involved in the post-war situation and crimes that had
7 been committed.

8 [10.05.02]

9 And in that Control Council Law No. 10, Article 2 defined crimes
10 against humanity and contained no such linkage, no requirement of
11 any linkage to a war crime, crime against peace or an armed
12 conflict.

13 Counsel quoted the Flick case, and the Flick case said
14 specifically what they were talking about is, again, even with
15 the jurisdiction as defined, they worried that the amount of
16 cases that they would have to try would be too large and that
17 they should concentrate, then, on those connected to the war.

18 In fact, with Flick said at page 1213:

19 "To try war crimes is a task so large, as the numerous
20 prosecutions prove, that there's not a necessity or an excuse for
21 expecting this Tribunal to try persons for offences wholly
22 unconnected with the war."

23 But in fact, the cases tried under Control Council Law No. 10 did
24 include cases where there was clearly stated in the jurisprudence
25 no requirement of a linkage to the armed conflict, to a crime

1 against -- war crime or a crime against peace.

2 [10.06.30]

3 In the Einsatzgruppen case itself at page 497, one of the
4 authorities cited, it indicated:

5 "This law is not restricted to events of war. It envisions the
6 protection of humanity at all times."

7 It went on to say at page 499, "The Allied Control Council, in
8 its Law No. 10, removed this limitation", and that's the
9 limitation about a connection to a crime against peace or a crime
10 against war:

11 "[...] so that the present Tribunal has jurisdiction to try all
12 crimes against humanity as long known and understood under the
13 general principles of criminal law, as this law is not limited to
14 offences committed during war."

15 This interpretation that, in fact, the World War II jurisprudence
16 clearly shows that no -- there was no requirement of a linkage to
17 a war crime or crime against peace, was also found in the Tadic
18 decision, the Appeals Chamber decision, paragraph 140, the
19 judgment of 2 October 1995. I believe it was the decision on the
20 defence motion for interlocutory appeal on jurisdiction.

21 [10.07.50]

22 In paragraph 140, Tadic, the Appeals Chamber said there's no
23 logical or legal basis for any such requirement, and it has been
24 abandoned in subsequent state practice with respect to crimes
25 against humanity.

1 And then the Tadic decision said that:

2 "Most notably, the nexus requirement was eliminated from the
3 definition of crimes against humanity contained in Control
4 Council Law No. 10."

5 They say:

6 "It's further evidenced by international conventions regarding
7 genocide and apartheid, both of which prohibit particular types
8 of crimes against humanity regardless of any connection to armed
9 conflict."

10 [10.08.31]

11 And of course, this makes sense even as of the second World War,
12 certainly as of 1975, that the interests of international law
13 would go beyond simply mass crimes committed in a time of war and
14 armed conflict or those linked to crimes of war, but would
15 include the protection of civilians from the most horrendous
16 atrocities, regardless of whether it's committed by a government
17 against its own people in a time of peace or in a time of war.

18 In addition, there's also, in 1970 -- November 1970, a convention
19 entered into force called the Convention on the Non-Applicability
20 of Statutory Limitations to War Crimes and Crimes Against
21 Humanity.

22 Article 1 of that Convention provided:

23 "Crimes against humanity, whether committed in times of war or in
24 time of peace as defined in the Charter of the IMT, shall have no
25 statute of limitations", to summarize.

1 [10.09.44]

2 Other courts have also recognized this. One of those is a case
3 from the European Court of Human Rights. And I'll try my best to
4 pronounce the names Kolk and Kislyiy v Estonia. That's
5 K-I-S-L-Y-I-Y for the second name.

6 And in this case, which was decided in 19 -- excuse me, in 2006,
7 however, it dealt with acts, criminal acts, that had taken place
8 in 1949 in the -- Estonia when it was a Soviet Socialist
9 Republic. And the court there found that, although there was a
10 complaint by the accused that the nexus -- the war was over in
11 1949 and there was no nexus to an armed conflict, the European
12 Court of Human Rights emphasized that:

13 "It is expressly stated in Article 1(b) of the Convention on the
14 Non-Applicability of Statutory Limitations to War Crimes and
15 Crimes Against Humanity that no statutory limitation shall apply
16 to crimes against humanity irrespective of the date of their
17 commission and whether committed in time of war or in time of
18 peace."

19 [10.11.06]

20 The same principle was recognized by a French court in the case
21 of Klaus Barbie, who I believe was represented by -- at the time
22 by Khieu Samphan's former counsel, Mr. Verges. There, in Barbie,
23 they made the following statement, that:

24 "Unlike crimes against humanity, war crimes require a nexus with
25 a situation of hostilities and armed conflict."

39

1 What's clear, they said "unlike crimes against humanity", so in
2 Barbie, they clearly were holding that crimes against humanity do
3 not require a nexus to an armed conflict.

4 And in the Justice case, one of the authorities we provided in
5 pages 979 and 982, they go through a bit of history about how,
6 over the course of time, but particularly in the 20th century,
7 starting from before -- or even the 19th century, but certainly
8 before the first World War and after the first World War, there
9 was increasing interest by states in protecting civilians in
10 other states from pogroms, from persecutions, from mass
11 atrocities, and that this had affected, obviously, the
12 development of international criminal law.

13 [10.12.30]

14 It was reflected, we say, in Control Council Law No. 10, and in
15 those prosecutions that took place where people were tried
16 without a connection to a war crime or crime against humanity --
17 excuse me, without a connection to war crime or crime against
18 peace as a crime against humanity.

19 So I'd like to move on to the second question.

20 I don't know if Your Honour is planning to take a break at some
21 time, Mr. President. Do you want me to move on to the second
22 question or do you wish to take a break now?

23 Thank you. I'm glad I'm holding your interest.

24 The second question is the -- whether, to the extent that the
25 Trial Chamber -- according to the Trial Chamber, crimes were

40

1 committed against Khmer Republic soldiers or, to come back, these
2 crimes were, nevertheless, committed as part of an attack
3 directed against a civilian population.

4 [10.13.30]

5 Now, listening to the Defence argument today, I think we have an
6 important point of agreement. The Defence, as I understood them
7 today, is saying that, after 17 April 1975, the former Khmer
8 Republic soldiers were no longer soldiers; they were civilians.
9 We agree with that.

10 When the war was over, this is not a situation where a part of an
11 army surrendered. This is a situation where there was no more
12 army. There was no more state, Khmer Republic. It had been
13 replaced by DK, Democratic Kampuchea.

14 So if one has to -- certainly, once someone is a soldier, the law
15 should not say that they're a soldier and, therefore, can be
16 targeted for the rest of their lives, when the -- 10 years after
17 they've left being a soldier, 20, 30 or 50 years after. At what
18 point do they become civilians?

19 We submit, and I believe from the Defence argument they agree
20 with us, that when the war is over, there's no longer an army
21 that they're a part of. They have to be considered civilians and
22 are entitled to the protection of civilians.

23 [10.14.50]

24 However, the Trial Chamber also, I think -- also said that they
25 agreed with that, but said -- they gave an alternative, if they

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1 were considered soldiers hors de combat, they still could be the
2 victims of crimes against humanity so long as the targeting of
3 these soldiers took place in the context of a widespread of
4 systematic attack on a civilian population.

5 And that's absolutely the international law. There's clear
6 jurisprudence on that.

7 Counsel cited the Mrkšić case, the appeal judgment in Mrkšić.

8 Paragraph 313 clearly says that:

9 "A person hors du combat may thus be the victim of an act
10 amounting to a crime against humanity provided that all other
11 necessary conditions are met, in particular, that the act in
12 question is part of a widespread or systematic attack against any
13 civilian population."

14 [10.15.53]

15 The same holding was reiterated in Mrkšić appeal judgment,
16 paragraph 29, where they said:

17 "The Appeal Chamber recently confirmed that there was nothing in
18 the text of Article 5 of the statute or previous authorities of
19 the Appeal Chamber that requires that individual victims of
20 crimes against humanity be civilians."

21 In paragraph 32:

22 "Accordingly, whereas the civilian status of the victims, the
23 number of civilians and the proportion of civilians within a
24 civilian population are factors relevant to the determination of
25 whether the chapeau element of Article 5 of the statute, that is,

1 an attack be directed against a civilian population, is
2 fulfilled, there is no requirement, nor is it an element of
3 crimes against humanity, that the victims of the underlying
4 crimes be 'civilians'."

5 The Special Court for Sierra Leone adopted this same holding in
6 the RUF trial judgment, paragraph 82. I won't read it. It's the
7 same holding.

8 In the trial Judgment in this case, in paragraph 194, the Chamber
9 held that the armed conflict between the Khmer Republic and Khmer
10 Rouge ended on 17 April '75 with the capture of Phnom Penh and
11 the Khmer Republic forces had surrendered. Thereafter, all Khmer
12 Republic soldiers not taking a direct part in hostilities were
13 civilians or, at a minimum, hors de combat, thereby enjoying the
14 same protections as civilians.

15 [10.17.32]

16 In any event, former Khmer Republic soldiers formed only part of
17 the millions of civilians attacked, and that's important. What's
18 clear from the holding of the trial Judgment, fully supported by
19 the evidence in this case, is that there was a widespread,
20 systematic attack on a civilian population, that all those who
21 were perceived enemies, civilian or non-civilian, were treated
22 similarly.

23 For example, Khmer Republic soldiers and civilian officials, New
24 People -- which, by the way, is not a term that the Prosecution
25 invented; this is a term that the Khmer Rouge authorities

1 invented. New People were, by the vast majority, civilians who
2 also were persecuted as part of this widespread and systematic
3 attack.

4 [10.18.30]

5 An example of the mixing of how these attacks against soldiers
6 fit into the attack against civilians is even in the
7 identification of the seven traitors that were to be executed. I
8 think at one time, Khieu Samphan added a couple additional names
9 to that list. But these people included both civilian officials
10 and military officials.

11 So the requirements of the law for a soldier hors de combat, yes,
12 to answer the question, they can be a victim of a crime against
13 humanity provided that the chapeau elements are met, that there
14 is a widespread and systematic attack on a civilian population
15 and that there's a linkage between that attack and the attack on
16 the soldiers hors de combat. In this case, there clearly was.

17 So I'll move on to the third question.

18 The third question that Your Honour posed was whether a
19 conviction for extermination encompassing murder requires the
20 Trial Chamber to be satisfied beyond reasonable doubt of each
21 individual unlawful killing or, as a potential alternative, be
22 satisfied beyond reasonable doubt of the occurrence of unlawful
23 killings based on the totality of the evidence.

24 [10.19.52]

25 Your Honour, the element of extermination, as you well know, is

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1 that there'd be killing on a mass scale. That's what's required.

2 No particular number is mentioned, but killing on a mass scale.

3 In the trial Judgment at paragraph 521, the Trial Chamber held

4 that:

5 "Having regard to the totality of the evidence before the Trial

6 Chamber describing the deaths that occurred during the evacuation

7 due to killings, starvation and exhaustion, the Chamber is

8 satisfied that at least several thousand people died during the

9 transfer of the population from Phnom Penh to the countryside.

10 Among the victims were babies, young children, sick and elderly

11 people."

12 And they made similar findings regarding Tuol Po Chrey and the

13 second forced transfer, where they found that it was killing on a

14 mass scale. In Tuol Po Chrey, I believe they made an estimate of

15 the numbers that died.

16 [10.21.04]

17 Your Honour, what's required in evaluating evidence is that every

18 element of the crime be proved beyond a reasonable doubt. It's

19 not required that every piece of evidence that's put before the

20 Trial Chamber or every -- that the -- is shown beyond a

21 reasonable doubt.

22 In the Limaj case at paragraph 70, they talked about it may not

23 be sufficient -- this is talking about, by the way -- I'm going

24 to be -- don't want to mislead anyone.

25 This is talking about the effect of different evidence about the

1 identification of an individual, and we say the same issue, the
2 same approach to the evidence should apply to the element of the
3 number, whether this element of mass scale has been met. And in
4 Limaj, they say that, in paragraph 153 of the Appeal Chamber
5 judgment, that:

6 "Not every individual fact supporting the proof of a crime is
7 required to be proved beyond reasonable doubt, but the totality
8 of the facts in relation to that crime have to be proven beyond a
9 reasonable doubt. It may not -- a relevant piece of evidence
10 viewed in isolation may not be sufficient to establish the
11 obligation of proof on the prosecution, but it is the cumulative
12 effect of the evidence, the totality of the evidence which must
13 be weighed in order to prove whether the prosecution has proved
14 the element beyond a reasonable doubt."

15 [10.22.50]

16 So what matters is that the Trial Chamber in this case determined
17 that, in each of these instances, the first and second forced
18 transfer and at Tuol Po Chrey, a vast number of individuals were
19 killed, we believe, satisfying the requirements of extermination.
20 Now, the Defence, by the way, I believe, mentioned this morning
21 the Staki? case. And having some familiarity with that case, I
22 just want to talk about it a little bit.

23 First of all, there is a difference in different tribunals about
24 the amount of detail that's pled and that can be proven. The
25 Staki? case involved a single municipality in a nine-month

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1 period, an allegation of deaths approaching 3,000.

2 [10.23.46]

3 The Trial Chamber made a finding in the end that at least 1,500
4 people died. When possible, at the Yugoslav Tribunal, individual
5 names of victims were pled. And in the Staki? case, like many of
6 that Tribunal, where they were known, for each incident the names
7 of individual victims were listed in the indictment. And in the
8 Judgment of the Trial Chamber, they made findings on each
9 incident and, where possible, the individuals.

10 That's not the way the judgments -- the indictments were pled or
11 judgments were written in a place like the Special Court of
12 Sierra Leone, where such detailed evidence simply didn't exist,
13 nor do we think it's possible to plead individual names and prove
14 all individual killings here at the ECCC where the number of
15 victims is vastly, vastly greater.

16 But in our submission, to answer your question, it's not
17 necessary to prove beyond a reasonable doubt each individual
18 killing so long as the Chamber is satisfied that the killing
19 occurred on a vast scale.

20 I'd like to talk about the recharacterization issue.

21 First, could I just ask Your Honour for an indication of how much
22 time I have?

23 [10.25.30]

24 MR. PRESIDENT:

25 You have about 20 minutes left.

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1 MR. KOUMJIAN:

2 Thank you.

3 So as for recharacterization of the -- excuse me.

4 JUDGE KLONOWIECKA-MILART:

5 Mr. Prosecutor, are you -- have you received my question,
6 meanwhile, that was sent by email to all parties?

7 MR. KOUMJIAN:

8 No, I did not.

9 [10.25.54]

10 JUDGE KLONOWIECKA-MILART:

11 Okay. So I was wondering whether it was--

12 MR. KOUMJIAN:

13 Sorry. Something was passed to me, and I perhaps didn't
14 understand it, so if I could read that now.

15 JUDGE KLONOWIECKA-MILART:

16 Sure, sure. I just wanted to make sure that this was not the
17 question yet -- this was not the answer yet.

18 MR. KOUMJIAN:

19 Well, I believe--

20 JUDGE KLONOWIECKA-MILART:

21 It can wait.

22 [10.26.10]

23 MR. KOUMJIAN:

24 I believe that this did answer your question. I thought it was
25 quite similar to the question.

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1 I see. You're talking about murder as opposed to extermination.

2 JUDGE KLONOWIECKA-MILART:

3 It's your discretion--

4 MR. KOUMJIAN:

5 Yes, thank you.

6 JUDGE KLONOWIECKA-MILART:

7 - whether you--

8 MR. KOUMJIAN:

9 Yes.

10 JUDGE KLONOWIECKA-MILART:

11 --want to elaborate in detail on it because it's a related issue,

12 but it may wait until later, obviously.

13 [10.26.12]

14 MR. KOUMJIAN:

15 Well, I think it's appropriate to -- thank you -- to handle it

16 now.

17 We believe, absolutely, the same requirement, the same logic, the

18 same reasoning, applies to murder as to extermination. In the

19 Judgment in this case, unlike some judgments where, in the

20 indictment, individual incidents were proved and individual

21 findings of guilt, this murder occurred, this murder occurred at

22 this village or this location, that's not how the case was pled

23 in the Closing Order, largely. Individual locations or individual

24 names certainly were not listed.

25 So the finding of the Chamber that murders occurred, in our view,

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1 the Court has to be satisfied, the Trial Chamber, beyond a
2 reasonable doubt that, in fact, murders occurred. It's not
3 necessary to make -- list each individual one and say for each
4 individual incident this we found beyond a reasonable doubt.

5 [10.27.32]

6 It certainly is possible. A Chamber has the right to do that. In
7 that case, there really would be convictions for, let's say, 100
8 individual murder counts.

9 In this Judgment, the Court didn't enter convictions for each
10 individual. You could argue they entered convictions for phase --
11 a series of incidents, the first forced transfer, the second
12 forced transfer, Tuol Po Chrey. But they didn't enter convictions
13 for each individual.

14 In these circumstances, I think what has to be proven beyond a
15 reasonable doubt is that these -- that murders occurred. And we
16 think that was proven far beyond a reasonable doubt, and
17 certainly, for many of the individual murders, were proven beyond
18 a reasonable doubt looked at by themselves. I'm not prepared at
19 the moment to go through each one.

20 So going on to the issue of recharacterizing the modes of
21 liability in this case, Rule 110 of the Internal Rules provides
22 that the Court has the right to recharacterize the offence.

23 Sorry. I'm just trying to find my notes on recharacterization. I
24 don't have them before me right now.

25 (Short pause)

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1 [10.29.16]

2 MR. PRESIDENT:

3 International Co-Prosecutor, we need to pause for about a minute
4 to change the DVD.

5 (Short pause)

6 [10.29.45]

7 MR. PRESIDENT:

8 International Co-Prosecutor, you may resume your submission.

9 MR. KOUMJIAN:

10 Your Honour, first, I think it might be helpful to explain a bit
11 about our understanding of why, for three -- four crimes, I
12 believe, the Trial Chamber did not enter convictions under joint
13 criminal enterprise. And I cannot find my note at the moment, but
14 I believe those were for exterminations for the first and second
15 forced transfer, for political persecutions at Tuol Po Chrey, and
16 also for enforced disappearance as to the second forced transfer.

17 [10.30.28]

18 To be honest, until we received the answer from -- the question
19 from Your Honours about recharacterization, we did not understand
20 why that happened and assumed that there had been a mistake in
21 the Closing Order. But after carefully reviewing it, it's clear
22 that the Accused were all charged with all of these crimes under
23 Joint Criminal Enterprise pursuant to the Closing Order.

24 The Closing Order clearly charged that.

25 What -- in paragraph, I believe, it's 1525 of the Closing Order,

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1 the Closing Order links individual policies to individual crimes
2 such as murder, extermination and political persecutions.

3 When the Trial Chamber severed the case, they indicated, as Your
4 Honours know the history of that, that they were going to do the
5 first and second forced transfer and, later, adding Tuol Po
6 Chrey.

7 [10.31.31]

8 And they indicated that that would mean that, as regards to the
9 five policies, the implementation of only two policies would be
10 -- would be litigated fully in the trial, and those two policies,
11 I believe, were the targeting policy and the forced transfer
12 policy.

13 However, it's important to understand how the policies were dealt
14 with in the -- in Case 002/01 in the trial.

15 While the Chamber said it wouldn't go into the implementation of
16 these other policies and the parties could not in different
17 locations around the country at different times, the existence of
18 the policies, of all five policies, was an issue litigated and
19 the parties were entitled to ask questions about it and litigate
20 it throughout Case 002/01.

21 So all five policies were the subject of Case 002/01, but the
22 Judges restricted evidence of its implementation and locations to
23 the two policies, the targeting policy and the policy on forced
24 transfers to the three sets of crimes -- crime scenarios, the
25 first and second forced transfer, and Tuol Po Chrey.

1 [10.32.56]

2 The Co-Prosecutors freely admit that we understood throughout the
3 trial that the JCE applied to all crimes. We didn't understand
4 that the Trial Chamber believed that there was some limitation on
5 JCE because of the Severance Order.

6 Everything that we've seen from how the Defence behaved,
7 including their final submissions, both in writing and orally,
8 and their questions during the case, would indicate to us that
9 the Defence also was under the impression that Joint Criminal
10 Enterprise applied to all of the crimes and had not caught what
11 the Trial Chamber caught at some point -- maybe it was when they
12 were writing the Judgment -- that certain policies only applied
13 to certain crimes according to paragraph 1525 of the Closing
14 Order.

15 [10.33.55]

16 So of course, in civil law, and particularly in the statute of
17 this Court, it's clear that the Judges, Your Honours, the Appeal
18 Chamber has a right to recharacterize the facts of -- to give a
19 new legal characterization to the facts found by the Trial
20 Chamber in the evidence shown.

21 It's our submission, of course, that you have to do that to make
22 sure that the Defendants had an opportunity to defend on the
23 facts that you're considering and that nothing was done to
24 prevent them from defending on those factual findings.

25 We submit that the Defence, in fact, defended on all the factual

1 findings that were necessary for joint criminal enterprise to
2 also be applied to those four additional crimes that the Trial
3 Chamber did not apply joint criminal enterprise to. Again, that
4 is in the first forced transfer, exterminations, on the second
5 forced transfer, exterminations and enforced disappearance, and
6 for Tuol Po Chrey, political persecutions.

7 The factual findings of the Trial Chamber establish all the
8 elements of the actus reus and mens rea necessary for a finding
9 that Khieu Samphan and Nuon Chea were members of a plurality of
10 persons who had the intent that these crimes be committed and
11 made substantial contributions to each of these crimes.

12 [10.35.14]

13 The Defence, in fact, did defend on all of those elements, so
14 there would be no violation of any fair trial right of the
15 Accused for Your Honours to recharacterize the offence in that
16 manner.

17 And I'm going to move on now to just a few minor closing remarks
18 on this issue at this time -- on different issues at this time.

19 One is that we, again, heard from the Defence that they believed
20 that the zones were independent and zone armies and things were
21 happening, killing of soldiers happened differently in different
22 zones around the country.

23 This is something -- and yesterday, yesterday afternoon, counsel
24 said that they were -- they found support in the testimony of
25 Philip Short for that proposition, the expert witness.

1 [10.36.34]

2 I would like to read you an answer that Philip Short gave to a
3 question posed by Nuon Chea's counsel. This is on the 8th of May
4 2013 at about 4.22 in the afternoon. Mr. Short said:

5 "It would not have been possible for zone commanders to act
6 against or outside the broad policy consensus which had been laid
7 down by the Centre. You are not dealing with an army that
8 descends into banditry which, on a large scale, which takes
9 matters into its own head and carries out massacres. You are
10 dealing with an army which was quite small, not an enormous
11 force, which was very rigidly controlled."

12 So the Trial Chamber, we believe, found that there was a
13 hierarchical structure where the orders of the Centre were
14 carried out, and that's fully supported by the evidence. It's
15 also fully supported by the evidence about how the killing of
16 Khmer Republic officers and officials occurred throughout the
17 country in all the zones, often with some of the same tactics
18 such as telling people they were going to meet the king or tricks
19 to have people identify themselves as officers or officials in
20 order to get their old jobs back or to get rice. So the Trial
21 Chamber's findings are fully supported on those points.

22 [10.38.15]

23 There was another question that I wanted to briefly address which
24 Your Honour asked yesterday, Judge Milart -- Justice Milart asked
25 yesterday to my colleague, and that was about the temporal scope,

1 thank you, which the Defence also got into in their arguments
2 this morning about whether or not how the Trial Chamber dealt
3 with evidence outside the temporal scope of the charges in the
4 Closing Order, the jurisdiction of the Court or the severance.
5 Your Honours, it is a well-established principle that in order to
6 prove crime occurred, the mens rea, particularly the intent of
7 persons, the knowledge of individuals that crimes will occur or
8 substantially likely to occur, a Court can and should look at
9 evidence that shows a pattern of conduct where it's probative as
10 to intent.

11 [10.39.22]

12 Clearly, for example, the fact that civilians were mistreated,
13 that captured soldiers were executed throughout -- for years of a
14 conflict would put leaders on notice of what's likely to occur in
15 another evacuation of a population of a city.

16 Similarly, acts occurring after an event, a crime occur can show
17 that, in fact, it was the intent of the leadership because
18 nothing was done to discourage it and, in fact, it was repeated,
19 it was encouraged.

20 So all parties in this case actually, throughout the trial, asked
21 questions and were able to elicit testimony and evidence about
22 matters outside the scope of the Severance Order or the
23 jurisdiction of this Court when relevant to the charges. Evidence
24 was excluded when it was clearly irrelevant.

25 It's up to the Defence, of course, in an appeal to identify any

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1 relevant evidence that they had that was excluded and identify to
2 Your Honours how that could have affected the Judgment. It's
3 pretty -- it's impossible for us to respond when we don't know
4 what they're complaining about. I think it's impossible for Your
5 Honours to deal with it if it's not specific.

6 [10.40.42]

7 The only evidence that we could think of yesterday on hearing the
8 Defence make that complaint was the Trial Chamber limited the
9 Defence questions, restricted the Defence in asking about a 1980s
10 programme by the then government to the K-5 program to use
11 civilian labour to build a defensive line on the border of
12 Thailand.

13 Defence has never shown how that was relevant to the charges in
14 Case 002/01. The single argument they made, they claimed it would
15 be relevant to the numbers of people that died during the DK
16 period from the regime as opposed to those who died, for example,
17 on that programme.

18 The total number killed is not an essential issue in Case 002/01.
19 It's -- there may have very slight relevance to Case 002/02, but
20 for none of the crimes charged is the exact number of people that
21 died an essential element of the offence in this case.

22 [10.41.51]

23 Thank you, Your Honours, very much for your time. Of course,
24 we're very happy to answer any questions Your Honours have.

25 MR. PRESIDENT:

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1 Thank you very much.

2 It is now time for a short break, so the Chamber will take a
3 short break for 20 minutes, and we will resume at 11.00.

4 (Court recesses from 1042H to 1110H)

5 MR. PRESIDENT:

6 Please be seated. The Court is now back in session.

7 We now move to the session that is questions by the Chamber. And
8 I'd like to inquire with the Judges of the Bench if you wish to
9 put questions.

10 JUDGE KLONOWIECKA-MILART:

11 Just one remark that -- I appreciate that the question that was
12 asked to the parties, and especially to the OCP, may be specific,
13 and even the parties who have intimate knowledge of the case may
14 not be able to cite to the trial record of -- from the top of
15 their heads, so I'd be happy to wait until tomorrow for the
16 specifics. And we will make time for the parties to relate to
17 this question, and we will welcome if the OCP would want to
18 indicate which murders it considers proven to the beyond a
19 reasonable doubt standard, if any.

20 (Short pause)

21 [11.12.35]

22 MR. KOUMJIAN:

23 I'm not sure if people are waiting for us to respond. We
24 understood that you gave us time until tomorrow. We'll take
25 advantage of that to be more thorough list of going through the

1 Judgment.

2 Obviously, the murders at Tuol Po Chrey we clearly feel proved
3 beyond a reasonable doubt, and we can indicate individual murders
4 during the forced -- first and second forced transfer that we
5 believe were proved beyond a reasonable doubt.

6 [11.13.16]

7 MR. PRESIDENT:

8 Since we do not wish to put questions to the parties now and it
9 is deferred to tomorrow's session, we now move on to the fourth
10 thematic session -- that is, the grounds of appeal related to the
11 Accused individual criminal responsibility.

12 And I notice the defence counsel for Khieu Samphan is on her
13 feet. You may proceed.

14 MS. GUISSÉ:

15 Yes, Mr. President. I would like to avail myself of the fact that
16 the Chamber doesn't have any additional questions apart from
17 those we have to respond to tomorrow. I would like to know
18 whether I can avail myself of this opportunity to provide some
19 specific information since the prosecutor talked of the expert,
20 Philip Short, and yesterday I said things relying on what I could
21 remember, and I would like to give some more precise information
22 to the Chamber to complete my submissions.

23 [11.14.26]

24 Perhaps with regard to the issue of characterization, I will deal
25 with that under the theme of responsibility because that appears

1 to be the seam -- the theme in which I can treat those issues.

2 And I would, therefore, like to give references of statements I
3 relied on, if you would agree with me.

4 MR. PRESIDENT:

5 Yes, you can proceed.

6 MS. GUISSÉ:

7 Thank you, Mr. President.

8 With regard to what I said concerning Mr. Philip Short, the
9 expert, and the various statements he made regarding whether or
10 not the army was unified or not, I have many authorities that I
11 used in my statement.

12 [11.15.15]

13 There's the first quotation, document E295/6/4 we referred to in
14 our closing arguments because it supports our brief. And I argued
15 that they didn't take into account exculpatory evidence.

16 It's the hearing of the 7th of May 2013, by Philip Short,
17 document E1/190.1 at about 13.59.35. And this is what he says
18 with regard to the evacuation of Phnom Penh:

19 "It is important since it is within the scope of Case 002/01 all
20 descriptions of the evacuations of Phnom Penh and other
21 authorities are concordant, in saying that the different zones
22 had quite some latitude with regard to the implementation of the
23 evacuation. Soldiers from the East Zone, for instance, tended to
24 be more flexible than those from the Southwest, who were under Ta
25 Mok. That was a scheme that was applied throughout the regime,

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1 depending on zones, policies and subordinate cadres. Things
2 changed from one place to the other. Same applies to chiefs of
3 villages and cooperatives. There was a large variety."

4 [11.16.37]

5 Another quotation by Mr. Short, hearing of the 9th of May 2013,
6 document E1/192.2 at 15.45.46, and he explains the movements of
7 the Khmer Rouge. And this is what he states.

8 He is referring to the period from 1977 to -- from 1960 (sic) to
9 1970. I beg your pardon. Let me quote him in its entirety:

10 "In fact, since the very beginning of the guerilla in 1968 and in
11 early 1970, it was even more difficult to impose any harmony
12 because of the problems and difficulties they faced in
13 communication. As from 1973, 1974, communications improved, and
14 it became more easy for the Centre to align itself with this. But
15 the front line was -- could communicate with chiefs of zones and
16 that remained the case after April 1975. And throughout the
17 Democratic Kampuchea period, there were considerable variations
18 and many difficulties in harmonizing policies nationwide."

19 [11.17.50]

20 On the 6th of May 2013, also in response to Judge Cartwright, and
21 it's somewhere before 11.12.15, document E1/198.1. This is what
22 is stated:

23 "Once more, one of the characteristics of the regime was that the
24 treatment reserved to people was not absolutely uniform. It
25 depended on the zones. And sometimes the lower units depended on

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1 the cadres who were responsible."

2 And on the 9th of May 2013 -- sorry. I have to move back and

3 forth in my reference of the transcript, E1/193.1, somewhere

4 around 09.48.45, he is comparing the situation of other

5 Communists, and he says:

6 "I believe that we can say that Democratic Kampuchea is

7 exceptional in many regards, and that is one of its aspects.

8 There was a certain degree of indiscipline that you wouldn't find

9 in what I'll call orthodox Marxist-Leninist countries." End of

10 quote.

11 And lastly, at the hearing of the 8th of May 2013, document

12 E1/191.1, somewhere around 09.49.41, and he's answering a

13 question put to him by the International Co-Prosecutor, and this

14 is what he states. And this is the particular point I referred to

15 when I was talking about the unification of the army. This is

16 what he states:

17 [11.19.30]

18 "One of the problems that Pol Pot faced was that he never truly

19 succeeded in reuniting the armed forces that remain under the

20 control of various warlords, the most important being Ke Pauk, So

21 Phim in the East, and Ta Mok." End of quote.

22 This is what I was referring to when I explained that those were

23 some of the criticisms we leveled against the Judgment or when we

24 talked about a monolithic vision of the movement. This doesn't

25 tally with what this expert himself had told the Chamber.

1 And perhaps to say something that ties into what I -- the
2 Co-Prosecutor said regarding the jurisprudence and the absence of
3 a nexus, to explain what I said a while ago, when I spoke to the
4 Chamber a while ago, I said we were being blamed for talking of
5 the treaty when we talked of the statute of Rome because the
6 Co-Prosecutors themselves made reference to this Convention on
7 the fact that war crimes and crimes against humanity were time
8 barred in 1968 because this Convention should be taken into
9 account.

10 [11.20.46]

11 This is a Convention that was signed -- of the 134 members of the
12 United Nations at the time, only 18 countries ratified it. And it
13 is important to bear this in mind, the fact that we are saying
14 that you cannot use such jurisprudence as an example to say that
15 it was part of customary international law at the time. Why?

16 Because the International Court of Justice, in the case of -- the
17 Continental Shelf case in '69 explains that for a conventional
18 rule to become a rule in customary international law, a number of
19 requirements have to be met. And it is page 43, paragraph 73 of
20 that decision. And it states the following:

21 "As regards other material that are generally taken into account
22 as being necessary for a conventional rule to be considered as a
23 general rule of international law, it is possible that even
24 though a long period may not have elapsed, a very broad-based
25 participation must obtain insofar as concerns the states that are

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1 concerned."

2 So a very broad base and representative basis must obtain.

3 [11.22.13]

4 And the jurisprudence cited by the Co-Prosecutor was only
5 ratified by 18 out of 134 states of the United Nations at the
6 time. It is not a broad-based representative, a corpus of states
7 as such, so we cannot consider that it was part of international
8 customary law at the time because we shouldn't forget the
9 essential point -- that is, was such law accessible and
10 foreseeable by the Accused, including Mr. Khieu Samphan, bearing
11 in mind the fact that there was a doubt not only in the
12 application of the text which should benefit the Accused, so
13 there's a problem of foreseeability and credibility which has not
14 been resolved.

15 Mr. President, may I avail myself of the time you have given me
16 to proceed to talk about the responsibility? Unless there are
17 other questions that you may want me to address.

18 [11.23.22]

19 MR. PRESIDENT:

20 Defence counsel, could you advise the Chamber how many more
21 minutes you anticipate?

22 MS. GUISSÉ:

23 Court's indulgence. It was my fault, Mr. President. I had omitted
24 to say that before the theme of responsibility is that we have
25 the report of the rapporteurs that has to be presented.

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1 I'll give you -- allow you to do so, then.

2 MR. PRESIDENT:

3 I'd like now to hand the floor to the co-rapporteurs for the
4 fourth thematic session on grounds of appeal related to the
5 Accused individual criminal responsibility.

6 [11.24.24]

7 JUDGE SOM SEREYVUTH:

8 Mr. President, allow me to read the co-rapporteur's report for
9 session on grounds of appeal related to the Accused individual
10 criminal responsibility.

11 The Trial Chamber found Nuon Chea and Khieu Samphan to be
12 individually criminally responsible through their participation
13 in a joint criminal enterprise in its basic form, also known as
14 JCE I, for some of the crimes committed during population
15 movements phases one and two as well as Tuol Po Chrey.

16 Individual criminal responsibility through JCE was affirmed in
17 respect of the crimes of murder, persecution on political grounds
18 and other inhumane acts encompassing forced transfers and attacks
19 against human dignity in connection with population movement
20 phase one, persecution on political grounds and other inhumane
21 acts encompassing forced transfer and attacks against human
22 dignity in connection with population movement phase two, and
23 murder and extermination in connection with the events at Tuol Po
24 Chrey.

25 [11.25.51]

1 In addition, the Trial Chamber found that the Accused had
2 planned, instigated and aided and abetted and that Nuon Chea had
3 also ordered all crimes charged in connection with the two
4 population movements and the Tuol Po Chrey.

5 Those crimes include, in addition to the crimes we have just
6 mentioned, extermination, persecution on political grounds and
7 other inhumane acts encompassing forced disappearance.

8 The Trial Chamber, however, entered convictions based on these
9 forms of liability only to the extent that the crimes were not
10 encompassed by the JCE.

11 Similarly, even though the Trial Chamber found that Nuon Chea,
12 but not Khieu Samphan, was criminally responsible for all crimes
13 based on the notion of superior responsibility, it did not enter
14 a conviction on that basis because he was directly responsible
15 for these crimes through his participation in the JCE.

16 [11.27.08]

17 Further, while the Trial Chamber found both the Accused
18 criminally responsible for murder in connection with phase one of
19 the population movement and, at Tuol Po Chrey, it held that
20 extermination as the more specific offence subsumes murder and,
21 therefore, entered a conviction only for extermination
22 encompassing murder.

23 Nuon Chea and Khieu Samphan raised various grounds of appeal in
24 relation to all modes of liability considered by the Chamber
25 which was -- which we shall briefly summarize.

1 A. Grounds of appeal relating to Joint Criminal Enterprise.

2 The Trial Chamber determined that liability under JCE in its
3 basic form requires that a plurality of individuals share a
4 common purpose which amounts to or involves the commission of
5 crimes and that the accused person must participate in the common
6 purpose by making a significant, but not necessarily
7 indispensable, contribution to its implementation.

8 The Trial Chamber noted that participants in a JCE can incur
9 liability for crimes committed by direct perpetrators who were
10 not JCE members provided that it has been established that the
11 crimes can be imputed to at least one JCE participant and that
12 this participant, when using a direct perpetrator, acted to
13 further the common purpose.

14 [11.29.04]

15 Further, the Trial Chamber found that liability under the notion
16 of JCE in its basic form requires that the Accused must intend to
17 participate in the common purpose and this intent must be shared
18 with the other JCE participants.

19 The Trial Chamber found that, at the latest, by June 1974 until
20 December 1977, there was a plurality of persons who shared a
21 common purpose to implement a rapid socialist revolution through
22 a Great Leap Forward and defends the Party against internal and
23 external enemies by whatever means necessary.

24 [11.29.50]

25 The Trial Chamber found that while this common purpose was not

1 criminal, in itself, according to the charges against Nuon Chea
2 and Khieu Samphan, the participants implemented the common
3 purpose through the population movement policy and targeting
4 policy which resulted in and or involved crimes including forced
5 transfers, murders, attacks against human dignity, and political
6 persecution.

7 The Trial Chamber found that the crimes committed during
8 population movements phases one and two can be imputed to
9 participants in the JCE who when using a direct perpetrator acted
10 to further the common purpose.

11 The Trial Chamber concluded further that there was a policy to
12 target former Khmer Republic officials which involved the murder
13 and extermination of former Khmer Republic officials at Tuol Po
14 Chrey and that those crimes could be imputed to at least Ros
15 Nhim, Secretary of the Northwest Zone and a participant in the
16 JCE.

17 [11.31.17]

18 In addition, the Trial Chamber noted that crimes covered by Case
19 002/01 could be directly imputed to Nuon Chea and Khieu Samphan
20 given the Trial Chamber's findings that they had planned,
21 instigated, as well as aided and abetted, and in the case of Nuon
22 Chea, ordered the crimes.

23 Regarding Nuon Chea's contribution to the implementation of the
24 common purpose, the Trial Chamber found that he was not only
25 involved in the initial development of Democratic Kampuchea

1 policies, but was also actively involved in their continuing
2 implementation throughout the period relevant to Case 002/01.
3 The Trial Chamber distinguished between two types of
4 contributions: First, Nuon Chea's involvement in the planning of
5 the common purpose and second, his role in disseminating and
6 implementing the common purpose through propaganda, education,
7 and public training.

8 [11.32.29]

9 As to Nuon Chea's intent, the Trial Chamber recalled his role in
10 formulating the policies of the CPK and his membership in the
11 committees that decided on the population movements. The Trial
12 Chamber found that he was also a strong proponent of
13 working-class struggle and that his role in trainings and
14 propaganda activities showed that he intended to further the
15 implementation of the common purpose.

16 The Trial Chamber also found that he shared the intent with the
17 other participants in the JCE to commit crimes at issue in Case
18 002/01, including discriminatory intent required for the crime of
19 persecution on political grounds.

20 With regard to Khieu Samphan, the Trial Chamber found that he
21 contributed to the implementation of the common purpose in five
22 ways: First, he intended -- he attended meetings of the Standing
23 and Central Committees and of Party congresses where the common
24 purpose and policies were planned and developed.

25 [11.33.48]

1 Second, he attended meetings and sessions where lower cadres of
2 the Khmer Rouge were informed about the common purpose and
3 policies.

4 Third, he was involved in economic matters of the Democratic
5 Kampuchea regime; notably, in the field of trade, export-import,
6 and commerce.

7 Fourth, he made public statements in support of the common
8 purpose and policies encouraging the Khmer Rouge cadres and the
9 population at large to adhere to the Party line.

10 And fifth, he liaised with Norodom Sihanouk and maintained
11 diplomatic contacts with external actors with a view to garnering
12 foreign support for Democratic Kampuchea.

13 [11.34.38]

14 On appeal, Nuon Chea and Khieu Samphan raised numerous arguments
15 against the Trial Chamber's approach and findings on JCE
16 liability. These arguments may be grouped as follows: The first
17 group of arguments relate to the legal foundation of the notion
18 of JCE liability. Nuon Chea, in particular, submits that, at the
19 time relevant to the charges, liability for joint perpetration of
20 a crime was narrower and required a contribution to the actual
21 crime.

22 The second group of arguments relates to the common purpose. Nuon
23 Chea and Khieu Samphan argued that the Trial Chamber erred
24 because the common purpose identified the implementation of a
25 rapid socialist revolution was not criminal in itself. They also

1 averred that the Trial Chamber erred when it found that the CPK
2 had adopted policies of population movements and targeting Khmer
3 Republic officials and soldiers. Moreover, they submit that the
4 Trial Chamber erred by assessing whether the implementation of
5 the policies involved and-or resulted in the commission of crimes
6 arguing that this unjustifiably lowered the requirements for
7 liability under JCE I.

8 [11.36.20]

9 The third ground of arguments concerns the contribution that,
10 according to the Trial Chamber, Nuon Chea and Khieu Samphan met
11 through the implementation of the common purpose. These arguments
12 include challenges to the Trial Chamber's specific findings on
13 their role and powers within the CPK and the Democratic Kampuchea
14 regime.

15 The fourth group of arguments relates to Nuon Chea's and Khieu
16 Samphan's intent challenging the Trial Chamber's approach and
17 findings in this regard.

18 B. Grounds of appeal related to other modes of liability. Nuon
19 Chea and Khieu Samphan also argued that the Trial Chamber's
20 findings as to their liability for planning, instigating, aiding
21 and abetting, and in respect of Nuon Chea only, ordering the and
22 superior responsibility, attended by numerous errors of fact and
23 law.

24 [11.37.29]

25 In relation to his liability for ordering, Nuon Chea argues, in

1 particular, that the actus reus of ordering was not established
2 because the decision to evacuate Phnom Penh and to move the
3 population between rural areas happened at meetings of the
4 Standing and-or Central Committees. Any decisions taken at those
5 meetings were implemented by the zone secretaries who did not act
6 upon the orders of Nuon Chea. The same applies in Nuon Chea's
7 submission to the events at Tuol Po Chrey.

8 Regarding their liability for planning, the Accused argued that
9 the Trial Chamber incorrectly defined the actus reus and that the
10 mere taking of decisions is not equivalent to planning

11 Regarding their liability for instigating and aiding and abetting
12 the crimes in question, Nuon Chea and Khieu Samphan allege
13 primarily factual errors in the Trial Chamber's findings or
14 submit that the activities identified by the Trial Chamber do not
15 constitute the actus reus of those forms of liability.

16 [11.38.49]

17 Further in relation to all form or these forms of liability, the
18 Accused argue that the Trial Chamber applied an incorrect
19 standard in respect of the mens rea which was not covered by
20 customary international law as it stood at the time the crimes
21 were committed.

22 In addition, Nuon Chea and Khieu Samphan raised arguments that
23 relate, in their submission, to the Trial Chamber's findings on
24 liability both under JCE and under the other forms of liability.
25 Notably, they raised arguments alleging errors in respect of the

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1 Trial Chamber's findings as to the structure of the CPK and the
2 modes of communication. Furthermore, Khieu Samphan submits that
3 the Trial Chamber incorrectly relied on omissions as opposed to
4 positive conduct when finding that he made a contribution to the
5 implementation -- implementation of the common purpose or aided
6 and abetted the crimes in question.

7 [11.40.01]

8 This concludes our report on the grounds of appeal relevant to
9 this session of the appeal hearing. Thank you.

10 MR. PRESIDENT:

11 Thank you. It is now appropriate time for our lunch break and we
12 will resume this afternoon at 1.30 p.m.

13 Security personnel, you are instructed to take the Accused to the
14 waiting room and have them returned to attend the proceedings
15 before 1.30 this afternoon.

16 The Court is now in recess for lunch.

17 (Court recesses from 1140H to 1333H)

18 MR. PRESIDENT:

19 Please be seated. The Court is back in session.

20 And the Chamber would like to give the floor to the defence team
21 for Mr. Khieu Samphan to submit the arguments.

22 MS. GUISSÉ:

23 Thank you, Mr. President.

24 The supposed responsibility of Mr. Khieu Samphan is obviously, as
25 in all criminal proceedings, at the very centre of the Judgment.

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1 It is in the course of the examination of such responsibility
2 that we realized to what extent the construction of that Judgment
3 was aimed at his conviction and that is where we see how bias the
4 approach was. And at this point in time, as I have to provide
5 some explanations, as I did at the beginning of the appeals, why
6 we drafted our brief, the way we did it.

7 It was important to decipher the process whereby the Chamber had
8 arrived at a conviction and what were the different acts it
9 carried out throughout this analysis and reflection to arrive at
10 the conviction of Mr. Khieu Samphan. And that is why we started
11 with part 16 of the Judgment in order to place the facts in a
12 chronological manner in order to assess at what time the Chamber
13 found that such and such an intent or criminal intent was -- on
14 what it was based and that is why we drafted our brief in that
15 manner.

16 [13.35.41]

17 So quite obviously, it is not in 50 minutes that we'll be able to
18 deal with all the errors of the Chamber in a comprehensive
19 manner. We have done this in our appeal brief. Today, I will
20 focus on the legal errors committed by the Chamber and I'll try
21 to answer the questions you've put to us by responding to the
22 some of the arguments raised by the Co-Prosecutors.

23 First of all, the first point I referred to, somewhat, when I
24 dealt with crimes and which I would like to reiterate here. It's
25 -- it is important and it's the issue of accessibility and

1 foreseeability of modes of responsibility and it is paragraph 68
2 to 98 of our appeal brief.

3 Khieu Samphan could not have envisaged the sophisticated modes of
4 responsibility of international -- of customary international law
5 in 1975. Even though the modes of responsibility are envisaged in
6 customary international law and today we continue to raise
7 questions.

8 Today, Mr. Khieu Samphan is in Cambodia. The only system he knew
9 when he was in the maquis, as he spent most of his time dealing
10 with that system, was the dualist legal system in Cambodia and
11 you cannot apply international norms to the Cambodian domestic
12 law, that we should bear in mind.

13 In 1975, it is obvious that he was not in a position to envisage
14 what was a joint criminal enterprise. I have cited the
15 jurisprudence of the ICC and we should recall that when we talk
16 of a joint criminal enterprise, we can only see -- say that this
17 was developed by the international criminal tribunals.

18 [13.37.56]

19 To respond to the Co-Prosecutors' argument, this is -- or rather
20 -- this is what the prosecutor said. The prosecutor contends
21 himself in saying that the gravity of the crimes supposed the
22 criminal conduct of the Appellant. That is not how we conceive
23 the matter.

24 I refer you to paragraph 46. The prosecutors know that they are
25 wrong because they deliberately omitted to present the entirety

1 of your reasoning in your appeals judgment or decision and we
2 should recall before we look more closely at what you said in
3 that decision.

4 The criminal conduct of an accused person is a combination of
5 both the actus reus and the mens rea. The principle of legality
6 applies to both constituents elements and you cannot consider
7 only one of them. And the principle of legality applies to the
8 modes of participation, as well, and not only to the crime.

9 [13.39.13]

10 In paragraph 96 of the Duch appeals judgment, you also cite the
11 Hadzihasanovic decision regarding credibility and you say that
12 some laws can be considered as having been accessible to the
13 Accused. And you continue to say, still in paragraph 96, that the
14 Chamber can rely on domestic law to establish that an accused
15 could have reasonably known that the crime, as described in the
16 indictment, was foreseeable, and that is precisely our argument.
17 But you do not stop there, since you hold that is -- there is an
18 obligation to verify the elements that constitute the crimes and
19 modes of participation. I refer you to paragraph 97 of the Duch
20 appeals judgment in which you state that the I -- the ECCC based
21 on the principle of legality and the principles attached to it to
22 ascertain that the criteria that define the elements of crimes as
23 well as the modes of participation retained were envisaged in the
24 law during the period that fell within the temporary jurisdiction
25 of the Court. They should have been foreseeable and it should

1 have been accessible.

2 [13.40.48]

3 These are the principles you lay down in that appeal judgment and
4 you underscored, still in paragraph 97, that a very careful and
5 rational assessment of the criteria is indispensable to guarantee
6 the legitimacy of the ECCC and the decisions it renders. In light
7 of what you stated, the response of the Co-Prosecutors to support
8 the position of the Chamber is very far from convincing.

9 I refer you to our submissions on joint criminal enterprise in
10 paragraphs 68 to 73 of our appeal brief, but before we deal with
11 the question that you asked regarding joint criminal enterprise,
12 as it should have existed in 1975, it is important, nevertheless,
13 to recall that in the interpretation of the Chamber of what the
14 Joint Criminal Enterprise I is, there is an -- a fundamental
15 error in it because it applies the mens rea applicable to JCE
16 III.

17 [13.42.00]

18 The Chamber erred egregiously in its definition of the mens rea
19 or JCE I. It tried to legitimate that error by using an extensive
20 interpretation of the actus reus and I refer you to paragraphs
21 694 to 696 of the Judgment. The various requirements it relies on
22 to arrive at its position did not exist anymore during the period
23 in question, as today, and we'll see this clearly. In any case,
24 that interpretation is false and cannot engage any form of
25 responsibility for Mr. Khieu Samphan.

1 Let us recall that the Chamber, for a start, correctly recalls
2 the actus reus. It starts by saying that there must be a common
3 purpose which consists in committing a crime or which entails the
4 commission thereof and it is in line with the decision that was
5 rendered on the 12th of November 2011, document E100/6, in which
6 it's applied JCE III. The problem is that after recalling this
7 correctly, it has -- it does what I would call a semantic slide
8 towards common purpose and says, "A common purpose can lead to
9 the commission of a crime and can envisage the commission of and
10 the means used to commit a crime."

11 [13.43.53]

12 Paragraph 313 of the prosecutor's brief states that there is no
13 difference; yet, the difference is important. This different
14 formulation has a different meaning and before we talk of the
15 law, we have to look at the vocabulary, the terminology. There is
16 a common plan that involves the participation in the crime and I
17 refer you to paragraph 692 which refers us to the Tadic appeals
18 judgment. And here we find the right definition and it says that
19 a crime has to be committed as part of the common realization of
20 the common purpose and it's in -- it is an integral part of the
21 process.

22 In the reverse, a common purpose which envisages the perpetration
23 of a crime -- that is paragraph 696 -- is a plan according to
24 which it is possible to the commit a crime; it is, therefore, not
25 an integral part of it. So we find that in this different

1 formulation, the Chamber brought into the process something that
2 doesn't exist in the actus reus in the commission of JCE I and,
3 in so doing, it lowers the bar, it lowers the standard.

4 [13.45.16]

5 And what we see in this different formulation is that the Chamber
6 tries to lower the bar in order to achieve a purpose and I
7 referred to this yesterday by talking of the distortion of
8 evidence, the actus reus and the mens rea of the crimes. We need
9 these standards because we do not have enough indicia to reach a
10 correct standard that allows us to rule that Mr. Khieu Samphan
11 had the intent to commit such and such a crime. And this bring
12 us, of course, to your question on the state of customary
13 international law in 1975, as regards crimes that were uncertain
14 and not -- or crimes that were just probable.

15 The question was formulated as follows: You asked whether, in the
16 application of customary international law as it was in 1975,
17 individual criminal responsibility based on the joint criminal
18 enterprise in its basic form, whether or not it existed at the
19 time, would necessarily have called for a situation in which the
20 author would try to seek to commit the crime in question as part
21 of the implementation of a common purpose in the sense that the
22 commission of a crime was the common objective or whether it
23 encompassed also situations in which the author knew that the
24 crimes in question would be or could be committed as part of the
25 implementation of the common purpose.

1 Before I elaborate on this, perhaps I need to slow down.

2 [13.46.59]

3 MR. PRESIDENT:

4 (No interpretation)

5 MS GUISSSE:

6 I will try to slow down, Mr. President. I didn't hear the
7 translation of what you said. I suppose that it has to do with my
8 speed, so I will try to slow down.

9 Before I elaborate further and reveal the case law that existed
10 at the time, I will respond to avoid the suspense that the answer
11 is clear. There is no room for uncertain crimes. The crimes in
12 question must be part of a common purpose and the perpetrator of
13 that crime should have the intent to commit that specific crime.
14 The perpetrator must have the intent to commit a crime as part of
15 the implementation of the common purpose. And when we look at the
16 case law of the International Military Tribunal, that is, the
17 Nuremberg Trial, we find that their case law doesn't tell us
18 anything different from that.

19 I will not go into doctrinal discussions because there have been
20 many on the -- the terminology of joint criminal enterprise and
21 that didn't exist between the international criminal tribunals;
22 it was only conceived of subsequently. An analogy was drawn
23 between JCE I and I'll use the English term "conspiracy" and it
24 is very close to what we refer to today as joint criminal
25 enterprise. I will not go into doctrinal discussions. I'll refer

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1 to Milutinovic and there was an analogy in which you tried to
2 prove that it was -- it was not the same thing, but there are
3 similarities nevertheless.

4 [13.49.04]

5 On this basis, all the more so as I can recall the Nuremberg
6 decision, in which in the indictment -- we're still referring to
7 the English -- similarly, we find this in the words of the
8 International Law Commission of 1996, I still refer to it in
9 English, "The principle of individual responsibility for
10 formulating a plan or participating in a common plan or
11 conspiracy to commit a crime." End of quote.

12 And what we submit before this Chamber is that it is impossible
13 to draw any argument from the case law of the Nuremberg Trials to
14 say that even within the same -- within the framework of the same
15 conspiracy, there's a standard envisaged in the joint criminal
16 enterprise as determined and defined in Tadic.

17 [13.50.28]

18 Neither the Trial Chamber nor the Co-Prosecutors can reasonably
19 argue that in light of the Nuremberg case law before 1975 and in
20 the 1975 international -- customary international law envisaged a
21 standard that was lower than the possibility of committing the
22 crime. It cites many cases: the Einsatzgruppen case, the
23 Schonfeld case, and the Pohl case. It is, therefore, important to
24 recall that, in most cases, we don't necessarily have the
25 judgments in their entirety.

1 A large proportion of these case law were cited profusely in --
2 in the Tadic appeals judgment, so I crave your indulgence for the
3 manner in which I'll cite them because I'll focus particularly on
4 excerpts of the Tadic judgments and translations thereof. It is
5 important to proceed in a chronological manner and say that there
6 is some continuity in this case law.

7 [13.51.39]

8 First of all, outside of what the Co-Prosecutors have said, in
9 the Sandrock case and in Almelo case in November in '45, we have
10 three cases of three persons found guilty by British tribunals --
11 we're talking of war crimes -- and these cases are an essential
12 source for us. In that case, the assessor recalls:

13 "It was beyond doubt, to my mind, that the three Germans knew
14 what they were doing and had gone to a particular location solely
15 to kill the officer. You know that they were aware that they were
16 committing joint criminal enterprise."

17 We realize that we are in a joint criminal enterprise as is
18 stated in that excerpt and there were persons present and they
19 were participating in that joint criminal enterprise which was
20 illicit and the -- the purpose was illegal, to kill someone. The
21 crime should, therefore, be planned. It should not be a crime
22 that is only possible and likely. There is a plan with a criminal
23 purpose.

24 [13.53.24]

25 In April 1946, we have the Holzer et al case. In this case, it is

1 a Canadian military court and the assessor is talking of a
2 criminal enterprise regarding the murder of a Canadian prisoner
3 of war by three Germans and it goes that the three persons knew
4 that they were taking the victim to a precise location with a
5 view to killing him. Now, we are talking of a criminal enterprise
6 and all the persons in that enterprise had a purpose which was
7 criminal.

8 In August 1946, we have the Jepsen et al case. Here, again, we
9 find that this is quoted in Tadic and I quote:

10 "If Jepsen participated in this deliberate massacre of some 80
11 persons aiding the others to do their share of the dirty work,
12 all of the 80 murders could be attributed to him as well as to
13 all the others who, in one way or the other, aided the commission
14 of that offence."

15 [13.54.36]

16 We can talk of complicity here, but in this case, we are talking
17 of active participation in a plan with a view to committing a
18 criminal act per se. There is no doubt here that there is a crime
19 that was certainly going to be committed and it was to go and
20 commit a murder.

21 Let us analyze the case law as quoted by the Co-Prosecutors. In
22 any case, we have here June 1946, the Schonfeld case. We have an
23 extract of this case law and an extract of the report on that
24 case and this is the extract they intend to use, that is, the
25 Co-Prosecutors intend to use and it states as follows, and I

1 quote:

2 "If several persons come together to commit an illegal purpose or
3 to carry out an illegal purpose with a view to having recourse to
4 illegal means to kill someone, that murder can be attributed to
5 all the persons present when the offence was being committed
6 knowing that they were going to participate in the commission of
7 the group -- of the -- of the murder." End of quote.

8 [13.56.03]

9 For the judges to reach a finding that the -- the joint criminal
10 enterprise was committed, when we look at the documents presented
11 by the Co-Prosecutors, we find that what is quoted here is a
12 provision of English law. The provision is established by a judge
13 advocate. I don't know how tribunals of the time functioned, but
14 we know that the assessor is a prosecutor who gives advice to the
15 court. We don't have any reasoning of the judgment, so to say
16 that this is case law will be going too far. We do not have any
17 written judgment; we only have the findings of the parties or the
18 submissions of the parties on the subject.

19 [13.56.56]

20 Even though we do not know the exact reasoning of the court in
21 question, what is important to note is that a little later, other
22 explanations are furnished. When I state that there is no exact
23 phrase of the reasoning of the Chamber, it is stated in the
24 document as follows: "It's reason for deciding as it did."
25 Court's indulgence, we're talking of Law Reports, Volume 11, page

1 71.

2 So we cannot state that we have a certain judgment on this point,
3 but we should also recall the circumstances at the time.

4 In the Schonfeld case, the judges raised questions on the
5 complicity of the members of a military unit who participated in
6 an arrest and they wanted to find out whether they were present
7 at the time when a certain Rotschopf executed illegally three
8 persons. So we are no longer in the area of complicity, we are --
9 nor are we in a joint criminal enterprise. And they continue by
10 saying that the same judge advocate who cited these provisions of
11 English law and these are the provisions that the Co-Prosecutors
12 would like to use.

13 [13.58.30]

14 These -- the judge advocate says something later on and I quote
15 in English: "If the Court takes the view that the object of the
16 visit to the Diepenstraat 49 was in its origin lawful, that is to
17 say, to effect arrests, and was being carried out by lawful
18 means, but that, in the course of its prosecution, Rotschopf
19 killed the three men, but that others did not aid or abet such
20 killing, then no doubt, the Court would find them not guilty of
21 the charge of 'being concerned in the killing'." End of quote.

22 So here, if we consider the question of complicity or common
23 purpose, in any case, the issue such as summarized by the same
24 judge advocate who recalled the English military legal standard,
25 when he sums up the problem, he clearly says that there has to be

1 a participation and involvement in a -- a purpose that is
2 criminal in itself.

3 [13.59.53]

4 And the jurisprudence that follows supports this analysis and I'd
5 like to refer you to the Renzano (sic) case in August 1948, which
6 is also quoted in the Tadic appeal judgment. And it is important
7 or it is necessary for an accused person before being convicted
8 has been involved in the crime. Being involved in the commission
9 of a crime does not signify only that the person is a person who
10 caused the death of the victim, whether it be through a gunshot
11 or any violent mean, but also supposes a degree of indirect
12 participation; in other words, he must be the cog in a succession
13 of events that led to the result that happens.

14 He can reach these means not only by giving the order to commit a
15 crime, but also through various other means. The question here,
16 that is raised, is not if this is a crime that is improbable or
17 uncertain; the question is, is this direct or indirect
18 participation? And however, the knowledge of the purpose must be
19 that it is clear that the purpose is a crime. It was necessary
20 for the accused person to be aware of the criminal purpose, the
21 criminal part of the joint criminal enterprise.

22 And when I speak about the criminal part of the joint criminal
23 enterprise, I mean that it is necessary to remind that in the --
24 this particular case here, the Co-Investigating Judges and the
25 Chamber retained the fact that creating a socialist regime in

1 Democratic Kampuchea was not, in itself, a criminal purpose, but
2 that policies resulted from this that then led to the commission
3 of crimes.

4 [14.01.57]

5 And what we always said -- in the Khieu Samphan defence team when
6 defending our client, what we always said, whether it be before
7 the Chamber or whether it be in our written submissions, was that
8 never, never the Chamber provides the evidence that Khieu Samphan
9 cooperated, at one point in time, with the Democratic Kampuchea
10 regime with the purpose of committing a crime. There was a
11 political project, but never the Chamber said or determined what
12 would be the criminal part of the common purpose and what would
13 be the involvement and the significant contribution of Khieu
14 Samphan to a criminal aspect of the common purpose.

15 Now, I would like to return to the jurisprudence from that time,
16 the necessity of proving the knowledge of the criminal purpose.

17 It is necessary to prove that when a person took part in a crime,
18 the person knew the purpose. This is very important. A person is,
19 indeed, involved when that person knows the purpose of his or her
20 acts.

21 [14.03.04]

22 Other jurisprudence, the Pohl case, the 1948 trial of the WH --
23 WVHA. In this case, several defendants were convicted for crimes
24 against humanity and these were defendants who were in charge of
25 running concentration camps. And it's interesting to note here

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1 that with regard to each one of the defendants -- and I'm not
2 going to go into detail because I don't have much time -- but, in
3 any case, with regard to each one of the defendants, the report
4 states that they either played a role that had a direct
5 connection with the commission of the crime or they had a role
6 that was a necessary element in the commission of the crimes. And
7 for none of the defendants the notion of anything else than the
8 criminal purpose is considered.

9 The same thing for another jurisprudence that the Co-Prosecutors
10 wish to use, 1951, the Einsatzgruppen case. Here, once again, in
11 the documents, it is clear that the necessity to be connected to
12 the purpose or the crime -- we're not speaking about any other
13 purpose than the commission of the crimes. And this is what we
14 can read, such as reminded in the Tadic appeal judgment in fact:
15 "Thus not only the main perpetrators, but also the accomplices
16 are guilty, those who have contributed in the commission of the
17 crime or who are involved in a project that is linked to the
18 commission of the crime and those who belong to an organization
19 or a group intending to commit such a crime."

20 Here, again, the purpose is clear; it is necessary for a crime --
21 a crime to be considered. The crime has to be the purpose.

22 [14.05.07]

23 And I'm not -- I'm not going to lose too much time here because I
24 have quite a few things to bring up, but simply I'd like to tell
25 you that what we retained or what was retained was that all of

1 the members knew that the aim was to commit murder at a large
2 scale. This is the jurisprudence such as we understand it from
3 the report.

4 So here, again, the common purpose in this current case here is
5 not -- and I'm not the one who said it, but it's the Trial
6 Chamber and the Co-Investigating Judges said this. "The aim --
7 the common purpose, in itself, was not criminal in itself." This
8 is what we said. And if the purpose is not criminal, we should
9 not be told that he participated -- our defendant participated in
10 the common purpose in a general purpose which is not criminal, in
11 itself, but what we have to see is which significant contribution
12 he provided for the commission of criminal acts.

13 This is with regard to the answer to your question. Depending on
14 the jurisprudence of the period, which corresponds essentially to
15 the Nuremberg Trial, there is no room for uncertain crimes. There
16 are -- there is no room for possible crimes. And the question
17 that I recalled this morning and that I'm going to -- that I
18 recalled at the beginning of my submission, the -- the main
19 question remains, that is to say: What was the accessibility and
20 the foreseeability of this kind of mode of liability for Mr.
21 Khieu Samphan?

22 [14.06.47]

23 Once again, 1970-1975, he was in the maquis and he -- when he
24 left the maquis, he -- Cambodia was devastated, so where could he
25 have -- where could someone like Khieu Samphan could have found

1 documents in order to interpret in an extensive way a mode of
2 liability involving conspiracy such as what happened in Nuremberg
3 and -- and on top of that, with the idea of recklessness which
4 does not exist at all in the jurisprudence I just covered with
5 you?

6 And let's be clear about this, neither the Co-Investigating
7 Judges, nor the Pre-Trial Chamber, nor the Trial Chamber, nor the
8 prosecutors have raised this notion that might have existed in
9 1975. So if more than 40 years after the facts, if more than 15
10 years after the Tadic case, you are the first ones to ask that
11 question, well, it's not Mr. Khieu Samphan, I should tell you,
12 who in the depths of his maquis, who would have had the idea of
13 thinking about such a mode of liability.

14 [14.08.04]

15 So we state, once again, that the Chamber committed an error of
16 law with regard to the mens rea by lowering the threshold to a
17 lower degree which is the awareness that crimes would probably be
18 committed and here I'm referring you to our appeal brief,
19 paragraph 68 to 71.

20 And I would like to remind you with regard to the basic form, the
21 Vocka (sic) appeal judgment, which the Chamber uses, never states
22 that it was the intent of participating that matters. It said, on
23 the contrary, the intention of committing the common purpose and
24 that the jurisprudence is very clear about this.

25 The Tadic appeal case, paragraph 228. "However, when we speak

1 about basic joint criminal enterprise, the mens rea varies
2 depending on the category that the common purpose falls under."
3 Now, regarding the first category, the required element is the
4 intent of committing a specific crime, this intent being shared
5 of course by the co-perpetrators.

6 The Vasiljevic appeal judgment at paragraph 101, "the mens rea
7 varies depending on the category of the joint criminal enterprise
8 considered. Regarding the basic form, the required element is the
9 intent to combine -- commit a specific crime. This purpose has to
10 be shared by all of the co-perpetrators."

11 [14.09.35]

12 And we can continue. The Stakic appeal judgment, for example,
13 paragraph 65:

14 "The required mens rea to convict varies depending on the
15 category of the considered JCE."

16 Regarding the basic form we have to prove that, "[...] the accused
17 person and the other participants in the JCE had the intent of
18 committing a specific crime."

19 The Sainovic appeal judgment, paragraph 996, and I will quote in
20 English.

21 "The Trial Chamber correctly articulated the requisite mens rea
22 for the first category of JCE, explaining that it had proved
23 'that the accused shared with the other JCE members the intent to
24 commit the crime of the underlying offence.'" End of quote.

25 [14.10.25]

1 And I would like to add to this the Munyakazi appeal judgment, 28
2 September 2011, in English once again.

3 "The basic form of joint criminal enterprise, which is at issue
4 in this case, requires that the accused must both intend the
5 commission of the crime and intend to participate in the common
6 plan aimed at its commission."

7 And this is what I was telling you at the beginning of my
8 statement, the problem that the Chamber -- the Trial Chamber
9 faced is that the Chamber never determined that Khieu Samphan was
10 driven by the intent of committing a specific crime whether it be
11 with regard to population movement one, two or Tuol Po Chrey.

12 And this is why it is, by violating the law in and in complete
13 violation of the constant jurisprudence, that the Chamber needed
14 to use the concept of a lower threshold which is the
15 foreseeability of the crimes or the awareness that these crimes
16 would probably be committed. And I would like to refer you to
17 paragraph 944 of the judgment.

18 So this criteria, which is illegally transposed from the JCE
19 doctrine to this case, which Kong Sam Onn will speak about more
20 in detail, was not applicable. It could not be used as a
21 substitute for the intent of committing a crime. I would like to
22 refer you with regard to this to our developments in our appeal
23 brief.

24 [14.12.03]

25 And it is interesting also to note that, as I said to you, the

1 issue of introducing the recurring modus operandi with all of the
2 issues of the trials jurisdiction was only focused on the idea
3 that the possibility of the crime being committed with a lower
4 mens rea. And with this lower mens rea we have to find a few
5 elements to find a link between Khieu Samphan and the crime and
6 therefore to convict him or to declare him liable.

7 Now, I would like to -- I see that my time is running out and I
8 must still answer the question about the re-characterization. And
9 you asked us this morning -- the Co-Prosecutor spoke about this
10 this morning. You asked for -- that -- for a written response
11 because you were thinking about re-characterizing the mode of
12 liability for the crimes of extermination during a population
13 transfer one, population transfer two and forced disappearance
14 and persecution for a political reason at Tuol Pol Chrey.

15 [14.13.20]

16 So I don't have much time, so I will refer you to our written
17 submissions, F30/5. But still I would like to answer the
18 observations F30/6 of the Co-Prosecutors. First of all, in order
19 to recall our position let me sum up our position that is stated
20 in our submissions.

21 In view of the applicable law and the circumstances of the case
22 this is what we said. We said that you cannot proceed to such a
23 re-characterization for three reasons.

24 The first, this would mean introducing for the first time in
25 appeal a new constitutive element which the Chamber has not ruled

1 upon or was not called to rule upon. Indeed, JCE has different
2 constitutive elements, in particular the actus reus with a shared
3 intent of committing a specific crime which is more demanding
4 regarding the modes of participation in the closing order.

5 [14.14.13]

6 Here it is not a question of degree of participation only. There
7 are a certain number of specific elements that are not intrinsic
8 to the original accusation, and I would like to send you to our
9 appeal brief, paragraphs 18 to 37.

10 The second reason: You would aggravate, if you did this, Khieu
11 Samphan's fate who launched an appeal--

12 MR. PRESIDENT:

13 Counsel, please slow down as the interpreter cannot catch up with
14 your speed. And we grant you additional 10 more minutes.

15 [14.14.51]

16 MS. GUISSÉ:

17 Thank you, Mr. President. Maybe this will allow me to be a bit
18 more serene as I speak and to speak slower.

19 Well, the second point that we raised in our written submissions
20 is that the Supreme Court would aggravate Khieu Samphan's fate
21 who lodged an appeal whereas the Co-Prosecutors did not appeal
22 the judgment. They only appealed the decision on the application
23 of JCE III.

24 And since they did not make this appeal, we would be in a
25 situation where we would be violating the principle that you,

1 yourselves, have recalled, that is to say, Rule 110.3 of the
2 Internal Rules, that is to say, non reformatio in peius,
3 according to which the -- that -- an appeal should not revise a
4 division (sic) at the detriment of the person who is appealing,
5 putting the appellant in a position that is more disadvantageous
6 before making the appeal because -- and this would be the case
7 because there would be a new form of characterization regarding
8 these crimes, a new characterization of liability that was not
9 considered initially.

10 [14.16.10]

11 And finally, third point, third obstacle according to us, the
12 Supreme Court would violate Khieu Samphan's right to recourse
13 because pursuant to Rule -- here I have a problem with mine as
14 well -- pursuant to a rule from the Internal Rules you will
15 determine Khieu Samphan's fate as a last resort, so there is no
16 recourse. There is no recourse here following that new
17 characterization which is an ultimate decision in this case.
18 So what do the Co-Prosecutors say when they answer document
19 F30/6? The Co-Prosecutors are asking you to act in an illegal
20 way. They start by recalling Rule 110.2 according to which the
21 Chamber can substitute the characterization of the Trial Chamber,
22 another characterization. However, it cannot introduce a new
23 constitutive element for which the Trial Chamber was not called
24 upon to rule.

25 [14.17.20]

1 Let me please start again. So I would like to refer to Rule
2 110.2. The Chamber indeed can substitute another characterization
3 to the characterization chosen by the Trial Chamber. However, it
4 cannot introduce a new constitutive element on which the Trial --
5 for which the Trial Chamber was not called upon to rule.
6 And it recalls here, and I think they reminded -- the
7 Co-Prosecutors reminded this morning when they quote
8 jurisprudence from the ICC, but none of this jurisprudence is
9 relevant because none of this jurisprudence is based on a similar
10 text. At the ECCC the text is clear. The Supreme Court does not
11 need to be guided by anything else than Rule 110.2. However, in
12 the Cambodian -- and in its counterpart in the Cambodian Criminal
13 Code which means that the Supreme Court cannot introduce a new
14 constitutive element which the Trial Chamber was not called upon
15 to rule on.
16 And what the Co-Prosecutors are requesting from you is not even
17 re-characterization. They are asking for an extension of this
18 characterization but re-characterization is not an extension. It
19 is a substitution and a new characterization so we are changing.
20 We are replacing something. We replace the characterization with
21 another and the confusion here of the Co-Prosecutors is blatant
22 because in paragraph 14 of their response they are asking you --
23 they are asking you, and I will quote in English,
24 "re-characterization of JCE convictions" -- they are asking to
25 extend this to the crimes that had not been characterized in such

1 a way at the start.

2 [14.19.16]

3 This brings us back to specifically to the obstacle that we see
4 which is to say that since -- and this in paragraph 19 -- since
5 the Co-Prosecutors acknowledge that the JCE has specific
6 constitutive elements and, in particular "the accused must have
7 intended to participate in the common purpose" and here this is a
8 poor explanation because we like to recall once again that the
9 required intent is not to participate in the common purpose but
10 to commit a specific crime. And Rule 110.2 formally forbids the
11 Supreme Court from introducing new constitutive elements. So for
12 us there is a real obstacle here, a real problem.

13 [14.20.08]

14 And in the Duch appeal judgment, because it is in this
15 jurisprudence that the possibility of re-characterizing came up,
16 the situation wasn't the same. There was a re-characterization by
17 your Chamber based on elements on which the Trial Chamber was led
18 to rule. The Trial Chamber was led to rule on these elements. I
19 would like to refer you to paragraph 15 of our appeal brief.

20 And you took care of respecting Rule 110.2 in Article 400 of the
21 Cambodian Criminal Code. You specified that the accused had not
22 been acquitted of his crimes before indicating that by convicting
23 the accused you were respecting Rule 110.2 of the Internal Rules
24 and Article 401 of the Cambodian Criminal procedure. Here you
25 quoted the rule and here I would like to refer you to the Duch

1 appeal judgment F28, footnote 735.

2 In the Duch case once again, the Trial Chamber was called to rule
3 upon the crimes in question. The idea here was not modes of
4 responsibility or of liability, but in any case if we look at the
5 rest of the jurisprudence, for example, the Stakic appeal
6 judgment in paragraph 58 and 104, which is quoted by the
7 Co-Prosecutors to support their position. We are told that this
8 is an example that you can use as a source of inspiration.

9 [14.21.49]

10 But this is not at all the same case with the Stakic case because
11 the difference, the fundamental difference is that the Trial
12 Chamber was called to rule upon the crimes in question and this
13 you can see when you look at paragraph 58 and 104 of this appeal
14 judgment. It is very clear the Trial Chamber ruled on that issue.
15 In this particular case the Trial Chamber did not rule on the
16 mode of liability on the specific facts, they spoke about other
17 facts, so therefore it is necessary however to recall that we had
18 an investigation. Investigating Judges who made their choice and
19 the prosecutors had the possibility of asking for
20 re-characterization at that moment but they did not do so. No
21 observations on the elements during the preliminary objections.
22 The Chamber itself never in fact invited the parties to
23 re-characterize these issues.

24 [14.22.54]

25 So now we are coming at the end of a whole procedure and now the

1 first time the question is raised before the Supreme Court and we
2 cannot deprive Khieu Samphan of a double degree of jurisdiction
3 because he is the one who is appealing and this would be putting
4 him in a much more tenuous position than the position he enjoyed
5 before appealing.

6 Now, regarding the rest because I only have a few minutes left, I
7 am going to cover this very quickly and then I will of course be
8 available for possible questions that you may put to me. But
9 simply, I would like to tell you that the issue of lowering the
10 threshold regarding mens rea is the same for aiding and abetting
11 and it is the same for planning and the same for encouraging.
12 Regarding aiding and abetting, basically the mens rea is based on
13 international custom as the Co-Prosecutors say. They mentioned
14 appeal judgments. We have to remember that the foreign -- the
15 Furundzija appeal judgments mentions three kinds of mens rea;
16 knowledge of the contribution, knowledge of the -- or identity,
17 absence of mens rea. And here we should recall once again that
18 this is jurisprudence that comes after the facts involved in this
19 case.

20 I will finish here simply by telling you -- because I haven't had
21 the time to go into the factual elements -- but I simply would
22 like to quote an example or to mention an example to show you how
23 the Chamber's argumentation, how the Chamber's constructs are
24 full of errors and do not correspond to any logical development.

25 [14.24.39]

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1 I would like to refer you to paragraph 955 of the Judgment where
2 we are told that the mode of liability with regard to JCE and
3 with regard to the supposed knowledge of Khieu Samphan on the
4 totality of the policies, paragraph 955, Khieu Samphan at Tuol Po
5 Chrey. What does the Chamber say here? The Chamber says that,
6 "Therefore, even if there is no evidence establishing that Khieu
7 Samphan was aware of the specific nature of the crimes that were
8 committed at Tuol Po Chrey, the Trial Chamber is convinced that
9 he knew that there was, back then, a recurring modus operandi
10 after the liberation of a zone to arrest, execute and disappear
11 the soldiers of the Khmer Republic.

12 [14.25.33]

13 So in this paragraph this is a clear demonstration of what I have
14 been telling you since the beginning of these proceedings, that
15 is to say, the factual errors, the errors with regard to the
16 characterization of the crimes and the errors with regard to the
17 modes of participation have only one single objective is to say
18 that even if he did not know, even if he did not participate even
19 if there is no significant contribution on the part of our client
20 he has to be convicted despite -- regardless of everything. And
21 that is the core problem of the judgment.

22 MR. PRESIDENT:

23 Thank you, Counsel, for your submissions. Let we have a short
24 break. We have a short break now and return at quarter to three.

25 (Court recesses from 1426H to 1447H)

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1 MR. PRESIDENT:

2 Please be seated. The Court is in session.

3 The floor is given to the OCP.

4 MR. KOUMJIAN:

5 Good afternoon, Your Honours. We will try to respond to the
6 arguments that the Defence has made this afternoon and also later
7 to address some issues that were raised yesterday. I would like
8 to start with the most recent submissions by Defence Counsel in
9 her oral argument regarding re-characterization of the offence.
10 Counsel states that this would introduce a new element into the
11 trial were, Your Honours, to utilize joint criminal enterprise
12 for the four crimes where the Trial Chamber did not enter
13 convictions under joint criminal enterprise. She has told us
14 repeatedly it would introduce a new element, but the Khieu
15 Samphan defence has never identified what is the new element. Is
16 it the fact that there was a plurality of persons who had the
17 intent to commit crimes within the jurisdiction of this Court?
18 No. That we know was litigated extensively at trial and is found
19 in the judgment.

20 [14.49.09]

21 Was it that the accused, Khieu Samphan, had the intent or Nuon
22 Chea the intent that these crimes be committed? No, that was
23 alleged in the closing order that was found in the judgment. I
24 will come in a moment to question number four, what the word
25 intent means.

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1 Is it the fact that these crimes happened that people were
2 disappeared without providing information to their families that
3 exterminations occurred during the first forced transfer and the
4 second in that political -- that Lon Nol officials and
5 officers/soldiers were persecuted by the regime at Tuol Po Chrey?
6 No. All of this has been litigated and the Trial Chamber has made
7 findings on all of these issues. All of these points the Defence
8 had every opportunity and took every opportunity to litigate.
9 This case is exactly very much along the lines of the Stakic
10 appeal judgment that Counsel mentioned. In the Stakic appeal
11 judgment, to be clear, what happened in that case is that the
12 Trial Chamber, civil law judges it happened to be, did not like
13 the concept of joint criminal enterprise and introduced in the
14 judgment of -- at trial a mode of liability of co-perpetration
15 largely following the German model of Roxin and this concept of
16 co-perpetration.

17 [14.50.49]

18 Neither party, neither the prosecution nor Stakic appealed
19 whether or not co-perpetration was a mode of liability at the
20 ICTY. It was the Appeals Chamber that on its own asked the
21 parties to address that question and then made its own finding
22 that co-perpetration was not within the modes of liability from
23 the statute of the ICTY and then re-analysed the findings of the
24 Trial Chamber to find that all of the elements of joint criminal
25 enterprise were met.

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1 [14.51.32]

2 So this is a case where the Trial Chamber made no findings about
3 a joint criminal enterprise but the factual findings that they
4 did make about how in this case the mayor of the town, Stakic,
5 worked together with the police, with the army in a criminal
6 enterprise to forcibly deport individuals from the municipality
7 resulting in mass crimes and approximately 1,500 killings. All of
8 these, they found, fit the elements of joint criminal enterprise
9 and convicted him of various crimes under joint criminal
10 enterprise.

11 Now, the concept of joint criminal enterprise and how it's used
12 in this case I think has been complicated, frankly, in the
13 Defence argument. I would like to revisit it a bit in a somewhat
14 simplified form.

15 First, absolutely, the Defence is correct, joint criminal
16 enterprise of course requires that the objective or the means of
17 those entering into the agreement that they have contemplated a
18 crime within the statute of the Tribunal. And in the case -- in
19 this case, to simplify both the closing order and the findings of
20 the Chamber, what's clear is they said that there was a
21 non-criminal ultimate objective and that was this radical
22 agrarian revolution, and that the members of the joint criminal
23 enterprise including of course Nuon Chea and Khieu Samphan and
24 the other top leaders agreed, understood that they would use
25 criminal means, crimes within the jurisdiction of this Court to

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1 accomplish those -- that objective.

2 [14.53.31]

3 Now, I am simplifying it a bit because I am taking out this
4 intermediate step that the closing order put in and was followed
5 by the Trial Chamber of the five policies which examined all of
6 this in more detail. But to simplify it and it's absolutely
7 clear, this is what the joint criminal enterprise boils down to,
8 an attempt to commit -- to achieve a radical revolution,
9 political revolution not in itself a violation of international
10 criminal law, but by means that were clearly criminal.

11 And the evidence in this case and the findings of the Trial
12 Chamber have shown that each of the accused made significant
13 contributions to that enterprise.

14 [14.54.20]

15 And I could go into that in some detail, but just very briefly in
16 regards to Khieu Samphan, what the Trial Chamber found is, in his
17 own words, he played an important if not essential role in the
18 Khmer Rouge development of their policies. He served, as you
19 know, in various positions that made him very prominent in the
20 public both to the Cambodian public and internationally. And this
21 was in a regime where it was very secretive so that amplified the
22 importance of his role. He was seen by many people as the leader
23 of the Khmer Rouge, because that's all they knew. Pol Pot and
24 Nuon Chea were staying in the shadows.

25 And the Trial Chamber -- the evidence shows and the findings show

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1 Khieu Samphan made very important contributions to that
2 enterprise, particularly -- in particular to these killings both
3 in his announcement, further announcements that the seven
4 traitors would be killed, and I think he added some names
5 including Lon Non who was killed, to those who would be killed,
6 with the threat that anyone who didn't join them in time would
7 further suffer the same fate. Those who didn't defect before the
8 victory of Khmer Rouge would suffer the same fate.

9 And in announcing -- many of the announcements he made during the
10 evacuation, he was the person that was on the radio talking about
11 when Lon Nol, for example, fled when the Americans pulled out. He
12 was the person that was on the radio representing the Khmer
13 Rouge.

14 [14.56.02.]

15 And when people were on the road being evacuated from Phnom Penh
16 under horrendous conditions, inhumane conditions, Khieu Samphan
17 remained the spokesperson, the voice justifying this, glorifying
18 the great victory of the Khmer Rouge in capturing Phnom Penh, all
19 the time that the regime that he was serving was inflicting this
20 tremendous suffering upon the population.

21 So the findings of the Chamber clearly show that both Nuon Chea
22 and Khieu Samphan made their significant contributions to this
23 joint criminal enterprise which clearly contemplated the use of
24 criminal means to achieve their objective.

25 [14.56.53]

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1 Now, I would like to come to the question that, Your Honours,
2 asked about, intent. We all agree that the cases have said that
3 those who are members of the joint criminal enterprise under the
4 first form, the basic form of joint criminal enterprise, in fact
5 for all forms, for also for the third form of joint criminal
6 enterprise, must intend to commit a crime within the jurisdiction
7 of the Court.

8 The question is what does the word "intend" mean? And we submit
9 that if you look at general principles of criminal law across all
10 legal systems, the word "intent" is never for general intent
11 crimes. I am not talking about specific intent crimes like
12 genocide, but for general intent crimes the word "intent" always
13 includes committing intentional conduct with knowledge of the
14 consequences that will occur or probably will occur.

15 I am hesitating because you see across different systems,
16 different words used to express the concept that the person
17 commits the intentional conduct aware of the probability, the
18 substantial likelihood, the fact that it will occur in the normal
19 course of events, that it is natural and foreseeable; all these
20 different words are used to express what it means to intend a
21 crime.

22 And in civil law it's generally, the general approach is to
23 divide intent into three concepts.

24 First, *dolus directus* of the first degree, that this is the
25 object of your conduct. The object of your conduct is to kill

1 this person.

2 [14.58.54]

3 Second, *dolus directus* of the second degree, which we submit at a
4 minimum is included in the joint criminal enterprise of the first
5 degree, joint criminal enterprise and meaning of intent. *Dolus*
6 *directus* of the second degree expressed again in different
7 systems, in different countries, in different languages, in
8 slightly different words, but it means that you are aware that
9 this consequence is probable, a substantial likelihood, natural
10 and foreseeable, will occur in the ordinary course of events,
11 different words are used for that. But it expresses the concept
12 that you are aware that your conduct has a, I'll use the word,
13 substantial likelihood of causing this consequence.

14 [14.59.45]

15 And in fact, we think the word "substantial likelihood" is the
16 most appropriate. It's -- remember the word -- the joint criminal
17 enterprise in the Tribunals including this one, ICTY and ICTR,
18 has been found by, Your Honours, and different court -- by the
19 Pre-Trial Chamber here, Trial Chamber here, Appeals Chambers and
20 other Tribunals, to become under the statutes of those courts
21 because it's part of committing. They say the word committing
22 includes commission by joint criminal enterprise.

23 So what is the intent required for committing? Well, again, it's
24 been expressed slightly differently in different cases at even at
25 the ICTY, but in *Lukic v. Lukic* (sic) for example, the Trial

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1 Chamber held that, quote -- this is paragraph 900 -- that:

2 "The requisite mens rea for 'committing' is that the accused
3 acted with the intent to commit the crime, or with an awareness
4 of the probability, in the sense of the substantial likelihood,
5 that the crime would occur as a consequence of his conduct."

6 To give a very practical example, a person is trying to get away
7 from the police and the traffic is slow in front of them so they
8 decide to go on the sidewalk to go faster to get away from the
9 police knowing that there are people or likely to be people on
10 the sidewalk.

11 [15.01.29]

12 I think in any legal system where the person does that even
13 though they may hope, "Gee, I hope I don't hit anyone because it
14 will slow me down" their objective is to get away from the
15 police, not to hit people. But they are aware by driving on the
16 sidewalk that there is a substantial likelihood that they are
17 going to hit and kill pedestrians. I think in every legal system
18 a person would be held responsible for that conduct.

19 Now, one of the things that I felt the Defence was conflating
20 continually this afternoon and also in their appeal brief is the
21 mens rea for a joint criminal enterprise of the third, the
22 extended form, JCE III, with joint criminal enterprise in the
23 first or even the second categories.

24 Contrary to what the Defence is saying, substantial likelihood is
25 not the standard for joint criminal enterprise in the third

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1 extended form. Joint criminal enterprise of extended form is
2 very, in my submission, very consistent with what is normally
3 called *dolus eventualis* in the civil law system.

4 [15.02.44]

5 If you look at the Krajisnik decision on this issue, there was a
6 trial -- appeal judgment decision on an interlocutory appeal. See
7 if I can find that. I hope I can come back to you with that
8 later.

9 But in that decision, Krajisnik made it clear that -- excuse me,
10 sorry, it's Karadzic. It's not Krajisnik. It's the Karadzic
11 decision, a more recent case Karadzic.

12 The Appeals Chamber made it clear the defence was challenging
13 whether or not the intent required, *mens rea* for the third
14 degree, should be that the event, the crime will probably occur
15 or just possibly occur and the Appeals Chamber made clear in
16 Karadzic decision that the standard is possible, but possible and
17 the accused must accept that risk, must reconcile himself with
18 that risk. So that is what the extended form, the *mens rea* for
19 the extended form of joint criminal enterprise amounts to.

20 Now, the evidence in this case, we submit, and found by the Trial
21 Chamber, clearly shows that the killings, the forced transfers,
22 all of the crimes, the extermination, the persecutions all
23 occurred in an extended pattern and the accused had pre-knowledge
24 of these events for many years for this pattern of conduct,
25 continual knowledge of these crimes occurring and continued to

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1 make their contributions to this joint criminal enterprise.

2 [15.04.45]

3 So the evidence indicates -- we submit shows clearly that they
4 had the intent, they were aware -- we would say, the best words
5 we would say to use for the intent required for the first form of
6 joint criminal enterprise is of "substantial likelihood". But I
7 don't see that as being different other than semantically in
8 practice with cases that use the words -- knew that in the
9 ordinary course of events the crimes would be or could be
10 committed.

11 Recall for future events it's never possible to know with an
12 absolute certainty that events will occur. We can only know that
13 they are probable to various degrees of probability.

14 Even Einsatzgruppen case, this group of mass executioners that
15 killed hundreds of thousands during the Nazi purges of
16 minorities, Jews and other minorities, yes, Counsel read
17 something where they said, where she said -- she quoted language
18 which said they participated in it knowing the crimes would
19 occur.

20 [15.06.04]

21 But of course we never know for certain that for example the
22 Allies won't rescue, won't achieve victory the next day and no
23 one else will be killed. You may send a trainload of victims of
24 minorities of Jews or Roma to Auschwitz. You don't know if they,
25 for sure that they won't escape, that the war won't end before

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1 they are executed or that they won't be one of the very few that
2 are picked out to do labour instead of being killed. That hardly
3 would mean that you don't intend their killing by your conduct.
4 You do conduct aware of the substantial likelihood where that in
5 the normal course of events these crimes will happen.
6 And this is exactly what happened, what occurred with Khieu
7 Samphan and Nuon Chea and the killings at places like Tuol Po
8 Chrey. Of course the Trial Chamber found they were not aware of
9 every single killing around the country and there wasn't clear
10 evidence that they knew beforehand about the killing at Tuol Po
11 Chrey, but it was part of a pattern of conduct that they endorsed
12 and certainly knew about and part of the joint criminal
13 enterprise that they continued to contribute to.

14 [15.07.22]

15 One clarification, I think Counsel at one point said you must
16 contribute to the crime in joint criminal enterprise. That's not
17 correct. If you go to Tadic, unlike a mode of liability such as
18 aiding and abetting, where you have to show that the accused's
19 contribution had a -- it was a substantial effect on the crime,
20 for joint criminal enterprise you simply have to show that the
21 accused made a substantial contribution to the enterprise.
22 Your Honour, there is many other points to cover but because time
23 is limited, I also wanted to give an opportunity to my colleague,
24 Mr. Lysak, to address you on some of the issues about the
25 planning for the first forced transfer, in particular Khieu

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1 Samphan's role in the planning for the first forced transfer,
2 particularly since a lot of emphasis was put in the Defence
3 arguments on the testimony of Phy Phuon and he is the
4 Co-Prosecutor who conducted that examination. So I turn it over
5 to him at this point.

6 (Short pause)

7 [15.09.13]

8 MR. LYSAK:

9 Good afternoon, Your Honours. I'm happy to take this opportunity
10 to address what I think is probably the most central issue that
11 has been raised by the Defence in what you have heard so far in
12 these appeal hearings.

13 We have heard a lot of rhetoric accusations that the Trial
14 Chamber is distorting the evidence that this was not a real
15 trial, a show trial. What I would like to do with you in the time
16 that I have is show you that this was about the evidence. Khieu
17 Samphan was not convicted because of some bias that the Trial
18 Chamber held. Khieu Samphan was convicted based on very clear
19 evidence of his contribution to a common criminal plan.

20 And specifically what I want to talk about are the two meetings,
21 that Counsel, Khieu Samphan's counsel made reference to
22 yesterday, the two key meetings at which decisions were made by
23 the Khmer Rouge leaders to evacuate all the residents of Phnom
24 Penh.

25 [15.10.44]

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1 The first was a meeting that was held in mid-1974, June to July
2 time period. That is the meeting that Nuon Chea at the very start
3 of his trial described in detail in a statement he gave and on
4 which he was subsequently examined while he was testifying. It's
5 a meeting that is referenced in some of the "Revolutionary Flags"
6 and contemporaneous documents.

7 Nuon Chea describes what took place at that meeting and the
8 initial decision made at that time that when Phnom Penh was
9 captured the entire population would be evacuated with no
10 exceptions, no exceptions for the sick or elderly. Everyone had
11 to go.

12 [15.11.44]

13 The issue that Phy Phuon brought to this meeting, Phy Phuon
14 testified that Khieu Samphan was one of the leaders who was
15 present at that meeting. This became a central issue of dispute,
16 disputed by the Defence and by Khieu Samphan's wife.

17 Your Honour, asked a question yesterday about whether the Trial
18 Chamber made an effort to address credibility and resolve
19 conflicting evidence. And this is -- this was a key part of the
20 case where there was conflicting evidence and the Trial Chamber
21 needed to do just that.

22 And I want to, before I get back to how the Trial Chamber
23 resolved that, just to reference you to some jurisprudence from
24 the ICTR on this very issue of what is required of the Trial
25 Chamber in this type of situation. This is a case cited in

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1 paragraph 95 of our appeal response. Forgive my -- if I mangle
2 the pronunciation of this case. It is the Kajelijeli appeal
3 judgment, ICTR 98-44A-A, and specifically paragraphs 59 to 61 of
4 that decision contains some very detailed discussion of what is
5 required from a Trial Chamber in this situation. I quote from
6 paragraph 59.

7 "The Appeals Chamber is mindful of the position expressed in the
8 Musema appeal judgment that a trial chamber is not required to
9 set out in detail why it accepted or rejected a particular
10 testimony." There then is some discussion of the general law
11 about the task of weighing and assessing credibility of witnesses
12 being with the Trial Chamber. Your Honours, have yourselves
13 pronounced law on this in the appeal judgment. I will not take
14 you back to that.

15 [15.14.14]

16 Continuing in paragraph 60:

17 "While the finding could have been elaborated by a discussion of
18 the witness -- specific witness JK27's credibility, the trial
19 chamber's failure to do so falls short of violating the
20 appellant's right to a reasoned opinion which does not ordinarily
21 demand a detailed analysis of the credibility of particular
22 witnesses. In Musema, for instance, the appeals chamber held that
23 a trial chamber is not necessarily required even to refer to
24 particular evidence or testimony in its reasoning, much less give
25 specific reasons for discrediting it."

1 [15.15.03]

2 Of particular significance, though, is the next paragraph,
3 paragraph 61:

4 "Under some circumstances a reasoned explanation of the Trial
5 Chamber's assessment of a particular witness' credibility is a
6 crucial component of a reasoned opinion. For instance, where
7 there is a genuine and significant dispute surrounding a witness'
8 credibility and the witness' testimony is truly central to the
9 question of whether a particular element is proven."

10 And they give an example of a witness or testimony,
11 identification testimony coming from a single eye witness.
12 Your Honours, that is what the Trial Chamber did if you look at
13 its judgment in discussing the competing evidence on whether
14 Khieu Samphan was present or not at the mid '74 Central Committee
15 meeting. This discussion is in paragraphs 133 through 142 of the
16 judgment where there is a very detailed discussion of the
17 evidence assessing the credibility of the respective accounts
18 that were given by Phy Phoun and by Khieu Samphan's wife to
19 evidence that existed that corroborated or did not corroborate.
20 And the conclusions that were ultimately reached, as stated in
21 paragraph 139 was that:

22 "Given the contradictions in So Socheat's testimony, her
23 motivation to assist her husband, the clear testimony of Phy
24 Phoun and the equally clear information provided by Suong
25 Sikoeun, the Chamber finds that So Socheat's evidence is

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1 unreliable."

2 [15.17.10]

3 So, Your Honours, I point this out because the question was
4 raised yesterday and, as we indicated, we do not believe and we
5 don't believe it was feasible for the Trial Chamber to assess the
6 credibility of every single person who testified. But where there
7 was a key issue where there was witness testimony in dispute,
8 they did so. And let me talk a little bit now about why, what was
9 the evidence the led the Trial Chamber to conclude that Khieu
10 Samphan had in fact been present at this meeting.

11 Specifically, there was a number of pieces of evidence that
12 confirmed and corroborated his account that Mr. Ieng Sary and Mr.
13 Khieu Samphan had returned from a foreign trip for this meeting.
14 Let me say a few things first about who Phy Phuon was, because
15 this was brought up by Counsel yesterday.

16 [15.18.18]

17 Phy Phuon, at that time, was the personal guard of Pol Pot and
18 Nuon Chea, the very top leaders of the Party. He had been
19 introduced to the revolution in 1963, became a member of the
20 Youth League of the Party in '67 or '68 and became a member, a
21 full rights member of the Party in 1971. That meant that he, as a
22 Party member, attended political education meetings and he
23 testified in this Court that the people who instructed him on the
24 principles, the policies, the Party lines were none other than
25 Pol Pot, Nuon Chea, Ieng Sary and Khieu Samphan.

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1 This was a significant witness. When the Khmer Rouge came into
2 power, Phy Phuon received an appointment. He was appointed to be
3 the third-ranking cadre at the Ministry of Foreign Affairs. His
4 title was Office Chairman of B-5. B-5 was the Ministry of Foreign
5 Affairs Office. So we are talking about a witness who had a
6 significant basis, significant knowledge, significant contact
7 with the very top leaders of the Khmer Rouge, something that you
8 could only know from being in this courtroom and I think that is
9 the difficulty and the reason for the law about credibility of
10 witnesses being a matter for the trier of fact.

11 [15.20.14]

12 You would have had to be here for his testimony and the testimony
13 of almost all the others to understand how different Phy Phuon
14 was from many of the other Khmer Rouge cadres who came to testify
15 in this Court. He was clear and straightforward. He was direct,
16 unlike many who came in and were evasive; denied the positions
17 they held in the regime, were evasive in answering questions to
18 the point that they had, we had to drag the information out of
19 them which we did.

20 He answered the questions. His memory was extremely good. He was
21 a breath of fresh air in this Court and he was extremely
22 credible. That is why you heard the Defence go on the attack
23 against him yesterday when we were to be discussing issues
24 relating to fair trial rights.

25 [15.21.24]

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1 Why did the Trial Chamber accept Phy Phuon's testimony about
2 Khieu Samphan being present at that meeting? Because it was
3 corroborated, because they heard from another witness, Suong
4 Sikoeun who was with Khieu Samphan and Ieng Sary on a trip they
5 were taking abroad about the timing of their return to Cambodia,
6 specifically that they came back to Hanoi at the end of May 1974.
7 They then went down to make a visit to stop into Laos -- to the
8 liberated zone in South Vietnam and by early June, early or
9 mid-June, Khieu Samphan and Ieng Sary were on their way back into
10 the country.

11 There is an issue that I will not get into right now about some
12 contemporaneous telegrams. If you have questions about that, I am
13 happy to get into that but I will leave that aside. But there are
14 also contemporaneous diplomatic cables establishing the timing.

15 [15.22.40]

16 Second reason; the testimony of Khieu Samphan's wife. What she
17 ultimately testified -- and let me refer Your Honours
18 specifically to testimony on the 10th of June 2013 which took
19 place at 14.23 to 14.28 and 15.40 (sic) to 15.16 -- she testified
20 that their first child was born on the 4th of May, 1974 and that
21 around that time they had to move to the Meak office. "It was the
22 new office and I went there during my early days after giving
23 birth."

24 Then, question: "At the time when your first baby was Mr.
25 Khieu Samphan with you, that is, on the day of the delivery of

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1 the baby?"

2 Answer: "During that time when I gave birth to my first child he
3 was in China and about a month later he returned. We remained
4 together and went to the Meak office." End of quote.

5 So while So Socheat came here to try to give an alibi to her
6 husband, because she testified that when Khieu Samphan came back,
7 he came back from meetings where he was negotiating deals with
8 China and Vietnam to support the Khmer Rouge, she claimed that he
9 then spent two months staying at home changing nappies. That is
10 the exact words that she used. Now, the Trial Chamber did not
11 find this credible.

12 [15.24.39]

13 More important about her testimony though, she puts Khieu Samphan
14 back in Cambodia in June 1974 at the time of these meetings and
15 she puts him at the location where the meetings took place. These
16 meetings took place at Meak. When you look at So Socheat's
17 testimony, she puts herself and Khieu Samphan at the very
18 location where these meetings took place.

19 I also mention Ieng Sary made an admission in an interview with
20 Steve Heder that he returned in 1974, to the country and
21 discussed at a meeting with Pol Pot the evacuation. This was also
22 relied on by the Trial Chamber.

23 I go through this in detail because it has been repeatedly said
24 here that this case has not been decided upon the evidence and
25 that could not be further from the truth. For us, this has always

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1 been about the evidence. Everything that went on in this
2 courtroom for almost two years, October 2011, till the trial was
3 finished in 2013, was about the evidence. It was very important
4 to us that the evidence be presented accurately, fairly that the
5 defendants have a chance to confront that evidence and that the
6 convictions, that the judgment be evaluated and decided based on
7 the evidence. And we take extreme issue with the rhetoric we have
8 heard so far in these hearings.

9 [15.26.37]

10 The second meeting, which in some ways is even more important,
11 that Phy Phoun testified to, was a meeting in early April 1975,
12 held at an office called B-5 and B-5 was the central command
13 headquarters of the Khmer Rouge leaders. An office established by
14 Pol Pot, where he met with the military commanders from the
15 various zones and commanded the attack on Phnom Penh. Phy Phoun
16 was there because he again was working as Pol Pot's guard and he
17 testified that a meeting was held about two weeks before 17 April
18 to finalize the plans for the evacuation. He described in detail
19 where the meeting took place, the time of day and he testified
20 that both Nuon Chea and Khieu Samphan were there that they both
21 expressed their positions and they both agreed to the plan to
22 evacuate Phnom Penh.

23 [15.27.53]

24 Again, the Trial Chamber looked to see if there was corroborating
25 evidence Phy Phoun's testimony, and there was because both Nuon

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1 Chea and Khieu Samphan admitted, gave -- have given statements
2 that they were at that location in the weeks preceding 17 April
3 1975. And indeed, there is actually film footage of Pol Pot, Nuon
4 Chea and Khieu Samphan together at the very location where this
5 meeting took place at B-5 which was identified by Phy Phuon. For
6 Your Honours' reference, it is E3/2346R. It's a video at 01.40.21
7 to 01.40.34. This is the type of detail that we heard in this
8 courtroom.

9 Final confirmation, a July 1982 interview of Khieu Samphan
10 reported by "The New York Times", document E3/687. This is what
11 Khieu Samphan said to "The New York Times" in 1982, and this is
12 the reporter's words.

13 "He" -- referring to Khieu Samphan -- "acknowledged that millions
14 of Cambodians had been sent out of Phnom Penh and into the
15 countryside as a result of the collective decision. Had he joined
16 in the decision?" -- questioned -- asked the reporter -- "Mr.
17 Khieu Samphan chuckled dryly and replied in French 'Yes,
18 evidently'."

19 [15.29.50]

20 Your Honours, evidence of two meetings at which Khieu Samphan
21 participated, direct evidence from an eye witness that Khieu
22 Samphan agreed to the plan to evacuate the population of Phnom
23 Penh. This is not a distortion, this is the evidence that was
24 heard in this courtroom.

25 That plan, by the way, we heard the question, what was his

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1 contribution to a criminal plan. A plan -- the plan that Khieu
2 Samphan agreed to was criminal in nature; the forced eviction of
3 millions of people from their homes without adequate provision
4 for food, water, shelter, medical care.

5 [15.30.45]

6 As Khieu Samphan said himself, if there had been a single vote
7 against the evacuations there could have been no evacuations.

8 That is the collective decision principle that, Your Honours, I'm
9 sure, are aware of.

10 Your Honours, the evidence about Khieu Samphan's contribution
11 wasn't just limited to his attending those meetings, Phy Phoun
12 also testified that Khieu Samphan was one of the cadres along --
13 one of the leaders, along with Pol Pot and Nuon Chea, who
14 conducted presentations to the cadres to explain why the
15 evacuation was necessary and relied on experiences from other
16 cities they had captured, such as at Udong.

17 You'll find that testimony in Phy Phoun's testimony on 26 July
18 2012, document E1/97.1 at 11.04.31 and at 09.45 through 09.48.

19 So this is the evidence upon which Khieu Samphan was convicted;
20 compelling detailed testimony about his approval and contribution
21 to a criminal plan to forcibly evacuate the population of Phnom
22 Penh, corroborated by multiple sources, not civil party
23 applications, not victim impact testimony, written records of
24 interviews, testimony of witnesses who appeared in this courtroom
25 and who were cross-examined by the Defence. By any accounts, a

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1 real and fair trial.

2 [15.32.58]

3 Your Honours, I don't know where I am time-wise. I was going to
4 say a few things about the argument that the zone -- the Khmer
5 Rouge militaries were not subject to a central command -- but --
6 yes? Okay.

7 The one other issue I want to talk about today is the issue that
8 Counsel have raised as to whether the zone -- whether the armies
9 were independent autonomous zone armies or whether, in fact, they
10 were subject to central authority.

11 You heard some quotes from Philip Short, the expert from both the
12 International Co-Prosecutor and from Khieu Samphan's Counsel, but
13 there was much, much more evidence from the people who were
14 directly involved in this, from the people who were at these
15 command headquarters.

16 [15.34.07]

17 That is the dispositive evidence, I believe, when we look at this
18 issue. And, specifically, we heard from four or five witnesses
19 about the two command headquarters operated by Pol Pot, Nuon Chea
20 -- where Pol Pot, Nuon Chea and Khieu Samphan were based from
21 1970 to 1975. First, S-71 and then B-5.

22 I heard a quote read suggesting that there was problems with
23 communications, but we heard from multiple witnesses who were
24 actually involved in the telegram offices in that time period,
25 the war time period.

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1 Norng Sophang testified on 29 August 2012, at 14.38 to 14.42,
2 that when zones were involved in contentious battles there were
3 telegrams coming to the CPK -- the party leaders at S-71, I
4 quote: "Twenty-fours around the clock." He described how he
5 received his telegram training in '73, and was the chairman of
6 the telegram office at the command headquarters as of 1974.
7 We heard from Phy Phuon about details to the point of the type of
8 radio equipment that was at the command base that allowed direct
9 communications between the leaders and the battlefield.
10 Phy Phuon also testified that while he was at B-5, he delivered
11 messages between Khieu Samphan and the battlefield. This is on
12 the 2nd August 2012, at 9.12 and 9.15.
13 [15.36.18]
14 Numerous witnesses testified to the zone commanders coming for
15 regular meetings to obtain instructions. And I would specifically
16 direct, Your Honours, by way of corroboration of what we heard
17 from the witnesses in this Court, to an interview that was given
18 by Ke Pauk before his death.
19 Ke Pauk was, at the time of the war, the deputy secretary of the
20 North Zone. He was one of the military commanders overseeing
21 troops in the war, and he later became the secretary of the North
22 -- the Central Zone. His interview is E3/2782, E3/2783.
23 And you will find in that interview a very detailed account of
24 the battles during 1970 to '75, and the orders that he received
25 directly from the Central Committee or Son Sen about where to

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1 attack, about the attack where they tried to capture Kampong Cham
2 provincial town and take the people out of there.

3 [15.37.32]

4 There is simply no question on the evidence heard in this
5 courtroom that this was a centrally commanded military operation.
6 Your Honours, I could address you for length about the evidence
7 in these proceedings. All we ask -- all we ask, is that when you
8 reach your decision it's based on the transcripts, the documents,
9 the evidence that we worked very hard to put before the Trial
10 Chamber for almost two years. We simply cannot decide this based
11 on rhetorical arguments that this was a show trial.

12 I am happy during the time I'm here to answer whatever questions
13 you may have as someone who was there in the trial. I have a
14 little more -- a little more familiarity with the record and I
15 have an understanding too of the difficulty of the task that you
16 have. This is an enormous record. Ninety witnesses who testified,
17 thousands of documents. I know how difficult it was for us to put
18 it all together into final submissions and we are here, as I'm
19 sure the Defence is, to answer your questions and do the best we
20 can.

21 But I wanted to address these specific, factual questions because
22 I think they're very important to your decision.

23 (Short pause)

24 [15.39.58]

25 JUDGE KLONOWIECKA-MILART:

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1 I was allowed one question by the President.

2 Counsel, could you, at least in a sketchy form, help us however,
3 connect the alleged -- or contentious presence of Khieu Samphan
4 at meetings, which you described, with his knowledge of
5 extermination of murdered -- murders that occurred during the
6 evacuation of Phnom Penh?

7 We are aware that there is evidence that in the meetings that is
8 -- the second meeting that -- at B-5 there was a success of Udong
9 evacuation discussed, but we understand from the evidence of the
10 same witness, it went -- it had gone smoothly.

11 [15.41.00]

12 So, the B-5 meeting wouldn't on itself necessarily show that a
13 sinister, or more sinister, than the evacuation in itself purpose
14 was contemplated in whatever form of intent described by the
15 prosecutor. So if you could at least point us in the direction
16 where to -- where would the Prosecution like us to look?

17 We are very well aware that the teams on both sides have vast
18 knowledge of Case 002 before its severance and, hence, your
19 vision of certain attributions is broader, I would say, than ours
20 which is looking at -- through the reversed binoculars.

21 So if you could help with this, I'd appreciate it. If not, we
22 will wait with our questions for tomorrow's session.

23 [15.42.19]

24 MR. LYSAK:

25 Thank you, Your Honour. I don't have my notes immediately handy

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1 on Udong and I want to give you specific references, but I can
2 give you a general answer to that question.

3 I wouldn't exactly describe Phy Phuon's testimony as the
4 evacuation of Udong went smoothly, that it was a non-event. By
5 "smoothly", he meant it was successful, and so you have to look
6 at the details of what actually took place when Udong was
7 evacuated, and that comes from a number of sources.

8 It comes from some accounts. We heard from some witnesses in the
9 Court, a witness named Nou Mouk, and from some research conducted
10 by Philip Short. It comes from also evidence of what happened in
11 other cities that were captured by the Khmer Rouge. And Steve
12 Heder I'm reminded also.

13 [15.43.24]

14 I will, tomorrow, have those specific references for you, but it
15 is clear that what happened when major cities were captured by
16 the Khmer Rouge prior to Phnom Penh was criminal in nature.

17 People were not just politely asked to join the Khmer Rouge. I
18 will -- I remember the testimony of Francois Ponchaud in this
19 courtroom. He lived in Kampong Cham area during that period, so
20 he had first-hand experience of what took place when the Khmer
21 Rouge captured towns.

22 And his testimony was -- there was a routine practice when they
23 would capture an area. They would take all the people out. They
24 would kill the commune chiefs and they would burn the houses.

25 Steve Heder made it to Udong I think maybe a week, 10 days, after

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1 the Khmer Rouge had done its damage there. He found bodies of
2 murdered nuns, many other people who had been killed, evidence
3 that things were far from smooth, Your Honour.

4 But I will get those -- I want to give you specifics, but in
5 general it was very clear from the evidence that what took place
6 when the Khmer Rouge captured cities prior to Phnom Penh was
7 horrific and these -- this was a common practice. It wasn't
8 isolated, the same thing happened every place when they captured
9 it. So I will bring some of that, some specific sites, for you
10 tomorrow.

11 [15.45.45]

12 MR. PRESIDENT:

13 Thank you very much. It is now time -- a good time for the
14 adjournment. And the Chamber will resume its hearing tomorrow at
15 9 a.m.

16 Security personnel are instructed to bring the two accused back
17 to the detention facility and have them returned tomorrow into
18 the courtroom at 9 a.m.

19 The Court is now adjourned.

20 (Court adjourns at 1546H)

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