ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

## អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber
Chambre de la Court Suprême

# TRANSCRIPT OF APPEALS HEARING

Case File N° 002/19-09-2007-ECCC/SCC

17 August 2021



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

Language used unless specified otherwise in the transcript

| Speaker | Language |
|---|---|
| Judge KONG Srim | Khmer |
| Judge Maureen CLARK | English |
| Judge Ya Narin | Khmer |
| Judge MONG Monichariya | Khmer |
| Ms. Helen WORSNOP | English |
| Mr Vincent de Wilde d'ESTMAEL | French |
| Ms. Ruth Mary HACKLER | English |
| Ms. Nisha PATEL | English |
| Mr PICH Ang | Khmer |
| Ms. Megan HIRST | English |
| Ms. Anta GUISSE | French |
| Mr KONG Som Onn | Khmer |
| Greffier | Khmer |

P R O C E E D I N G S

(Court opens at 0858H)

THE GREFFIER:

All rise.

(Judges enter the courtroom)

MR. PRESIDENT:

Please be seated.

Today is the second day that the Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia resumes the hearing.

Yesterday, we have heard the submissions on the jurisdiction of the Trial Chamber.

Mr. Greffier, please report the presence of all the parties.

THE GREFFIER:

Excellency President, Your Honours, for today all parties are present. Here with us we have the National Co-Prosecutors, Excellency Chea Leang and Helen Worsnop. The International Co-Prosecutor is also with us.

For the Accused – for the Defence team, we have here with us Mr. Kong Sam Onn and Anta Guisse, co-counsel for the Accused. And the Accused, Khieu Samphan, is present as well in this hearing.

[09.01.04]

For Civil Parties, Pich Ang and Ms. Megan Hirst are present. And five additional Civil Parties are with us also in this hearing, Madam Mea Saroum (phonetic), Madam Hong Hoeun (phonetic), Madam Al Kali (phonetic), Mr. Som Batti (phonetic) and Madam Yim Sovann are with us.

Thank you very much, Mr. Excellency President.

MR. PRESIDENT:

Today we will continue the topic on the jurisdiction of the Trial Chamber.

Yesterday afternoon, we have heard – we heard the submissions of the Co-Prosecutor already. For this morning, I would like to invite the Civil Party Lead Co-Lawyers to make their submissions.

You have the floor now.

[09.02.31]

MS. HIRST:

Good morning, Mr. President, good morning, Your Honours, and good morning to the parties.

Your Honours, I am compelled to spend some of my time this morning as I begin to address the rather surprising argument which was made yesterday by the Defence that Civil Parties do not having standing before this Chamber to make arguments about the scope of the case.

I say this is surprising for several reasons, firstly, because I find it hard to conceive of very many things more clearly linked to civil party interests than the scope of the case.

For a civil party, the scope and whether you are inside it or outside of it, that's what determines whether the crimes you experienced will become the subject of a judicial determination, whether you could see official recognition of what you went through, whether there is a possibility of accountability for the crimes you suffered.

[09.03.47]

Every time the scope is shrunk, some Civil Parties will lose that. And of course, the arguments we're dealing with today are also relevant to broader civil party interests concerning legal certainty, which I spoke about yesterday already.

The second surprise yesterday was that Defence counsel came up with a new standard for civil party standing. She said that it exists where Civil Parties have a specific interest, but

not where they have a general interest.

Your Honours, I don't know where that comes from and I don't even know how that distinction could be applied in practice. This is not a distinction which is found in Your Honour's rulings, F10/2, F52/2, and it is also not what Your Honours said in the Case 2/1 Appeal Judgment at paragraph 81.

The situation covered by that paragraph is entirely different from what we are looking at here. It dealt with a civil party filing in which – in which reference was only given in one sentence to the justification of balancing the rights of the parties. The Chamber said that justification was too generic.

The third thing that surprised me yesterday was to hear counsel for the Defence say that there had been a shift in our approach. That was perplexing because Civil Parties have a long history at this Court and in this particular case of raising issues about the scope of the case, including on questions such as rape outside forced marriage and the remaining charges.

[09.05.50]

In our filing F60/1/1 at footnote 10, we list five written submissions we filed during the trial phase which concern scope, and we also have a citation there to the oral submissions made about scope in the closing arguments of this case. And many of those, in fact, address the very same issues of admissibility which we're speaking about. So there has been no shift.

I'll leave the standing point now unless Your Honours have any questions. We have made fuller submissions on this in F60/1/1 and in our response brief at paragraph 43 to 47 and 115 to 117.

Regarding the question of the scope of the case itself, our position remains that most of the Defence's arguments were raised far too late, years after the Defence was aware of the

issues and years after the first opportunity for seeking a judicial ruling.

[09.07.07]

I'm going to begin by responding to some of the points from yesterday.

Firstly, Your Honours asked why Khieu Samphan did not raise these matters before the Co-Investigating Judges or the Pre-Trial Chamber. That's in paragraph 14 of the Co-Rapporteur's report.

Yesterday, Defence counsel acknowledged openly that these matters were never raised at pre-trial and she spoke at length about why the Closing Order was not appealed, but what she did not explain is why those matters were not raised before the Closing Order.

There are things to be known, legal question, that these matters could have been raised in an annulment application under Rule 76, paragraph (2), so Your Honours remain without an answer on that question. And I want to use a little time to highlight just how much opportunity Khieu Samphan did have to deal with many of those issues before the Closing Order was ever issued, and I'll do that by taking an example from among the Type 1 scope arguments.

[09.08.25]

Grounds 53 and 54 concern Kraing Ta Chan Security Centre. In those grounds, the Defence argues that the introductory submissions did not cover interrogations, torture or ill treatment through prison conditions at Kraing Ta Chan.

We say those points are wrong on their merits. The introductory submission did encompass those matters. But more relevantly today, the Defence could have raised arguments about this many years ago. It should have been early – it should have been obvious to them as early as 2008 that those matters were being treated as within the scope of the case.

The documents notified to the parties during the judicial investigation included the

following.

Document E3/8350 is a rogatory report filed on the 15th of February, 2008. It describes several witnesses who spoke about Kraing Ta Chan. It refers to detention, interrogation and systematic execution. It describes witness evidence which repeatedly refers to torture, interrogation and starvation, and it speaks of illness and persons being buried alive. [09.09.58]

A further rogatory report, E3/8356, was filed around a month later, on the 3rd of March, 2008, also concerning Kraing Ta Chan. It gave details of interviews with four witnesses. All of them speak about interrogation in Kraing Ta Chan. All of them speak about inhuman conditions of detention in Kraing Ta Chan, lack of sanitation, lack of food, shackling, disease, dehydration. All of them talk about conduct which could obviously be described as torture, including beatings during interrogations using clubs and rattan whips, and prisoners beaten to death during interrogation.

In addition to these rogatory reports, of course, there were the written records of interview of the witnesses discussed in those rogatory reports. And we've been able to identify nine of those which have material on torture, interrogation or prison conditions. [09.11.14]

A site report, E3/5828, filed in September 2009 also mentions torture, interrogation, disease and starvation.

So Your Honours, it should have been very clear from 2008 or 2009 when the Defence received these documents that the Co-Investigating Judges were investigating torture and ill treatment of prisoners at Kraing Ta Chan. If the Defence believed that that exceeded the scope of the introductory submission, it was clearly open to the Defence to request annulment under Rule 76(2).

And if there was any doubt remaining that these matters were being treated as within the

scope of the case, that must have been removed by the Closing Order, which clearly mentioned conditions of detention, interrogations and torture in paragraphs 501 to 2 and 506 to 9.

That, of course, brings us back to the arguments we heard yesterday about why the Defence did not challenge the Closing Order.

[09.12.36]

Yesterday the focus was very much on Rule 74(3) and whether it was possible to appeal the Closing Order, and I will come back to that momentarily. But we also note that in addition to appealing the Closing Order in regard to other issues, on the very same day, the 18th of October, 2010, Khieu Samphan lodged an application for a permanent stay of proceedings based on abuse of process regarding the investigation stage.

Now, unfortunately, these documents don't appear to be in Zylab. I've been in touch with the administration, but I haven't yet had clarification about how we can find those documents in Zylab, but the decision is available online, so I'll give the full reference.

It's called "Decision on Khieu Samphan's Interlocutory Application for an Immediate and Final Stay of Proceedings for Abuse of Process", and it's given document number 2 dated 12 January 2011.

Now, in the motion which led to that decision, Khieu Samphan argued about a range of procedural issues relating to the pre-trial stage.

[09.13.57]

That document is not filed pursuant to Rule 74(3) and it wasn't limited to the subjects which are listed in Rule 74(3), and yet again there is no mention of saisine being exceeded and we've heard no explanation for the Defence of why that was the case. But I'll turn back now to the question of Rule 74(3) itself.

The Defence position on this seems to be that in 2010, the Defence looked at the Internal

Rules and discovered that it was definitively not possible to appeal the Closing Order in respect of the question of saisine and then, having identified this in the Rules, they simply didn't try.

Listening to the Defence yesterday, an observer might have thought that Rule 74(3) expressly prohibits the Defence from appealing the Closing Order on questions of saisine. It does not do that at all.

[09.15.12]

Rule 74(3)(a) says that the Defence can appeal on matters of jurisdiction. The question, and we say it remains an open question, is what is meant by "jurisdiction".

Ironically, we are having this debate today in a session which is titled "Jurisdiction", and the Defence even argued yesterday that their objections constitute absolute jurisdictional questions in line with paragraph 31 of the Case 1 Appeals Judgment, F28.

So the question of what can be appealed from the Closing Order under Article 74(3)(a) is a matter of interpretation. What does the word "jurisdiction" mean?

It is true that the Pre-Trial Chamber jurisprudence on this question is problematic, and it's true that the Pre-Trial Chamber has generally spoken of Internal Rule 74(3)(a) as allowing challenges to the Court's personal, material, temporal or geographical jurisdiction, and in some early decisions the Pre-Trial Chamber did find appeals regarding saisine to be inadmissible, although we say without giving clear reasons for that. But we also know that the Pre-Trial Chamber has expanded its appellate powers beyond Rule 74(3) where that is necessary to prevent serious fair trial violations.

[09.17.06]

That power has even previously been used to hear a challenge concerning investigations beyond the scope of the introductory submissions. That's the JCE decision, D97/14/15, in particular, paragraphs 32 to 34. And most significantly, we have a number of strong

statements from the Pre-Trial Chamber that it has exclusive power to review procedures undertaken at the investigation stage.

At paragraph 134 of our brief, we've quoted a statement from the Pre-Trial Chamber in the Case 4/2 considerations on appeals from the Closing Order. In Case 3, the International Judges made even stronger statements to this effect. That's in D66/27 of Case 3 at paragraphs 123 to 129 and 267 to 268.

Those statements take the position that questions about procedural defects in the investigation are not permitted to be ruled on by the Trial Chamber or the Supreme Chamber and, therefore, they must be dealt with by the Pre-Trial Chamber. Indeed, that is the clear meaning of Rule 76(7). It says, in the English version:

"Subject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation. No issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber."

[09.19.14]

To the extent that the Pre-Trial Chamber jurisprudence is somewhat unclear or contradictory, in part because very few defence teams have attempted to raise issues about saisine in their Closing Order appeals, and as far as we've been able to find, the Pre-Trial Chamber has never explicitly addressed the question of whether Rule 74(3)(a) should be interpreted in the light of Rule 76(7).

We can't help but wonder, why did the Defence not attempt to raise that very question and argue for a wide interpretation of Rule 74(3)(a). How could they have known what the Pre-Trial Chamber would rule without even attempting to persuade it?

[09.20.14]

Your Honours, we say that Rule 74(3)(a) must be interpreted as allowing appeals on these issues. The Internal Rules need to be given an interpretation which puts those Rules and

understands them in light of each other so that they fit together.

Rule 76(7) says that after the Closing Order, defects in the indictment are cured and cannot be raised before the Trial Chamber or the Supreme Court Chamber.

If Rule 74(3)(a) is read in light of that provision, then it is clear that procedural failings at pre-trial such as allegations of exceeding the scope of the introductory submission, they must be appealable to the Pre-Trial Chamber because thereafter, they are barred.

Your Honours, the correct approach is a purposive interpretation, an approach which makes sense of the Court's structure and its procedural framework so that they hold together and advance the objectives which they seek. There are two points on this, really. [09.21.32]

The first is that the procedural framework strives for certainty and clarity before the end of the pre-trial stage, and the second is that the Pre-Trial Chamber is the Chamber given responsibility to oversee the judicial investigation.

If there was a question about whether the Co-Investigating Judges followed correct procedure in reaching the Closing Order, why would the Rules intend for those matters to be left beyond the pre-trial phase? Why would the Rules intend for those questions to go to the Trial Chamber rather than the Chamber which is specifically empowered to oversee the investigative process?

Why would jurisdiction, that term when it's used in Rule 74(3)(a), be intended to exclude jurisdictional questions arising out of investigative procedure? It would make no sense to prevent the Defence from raising issues of saisine to the Chamber which is most appropriate to deal with those matters, and at the point in the proceedings where certainty could be achieved before the transfer of the case file to the Trial Chamber. [09.22.58]

So we believe that these sorts of appeals from the Closing Order are permissible, but in

any event, even if we are wrong on that, wherever the Pre-Trial Chamber has ruled that an appeal against a Closing Order was inadmissible, it has gone on to make the point that the issue should instead be put as a preliminary objection to the Trial Chamber. So it has to be one or the other.

If the Defence say that these matters could not be raised at pre-trial, that means they must have been able to be raised as preliminary objections and they should have been raised as soon as they were known. The ultimate point is that, in this instance, the Defence did neither of those things. It didn't raise the questions before the Pre-Trial Chamber, it didn't raise them before the Trial Chamber.

If I understood Khieu Samphan's submissions correctly yesterday, then his position is this; that when an accused notices that the scope of the case is being exceeded, the Internal Rules require him to wait until the end of the trial to raise that matter.

[09.24.15]

This would mean that we would hold the trial first and then decide subsequently which matters fall within the scope of the trial. It's hard to imagine any legal system that would be designed that way. It would be difficult to reconcile with the principle of legal certainty in Rule 21(1) or with Your Honours' ruling in paragraph 237 of the Case 2/1 appeal.

Your Honours, I see that I'm at the limits of my time. I did have one short additional point which I would hope to cover prior to having heard the Defence's submissions yesterday which I needed to respond to.

I'd like to ask Your Honours' indulgence for a further four minutes or so, if I may.

MR. PRESIDENT:

You may continue.

[09.25.31]

MS. HIRST:

I'm grateful, Mr. President.

My final point concerns the prejudice which would arise if the Defence were permitted to challenge the scope of the case for the first time at its conclusion. And as an example of this, I'd like to look at Ground 39 concerning the geographical scope of charges concerning Tram Kak Cooperative.

Although the Closing Order speaks generally about Tram Kak district, paragraph 302 mentions only eight of the 15 communes of Tram Kak, and the same issue arises in paragraph 43 of the introductory submission.

The Defence now says that charges relating to Tram Kak district were limited to those eight communes, but the Defence was silent on this issue through trial and the consequence was this. A significant amount of evidence was heard during the Tram Kak segment which concerned events in Tram Kak but which occurred outside those eight named communes. In particular, the Trial Chamber heard evidence concerning events which took place in Leay Bour commune, Cheang Tong commune and Popel commune, all in Tram Kak, but none of them named in paragraph 302 of the Closing Order.

[09.27.06]

Civil Party Chou Koemlan, Civil Party Oem Saroueurn both lived in Leay Bour and testified about their experience there. They spoke, between them, over three days. Witness Neang Ouch, alias Ta San, was transferred to Tram Kak in 1977 and lived in Leay Bour. He testified over three and a half days.

Witness Khoem Boeun, alias Yeay Bouen, was commune chief of Cheang Tong commune. Her evidence covered Cheang Tong commune as well as Popel commune, where her husband was commune chief, and she testified over two full days.

Witness Meas Sokha lived in Cheang Tong commune. He testified about being imprisoned in Kraing Ta Chan but, additionally, about conditions of life in Cheang Tong. And he

testified over three days.

[09.28.10]

I could continue, but I hope the examples make the point already, which is that the Trial Chamber heard days and days of evidence focused on events in Tram Kak district which occurred outside the eight named communes. It specifically identified Civil Parties and witnesses based on their knowledge and experience of those other communes. And throughout all of this, the Defence was silent.

The difficulty is this, Your Honours. The Trial Chamber had a limited amount of time, and each hearing day was precious. That precious time was used on these sources of evidence, people who had lived and worked in parts of Tram Kak outside the named communes.

Now, if the Defence had raised its objection at the time and if the Chamber had agreed, other evidence could have been identified and heard about those eight named communes.

[09.29.21]

I've taken this ground simply as one example, Your Honours, and we make this point in order to demonstrate that our arguments about admissibility are not a mere technicality. There has been a very tangible prejudice if the Defence is permitted to raise these objections late.

The opportunity was lost for the Trial Chamber to hear from other Civil Parties or other witnesses who might have had relevant material in their knowledge. The Trial Chamber's ability to ascertain the truth as required by Rule 85 would be harmed.

We ask Your Honours to uphold the approach of the Trial Chamber and to rule that arguments about scope which were not raised at the first opportunity are inadmissible and they must be dismissed on that basis.

Thank you, Your Honours. That concludes my submissions unless there are any questions.

MR. PRESIDENT:

Next I would like to invite Judge of the Bench – or Judges of the Bench to put questions to parties. The floor is opened.

(Short pause)

I'd like to invite Judges of the Bench to put questions to parties if you have any.

[09.32.01]

JUDGE CLARK:

One query that has been bothering me since the beginning of this appeal. Perhaps there isn't an answer.

Is there an equivalent of estoppel by conduct in criminal trials?

It's a difficult question, and you may not have the answer, but it seems to me that this is what you're addressing us on, that the equitable principle of estoppel could in some way apply to the conduct of a party in a criminal trial.

Do you have any comment on that?

[09.33.00]

MS. GUISSE:

It seems there was some issues.

Could you please repeat your question?

(Short pause)

JUDGE CLARK:

Ms. Hirst?

MS. HIRST:

Yes. Thank you, Judge Clark, for the question.

In fact, it's our position that there is something very similar to a doctrine of estoppel on this issue. The question has come up repeatedly at the ad hoc tribunals, and there, they don't

use the term "estoppel" as such. The term which is more frequently used is "waiver", so the principle as it's put is that if the parties remain silent, they have waived their ability to raise a point on appeal.

And I think this is something rather similar to the concept of estoppel in the sense that what happens is that the other parties rely on the silence of that party who knew of the issue and didn't take the issue at the relevant time and that, therefore, they are prevented because of the reliance of the other participants in the proceedings from raising it later.

[09.35.01]

So I would say that although the term "estoppel" is not used in the way that we would use it in our common law legal systems, the principle is actually very similar, and that is a principle which we've referred to in our response brief. I believe it's at paragraph 173 of our response brief and the footnotes that are cited there.

As we were – as we were elaborating our brief, we did have, of course, page limitations, so we've only really included one paragraph there, but the jurisprudence of the ad hoc tribunals does go into quite some detail on the principle, and it has been repeated in very many cases.

I hope that assists, Your Honour.

[09.35.51]

JUDGE CLARK:

I'm very grateful. Thank you.

MS. WORSNOP:

Good morning, Your Honour. I would just like to add that our position is the same as the Civil Parties, that essentially "estoppel" and "waiver" have been used interchangeably.

And in that regard, I would like to draw your attention to your Appeal Judgment in Case 1 where, as has been discussed previously, you worked your way around some of these

issues and discussed the difference between absolute jurisdictional challenges and procedural jurisdictional challenges.

And in the context of that, at footnote 78, which is appended to paragraph 31, you discuss the issue of waiver. And actually, at the bottom in the quote to the Sri Lankan Court's jurisprudence, you speak – the Court there, which you cite, speaks about "acquiescence, waiver or inaction on the part of a person may estop him from making attempt to establish that the Court was lacking in contingent jurisdiction". There, "contingent jurisdiction" being used in a similar way to procedural jurisdiction in the context of this discussion.

[09.37.20]

So I would say that these issues can be discussed in terms of estoppel or waiver and, indeed, have been done so already by this Court.

Thank you.

MS. GUISSE:

Madam, Your Honour, may…

In the paragraph that I quoted yesterday, there is no idea of this waiver idea that I do not understand in English, but in French it's very clear that when there are issues that can put an end to prosecution, they can give rise to objections at any moment, as the paragraph states.

Thank you.

(Short pause)

[09.39.11]

MR. PRESIDENT:

If there is no more question, we will proceed to the next item of the agenda.

And I'd like to invite the Co-Rapporteur Judge regarding the grounds of appeal relating to the crimes for which Khieu Samphan was convicted.

Thank you.

JUDGE YA NARIN:

Thank you, Mr. President. Allow me to read the Co-Rapporteur Report for the session on grounds of appeal relate to the crimes for which Khieu Samphan was convicted.

The Trial Chamber found the Accused guilty of several crimes against humanity grave breaches of the Geneva Conventions and genocide of the Vietnamese through his participation in the common purpose and sharing the same criminal intent of "joint criminal enterprise".

[09.40.29]

He was convicted of the following crimes that were committed in the course of the implementation of the five policies of the Communist Party of Kampuchea during the Democratic Kampuchea regime:

(a) The crimes against humanity of murder, extermination, deportation, enslavement, imprisonment, torture, persecution on political, religious and racial grounds, and other inhumane acts through attacks against human dignity, conduct characterized as enforced disappearances, forced transfer, forced marriage and rape within the context of forced marriage;

(b) The crime of genocide by killing members of the Vietnamese ethnic, national and racial group;

(c) Grave breaches of the Geneva Conventions of wilful killing, torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or a civilian the rights of fair and regular trial, and unlawful confinement of civilians under the Geneva

Conventions at S-21 Security Centre.

[09.42.05]

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

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

Legal errors.

The Accused submits that the Trial Chamber violated the principle of legality by failing to apply the correct legal criteria in its examination of whether the crimes were sufficiently accessible and foreseeable to him in 1975. The Trial Chamber's reliance on three factors in its analysis is disputed.

[09.43.30]

Those factors were the existence of the crime or mode of liability in customary international law at the time of the alleged criminal conduct, the gravity of the crime and, finally, the positions occupied by the Accused as a member of Cambodia's governing authority. He asserts that the application of these criteria was an error of law which negates all the findings and convictions.

This argument relating to the legal error regarding the principle of legality is mentioned in several other places in the Accused's submissions. The Chamber believes that challenges to the legality of specific crimes properly fall to be argued in this section on Crimes.

The Accused challenges the Trial Chamber's legal definition of murder with dolus eventualis and submits that no concept of murder with dolus eventualis existed in customary international law in 1975. All findings of murder with this intent must, therefore,

fall.

The existence of murder with dolus eventualis in customary international law in 1975 was determined previously in the Appeal of Case 002/01. The Chamber would welcome some clarification on why this submission should be re-litigated.

[09.45.18]

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

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

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

[09.46.41]

The Accused challenges the Trial Chamber's definition of the constitutive elements of the crime against humanity of persecution on religious grounds which he submits led the Trial Chamber to make erroneous legal and factual errors relating to the treatment of Buddhists and of Cham. Specifically, he argues that the Trial Chamber erred its definition of the mens rea for those crimes.

The Accused challenges the sufficiency of the evidence for the convictions of crimes against humanity of political persecution of "New People", former Khmer Republic soldiers,

real or perceived enemies or that the Cham were specifically targeted and subjected to discriminatory treatment.

The Accused challenges the findings of the crime against humanity of persecution on racial grounds of Vietnamese living in Cambodia, as he submits that Vietnamese in Democratic Kampuchea were not a discernible racial group. The same arguments are made in relation to convictions for persecution of the Vietnamese through acts of deportation, arrest and murder on the basis of their race and the requisite level of discriminatory intent. [09.48.26]

Several arguments relating to legal errors are raised regarding forced transfer, enforced disappearances, attacks against human dignity, rape and forced marriage as crimes against humanity of "Other Inhumane Acts". The primary challenge concerns:

(a) the Trial Chamber's definition of the law applicable to "Other Inhumane Acts;

(b) its failure to consider whether the facts constituting the crimes were sufficiently foreseeable to the Accused by 1975.

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

It is disputed whether the Trial Chamber's finding that the Khmer Krom could be victims of enforced disappearances as the facts relied upon were outside the scope of Case 002/02 and, further, that evidence of the treatment of the Khmer Krom was unlawfully used to convict the Accused of enforced disappearances of the Vietnamese. [09.50.15]

"Other Inhumane Acts" characterized as forced marriage and rape in the context of forced marriages are challenged on the basis that those crimes were not sufficiently foreseeable

to the Accused, specifically in circumstances where neither act attracted criminal sanctions in Cambodian or international law at the time. He disputes the fact that consent to marriage was absent.

Consent was a principle adopted by the Communist Party of Kampuchea and the marriages conducted during Democratic Kampuchea approximated Khmer traditional arranged marriages. He

therefore disputes the legality of his convictions under the title forced marriage.

[09.51.21]

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

With respect to the crime against humanity of enslavement, the Accused challenges the Trial Chamber's jurisdiction to adjudicate facts in relation to particular sites comprising Phnom Kraol Security Centre. Further, he submits that the Trial Chamber erred in law by relying on insufficient and unreliable evidence to find that the crime was established.

Similarly, regarding the crime against humanity of torture, he disputes the sufficiency of evidence to make a finding of torture against Cham detainees at the Security Centre of Trea Village. The Chamber would welcome focused argument on these challenges.

With respect to the charge of the crime against humanity of deportation of the Vietnamese at Tram Kak, the Accused raises the same argument presented at trial that this charge was not contained in the French version of the Severance Annex.

[09.53.25]

The Trial Chamber and the Supreme Court Chamber have already addressed the error of

omission which occurred in the French translation of the Annex but was present in the Khmer and English language versions. The Supreme Court Chamber would be assisted by an explanation for why the same matter has been repeated in this appeal.

The Accused further challenges the sufficiency of evidence to convict for the crime against humanity of deportation of the Vietnamese to Vietnam and, secondly, that the crime was committed with the requisite intent to forcibly displace victims over a national border. He challenges all factual and legal findings relating to the murders of Vietnamese and of genocide.

The Accused disputes the findings that murders of Vietnamese had been committed in various cooperatives and in territorial waters and, further, that the crimes were carried out with the necessary intent to destroy the Vietnamese ethnic group.

[09.54.56]

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

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

Thank you.

MR. PRESIDENT:

The Supreme Court Chamber would take a break now and we will resume at 25 past 10:00.

(Court recesses from 0956H to 1023H)

MR. PRESIDENT:

Next, I would like to invite the Defence team for Khieu Samphan to make submissions.

You have the floor.

MS. GUISSE:

Good morning, Mr. President of the Supreme Court, and thank you for giving me the floor. Given the limited time available, and the fact that we cannot respond to the Prosecution and Civil Parties regarding all of the crimes,

[10.24.47]

I will focus in today's intervention on the question of the genocide of the Vietnamese, the crimes of persecution, crimes against humanity, and other inhumane acts and the facts of forced marriage. And given what time I have left, I will then respond to your questions.

I would also like to specify that the fact that I'm concentrating on these three subjects does not change the fact that we are of course basing our arguments on the new sources that we communicated in response to the statements of the Prosecution and the Civil Parties, and which we classified by theme in our list of sources.

This being said, I will now speak to the question of genocide of the Vietnamese, as it was addressed by the Chamber in its Reasons for Decision, and dealing with these facts forces us to return to the issue of the *saisine* and its consequences on the conclusions of the Chamber in factual terms.

[10.26.06]

The Prosecution states in paragraph 320 of its response to our Appeal Brief, that it was also at the hearing on the killings of Vietnamese outside Prey Veng, Svay Rieng, and there's a good reason for that. It is a perfect example to illustrate our grievances as a whole with regard to the Chamber in relation to both the saisine and the facts.

And in the first part of my intervention I would like to recall our Appeal Brief, paragraphs 435, 438, and 520 and 521, where you will find all the references as to the facts and hearing that I am discussing. And, also, our final submission in paragraphs 1878 to 1896 and 1932 to 1934. And there are also references to be found in the reply of the Co-

Prosecutors, paragraphs 316, 321, and 342 when dealing with Grounds 60 and 80, depending on the way in which this was enumerated.

Then the Closing Order there was mention made of facts characterized by the Co-Investigating Judges of murder constitutive of genocide, murder constitutive of crimes against humanity and extermination constitutive of crimes against humanity. In this part of the Closing Order, there is no geographical indication.

However, in the part of the Closing Order which is dedicated to facts, the Co-Investigating Judges noted, and I quote, "that they were seized of measures aimed against the Vietnamese in the provinces of Prey Veng and Svay Rieng and during incursions into Vietnam." (As read)

[10.28.18]

Then they developed two subsections in the same order, and I quote, one was "Massacres of Vietnamese civilians in the provinces of Prey Vang and Svay Rieng", and the second subsection was "Massacres of Vietnamese civilians outside of the provinces of Prey Veng and Svay Rieng." (As read)

And the second subsection which deals with events outside of these two provinces begins with the following statement. "The massacre of Vietnamese civilians was not limited to the provinces of Prey Veng and Svay Rieng, proving in this way that it was organized in the framework of a national policy." (As read)

Reading the Closing Order of the Co-Investigating Judges, that they had been seized of the facts taking place in Prey Veng and Svay Rieng and during incursions into Vietnamese territory, then that they went beyond that to demonstrate the existence of a national policy.

And when we checked with the initial indictment, that is very clear that the Prosecution seized the Co-Investigating Judges exclusively for events taking place in Prey Veng and Svay Rieng and during incursions into Vietnamese territory.

[10.29.33]

This is all the more clear that before the Closing Order that was handed down, the Co-Investigating Judges had rejected the requests of the Prosecution and the Civil Parties to examine elements of evidence concerning crimes committed in other provinces. In that rejection decision, they recall, and I quote, "If we refer to paragraph 69 and 70 of the initial indictment, the Co-Investigating Judges were seized of the treatment reserved to Vietnamese living in the provinces of Prey Veng and Svay Rieng, and living in Vietnam during incursions in Vietnam." (As read)

And the Prosecution never offered a supplementary brief. So we can understand clearly here that the Chamber was seized exclusively on facts committed against the Vietnamese living in Prey Veng and Svay Rieng, and the severance, which came later, removed the facts which occurred at the time of incursions in Vietnamese territory, at the request of the Prosecution, in fact.

Yet, in its Reasons for Decision, the Chamber stated that it had been seized of these facts in the entirety of Cambodian territory. It felt that the proof was insufficient in the province of Prey Veng, and initiated convictions for events in Svay Rieng but also in territorial waters in the province of Kampong Chhnang, and in a pagoda in the province of Siem Reap and in Kratie.

[10.31.13]

How did we get there? That is the question. The chronological presentation makes it easier to better understand and see how the process unfolded for those who were not attending from the beginning.

I would like to recall that during the preliminary statements, and that was hearing record E1-13.1, the Prosecution plead exclusively on Prey Veng and Svay Rieng, and they briefly mentioned massacres in other parts of the country to mention genocidal intention in Prey

Veng and Svay Rieng; that's the only time they mention that. And, in fact, they conclude on that day, E1-13.1, around 14.28, and I quote: "Ladies, gentlemen, Your Honours, there is no doubt that the Accused shared this intent, and we will supply the proof of this which will make it possible to establish that the systematic destruction of the Vietnamese population of Prey Veng and Svay Rieng represented genocide for which the Accused have full, personal criminal responsibility." (As read)

[10.32.35]

So this was what was said at the beginning of Trial 002 prior to severance. So how did things evolve after that?

At the stage of submission of evidence, everyone agreed to say that the elements of evidence outside of Prey Veng and Svay Rieng are solely to establish a national policy, and the Chamber had initially intended to hear nine witnesses and two Civil Parties on the subject. But in November 2015 in a document numbered E319/36, paragraph 11, the Prosecution asked that new witnesses be heard and justified it as follows, in paragraph 11: "The deposition in the hearing of this witness, a former cadre of Division 164 (Navy) of regiment 140 is particularly important with regard to allegations relative to orders aiming to arrest and execute all Vietnamese captured at sea and a general policy of KD against the Vietnamese." (As read)

We opposed this new witness testimony, and here I would like to recall Hearing E1/360.1 between 9:37 and 9:40 in the morning. However, the Chamber authorized this testimony on the Vietnamese at sea, and tersely stated that these elements had not been available prior to opening of the trial, and this is in hearing E1/363.1 around 13:38.

[10.34.19]

When the testimonies began, there was an initial objection from Nuon Chea's defence. What did the parties respond that day? The international lawyer for the Civil Parties replied

that the deposition from the Prak Doeun Civil Parties was relevant for the policy of measures taken against the Vietnamese, and then added around 15:07 the same day: "Therefore, we simply ask you to pursue usual practice." (As read)

What usual practice was she referring to? Well, there's a practice which was that of the Chamber throughout the whole trial with regard to the Vietnamese, as well as the all of the facts in Case 002/2, which was to hear witnesses, including when they fell outside the scope of the trial. And it's not their fault, of course, for the Vietnamese. And the Prosecution on that day confirmed that the purpose was to use this evidence to demonstrate the existence of a national policy. This was what was said then. And this is E1/360.1 around 3:15 in the afternoon.

[10.35.40]

And the response was somewhat blasé, given the record of the Chamber in this regard, and that tendency to talk about things saying it is outside of the scope but still relevant, or that it is relevant for the policy, but what I would like to say is that we don't have much time and so I unfortunately under the impression that as usual, the Chamber will reject the objection of my colleague from the Defence team, and this is exactly what happened.

Same hearing after 15:16, the Chamber decided to reject the objections stating indeed this is important for the policy, that it was pertinent for the policy issue. And so this is what they said at the time. It was very clear that the point was to judge the Accused for the facts that occurred in Prey Veng and Svay Rieng, and that any other evidence was to speak to the general policy.

Now, this didn't stop there ,of course. We tried unsuccessfully to oppose the new testimony and new witnesses, particularly a request by Prosecution, E381, which opened Pandora's Box, actually, because at the time the Co-Prosecutors continued to state that this was in order to establish the existence of the national policy and here I refer you to their motion

E381, paragraph 9, which we placed in our own Appeal Brief in paragraph 436 in its entirety.

[10.37.24]

So you will see that the day that we pleaded our opposition to these elements, we opposed the depositions of these new witnesses, stating that all persons who had already made depositions had been heard on the issue of national policy and that therefore Prosecution's motion was justified by the fact that the Prosecution did not have sufficient evidence for Prey Veng and Svay Rieng. And at the time, the Prosecution reiterated that, indeed, it was the facts of Prey Veng and Svay Rieng which were concerned on the issue of the charges against Khieu Samphan and other Accused at the time, but that the basic and fundamental line was to discuss national policy. And here I can refer you to our footnote 759 in our Appeal Brief. We underscored that in the initial indictment, there was no mention of the Vietnamese at sea, and at the time, the Prosecution had not responded.

[10.38.23]

Unfortunately, once again, the Chamber allowed the majority of the Prosecution's requests and heard the witnesses, stating - and that is memo E380/1 and the Reasons for Decision E380/2, that these depositions had relevance in regard of the policy against the Vietnamese.

So up to that point, we are still outside of Prey Veng and Svay Rieng. It's to establish a policy. Then came the pleadings. Our position was to recall--

THE PRESIDENT:

For the counsel for the Defence, please slow down. The interpreter cannot catch up with you.

MS. GUISSE:

I was saying that during our final pleadings, we had recalled the scope of the saisine. In our

final submission, we stated that the Chamber was seized of the facts and not just requests for evidence. We reminded the Prosecution about the scope of the *saisine* and we also said that the Co-Investigating Judges were authorized to investigate only that which was legally characterized in the Closing Order.

[10.40.12]

During final pleadings, we were told by the OPC that they had focused in their brief on Prey Veng and Svay Rieng with one exception, Kratie; I refer you to E1/526.1 at around 3:43 in the afternoon.

At the time of the final pleadings, everything was mentioned except Prey Veng and Svay Rieng, and this is what we said in our rejoinder at the hearing of 21 June 2017, in E1/526.1 from 9:21 to 9:29 in the morning.

How did this slipup occur? How did we drift? Well, because there wasn't enough evidence for Prey Veng and Svay Rieng something had to be added, and this was verified because when the Reasons for Decision, the Chamber did not retain events occurring in Prey Veng, except that upon reading this motivation, we are surprised to find that the Chamber felt that it had been seized with the facts covering the entire Cambodian territory far from what had been stated during the various debates at the hearing on the fact that it could use the elements outside of Prey Vang and Svay Rieng only to establish a national policy. And this chronology was important in order to understand the grounds for our appeal.

[10.41.34]

The Prosecution never replied on the issue of the initial *saisine* of the Co-Investigating Judges, even though we are in a Roman-Germanic framework of law. And so, the Prosecutors decide where to investigate, issue the initial indictment, they say where they're going to go; they stated that they would focus on Prey Veng and Svay Rieng.

And I would like to remind you that in fact the Prosecution finally did not appeal the

acquittal on Prey Veng.

Now, in the ruling, paragraphs 3451, conclusions of the Chamber in Svay Rieng, at 3451, we are told that there is no proof of genocide in Prey Veng. In paragraphs 3455 and 3492, the Chamber concludes that in Svay Rieng there was a suicide, which it would not consider in the framework of that legal characterization of the facts because it was not included in the Closing Order, and then it would consider the genocide in Svay Rieng as being established on the basis of a single testimony, that of witness Sin Chhem, which relied on hearsay, concerning the four Vietnamese families.

[10.43.07]

So Mr. President, ladies and gentlemen, members of Supreme Court, this is the evidence that was submitted on genocide by murder with which our client was charged and convicted. One witness, Sin Chhem, provided hearsay testimony about four Vietnamese families, this witness, Sin Chhem, was not corroborated, she was not a direct witness of the events; she stated that she was informed of these events by people whose names she forgot. And contrary to the conclusion of the Chamber in the 3516, she never said that some Vietnamese had been arrested and detained prior to disappearing, because in Hearing E1/307.1 of 14 December 2015, around 3:27 she stated, and I quote, that the maltreatment which she witnessed was committed by Khmer against Khmer.

She also stated that though she did see human remains, she was not a witness to executions and was not able to say who they may have been. This is during the same hearing, at 15:16.

[10.44.27]

So this is the proof and evidence on which the Chamber relied in order to convict our client of the crime of genocide by murder against the Vietnamese. And this is why, in our Appeal Brief, we concluded that acquittal was necessary for lack of evidence. Lack of evidence

because we didn't know who the perpetrators were; we did not know who had executed the families.

We also have uncorroborated hearsay, and this should not be enough on a factual level to conclude with genocide by murder. And the Chamber should have been all the more aware of this fact that in paragraph 3486 of the ruling, it did not follow the same reasoning where there was, again, a hearsay witness, and the Chamber recognized that there was not enough evidence, or it considered that it could not base itself on that testimony. It did not follow this reasoning with the witness testimony of Sin Chemm, because she was the only witness who could be used to convict Khieu Samphan. But it was not sufficient in terms of factual evidence and it was not sufficient, also, in law.

And now I need to look at the legal issue of the crimes of persecution and genocide. I shall address both aspects together because there are similarities, and I shall seek to respond as I move along to what was said by our colleagues of the Prosecution.

[10.46.25]

Now, our first grievance with the ruling lies in the fact that the definition of persecution given by the Chamber was an erroneous one because it did away with the objective to exclude from that definition, which is an essential and important element. To respond to our argument, the Prosecution says, "Oh, look to the Duch ruling," which is quoted, along with a footnote of the Duch ruling in paragraph 240 of the Duch ruling 001-L28, which says, in a general fashion, that the Tribunals after the Second World War did not require that this condition be established for each one of the accused in respect of specific persecution acts for which they are found guilty.

The problem here is that no jurisprudence to support this conclusion is cited. And this is a problem so we need to look into the detail of the jurisprudence as we did in our Appeal Brief, and we need to look at the supplementary sources that we have supplied as part of

this hearing. And, of course, the intention to exclude the Jews was fundamental to the declaration of guilt at the International Military Tribunal, with regard to persecution. I refer you to our sources. And this is not the same as what our Prosecutors are saying.

[10.48.10]

We refer, consequently not only to what we said in our Appeal Brief but also to the sources that I've referred to, including the judgment of the International Military Tribunal, the judges' trial, and Eichmann and we refer, also, to the doctrine that we've supplied that explains that the lesser forms of persecution become crimes against humanity only when there is a will to exclude. And there is an article by Jerome Emtil (phonetic) which is referenced in our sources.

So where genocide seeks to destroy, persecution seeks to exclude. And the genocide aspect is the will to exclude to the extreme degree, as it is the will to destroy.

I would also like to refer you to the analysis of the ruling on major war criminals from the Military Tribunal, which were very clear in terms of the intention to exclude. So the exclusion of the Jews as a discrimination also appears in the declarations of guilt and you can look at the conviction of Fritzsche, page 196 of our sources, the conviction of Seyss-Inquart, page 225, the conviction of Frank, page 194, of Streicher, page 198, it's very clear here that the constitution of a crime against humanity in the form of persecution requires a discriminatory intention, in the form of excluding the Jewish population of Europe, and that was the policy of the Nazis. And that is what we stated in our brief. And you can look at the paragraph 643 and following in that brief. So there has been an error in law on the part of the Chamber.

[10.50.14]

We see the same thing in the ruling on (unintelligible) which is also in our sources in paragraph 636 which says that genocide is the worst form of persecution via ultimate

exclusion, which is the destruction of the group, and there is the doctrine appearing in the Jurovics article on this issue. The definition of persecution retained by the Trial Chamber is close to a *de facto* discrimination, as we said in our paragraphs 954 to 956 of our Appeal Brief.

Now, the issue of indirect discrimination is not a concept in international criminal law. Indirect discrimination does not require an intent of discrimination; it is incompatible with persecution in its definition from 1975.

[10.51.16]

I shall try to speak more slowly.

The Civil Parties speak a lot about indirect discrimination in their response. We remind you that that the customary rule of international human rights law provision is not relevant because it is not international criminal law. In its paragraph 79, the Jelisic judgment refers to the question of the choice of victims to be persecuted. And, in any case, it would be necessary to demonstrate a discriminatory intent on the part of the Accused, and this has not been proven.

I come now to the issue of the crime of genocide. Our argumentation appears in paragraphs 1059 and following of our Appeal Brief.

The Chamber has made a serious mistake in omitting an essential part of the crime of genocide seen in terms of its specificity and massive character, but in the file no substantial part of the group has been targeted. Hence, I refer you back to what I've just said regarding Svay Rieng where, with just one testimony, the Chamber has found one murder - the murder of four Vietnamese families, and I remind you that we do not know who was responsible, nor the real conditions, because the witness was not a direct witness and spoke only on the basis of hearsay.

[10.53.12]

We are told that by the Co-Prosecutors that there is no minimum threshold. I shall answer by referring back to the Jurovics judgment, paragraph 82 that cites a major number of sources regarding the need to establish the massive character of the crime. Because these are mass crimes. The Jurovics ruling cites this jurisprudence, and also cites many sources, including, importantly, the draft article of the International Law Commission with its commentary, and you have all that in our sources.

Another point that it would have been very important to for a conviction of genocide, it was not proven that the people killed were not chosen in terms of their deaths' impact regarding the survival of the group. This has not been proven. I refer you to the final report of the expert panel comprised pursuant to Resolution 780 of the Security Council, and that appears in our sources, too.

[10.54.32]

In that report, we cite a study on the question of preventing the crime of genocide, and it is said here, "the expression in part appears to indicate a rather large percentage in relation to the group or a major fraction of the group such as its leadership". So it's important to consider both the relative scale and the overall numbers. This was not demonstrated in the case at hand, particularly in respect of Svay Rieng.

At any rate, the discriminatory intent of Khieu Samphan has not been demonstrated for persecution, nor for genocide, and this is fundamental because there is an incompatibility between the *dolus eventualis* mentioned in the decisions of the Chamber that we shall look at later on, but also in recalling that the Chamber still did recognize in paragraph 715 of its Judgment that it was essential to establish the responsibility in terms of persecution as a crime against humanity that the Accused had that specific intention.

Furthermore, in terms of genocide, the Accused must also have to share the intention with the direct perpetrator, and the discriminatory nature of this must also be demonstrated.

This is mentioned in paragraph 693 of the ruling in 002/1.

Once again, the special intention required for the crime of genocide and the crime of persecution it's incompatible with *dolus eventualis*, and we shall revisit it when we talk about the joint criminal enterprise.

[10.56.48]

I shall now speak to the issue of crimes against humanity, other inhumane acts, and refer to the essential issue in our appeal of the Reasons for Decision, that at the time of the facts, between 1975 and '79 forced marriages and rape within such marriages was not considered to be a crime against humanity, other inhumane acts. The Chamber made a mistake in law by not applying the correct legal categories of the other inhumane acts, the residual categories of crimes against humanity, and I refer you to our Appeal Brief in paragraphs 1117 to 1155 where the elements of crimes against humanity, other inhumane acts must involve a two-part material element, that is, the existence of an illicit act or omission under customary international law, facts with the same degree of severity as the other crimes against humanity listed, and secondly, that there must be a moral element of the intention to inflict serious suffering. I shall concentrate on the first point; that is to say, the material element.

[10.58.20]

So, first, let's delve into how the other inhumane acts were analysed, that the Supreme Court, in its ruling in Case 002/1, noted, so that is F36 in paragraph 576, the Supreme Court first of all declared that in '75, there was no doubt that the other inhumane acts were considered to be a supplementary category of crimes against humanity. And in this respect, we agree. There has never been any misunderstanding on our part.

The Supreme Court then recalled the natural tension in that concept and the *lex certa* principle before saying that it agreed with the principle of legality, this notion needed to be

interpreted and applied in such a way as to limit the scope of this supplementary category, since an ejusdem generis interpretation offers an essential guarantee in this respect. Paragraph 578 of the ruling.

Then the elements of the crime were mentioned. The first of these three elements was the material element, being the existence of an act or an omission of the same seriousness as other listed crimes against humanity. Paragraph 580. Hence, we're not only examining the legality of the category or of the crime of other inhumane acts in a generic fashion, as the Trial Chamber does, and as is insinuated by the other Prosecution and Civil Parties, but looking at the legality of the interpretation and application of that definition.

[11.00.24]

And, by the way, the Supreme Court illustrates this point in paragraphs 584 and 585 where it refers to examples of these instruments, Common Article 3 of the Geneva Convention and the Universal Declaration of Human Rights, and illustrates this positive articulation of law and prohibition by saying, and I quote: "In practice, habitually, an inhumane act with a degree of seriousness which is the same level as of the other crimes against humanity would also violate the fundamental aspects of human rights and the ban on cruel, inhumane or degrading treatment in connection with Common Article 3 of the Geneva Convention." (As read) Paragraph 585.

The Prosecution and Civil Parties neglect the essential counterpart which is the need to identify the prohibition of the particular act. Yet it is very clear. We are dealing with two very different things. And the Civil Parties and the Prosecution are confusing things here between the two criteria.

[11.01.38]

Yet, what the Supreme Court recalled and called formal conditions of unlawfulness, and the conditions that need to be fulfilled just to strike a balance between not reducing the

raison d'être of the supplementary category to zero, which we agree on, while maintaining the balance with the principle of legality in respect of other inhumane acts, and this is the point that is being neglected or denied by the Prosecution and Civil Parties.

Contrary to what the Civil Parties and Prosecution say, what the Supreme Court has called formal conditions of unlawfulness, that is only the denomination for the analytical framework of inhumane acts which are based on international jurisprudence and on logic.

Furthermore, interestingly, this same analysis framework is also apparent in a decision from the International Investigating Judge that we referred to in our Appeal Brief, and I refer you to paragraphs 670, 1104, 1110 and 1115 of our brief. And this analysis framework was comfortably ignored by the Prosecution and Civil Parties.

It's interesting to note that this decision that that the Co-Investigating Judges and the Supreme Court did not necessarily use the same terms but it's exactly the same reasoning, and I shall pick up again this reasoning of the International Co-Investigating Judge to draw the parallel with what the Supreme Court had said.

The International Judge had issued a finding regarding the requests for investigation on the crime of forced pregnancy and began by noting that there was nothing establishing that the underlying behaviour was not necessarily constitutive of a crime in those years, 1975, '79. Paragraph 46 of his ruling. Then, in paragraph 48, he recalls the elements that constitute the crime, which is the same as the Supreme Court, that the nature and gravity must be similar to those of other acts listed, paragraph 48.

[11.04.22]

And in paragraph 49, he says that international criminal jurisprudence shows that the Tribunals have sought to identify legal parameters that make it possible to identify the behaviour in question and then to be able to position this in terms of international law standards in human rights and international criminal jurisprudence, in order to determine

whether the necessary threshold was achieved to qualify as another inhumane act.

He also added in paragraph 50 that the minutia of the examination clearly showed the very prudent approach adopted by the ICC, in order to maintain the principle of legality, and the need to interpret very strictly criminal law, and, in cases of ambiguity, to interpret it in cases so as to find in favour of Accused. That is important to note.

[11.05.28]

He also stated that specific parameters needed to be identified to be able to find the underlying behaviour likely to fall within this category, and this is also necessary to determine whether the fundamental exigencies of accessibility and foreseeability were fulfilled.

In the same decision, paragraphs 52 to 62 there is a lengthy analysis that in paragraph 64 provides the conclusion that there must be a rule in customary law recognized as linked to the relevant human rights used to determine the inhumanity of the act being examined. Therefore, the Investigating Judge took on the approach, which was adopted by the above-mentioned jurisdictions, in order to verify whether there existed between ’75 and ’79 a broadly accepted definition as well as a customary rule of international law relative to forced pregnancies, and therefore the facts of forced pregnancy could, in line with the principle of legality, receive the qualification of other inhumane acts. Paragraph 65. So the following this approach enabled him to conclude that this crime did not exist in ‘75 to ’79. He then looked at the international instruments that existed at the time. He also looked at the history of criminalization of this act. He also examined national law and current evolution and concluded, in paragraph 73, that there was no criminalization in Cambodia and no general consensus.

[11.07.22]

He noted the progressive yet slow evolution of forced pregnancy being recognized as a

crime, and concluded in paragraph 74 that there was not sufficient evidence attesting to the regular and general practice by states in which the acceptance of this practice as law, *opinio juris*, to confirm that international community saw a violation of this autonomy as a gross violation of fundamental human rights between ’75 and ’79.

So this is the approach, following the careful examination of the issue that he carried out, which is totally in line with what the Supreme Court had indicated as a means to consider the other inhumane acts. And one can understand that, as far as other inhumane acts are concerned, they must be circumscribed; there is a need to find an international customary law or rule that condemns this at the time, and these are the exact prohibitions envisioned by the Supreme Court in its condition of formal illegality.

[11.08.38]

Therefore, establishing the breach of a human right is not sufficient, contrary to what the Prosecution and Civil Parties stated. So other inhumane acts is a general category, but it does not contain all inhumane acts and therefore it is necessary to enter into a careful examination of this in international courts. And I would like to recall jurisprudence in our sources, the Popović ruling, paragraph 761, the Closing Order for Im Cheam, an opinion of the International Judges of the Pre-Trial Chamber 004/D257/1/8. All this is in our submission. And, thus, it is important to apply this analysis framework for the period of ’75 to ’79 concerning behaviours relative to forced marriage and rape, and the conclusion is that we cannot say  that they can be qualified as other inhumane acts at the time. The formal unlawfulness could not be proven in the absence of a rule of customary international law. We just saw the whole approach that I referred to, that is, the approach of the International Judge as well as of the Supreme Court. And the reply of the Prosecution and the Civil Parties is to this focused on international human rights instruments and the few humanitarian law instruments protecting the rights of the family.

The Prosecution and the Civil Parties also raised a few international humanitarian law instruments. Yet, if we put them back in their context, the simple mention of the respect of the rights of the family is not enough and will not demonstrate that forced marriage could be constitutive of a crime against humanity in 1975. And as a matter of fact, to give you some context, this is something we put in our new sources. There was a statement by the General Assembly of the United Nations in '74 which states the opposite. It states, in fact, that it establishes a distinction between the respect of rights, and those rights the breach of which was prohibited at the time. '74 is important, that is really the period we are working with, here.

[11.11.45]

What does that statement say, that statement by the United Nations General Assembly? It lists what will be condemned, or rigorously condemned or considered to be criminal, in paragraphs 1, 2, 4, and 5. And what are we talking about there? We are talking about attacks and bombings of civilian population; use of chemical and bacteriological weapons; all forms of repression; and the cruel and inhumane treatment, notably imprisonment, torture, firing squads, mass arrests, collective punishment, destruction of homes and forced displacement. Neither rights of family nor forced marriage are not included.

[11.12.39]

It must also be recalled that a national practice cannot be used to establish the existence of a rule of international customary law. That is found in the ruling on Case 002/1, paragraph 805. And even if a domestic law can in fact give reasonable information to an Accused, but here I send you back to the Duch ruling, paragraph 96.

The Prosecution's study of domestic law is in fact showing a practice of penalization which is not widespread, contrary to its position. There is no demonstration of international customary law on this issue at the time.

Cambodian law in particular does not provide in the Criminal Code of 1956, any provisions the issue of forced marriage, but it is true - and here it's important for us to say that here, we were wrong. We didn't look at the Civil Code of 1920, which does indeed validate and requires consent.

So we really did let that slide by, and the Prosecution and Civil Parties were perfectly justified in pointing out this defect in our presentation. However, in any case, this is not sufficient to indicate that we might be working with a provision requiring enforcement against forced marriage.

[11.14.25]

And here, even though I know that this is an argument that we don't like to hear, the cultural context of arranged marriage is particularly important and must come to the fore. As of today, when I speak to you now, in 2021, the forced marriage is still not prohibited in Cambodian law and in fact it isn't considered a distinct crime against humanity in international law, in spite of the evolution of human rights. Perhaps that will change, but today, in 2021, this is not yet the case.

So if we apply the analytical framework which was set by the Supreme Court and which is the same as the one that I have described in detail, we cannot conclude that there existed other inhumane acts, including forced marriage in this case. And since forced marriage in '75 to '79 could not constitute a crime against humanity in this residual category, sexual violence perpetrated in the framework of such marriage could not either be prosecuted.

[11.15.49]

So let's be clear; because this is something which was thrown at us in the replies. We never said - and I think the transcriptions are clear about this in our pleadings and different positions that we took; we never said that forced marriage or their consummation were not a violation of human rights. Whatever Prosecution or Civil Parties may say.

But what we do say is that when these acts occurred, they were not considered to be of the same nature and severity as crimes against humanity listed and that therefore they could not be characterized as other inhumane acts. We must be clear, also, that the sexual abuse in case was of a very specific nature, because the consummation of marriage is a natural consequence of the institution of marriage.

And it's also important for context to remember the position of the Closing Order on how the Khmer Rouge and the Communist Party of Kampuchea considered rape. Paragraph 1429 of the Closing Order, the official policy of the CPK in the case of rape was to prevent a crime and punish the perpetrators, even if obviously this policy did not manage to prevent a rape, it cannot be considered that rape was one of the crimes uses by the CPK leadership to implement its common project.

[11.17.36]

This came up many times during the hearings and it is something that the witness François Ponchaud could have spoken to if we had been allowed to summon him to that hearing. In any case, the fact that you cannot dissociate sexual violence from the crime of forced marriage as alleged was recognized by the Prosecution in opening statements E1/13.1, as well as in opening statements at 11:46 or later at 11:50 on the same day or in the initial hearing of Case 002/2 E1/240.1, where it is stated that rape cannot be dissociated from forced marriage and therefore if a forced marriage was not a crime against humanity in the category of other inhumane acts, then the consummation of such marriage could not fall into that category either.

So this does not in any way represent a denial of the suffering of witnesses and Civil Parties described as they testified during trial. But this is a matter of law. It has to do with whether or not the Chamber could in fact convict on these charges, and it could not.

[11.19.08]

And it should also be recalled that the cultural context is important. During the hearings we heard that the vast majority of the persons who were married during that period were still with their partners or spouses, and I would like to recall the testimony of expert witness Peg LeVine at the hearing on 11 October 2016, that around 9:10, where she said it's after the word "forced" became an item in the agenda to be assessed in the ECCC that people began to get the impression that they were ashamed. This did not change their interpretation of their marriage as not being authentic, but they were worried about the degree to which they could discuss it publicly given the manner in which their marriage had been depicted in the media. So here is another analytical framework.

It is important to recall this, and this is all the more important that the argument in our Appeal Brief takes on its full meaning on the two other constitutive elements which we won't be able to elaborate on right now, but which I would like to refer you to all of the elements included in our Appeal Brief, that is, the facts with the same degree of gravity as the enumerated crimes against humanity and above all, the intent to inflict grave suffering, which I'm sure we will come back to when dealing with the personal responsibility of Khieu Samphan, but for the time being I would like to refer you to paragraphs 1156 and following of our Appeal Brief.

[11.21.00]

These are the points I wanted to discuss but very quickly, since I see that I'm practically out of time. I would like to respond to the question raised by the Supreme Court Chamber in paragraph 32 of its report to state that we have not stated that there was a translation problem in the Grounds for Appeal on the question of the deportation of Vietnamese. Oh, sorry; sorry. Wrong question; sorry. On the deportation of Vietnamese in Tram Kok, rather, we had raised an issue only in regard of the fairness of the procedure; paragraph 115 of our Appeal Brief.

[11.22.00]

This was absolutely not in the section on the crimes. What we indicated was just that when a problem of translation had been raised during the debates, and that we did indeed observe that in the other two working languages of the Tribunal there was a mention which was not found in the French version of the text, we stated and recognized that during the hearing. And in its Judgment, the Chamber did not even acknowledge the fact that we recognized this point.

Once again, this is not at all a ground raised in as part of the crimes, but just a way to show that whatever we said, even when we had to recognize that there was a difficulty that we had not recognized at the beginning and we were now recognizing in the face of reality, and recognize that we have made a mistake, which was caused by an error of translation, this was not even acknowledged by the Chamber. That was the sole purpose of our mentioning this point.

Also, on the question of slavery in Phnom Kraol and the torture of Cham at Trea, paragraph 35 of your report, I would like to refer you to paragraphs 1372 to 1379 on Phnom Kraol in our Appeal Brief where we clearly stated that there was an issue of *saisine* on Phnom Kraol, and that the Chamber wrongly considered a prosecution of K-11 was in Phnom Kraol 17, and that we quote the Closing Order which clearly stated that the crime of imposing slavery was to be used only for K-11 and that there was an erroneous analysis of the evidence by the Chamber because it indicated that there was confirmation of - well, it's stated that the written statement of a certain Aum Mol confirmed the deposition at the hearing of Kul Nem, a Civil Party. And here I refer you to our Appeal Brief 882-883.

[11.24.26]

And we stated on this occasion that there could not be any corroboration because there were two different situations. And it's important to say that because it's important for us to

recognize the errors that we have made. We stated that we could not question the Civil Party because they mentioned Phnom Kraol only in their statement on suffering, which we said in our Appeal Brief, paragraph 882.

[11.25.00]

This is a mistake on our part and the Civil Parties were right to point this out, but what we do say, however, is that the Chamber distorted the statements of the Civil Parties stating that it had been detained, paragraph 3093, and here I read what the Chamber said. "Even though the Civil Party was mainly questioned on the conditions of work at K-11, the Chamber concludes from the fact that this transfer to K-11 was punitive in nature, that he was indeed detained." That is the Chamber's conclusion.

And so this was a partial use of the Kul Nem deposition; and, more specifically, a distortion of what she said because she never said that she had been detained at K-11- or he never said that he had been detained at K-11; he said that he had been transferred there. And so I send you back to Kul Nem's statement E1/888.1, a little bit before 14:39 where he stated between 14:38 and 14:39, "I was sent to the Division at K-11. I was told to pick rice." (As read) And he said that this is the type of mission that he had, and this is where his marriage was arranged.

MS. GUISSE:

So it is only incidentally that we have this information on Phnom Kraol because Kul Nem was called for the section on the forced marriage category. This is evidence, as if we needed more of it, that the Chamber was capable of using the Civil Parties' statements on all of the charges in Case 002/2, when it has the opportunity to do so.

[11.26.55]

So if Kul Nem is referring to difficult working conditions, he's not talking about detention and he's not speaking as a prisoner, unlike the witness testimony of Aum Mol. And once

again, I refer you to our elaborations in our Appeal Brief.

As regards torture against the Cham in Trea, we simply state that the evidence is insufficient and we refer you to our Appeal Brief and final statement, paragraph 925 in our Appeal Brief, where we explain that convicting on torture in Trea based on the single witness statement is insufficient.

That brings me to the conclusion of my statements on this segment, Mr. President.

Thank you.

[11.28.22]

THE PRESIDENT:

Now it is time for lunch, and I would like to inform all parties that we will resume at 1:30 p.m.

I would like to instruct the security guards to bring the accused back to the detention facility and return him to the courtroom at 1:20 p.m.

The court is now in recess.

(The accused Khieu Samphan leaves the dock)

(Court recesses from 1129H to 1330H)

MR. PRESIDENT:

Please be seated.

The Chamber is now back in session. Greffier, can you report the attendance, please?

[13.31.07]

THE GREFFIER:

Mr. President, Your Honours, all parties are present. Thank you.

[13.31.33]

MR. PRESIDENT:

I would like now to hand the floor to the Co-Party to make submissions. The floor is yours.

Thank you.

[13.31.56]

MS. WORSNOP:

Good afternoon, Mr. President, Your Honours, and parties.

I'd first like to address the defence's contentions this morning regarding the Trial Chamber saisine for killings of Vietnamese.

The scope of case 2 is defined by the closing order, which is for the Trial Chamber to interpret. The co-prosecutor's submissions during trial are not determinative of that interpretation.

As we've set out in detail in our brief in response to Ground 60, the Trial Chamber properly determined its geographic saisine to include killings of Vietnamese nationwide.

As Appellant concedes, the closing order, in its section on factual findings on crimes extensively detailed killings outside Prey Veng and Svay Rieng.

[13.32.50]

It also found that Vietnamese had been killed in other crime sites within the scope of case 2, such as S-21, Au Kanseng, and Kraing Ta Chan.

The specific sections characterizing genocide, murder, and extermination refer to the treatments of the Vietnamese as a whole and without limitation.

In those same sections, the Co-Investigating Judges refer expressly to widespread killings outside the East Zone.

The Trial Chamber's severance decision and annex then also defined the scope of the genocide, murder, and extermination charges in Case 002/02 by reference to the treatment of the Vietnamese without limitation and referred to all paragraphs in the closing order, establishing killings outside Prey Veng and Svay Rieng.

[13.33.49]

I'd now like to move on to address the alleged errors in the Trial Chamber's articulation of the elements of murder and persecution as crimes against humanity, as well as the Appellant's claim that the principle of legality was breached by his convictions for other inhumane acts through forced marriage and rape within those forced marriages.

I'd first like to make two general remarks. Murder, persecution, and other inhumane acts were all at issue in Case 001, in Case 002/01.

This Chamber has already conducted an extensive survey of the pre-1975 law and jurisprudence to arrive at a detailed and considered findings on their elements. It did so, having reviewed and rejected many of the arguments the Appellant now raises, and nothing in this appeal gives reason to reverse those decisions.

Second, many of the Appellant's arguments regarding the status of the law in 1975 confuse the facts of specific cases with elements of crimes.

Simply because a more stringent actus reus or mens rea existed in the facts of some of those cases does not make that the legal test.

[13.35.14]

Whether there exists sufficient evidence of courts accepting a lower threshold, and especially in the absence of any country jurisprudence, customary law is settled.

Turning first to murder committed with the dolus eventualis mens rea, and specifically Appellant's allegation that this crime did not form part of customary international law in 1975.

As Your Honours pointed out, its customary status, accessibility, and foreseeability were conclusively settled by this Chamber in Case 002/01.

[13.35.52]

This Chamber demonstrated that in the *Medical Case*, the U.S. Tribunal at Nuremburg convicted on the basis of dolus eventualis mens rea.

Appellant has provided no case law in which an accused was acquitted because of this mens rea and we can also confirm that we know of none.

As such, customary law was settled.

There was therefore no requirement for the Trial Chamber, or this Chamber, to establish a general principle of domestic law, since there was no lacuna in customary international law.

However, as an extra safe guard, both chambers confirmed that their conclusion that direct intent is not required is consistent with national legal systems.

After the Trial Chamber added jurisdictions to this Chamber's already extensive findings, it confirms that the evidence was so prolific that the general principle in fact existed.

In our brief, we provided yet more examples. There is no doubt that as of 1975, almost uniformly, states accepted a definition of unlawful killing that included knowingly and willingly engaging in conduct likely to cause death.

And contrary to Appellant's contentions, the Trial Chamber correctly applied the dolus eventualis mens reas. It simply expressed its findings in a number of different equally correct ways.

[13.37.27]

It held that the perpetrators acted with the knowledge that conditions would likely lead to deaths and the acceptance of the possibility of this fateful consequence, or with manifest indifference to human life.

These articulations appear in the judgement both conjunctively and disjunctively and the Supreme Court Chamber has already confirmed that each one individually satisfies the mens rea.

In reality, each incorporates of the other. For example, if you act in the knowledge of the likelihood of death, then you have accepted the risk. Similarly, to accept the risk of the possibility of a fatal consequence, you must know about that possibility first.

[13.38.16]

I now turn to Appellant's claim that the actus reus for murder was not satisfied because the Trial Chamber allegedly based its findings on culpable admissions without identifying a duty to act.

To be clear, what the Chamber actually found was that the actus reus was fulfilled by the imposition of conditions of the worksites and cooperatives that caused the victims' death. And by the absence of appropriate measures to change or alleviate those conditions.

So what the Appellant characterizes as an omission, the absence of appropriate measures to change or alleviate the conditions that the DK authorities themselves imposed is not an omission at all. It's simply another way of saying that the authorities continued to impose life threatening conditions, i.e., they continued their positive acts.

In any case, even on his own arguments, Appellant fails.

Given the direct perpetrators were the very people who imposed the conditions, it's clear that they were in a position to change or alleviate them, and thus, as the ICTY Appeals Chamber in Čelebići explained, they had a duty to do so.

[13.39.37]

Moving now to persecution. I'll look first at the actus reus, and specifically Appellant's challenges to the Trial Chambers findings concerning the Buddhist, Cham, and Vietnamese based on so called indirect discrimination.

This describes a situation where a policy or law applies to everyone, which adversely affects a group that share a protected characteristic.

Appellant incorrectly alleges that this does not constitute discrimination in fact because CPK policies applied to every Cambodian citizen and the concept of indirect discrimination did not exist in law in 1975.

This Chamber has already demonstrated that Appellant's position is flawed.

[13.40.27]

In the Case 001 Appeal Judgement, it surveyed the pre-1975 law extensively and held that an act or omission discriminates in fact where there are actual discriminatory consequences for members of a group, or where the victim is targeted because of his membership of a group.

By his arguments, Appellant distorts the essence of what the crime of persecution is fundamentally about.

Persecution is about being harassed, oppressed, or otherwise made to suffer because of who you are, because you belong to a particular group.

So if a victim endures discrimination because he's Buddhist or Cham, it is irrelevant that all religion was outlawed by the CPK. If the Cham were forced to eat pork or otherwise face starvation, they are suffering a special harm not experienced by the general Khmer population specifically because of their religion.

What matters is the effect of the policy, not its wording.

[13.41.35]

And this understanding of discrimination existed well before 1975, as demonstrated by the conventions and jurisprudence cited by the Civil Parties in their brief. It's noteworthy that no less than three advisory opinions from the Permanent Court of International Justice in 1923, 1932, and 1935 concluded that in order to be effective, prohibition against discrimination has to ensure the absence of discrimination in fact as well as in law. They explained that equal treatment of groups whose situations and requirements are different can result in inequality in fact.

Turning now to the mens rea and Appellant's Ground 94, nothing in the law of this Tribunal, any of the post World War II jurisprudence, or indeed, the ad hoc Tribunals, supports Appellant's position that the mens rea of persecution required more than intent to

discriminate on one of the defined grounds. It certainly did not require an object to remove persons -- sorry, objective to remove persons from Cambodian society or from humanity. Again, this Chamber confirmed this in Case 1. And again, Appellant confuses facts and law.

Persecution can, and often does, escalate over time, resulting in the intent to remove individuals from society. On the facts of many cases at all the international tribunals, this is precisely what happened, but that doesn't make it part of the legal test.

[13.43.22]

This morning, defence counsel referred extensively to the Nazi's discrimination of the Jews.

Post World War II tribunals often found that the Jews had been persecuted through acts that did not demonstrate any intention to remove them from society or to exterminate them. And we've described some examples in our brief.

And specifically, in their analysis entitled "Persecution of the Jews", the International Military Tribunal at Nuremburg explained the distinction and the escalation very clearly: "With the seizure of power [in early 1933], the persecution of the Jews was intensified. A series of discriminatory laws [was] passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and their rights of citizenship. By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life."

[13.44.34]

Finally, other inhumane acts. I'll dispense very quickly with Appellant's contention in Ground 97 that the crime is neither accessible nor foreseeable unless the underlying act has been criminalized by international or national laws.

Not only has this been debated and debunked by every ECCC Chamber and the ad hoc

tribunals, but Appellant himself makes sufficient submissions to demonstrate that it was both accessible and foreseeable that he could be convicted of other inhumane acts in 1975.

He accepts that the residual other inhumane acts category was a crime in 1975 and that its content would be ascertained using the ejusdem generis rule. Put another way, he knew that he could be held criminally responsible for conduct that was both inhumane and of a similar nature and gravity to the listed crimes against humanity.

[13.45.41]

I'll address Ground 98 equally briefly.

In the Case 002/01 Appeal Judgements, the Supreme Court Chamber introduced what it called a formal international unlawfulness test as an extra safeguard to ensure compliance with the principle of legality.

This Chamber explained that this requires relating other inhumane acts to conduct infringing basic rights appertaining to human beings as identified under international legal instruments. And that is exactly what the Trial Chamber did.

What this Chamber did not require was for each exact factual scenario to have been predicted and prohibited in international instruments as the Appellant alleges.

Not only is there no legal difference between rights and prohibitions in human rights law, but to do what Appellant is asking would defeat the very purpose of other inhumane acts as a residual category.

I now have a few remarks about Appellant's challenges to the Trial Chamber's findings that the DK forced marriages and forced consummations constituted other inhumane acts.

These involve mixed questions of facts in law.

[13.46.57]

I'll just address the legal aspects of the Appellant's submissions raised in Grounds 160,

171, and 172 and my colleague, Ruth Mary Hackler, will discuss the facts.

Appellant misunderstands the law on other inhumane acts as I said, to adhere to the principle of legality, the Trial Chamber was only required to find, and did find, that the conduct was of a similar nature and gravity as the list of crimes against humanity and violated the victim's basic human rights.

Forced marriage undoubtedly violates human rights that were already set out in international instruments before 1975.

[13.47.41]

The Trial Chamber chose the example of the most fundamental, the 1948 Universal Declaration of Human Rights.

Appellant is wrong to claim that this wouldn't suffice on its own, but it doesn't need to. He pretends that a wealth of human rights conventions endorsing the freedom to marry simply don't exist.

A more exhaustive list is in our response, but I'd like to just give you a couple of examples.

Cambodia acceded to the Supplementary Convention on the Abolition of Slavery in June 1957.

At Article 1, the parties agreed to outlaw practices, including those whereby a woman, without the right to refuse, is promised or given in marriage on payments of consideration.

Then in 1962, the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages confirmed that no marriage shall be legally entered into without the full and free consent of both parties.

As to the second requirement, where forced marriage is of the same nature and gravity as the enumerated crimes against humanity, Ms. Hackler will address you on the forced marriage factors in the DK.

[13.49.00]

I'll just make two brief points.

First, by reference to judgements from Special Court Sierra Leone and the ICC, the Trial Chamber showed that other tribunals have formed the view that in principle, forcing individuals to marry is of the same nature and gravity. And this was confirmed again in the recent ICC Trial Judgements in Ongwen.

Second, I would like to dispel some myths put forward by the Appellant regarding patterns of domestic criminalization of forced marriage by 1975.

Aside from the fact that domestic criminalization is not part of the legal test for other inhumane acts, his assertions are factually inaccurate.

[13.49.47]

He paints a Eurocentric picture of forced marriage criminalization beginning in the 21st century.

To build on this characterization, he asserts that Asian, and particularly ASEAN countries, which had various types of arranged marriage practice, accepted forced marriage as a cultural norm.

By doing so, he grossly extorts the true global picture, which was in fact rapidly recognizing that the criminality of forced marriage was in place well before the DK regime.

In our response, we cited seven jurisdictions that had criminalised forced marriage as such by or during the DK period.

With the benefit of further research, we can now add the Bahamas, Cyprus, Malaysia, and the U.S. State of Oklahoma to that list. We explained that 20 more framed criminalization by reference to abduction or detention for the purpose of marriage. We can now add England, New Zealand, Samara, the Australian States of Tasmania and South Australia, Kiribati, Brunei, the U.S. States of Nevada and California, and the Cook Islands.

[13.51.10]

What's more, it was precisely those countries with traditions of arranged marriage that led the charge.

Appellant's invited you to put ASEAN countries under the microscope, and we welcome that invitation.

Out of the 10 ASEAN countries, the majority have criminalized conduct constituting forced marriage by 1975.

My final remarks concern Appellant's position that the conviction of other -- sorry, conviction for other inhumane acts through forced consummations was not foreseeable in 1975.

Where the victims were female, the Trial Chamber found that these acts constituted rape. Now, as we're in the realm of other inhumane acts, the Chamber did not need to adhere to a legal definition of rape, but as a descriptive term, rape is, of course, correct.

[13.52.04]

Again, the Trial Chamber simply needed to find that forced consummations a, violated a basic right, and b, reached the required gravity threshold.

We acknowledge that the Trial Chamber omitted to articulate the first requirement, but submit that it did so because the answer is so obvious.

In fact, at every other modern tribunal, and indeed in Control Council Law No. 10, rape is an enumerated crime against humanity.

I refer Your Honours to our response for further references to international law condemning rape.

I should be able to stop there since this position is so clear, but Appellant argues that non-consensual intercourse within the confines of marriage was perfectly acceptable in 1975. In doing so, he invites you to find that he could not possibly have foreseen criminal conviction for forcing thousands among Cambodia's population to marry against their will and then

compelling them into sexual intercourse, often with a stranger, and often monitored by militia on fear of severe punishment, including death.

His position is untenable.

[13.53.20]

Rapes within the legitimate consensual marriage, whilst themselves foreseeably criminal, are a fair cry from the situation we have here.

First, there cannot possibly be any presumed consent in these circumstances. The man was not the rapist. He was another victim forced by the CPK to inflict intercourse upon a woman to produce children for the regime.

In fact, there's no fundamental difference between CPK policy and the enforced prostitution of both parties.

[13.53.54]

The prohibition on enforced prostitution, upholding the right not to be forced into sexual intercourse without free and full consent, was expressly laid out in several international conventions by 1975 and has since been confirmed in the statutes and jurisprudence of the ICTY, the ICC, and the SCSL.

Second, the only reason the so-called marriages existed was because they were forced upon the victims in the hours and days preceding the rapes. A defendant cannot use his own criminal acts to legitimize another crime.

In recognition of this, both the SCSL and the ICC in Ongwen have entered criminal convictions for sexual violence in the context of forced marriages.

In fact, as we explained with detailed citations in our response, it was a general principle of law, and wholly foreseeable in 1975, that a forced marriage was not a legal marriage and could not possibly provide a technical loophole for the DK Regime's heinous campaign of sexual violence.

I shall now pass the floor to my colleague, Nisha Patel.

[13.55.25]

MS. PATEL:

Good afternoon, Mr. President, Your Honours.

The Appellant's convictions for eight crimes against humanity are each based on several instances that occurred throughout the DK.

We address his challenges to the crimes in detail in sections 7c, d, and e of our written response.

Today I will discuss some of the Appellant's erroneous challenges in regard to enslavement, murder, and persecution of the New People.

Then my colleagues will speak on the treatment of targeted groups and the regulation of marriage.

Turning first to enslavement, civilians were exploited for the CPK's benefit, not only at cooperatives and worksites, but also during their unlawful detention at security centres.

[13.56.23]

People were reduced to mere commodities as they were forced to work pursuant to a regulated schedule in a climate of fear and control.

The Appellant's Ground 133 fails to show that there was insufficient evidence to establish enslavement at Phnom Kraol Security Centre. He ignores evidence at K-17 and Phnom Kraol Prison because he assumes his Ground 48 on *saisine* will be upheld.

Regarding K-11, this morning he advanced a new argument on appeal that the Trial Chamber erroneously found Kul Nem was detained at K-11.

His mere disagreement with how the Trial Chamber interpreted Kul Nem's testimony in paragraph 3093 of the Judgement and his disregard of other evidence before the Trial Chamber regarding what K-11 was used for demonstrates no error.

In paragraph 3029 of the Judgement, the Trial Chamber explained that K-11 was a temporary detention and re-education facility. K-11 prisoners were from Division 920 of the CPK's military including Kul Nem. And this is paragraph 3063 of the Judgement.

Kul Nem told the Trial Chamber that people in his division were being accused of enemies -- of being enemies of the CPK. He said he was sent to K-11 as a punishment.

In relation to the same ground, the Appellant's complaint in his appeal brief is also made with regards to the Trial Chamber's use of Aum Mol's WRI.

[13.58.24]

Your Honours have held that the right to examine a witness is not absolute. WRI's can be used for evidence including where, as here, the declarant is deceased, the evidence concerns the crime base rather than the Appellant's acts and conduct, and it corroborates live testimony.

Moreover, contrary to the Appellant's assertion, WRIs are not of inherently low probative value. They have been obtained by impartial co-investigating judges with appropriate safeguards to ensure reliability.

I next turn to murder, with dolus eventualis at the cooperatives and worksites.

[13.59.14]

The crime was based on evidence that enslaved civilians in a coercive environment, were forced to achieve unreasonable work quotas by undertaking arduous manual labour day and night without adequate rest, food, and medical treatment. These dire working and living conditions had an individual and cumulative impact resulting in deaths from sickness, malnourishment, exhaustion, and/or work injuries.

In Grounds 101, 116, and 117, the Appellant's piecemeal reading of the Trial Judgement fails to demonstrate insufficient evidence of murder with dolus eventualis at the Tram Kak Cooperatives and 1st January Dam Worksite.

For example, evidence that at least six to 10 workers died from conditions at 1st January Dam is supported by evidence discussed in paragraphs 1535, 1626, and 1627 of the Trial judgement. Not only paragraph 1629, as he contends.

Similarly, the direct perpetrators mens rea for those deaths is discussed in at least 10 paragraphs of the judgement. Not just the two that he identifies in his appeal.

[14.00.54]

These paragraphs thoroughly demonstrate that the perpetrators observed and received information on both the dire conditions and their consequences on the workers, yet they accepted their risk of deaths when they maintained those conditions and instructed labourers to adhere to CPK workplans.

In Grounds 102, 113, 117, and 123, the Appellant misreads the Trial Chamber's findings for all the cooperatives and worksites, claiming the Chamber never identified when the mens rea of the direct perpetrators was formed.

Throughout each site's period of operation, dire conditions were imposed and maintained. The moment the direct perpetrators imposed those conditions, they knew deaths were likely. And when the deaths did occur, they continued to maintain dire conditions, demonstrating their acceptance of the likelihood of deaths.

[14.02.09]

Any external factors that the Appellant raises as contributors to those conditions are irrelevant because the mens rea existed in relation to their voluntary criminal acts.

In Grounds 132, the Appellant shows no error in the Trial Chamber using Sok El's WRI, together with other relevant evidence to find a prisoner was murdered with dolus eventualis at Phnom Kraol Security Centre.

Sufficient counterbalancing factors were in place for the Trial Chamber to fairly and properly assess the reliability of the evidence that Sok El gave before he died and could

testify.

First, the evidence was taken in proper form by the OCIJ and it was under oath and audio recorded.

Second, his evidence on the conditions at the security centre was corroborated by four live testimonies and other OCIJ interviews.

And third, the Appellant was given the opportunity to challenge those conditions at trial, which he does not dispute.

Based on a holistic evaluation of the evidence, the Appellant fails to show it was unreasonable to find that a prisoner had died from dire conditions.

[14.03.45]

In any event, if the Trial Chamber erred in finding the crime proven, the error would not invalidate the Appellant's conviction for murder. His conviction is based on several murders throughout the DK, not only the murder at Phnom Kraol.

Finally, I turn to the persecution on political grounds of the New People at the Tram Kak Cooperatives, 1st January Dam, and Trapeang Thma Dam.

In Grounds 107, 114, and 118, the Appellant would like Your Honours to believe that the New People could not be discriminated in fact because they were treated the same as the rest of the enslaved population.

[14.04.38]

He further trivializes the discriminatory acts against the New People at each site by disregarding a broader persecutory policy towards them, which the Trial Chamber found was in line with the CPK's policy on the treatment of real or perceived enemies of the regime.

That persecutory policy implemented a classification system that made the New People politically and economically inferior to people from the poor and lower middle peasant

classes who had politically clean biographies.

The latter became known as the Base People and were given full rights, which allowed them to hold positions of power or oversight at cooperatives and worksites.

Another aspect of this persecutory policy involved CPK instructions to refashion, arrest, and smash the New People.

Accordingly, the New People experienced a range of discriminatory acts.

At the Tram Kak Cooperatives, this included being screened, segregated from the Base People, made to work harder, and given less food than others.

At 1st January Dam, it included being monitored by the militia, susceptible to accusations of wrong doing, arrested, and never seen again.

[14.06.18]

At Trapeang Thma Dam, students and intellectuals were targeted for arrests and execution and these acts were carried out.

In sum, regardless of how others were treated the New People were subjected to targeted acts because they were New People, whom the CPK perceived to be enemies, and therefore were discriminated in fact.

This concludes my submissions and I will now give the floor to my colleague, Mr. de Wilde.

Thank you, Your Honours.

[14.07.07]

MR. D'ESTMAEL:

Mr. President, the Honourable Judges, concerning the treatment of specific groups, in the 11 minutes that I have, I will raise the questions raised by this Chamber in its report and discuss the existence of Party policies and respond to the arguments of the defence as they were presented this morning.

The defence did not really respond to your written question concerning the torture of the

Cham detainees at the village of Trea security centre.

The Trial Chamber correctly concluded in 3317 and 18 that the crime of torture existed, given the specific description by witness It Sen concerning the manner in which the Cham men had been beaten repeatedly in order to obtain information concerning the fact that they belong to the Cham group.

In what way is the Chamber right and is the defence not in fact working under basis of an error in facts?

There is international jurisprudence that the Chamber may indeed rely upon a single witness to establish fact.

Also, in paragraph 3280, the Chamber explained that its methodology was to meticulously examine the various pieces of evidence that hinged on the statements made by a single person.

[14.08.36]

Thirdly, It Sen's testimony that has been said is partially corroborated by those of two Cham women, Math Sor and No Sates, who were also asked whether they were Cham or Khmer in the same security centre in Trea.

Fourthly, in its appeal, the Defence simply repeated its challenging from its of the credibility of It Sen in its final conclusions. The Chamber rejected this in a motivated fashion in its judgement paragraph 3280.

Finally, the Defence wrongly claims that the It Sel's testimony is contradictory because he said on the one hand that the members of his group had been beaten to determine whether they were Muslim, and on the other hand, that the torturers already knew that they were Cham.

[14.09.30]

As a matter of fact, it's more than probable that the perpetrators of the torture already knew

that they were Cham, since according to what It Sen said during the hearing, this group of persons had been taken in Cham villages of Ampil and Saoy and once they came to Trea, they were treated and called liars and beaten, even more so when some of them replied that they were Khmer. The fact for the perpetrators to beat them deliberately in order to obtain confirmation that they were Cham is not, in and of itself, contradictory and is not sufficient to establish an error of fact.

Above and beyond this question of torture, as practiced in the security centre of Trea, the main underlying argument of the Appellant is that the Trial Chamber should not have concluded to the existence of a policy of the CPK involved in the perpetration of crimes intrinsically links to the common project.

Concerning the real or hypothetical enemies, amongst them the Cham, but also the former leaders of the Khmer Republic, Buddhists and the Vietnamese. However, the 45 grounds for appeal on specific groups that have been brought to us will fail because the Appellant has not assessed the evidence fully and thoroughly, and because he has often distorted or wrongly interpreted the evidence or the findings of Chamber rulings, and these grounds of appeal contained errors or misrepresentations.

[13.11.20]

As for the Cham, the Chamber sufficiently motivated its finding that the CPK created a criminal policy targeted at the Cham implying measures that would place this distinctive group in jeopardy.

It is also concluded that the Party systematically attempted to assimilate the Cham to the Khmer by imposing the suppression of Cham cultural and religious practices throughout the entire country.

The Chamber also concluded that at the end of 1975, they were forcibly transferred in order to separate and disperse them and that later on, they were systematically arrested,

detained, and exterminated in mass simply for being Cham.

[14.12.10]

The Appellant abstained from considering the totality of the evidence. For instance, he ignored contemporaneous official documents, including Telegram 15 sent by Sao Phim to Pol Pot on 30 November ’75 after the Cham rebellion and showing that the policy against the Cham was established by the Party’s centre.

The Appellant also ignored the depositions of numerous witnesses and Civil Parties, he excluded Prak Yut’s testimony or distorted the Chamber’s assessment of that testimony.

Prak Yut was the former secretary of the Kampong Cham District in Sector 41.

The testimony of Prak Yut is an essential element because it affirmed that she, along with other district secretaries, including that of Kang Meas had received orders from the sector leadership of the zone to establish lists, and to purge the Chams, along with Lon Nol civil servants, and members of the military. She admitted that she had organized such arrests and killings on these orders from Or Phan (phonetic). And she stated:

“The order that I received was clear and consisted of executing all the Cham.” (As read)

[14.13.38]

As for the Vietnamese, the Chamber rightly concluded that the CPK leadership had established a criminal central policy targeting them for prejudicial treatment and political destruction, linked to the common project. And the Chamber concluded it was not a coincidence that people of Vietnamese ethnicity were treated as the hereditary enemies throughout the entire country and that they were identified by way of lists, biographies, and denunciations prior to their systematic deportation or arrests and execution.

The Chamber relied, amongst other things, on documents from Democratic Kampuchea to identify the Vietnamese group as being distinctive and protected, and to establish that the executions of Vietnamese were, in effect, attributable to the CPK leadership.

The Appellant made use of a partial approach, forgetting the hateful speeches, notably from Khieu Samphan and Pol Pot referred to the entire population of Vietnam and not only to Vietnamese military in the context of armed conflict. On 15th April 1978, Khieu Samphan publicly called for the need to make aggressive enemies of all kinds, and more specifically, the Vietnamese, totally and definitively disappear from Cambodian territory, in order to "protect the Cambodian race."

[14.15.18]

Concerning genocide by murder, my colleague, Helen Worsnop said that the referral order, which defines the scope of the trial, contained sufficient elements for the Trial Chamber to reasonably consider that this extended to the entire national territory of the country and not only Prey Veng and Svay Rieng. And it is not correct to state that the crime of genocide by murder as established the Chamber is based exclusively on the testimony of Sin Chhem and concerns only four families in Svay Rieng.

And the crime of genocide by murder also concerns hundreds of Vietnamese killed in S-21 and at Au Kanseng.

And the Chamber also established efficiently that the crime of genocide was established and implemented as part of the national policy of the Party in various other parts of the country on the basis of recurrent and systematic measures.

And the best illustration of genocide and persecutions exercised against civilians and non-combatant Vietnamese, and that's civilians including children and the elderly, who represented no threat whatsoever to the regime, were being treated as enemies and executed like all other Vietnamese in S-21, at sea and elsewhere in the country, including Wat Ksach in the northern zone.

[14.16.53]

The Appellant also omitted large excerpts of Meas Woeun's testimony, who affirmed during

the hearing that all Vietnamese, whatever their status or their age, were considered to be enemies and that, I quote:

"We have received instruction that the Vietnamese had to be smashed, because they had not returned to their countries." (As read)

So I'll go a bit beyond our time, but I would like to come back to Sin Chhem's testimony, which the Defence tried to attack this morning and its Grounds for Appeal 152.

[14.17.39]

Once again, the Defence pretends not to see the entire testimony, as well as the fate that awaited all Vietnamese in the context of a central policy which aims to kill them in Cambodia. Though it is correct that Sin Chhem did not directly witness the execution of the four families in question, including newborns. Nevertheless, there are specific elements which leave no doubt that these families were indeed killed.

And I will take the liberty of repeating our response to the Appeal of the Defence on this point, in document F54/1 paragraph 598. Let us judge the following the elements.

Sin Chhem knew these families prior to 1975. She had lived near them and worked with them. More important, she saw these Vietnamese with their hands tied behind their backs.

The persons who witnessed the arrest also reported the fact that they had disappeared and been executed.

The head of the municipality himself said that the wives and the children of mixed marriages were taken away and killed.

Sin Chhem saw the bodies of a family, including children, in a rice paddy and she was told that they had been killed the night before. And Sin Chhem was also aware of the fact that Vietnamese from other villages were being executed.

[14.19.11]

The Chamber therefore reasonably considered that given the context and the accuracy of

the testimony, the only reasonable conclusion was that the members of these four families had indeed been killed.

To conclude, grounds for appeal on specific groups must fail because they demonstrate no error of fact or law.

And I'll give the floor to my colleague, Ruth Mary Hackler, who will need 11 minutes to speak to you about forced marriage and rape.

Thank you for your attention.

[14.20.01]

MS. HACKLER:

Today I'll focus on two of the issues mentioned in Your Honours' report.

First I'll discuss the Appellant's claim that there was no policy to force people to marry and consummate their marriages. Then I'll turn to his dispute with the Trial Chamber's finding that during the DK regime, consent to marry was absent.

These and his specific evidentiary challenges are also addressed in section 7d of our written response, as well as in the civil parties's written submission.

None of Khieu Samphan's arguments establish any error that would warrant intervention.

Before I go further, it's important to note that in her submissions this morning, defence counsel misstated the intent element for the other inhumane acts test, saying it required an intent to cause serious suffering.

That's not the test this Chamber articulated in paragraph 580 of the Case 002/01 Appeal Judgement. That standard requires that the act must have been performed intentionally and it must have caused, but not intended, serious suffering or a serious attack on human dignity.

This misapprehension of the standard seems to have influenced some of Appellant's national policy arguments.

[14.21.32]

As Your Honours know, during the DK regime, CPK officials exercised absolute and total control over every aspect of people's lives. Nothing was off limits, including their most intimate acts.

The policy that regulated marriage had two components. The first dictated whether, when, and whom people married. The second coerced them to have sexual intercourse with their new spouse.

Just like with other CPK policies, any refusal or opposition to either component could be met with harsh consequences. As a result, most people didn't dare to object.

[14.22.18]

The finding that forced marriages and forced sexual intercourse within those marriages were part of an intentional CPK policy was based on extensive evidence, not on a selective and biased assessment, as the Appellant alleges.

As the Civil Parties noted yesterday, the judgement shows the Chamber carefully considered potentially exculpatory arguments and testimony, but these were outweighed by evidence that the highest levels of the party intentionally created the policy, issued instructions down the chain of command, and the lower levels carried them out, all to support the rapid implementation of the socialist revolution.

The strongest piece of evidence showing that the policy emanated from the upper echelon was E3/775. This was the family building policy document that was so important it was published twice in the party's Revolutionary Youth Magazine.

The document emphasized that in terms of choosing a spouse, Angkar's decisions prevailed over personal choice:

"In the matter of building a family, no matter the outcome of the organization's and the collective's assessments and decisions, they must be absolutely respected. Do not have

hard feelings. Do not be disappointed. This is because only the organization and the collective are able to make a thorough assessment from every aspect." (As read)

[14.24.05]

Speeches and statements from senior leaders also confirmed that marriage and the consummation of marriage would facilitate the party's goals.

In one speech, Pol Pot said that to effectively defend and build the country by leaps and bounds, the current population of nearly eight million people was far too small to achieve the country's full potential. That required more than 20 million people.

He then announced:

"Therefore, our aim is to increase the population as quickly as we can." (As read)

Also advocating for a rapid increase in population were Khieu Samphan, Ieng Sary, and the party's propaganda magazines.

[14.24.52]

Now, the Appellant doesn't dispute these statements. Instead, he argues that the CPK wanted to increase the population by improving people's living conditions and marriages were arranged for the needs of the people.

Now, the Chamber considered these arguments, but they were debunked by a wide range of evidence showing that marriages were organized for the benefit of the revolution, not the people.

Witness Chuon Thy testified that Pol Pot told cadres at a meeting in Kampong Chhnang that weddings should be organized since they needed the population.

Civil Party Chea Deap also gave evidence of a meeting in which the Appellant instructed the ministries to arrange marriages for all male and female youths so they could produce children and there would be more forces to defend the country.

Instructions regarding the policy were systematically disseminated to the lower levels for

implementation. At least seven former Khmer Rouge cadres gave evidence that cadres across the country were informed in meetings and training sessions of the upper echelon's marriage directives.

[14.26.16]

Nationwide, men and women were matched and forced to marry in collective ceremonies. Of course, forcing them to marry was only one component of the policy. Numerous Civil Parties and witnesses gave evidence that at the wedding ceremonies, presiding officials conveyed to the couples that they were expected to have sex to produce children for Angkar.

To ensure that they did, militiamen monitored the newlyweds and reported to their superiors about the couples' nighttime activities. More than 20 witnesses and Civil Parties were cited on this issue in Judgement paragraphs 3641 through 3646.

When authorities discovered a couple hadn't had sex, various consequences followed. These included physical intervention, summoning and threatening the couples with death, sending them for re-education, and even disappearance.

[14.27.20]

The Appellant alleges that any marriages or consummations that were forced were the result of cadres who failed to correctly apply the party line, not a result of national policy. But forced marriages and forced sexual intercourse took place throughout the regime. Now, the Chamber noted there were some variations in the details of implementation, but practices across the country were so fundamentally similar they couldn't be explained as coincidence or as the result of rogue officials. They could only be explained as part of a systematic centralized policy from the highest echelon.

In light of all these considerations, the Trial Chamber's finding that there was a CPK policy that forced people to marry and consummate their marriages to produce children for

Angkar was reasonable and should be affirmed.

Turning to the issue of consent, Appellant wrongly argues that marriages weren't forced because consent was a marriage principle adopted by the CPK.

Legally and factually, this doesn't withstand scrutiny.

[14.28.43]

Legally, a consensual decision is a decision made without force, threat of force, or taking advantage of a coercive environment. Consent imports a notion of personal autonomy. When someone in a coercive environment doesn't voice refusal because they fear violence or detention, it cannot be interpreted as genuine consent.

Factually, although the Trial Chamber found that consent was in fact part of the party's marriage principles, it also found that in practice, the pervasively coercive environment of Democratic Kampuchea rendered genuine consent impossible. Any attempt to conflate marriage practices before and during the regime disregards the insistent threat of violence and actual punishments kneaded out to those who refused to marry. People couldn't freely object because they justifiably feared being labeled an enemy, and the severe consequences that could follow.

[14.29.55]

As for the consent that couples were required to express at wedding ceremonies, that was an empty formality. To survive, couples didn't have to mean it. They just had to say it. That's not genuine consent.

Even in cases where cadres or soldiers who are allowed to request marriage to a woman of their choosing, Angkar's decisions took precedence. The men still had no control over whether to marry, and if the proposal about who to marry was consistent with the collective interest, Angkar approved it --

[14.30.38]

MR. PRESIDENT:

(No interpretation)

[14.30.54]

MS. HACKLER:

Okay. When a proposed wife was approved, she still had no say in the matter and risked harsh consequences if she refused.

In short, none of the Appellant's arguments show any error that would warrant overturning the finding that genuine consent was absent in marriages during the DK period.

Thank you, Your Honours. I'll now yield the floor to the Civil Parties.

[14.31.34]

MR. PRESIDENT:

I would like to inform the parties to please respect the time allocation. You can probably exceed a little bit of the time allocation. Otherwise, we will cut you off.

And now I'd like to hand the floor to the lead co-lawyers to make your submissions. Thank you.

[14.32.27]

MS. HIRST:

Good afternoon, Mr. President. Good afternoon, Your Honours. And good afternoon, again, to the parties.

We will divide our time in this afternoon session. Pich Ang will address issues concerning the regulation of marriage.

I had intended first to respond to some points which were raised by counsel for the defence before the lunch break concerning in particular the scope of the case regarding the treatment of the Vietnamese, persecution, and genocide, but those matters have been covered so comprehensively by the Office of the Co-Prosecutors and I don't want to

duplicate their submissions, so I'm going to say simply that we agree with the points that have been made on those issues, although of course, we also stand by our written submissions in our response brief.

I'm going to focus on three topics in the time that I will take this afternoon.

Firstly, some general points concerning factual grounds of appeal raised by the defence.

Secondly, the legal framework to the crime against humanity of other inhumane acts, and thirdly, how that framework applies to conduct involving enforced disappearances.

[14.33.48]

I'd like to emphasize, as others have already done, that focusing on these topics doesn't imply that we diminish the importance of other arguments in our response brief. There are so many crimes covered by this case, and of course, all of those crimes are very important to the Civil Parties who experienced them.

But since our time is limited today, we will need to focus on just a few issues, and therefore we've chosen some which we believe it's particularly important to clarify or highlight.

So considering first the question of the defence's factual grounds of appeal.

There are very many of these in the defence's appeal brief. And of course, each of them will ultimately have to turn on its own merits.

[14.34.43]

But there are some common weaknesses which can be identified again and again throughout the factual grounds.

The key one is that very often, the factual grounds do not appear to address the correct standard of review on appeal. It often appears to us as though the defence is simply arguing the merits of the evidence, attempting to demonstrate a reasonable doubt.

But clearly, we are no longer at trial and therefore that is no longer the appropriate standard.

To succeed on a factual ground on appeal, the Appellant must show that the finding is one which no reasonable trier of fact could have reached. That standard is a high one and it's a standard which Khieu Samphan himself cites in paragraph 22 of his Appeal Brief.

But despite that, he frequently seems to revert to simply disagreeing with the Trial Chamber's conclusions, but without demonstrating that those conclusions are unreasonable.

That failing is compounded by a second one. Many of the defence's factual grounds are premised on a misunderstanding of the applicable rules of evidence.

[14.36.08]

And both of these failings are clearly demonstrated in the defence submissions about the killing of Vietnamese people.

The consistent evidence throughout this case was that in various places, Vietnamese people were identified and separated from Khmer people, that they were taken away, and that they were never seen again.

On the basis of that evidence, Khieu Samphan was convicted of the crimes against humanity of murder, extermination, and genocide.

The defence attempts to attack the evidence about these events as being hearsay. And we heard this argument made again today.

But those arguments from the defence misconstrue the concept of hearsay and its relevance. I'll give as an example the testimony of civil party Krak Doen (phonetic) that we've dealt with in our Response Brief at paragraphs 301 to 303.

He described the process by which all of the mixed Vietnamese/Khmer families in his location were identified and then made to march. He described the point at which the Vietnamese members of the group were separated, including his wife, mother-in-law, and child. And he described the fact that none of those persons were ever seen again.

Now, on the question of whether those Vietnamese people were killed, it is true that it is hearsay when Krak Doen (phonetic) testified that his unit chief had told him that the Vietnamese people had been smashed.

But the rest of his evidence was not hearsay. He testified about his own personal observations of his family members being identified as Vietnamese, taken away, and never seen again.

In any event, Your Honours, while hearsay may have been treated more cautiously than other evidence, there is no prohibition on its use in international trials.

The defence's position, taken to its logical conclusion, seems to be there were killings that were alleged, but Trial Chamber requires eye witness evidence in order to conclude that those killings occurred.

[14.38.48]

That position is at odds with common sense. Where mass killings are organized in this way, there are often no survivors who can testify about their experiences.

In this case, only one Vietnamese civil party was able to give that kind of evidence.

Civil party Chung Yan Chett (phonetic), who is discussed at Trial Judgement in paragraphs 3468 to 3469, was taken from Dar Village, along with his family, and all the other Vietnamese people there. They were tied up and they were made to walk to a location in a forest. And one by one, they were hit with an axe and pushed into a pit.

By chance, Chung Yan Chett (phonetic) did not die. And only as a result of that, he was able to give eye witness evidence of his experience.

But his evidence also helps to make clear exactly why this kind of evidence is so rare.

Where killings are committed in this way, there would usually be no surviving eyewitnesses, other than those persons who committed the killings.

[14.40.16]

Demanding an eyewitness account would also run counter to international case law, such as that which was referred to by the Trial Chamber in paragraph 628 of the Trial Judgement.

The ICTY Trial Chamber in Krnojelac and the ICTY Appeals Chamber in Kvočka and in Tolimir ruled that in order for a trial chamber to find beyond reasonable doubt that persons had been killed, it is not necessary to have identified a corpse, and nor is it necessary to have an eyewitness to the killings.

Citations to those cases are in our Table of Authorities.

The ICTY Chambers in those decisions said that inferences could be drawn, for example, from the following types of evidence: patterns of mistreatment, the disappearance of other individuals, the length of time which has elapsed since persons disappeared, and the fact that those persons have not been in contact with people they would have been expected to contact, such as their family members.

[14.41.33]

Those are precisely the kinds of evidence that the Trial Chamber had before it regarding the killings of the Vietnamese.

I've mentioned Krak Doen (phonetic) already. Another example is civil party Uchesen Lie (phonetic). He's discussed in our response brief at paragraphs 304 to 307.

He described how he was sent away to pick bamboo, along with other men from his village who were also married to Vietnamese women. When they returned, the men, they were told by the cooperative chief that their family members were gone and that they had performed a great service to Angkar by cleansing themselves and ridding themselves of rotten flesh.

[14.42.26]

Uchesen Lie (phonetic) saw other people in his cooperative wearing his family's clothes

and he never saw his wife and children again.

Yes, this evidence can be described as circumstantial. It is true that nobody gave evidence of seeing those killings occur. But the only reasonable inference available to the Trial Chamber was that those Vietnamese people had been killed.

The defence has raised no possible basis for contending that the Trial Chamber's conclusions were unreasonable.

Now, I've been speaking until now about the defence challenges concerning the killing of Vietnamese people, but the same kinds of problems arise throughout Khieu Samphan's factual grounds of appeal.

Evidence is attacked on an unconvincing basis and the defence asks for findings to be overturned simply because it disagrees with them, but without coming close to demonstrating that those findings are unreasonable.

[14.443.39]

We saw a further example of that this morning concerning civil party Kul Nem, and I want to agree with what my colleague from the OCT said on that. Again, it was a question of a factual finding made by the Trial Chamber that this civil party had been detained at K-11. The Trial Judgement sets out the Trial Chamber's reasons for that finding at paragraph 3093 and the Trial Chamber explained its reasons for finding that Kul Nem was forced to engage in hard labour at paragraph 3104.

Now, the defence may disagree with those findings, but they are clear, they are reasoned, and they were opened to the Trial Chamber on the evidence before it. They are not unreasonable.

We ask the Chamber, we ask Your Honours, to apply the standard of review on appeal rigorously. Factual findings must stand, unless it can be shown that no reasonable tribunal could have reached them.

[14.44.56]

And I want to move on now to some observations regarding the legal framework applicable to the crime against humanity of other inhumane acts.

Before making our submissions on disappearance and the regulation of marriage, it's important to be clear about what the legal framework is of this crime.

And our key point is this one: the crime against humanity of other inhumane acts has three specific elements. They're set out in paragraphs 580 of the Case 002/01 appeal judgement and we've referred to them at paragraph 520 of our Response Brief.

The elements are these.

Firstly, a gravity element. An act or omission of similar seriousness to other crimes against humanity which existed at the relevant time.

Secondly, a suffering element. The act or omission caused serious mental or physical suffering or injury, or constituted a serious attack on human dignity.

[14.46.12]

Thirdly, the mens rea requirement. The act or omission was performed intentionally.

I'm reiterating these elements, as simple as they may seem, because confusion has repeatedly crept in regarding this crime. And that's because instead of simply applying these three elements, there has sometimes been a tendency to want to look at subcategories of conduct and treat them as a substitute for the three elements I've just identified.

I'm going to call that the subcategories approach. That approach centers around the idea that the elements to be looked at are not the elements of other inhumane acts per say, but rather, a defined subcategory of conduct, such as enforced disappearances, forcible transfer, or forced marriage.

We can see this approach sometimes reflected in parts of the defence appeal brief, and I'm

going to come back to that, but I want to remark firstly that we can also see this approach in some places in the Trial Chamber's judgement.

[14.47.35]

For example, in paragraph 727, setting out the legal framework, the Trial Chamber said that it would refer to constituent elements of the conduct in question. And in paragraph 754, it goes on to set out the so-called elements of the crime -- of the conduct of enforced disappearances, listing them as firstly, a deprivation of liberty, secondly, a refusal to disclose information, and thirdly, involvement of the state.

And then throughout the judgement, when analysing disappearances, the Trial Chamber repeatedly applied those three elements, deprivation of liberty, refusal to disclose information, involvement of the state. It did that, for example, at paragraphs 1200 to 1203, 1425 to 1426, 1840 to 1843.

Now, for the most part, this does not constitute an appealable error. And that's because the Trial Chamber went on to additionally apply the correct three elements of other inhumane acts, satisfying itself that they were made out.

So there was no impact on the outcome.

[14.49.07]

The one exception to that is the subject of the prosecution appeal concerning forced sexual intercourse experienced by men, which I won't touch on today.

But the broader principles are relevant to all of the conduct which was charged as another inhumane act.

When the Trial Chamber used the subcategories approach in Case 2/1, Your Honours ruled that that approach was incorrect. At paragraph 589, the Appeal Judgement explains that the only issue of relevance is whether the conduct in question actually fulfilled the definition of other inhumane acts.

Now, to clarify two points. Firstly, we don't say that it's impermissible to use a short hand to refer to the conduct we are speaking about. When we speak about other inhumane acts through forced marriage or through enforced disappearances, we're using a generic term to summarize a whole range of conduct, and that's permissible. The phrase is only a convenient short hand. It is not, itself, a legal characterization with elements which need to be met.

[14.50.32]

Secondly, we don't say that it is never relevant to look at other crimes against humanity when analysing the elements of other inhumane acts or that it is never relevant to look at what other courts have said about the suffering caused by certain types of conduct. This can be done, but ultimately these are only analytical tools to assist in analysing the evidence with a view to answering the three fundamental questions about the elements: was the conduct grave enough; was the conduct such as to cause serious suffering; was the conduct intentional? The elements remain the same: gravity; suffering; intention.

And with that in mind, I want to turn to look at my final topic, which is the conduct referred to throughout this case as enforced disappearances. And in line with the submissions I've just made, I want to emphasize that I use that term enforced disappearances as a short hand for the conduct in question and that we need to bear in mind, of course, that this conduct was charged as the crime against humanity of other inhumane acts.

[14.51.46]

In several places in his Appeal Brief, Khieu Samphan challenges the Trial Chamber's findings regarding enforced disappearances, but seems to do so based on a misunderstanding of the relevant elements of the crimes as they were charged.

In fact, because the conduct was charged as other inhumane acts, the question at trial was whether the conduct met the three elements: gravity; suffering; intention. And when we're

speaking of the suffering element in relation to disappearances, it's important to note that this is not only the suffering of the person who was disappeared. The Trial Chamber explained this clearly in its findings concerning Phnom Kraol Security Centre at paragraph 3164 of the Trial Judgement.

[14.52.51]

Inmates were subjected not only to the unexplained disappearances of their fellow prisoners, but were subjected to an environment of uncertainty and fear of themselves being removed from the security centre to a destination and fate unknown.

As to those family members, friends, acquaintances, and fellow inmates of those who were abducted, it is clear that no closure or definitive explanation was afforded to them in the nearly 40 years following their disappearances, leaving them to speculate about their ultimate fates, or to conclude, on the basis of limited information and common narratives, that these people had been sent to their deaths.

The suffering of those who remained that observed the people around them disappearing was also experienced at worksites and cooperatives.

Civil party Yem Kaknee (phonetic) testified about seeing her mother and the rest of her family members taken away from Tram Kak cooperatives on a truck, along with many others, never to be seen again.

[14.54.08]

She testified about her suffering:

"I did not know what happened to them or what their fate was, whether they were sick, or they were sent somewhere. Because of that, I became ill." (As read)

That's at E1/287.1 after 1549.

So an important part of the suffering caused by this conduct is the suffering experienced by family, by community members, by fellow prisoners who were left not knowing what had

happened to the disappeared persons.

Now, I mention this because it's very clear from this that in order for Khieu Samphan to be convicted, there was no need for the fate of these disappeared individuals to be proved. It did not need to know for certain whether they were killed or whether, perhaps, they were detained, forcibly moved, and subsequently died. That is irrelevant to the elements of the offence which is charged.

In fact, to the contrary, part of the suffering caused arose precisely because the fate of these individuals was not known.

[14.55.28]

Despite this, Khieu Samphan attacks some of his convictions concerning disappearances on the basis that the fate of the disappeared people was not proved.

For example, in Ground 135 at paragraph 888 of the Appeal Brief, his challenges his conviction regarding disappearances from Phnom Kraol Security Centre on the basis that evidence given by former prisoners about the possible fate of other prisoners who had disappeared was hearsay.

Aside from again being a misapplication of the concept of hearsay, the argument misses the point. The Trial Chamber was not making a finding about the fate of those disappeared people. The Trial Chamber was able to make findings about the three elements of other inhumane acts without knowing the fate of the disappeared individuals. The evidence of the other prisoners was enough to demonstrate the gravity of the conduct, the terror which those other prisoners experienced as a result of the disappearances, and therefore their suffering.

[14.5645]

Khieu Samphan repeats this error in Ground 111 at paragraph 756.

There he argues that the Trial Chamber could not convict Khieu Samphan in respect of

Vietnamese people disappeared from Tram Kak District and he points to the Trial Chamber's conclusion that Vietnamese people were "deported and/or disappeared." That's in paragraph 1201 of the Trial Judgement.

The argument seems to be that the use of the "and/or" shows that the fate of these individuals was not known beyond a reasonable doubt.

We say again, their fate did not need to be proved.

[14.57.31]

And in Ground 127 at paragraph 837 to 840, Khieu Samphan falls into the subcategories error. There he argues that those who were disappeared from their communities in Tram Kak could not later be disappeared from Kraing Ta Chan Security Centre.

He says that the crime of enforced disappearances is the continuing crime, which cannot be committed twice in respect of a single person.

But that conclusion is based on applying the elements of a standalone kind of enforced disappearances, which did not exist in 1975, and in respect of which, Khieu Samphan was not charged or convicted.

So once again, it's also necessary to recall the disappearances caused suffering not only to the person disappeared, but also to those around them who were terrorized as a result.

It was entirely possible for this to occur first for family and community in the Tram Kak Cooperatives, and then later, for fellow prisoners at Kraing Ta Chan.

The common error in all of these grounds is a failure to define the crime correctly by the elements of other inhumane acts: gravity; suffering; intention.

[14.59.06]

Where those elements are applied correctly, there is no doubt that the crime of other inhumane acts was made out in respect of disappearances for large numbers of people from Tram Kak District, Phnom Kraol Security Centre, and Kraing Ta Chan Security

Centre, as well as from other locations and Khieu Samphan's convictions for those crimes should be upheld.

That concludes my submissions and I'll pass the floor to Pich Ang, who will be addressing the regulation of marriage.

[14.59.52]

MR. PRESIDENT:

We should take a short break to allow the recording to change the DVD first.

(Short pause)

[15.00.37]

MR. PRESIDENT:

You may now resume.

MS. ANG:

President, Your Honours, representatives of the OCP, representatives of the defence team -- of the accused, rather, the Civil Parties, and the public, I am Pich Ang. I would like to submit to the Court concerning what has been raised by the defence team that the Court did not correctly consider the forced marriage.

I would like to raise three points. Number one, about legality. Number two, about the consent. And number three, about the severity of the act and also the suffering of the victims and Civil Parties.

The defence (inaudible) mentioned that it is not the crime and we cannot distinguish between the forced marriage and rape in it. And since there is no rape within the family, that is why forced marriage does not exist.

[15.02.33]

I would like to indicate that the law of the Cambodia before the Democratic Kampuchea, particularly the Penal Code of 1956, stipulates this particular issue. And it also states that it

is rape. Article 443 states about this issue and there is no exception between for wives and husband and there is nowhere it mentions on the issue. Article 443 mentions that anyone -- it means that anyone who rapes another person shall be punishable. There's no exception here.

For the issue that whether or not there was a law stating about a rape by the spouse, the defence raised a number of legal issues and the Co-Prosecutor has mentioned already. To save the time, I will not repeat what has been mentioned by the Co-Prosecutor already.

Another one is about the arranged marriage and the marriage arranged by the Democratic Kampuchea was the same.

[15.04.26]

On this particular point, the defence -- the defence raised that the arranged marriage was not a crime because in the past, parents arranged marriage for their children and Angkar was replacing the parent roles.

I would like to indicate that -- I would like to mention the legal framework of Cambodia, particularly the civil law.

Article 124 mentions the definition of marriage. The -- it is the solemn declaration that the (inaudible) would live together. That is the agreement between the men and women to live together. There's nowhere in the civil law states about there shall be the consent and agreement by the parents or the parents cannot force -- can force the children to get married.

But there is exception for the minors. The minors shall have the agreement and consent from the parents.

As I have stated, there is no where in the civil law stating about the consent by the parents.

There's one more point that if I mention about the fact that it is -- the arranged marriage is the Cambodian culture and the Angkar plays the roles as the parents.

[15.06.26]

This is not acceptable. We cannot compare between the culture and the arranged marriage.

For the word culture, it is not the culture or tradition to force the children to get married. It was simply just the practice, rare practice, in the past before the Democratic Kampuchea.

And we cannot consider that this is the culture of Cambodia that parents can force children to get married.

And in addition to this, so what is the difference between the culture and forced marriage?

In Cambodian culture, parents are the guardians taking care of children. They love children. And parents usually take care of the happiness of the children.

[15.07.41]

When there was forced rape in the marriage, the parents would not be happy. And marriage is the value for Cambodian people. The women and men, usually they want to have the marriage celebrated officially in a good way by their families. It is not the marriage -- the forced marriage that they want.

So marriage is also to show the dignity of all of the families.

After taking control of the country, Angkar, who blocked the property, belongings, and houses, and also Angkar robbed the guardian's power and authority.

In addition to that, Angkar required the couple to consummate the marriages, and if the female did not agree, Angkar forced the males to rape the women, and if there was objection, disappearance or death would happen.

And militia men went to eavesdrop and to listen secretly during the nighttime after marriages.

So this is not the culture. This kind of culture does not exist in Cambodia.

The defence team mentioned as well that there is no evidence showing the

discouragement of the couples.

[15.10.09]

I would like to bring to Your Honours attention a number of points.

As we could see, a climate of fear was created during the regime. There was no consent agreement, but only a climate of fear. And a couple forced themselves to get married and also to live as husband and wife.

I would like to bring an example to your attention, Chum Samoeurn. Chum Samoeurn mentions that she was threatened. She was threatened that if she did not agree to marry, she would not have any man for her life partner and if Angkar saw her smiling at someone, she would be killed.

Preap Saokhoeurn. Preap Saokhoeurn mentioned that if anyone fails to obey Angkar's orders, they would be killed like animals. She was threatened that she would either be put into prison or be killed. This is mentioned in E1/487.1.

[15.11.42]

Likewise, civil party Chea Deap mentioned that after a few times of objection, refusal, she was sent to work elsewhere and she realized that she could not -- she could no longer refuse to get married.

For Mom Vun, civil party Mom Vun spoke of being raped by a group of cadres after she refused to marry. A few days after she was raped, she agreed to get married and she said: "I had to get married because I was warned and threatened and I was threatened that if I speaked out, I would be killed. So in order to survive, for the sake of my children, I had to marry, despite my fears." (As read)

For Chea Deap. Chea Deap mentioned that she had sexual intercourse with her husband because she was afraid of committing moral misconduct. This is mentioned in E1/46811. She indicated that she was monitored and she was afraid, both of her husband and the

militia man. She added that people disappeared because they committed moral offences. I have never heard of the word moral misconduct and for those committing misconduct, then they would be disappeared.

And regarding the statement, testimony of Kasumi Nakagawa, testified that people were aware -- people were aware that refusal may have resulted in their deaths, therefore many people did not dare to refuse. This is mentioned in E/472.1.

[15.14.15]

Your Honours, TC found that the overwhelming majority of the evidence shows that people could not refuse to marry because -- to marry without suffering consequences because people were afraid because everywhere in Democratic Kampuchea had the same threatening climate.

For the question whether the forced marriage is related to severity of crime, the defence mentioned that it was not about the severity of the crime. And I would like to submit to the Court that this is the crimes against humanity under the inhumane acts.

[15.15.17]

I would like to mention the testimony 9. He stated that he was worried because of the -- because he was threatened to get married. He could not eat. And he stated that he agrees to get married because he wanted to survive and to see the world. This is the severity that we could not accept.

The civil party, Keo Theary also testified that she was so terrified when speaking to the one who came to ask her about the marriage. She was shy and she was ashamed to speak about the sexual intercourse.

This indicates the feelings, the sufferings, of the victims who were forced to get married.

The civil party Yos Phal mentioned about her suffering as well. She had the fiancé and -- he has the fiancé and wanted to get married to his fiancé. He had suffering because he

could not get married with his fiancé.

Civil party Prak Sokhoeurn mentioned that:

"I was forced to get married and forced to have sexual intercourse that I did not agree. I had pain and suffering in my heart and I have physical pain as well." (As read)

The civil party asked why Angkar arranged as to who to get married and:

"Why Angkar required us to get married to those whom we did not love." (As read)

[15.17.51]

Pen Sochan, who was forced to get married even before she reached puberty. And after the marriage, she was tied to a pole and to allow her husband to rape her. She was so painful. At the time, she did not reach puberty yet and she was raped. She had bleeding after she was raped for a period of one month.

Mr. President, I would like to ask for three more minutes, if you allow it.

[15.18.42]

MR. PRESIDENT:

Yes, please.

MS. ANG:

Thank you very much, Mr. President, for other issues.

The defence mentioned that the Trial Chamber did not probably consider the suffering of the Civil Parties.

I would like to submit to Your Honours that the defence team might have seen only the partial evidence or the partial testimony of the Civil Parties. The defence should have looked all the context or the testimony of the Civil Parties.

Civil Party Mom Vun. For Civil Party Mom Vun, the defence said that she or he had no significant suffering because of the marriage. The defence team may have overlooked the testimony and ignored what was said by Civil Party Mom Vun.

Mum Vun stated that she was ashamed because of her marriage. She was also afraid so that she would be killed if she refused to marry.

For Civil Party Val Lamhone (phonetic), in the written record of the interview, the civil party stated that she would be killed by the authority or the cadre, that is why she agreed -- she forced herself to get married and forced herself to live with the husband.

[15.20.52]

Likewise, Civil Party Mea Saroum (phonetic), in the document A3/9736, she stated about her suffering.

Meah Kooin (phonetic). Meah Kooin (phonetic) also stated that -- also stated about the suffering the forced marriage, the marriage that he or she was forced to marry at the time.

Your Honours, the assertion of the defence team that the Chamber fails to consider the elements of forced marriage is not reasonable. It is the error by the defence team and the defence team did not properly consider all the issues.

And there are established elements, as mentioned by the Co-Prosecutor. And I would like to submit to the Chamber that it is also stated in the legal framework of Cambodia, forced marriage has the prejudice against the victims, it has impacts on the victim's rights, and it should be considered as the crimes against humanity in the form of inhumane acts.

Thank you very much, Mr. President.

[15.22.44]

MR. PRESIDENT:

Because we are now reaching the break time, I would like to call for the break. And will come back at 3:00 -- 50 past 3:00.

(Court recesses from 1522H to 1548H)

THE PRESIDENT:

Please be seated.

Now, I'd like invite the Judges of the Bench to put questions to the party, if you have any. The floor is open.

JUDGE CLARK:

I have to think about how I am going to phrase this question. It's directed to all of you, really, because Ms. Guisse mentioned this and then all of you addressed this in some way, but it's a concept that I never thought of.

[115.49.48]

Forgive me if I don't repeat it as eloquently as you did, but my understanding is that you said something that certainly attracted my attention, and that is that when one is, when a Court is considering whether certain conduct reaches the gravity of crimes -- of other crimes against humanity, other inhumane acts, that when you're doing that, when a Court is doing that, that the Court has to also consider the principle of legality. Now, each of you touched on that a little bit, but I really would like you to help me on that, and then perhaps if the other parties want to come in.

Is that what you are saying that it isn't enough to look at the gravity of the crimes and the suffering and to see if it measures up to other identified crimes against humanity, but you also have to consider the principles of legality? Because after all, the Court is considering the offence in 2021, whereas the conduct occurred in the 1970s. Did I make myself in any way clear?

[15.51.29]

MS. GUISSE:

Your Honour, you did not specify which party should be the first to respond to your question. However, since we were the first to raise this issue in our appeal, perhaps you would like to hear—

JUDGE CLARK:

I invite you.

MS. GUISSE:

As I said at length today, we do say that the principle of legality must also be considered in the context of the residual categories of other inhumane acts. It's an important aspect, and I think that the principle of legality, concerns not only crimes against humanity, other inhumane acts, but in fact all of the crimes that are relevant to Case 002/2 which Khieu Samphan is appealing today. The principle of legality is an essential argument, especially because we must refer to the system of law applicable at the time of the facts for which he is being prosecuted.

[15.53.03]

MS. WORSNOP:

Good afternoon, Your Honour. Yes, I mean, we agree, obviously, that the principle of legality applies to all the crimes and the consideration. As far as inhumane, other inhumane acts specifically is concerned, I think that -- sorry -- we submit that the questions to whether it was criminal in and of itself in 1975 is not in dispute.

So far as the underlying acts are concerned, the -- as we mentioned in our brief and has been said today, they, themselves do not have to be criminalized, and the -- if I could refer you to your statement from the Case 2/1 appeal judgment, you said that the principle of legality as a whole, including foreseeability and accessibility, would be respected if the specific conduct, which is found to constitute other inhumane acts, violates a basic right of the victims and is of a similar nature and gravity to the other enumerated crimes against humanity. So you mentioned gravity in your question. In assessing gravity, you are taking part in the legality assessment, we submit.

JUDGE CLARK:

Thank you. Does -- anybody else?

[15.54.39]

MS. HIRST:

Your Honour, I'm not certain there's very much I can add to what's already been said by my colleague from the OCP. We agree with the approach, and it's set out in our briefs at paragraphs 520 and following, that the correct approach is the one that was set out by Your Honours in the Case 2/1 appeals judgment.

And really, the essence of that approach is to say that the concept of legality is built into the elements of crimes against humanity, other inhumane acts. And particularly, the first element requires that an assessment is made as to whether the conduct we are looking at is similar in its nature and its seriousness to other crimes against humanity which existed at the relevant time. So by going through that process and dealing with that element, the requirement to protect potential accused persons in respect of crimes which are foreseeable, that's already built into the elements of the offence.

JUDGE YANARIN:

Thank you, and I have a question relating to marriage.

[15.56.16]

In the Appeal Brief, by the defence counsel, they have made a number of submissions in relation to marriages, and they claimed that the marriage that took place during the Democratic Kampuchea Regime was on a voluntary basis, it was not coercive, and that it was the principle of the Communist Party of Kampuchea. And I'd like to get a further clarification from the Defence on the principle of a voluntary basis as what kind of conditions that this principle was applied and from when.

I have heard the submissions by the Co-Prosecutors as well as from the lead co-lawyer for Civil Parties that they rejected this principle, the -- of -- on the voluntary basis. So based on the argument raised by the Defence, can you mention as when that principle was put in

implementation, that both parties before they got married, did they have a chance do so voluntarily? This is because they -- the parties themselves mentioned that they did not even know the other side for their marriage. So how could this principle be applied when they mention it? Thank you.

[15.58.18]

MS. GUISSE:

Your Honour, I shall give you a two-pronged answer. First of all, on the question of the policy, the principle is that on the Defence of Khieu Samphan, we don't speak of a policy regarding marriages but marriage regulations. That is what we clarified in our Appeal Brief. We mentioned a number of texts from the CPK period. Amongst these, you have the famous Twelve Moral Principles which even pre-date the DK period, and these were the principles that were inculcated into members of the CPK, and this included the principle of consent of both the possible spouses before marriage.

[15.59.12]

This principle was mentioned by several cadre witnesses. The Chamber obviously decided that this principle of consent was not real, or at least the texts, as mentioned in the Revolutionary Flag that mentioned these 12 moral principles, were not based on fact, yet they were consistently mentioned by cadres or non-cadre witnesses, saying that this principle was very often mentioned in witness testimony on the marriage issue and outside the marriage, where they talked about solemn commitments sometimes made in collective ceremonies where the future spouses would take each other in matrimony and would love each other and to make this commitment before the whole community. So that's on the issue of regulation of marriage.

Now, on the other issue, did people know each other or not, well there was a whole varied gamut of experience. We have never said that there were no cases of marriages that were

not wanted by the people concerned, and of course we had some witnesses describe their personal experience in this respect. The real question is was there a policy of the CPK to organize forced marriages, and it seems that no, it was not part of the policy or CPK regulation.

Now, based on the different witnesses heard by the Chamber, I cannot tell you about all these witnesses from memory, but I can refer you to our brief, starting with paragraph 192, which describes the regulation of marriage to explain that depending on the case, saying that there were encounters that could be organized between people of the same age group. There were witnesses who explained that there were groups of women, groups of men in the cooperatives, and sometimes meetings for them were organized so that they could meet and get acquainted.

[16.02.02]

There was a variety of types of experience, and amongst that great variety, we find an element that is important. Indeed, it is that diverse variety of experience from one place to another, from one group of people to another, among the cadres, that shows that there was no unified policy for encouraging forced marriage. There was a marriage regulation that was enforced in different ways across the country. It's important to stress this.

And another important point in our Appeal Brief is that, in paragraphs 1196 to 1210, we tried to produce some kind of general analysis of the evidence in the case, attempting to look at the statistics to demonstrate when we are looking at the evidence strictly related to only forced marriage, you have witnesses and Civil Parties who come up and talk about their experience, saying that, yes, they were forced to get married, and sometimes it was done with extreme violence. And I can take an example that was mentioned earlier by the Prosecution and the Civil Parties in reference to the case of Mom Vun, the civil party, I think that's the one I have in mind, who says that she was raped by a cadre because she

was refusing to get married.

[16.03.40]

For us, that is the quintessential example that shows that there was an absolute violation of the marriage regulations that required consent of the two parties and also whereby rape was absolutely prohibited and very much frowned upon by the Khmer Rouge, as noted in the Closing Order.

I would like to recall in this connection that when we discuss in our brief the regulations on marriage, the issue of surveillance, that was mentioned by certain witnesses and Civil Parties, explaining that it was not an order from the leaders to do so, on the contrary, it was frowned upon and it could be sanctioned. There was the testimony of Duch, who said that one particular cadre, Tang, who was thereafter arrested, had tried to go and watch a couple and was therefore punished.

So that's an example that enables us to look at this in perspective and to show that there is a whole diversity of experience. What the Chamber considered to be a policy is in fact what we consider to be a deviation from the regulation on marriages. Thank you.

[16.05.44]

THE PRESIDENT:

If there are no more questions, and other parties do not wish to add further, I would like now to close the -- I would like now to adjourn the hearing, and we will resume tomorrow at 9:00 a.m.

The security guard are instructed to bring the Accused back to the detention facility and bring him back at 8:45.

Co-Prosecutor, do you need to answer the question in addition to what you have just stated?

[16.06.33]

MS. HACKLER:

Thank you, Your Honour, yes. We'd just to like to add there is no requirement experiences must be perfectly uniform for the Trial Chamber to conclude that conduct meeting the elements of the crime remains criminal. In addition to that, as we know, a lot of the Khmer Rouge propaganda, they would say one thing, that "we're going to honour the principles of having courts that try people and observe the rule of law", but what actually happened in practice was very different. So you could have something on paper, but in practice that wasn't followed through.

Thank you, Your Honours.

MR. PICH:

Mr. President, please allow me to add and respond to what the Defence team mentioned about Mom Vun.

Mom Vun was raped by one individual. It was stated that she (unintelligible) the people raped her. Actually, she was punished by raping, and the regiment punished Mom Vun because of her refusal by raping her, and she refused to marry, to get married, and afterwards she was raped.

[16.08.46]

THE PRESIDENT:

What of other parties? Do you wish to add anything else?

MR. KONG:

Mr. President, number one, I would like to note what has been mentioned by my colleague concerning the forced marriage. A forced marriage is part of a crime falling within the category of in -- part of inhumane act. In relation to the policy of the Democratic Kampuchea, a forced marriage is a kind of a punishment for those who violated the order. I can say rape is one type of the punishment. The Democratic Kampuchea did not support

the cadres to commit -- to commit the rape, and I believe that the Chamber has (unintelligible) already about this matter.

And as for the regulation, the practices were not the same for in the different regions, and also against the couples, as mentioned by my colleague. So different practices, it's -- it has nothing to do with what is in the paper and the real practices.

[16.10.51]

I believe this happened in all societies, so the -- what is written in the paper, the -- there may be differences between the older practices and what is stated in the paper. As we can see, you know, in the past the practices were different from the present time. In the past, the given -- the exchange of information was in difficult situation, and it is different now from --it is different now. For now, we have telegram, we have the system for our communication.

So what is important we need to consider the policy, the policy in principle. If the policy prohibits all not to commit the main acts, that is the policy itself that we need to consider the -- for the practices of individual that concern those individuals themselves. So it will be the responsibility of the cadres in charge.

Anta Guisse, my colleague, mentioned already about the issue of banc (unintelligible) and the Chamber may be aware as well of this matter.

Thank you very much, Mr. President.

[16.12.44]

THE PRESIDENT:

Now, the Chamber adjourns the hearing for today, and we will resume at 9:00 a.m. tomorrow.

The security guards are instructed to bring the Accused back to the detention facility and please bring him back to the courtroom at 8:45 a.m.

The Court is now adjourned.

(Adjourns at 1613H)