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

16 August 2021

Before the Judges: KONG Srim, Presiding
YA Narin
Maureen Harding CLARK
SOM Sereyvuth
Chandra Nihal JAYASINGHE
MONG Monichariya
Florence Ndepele Mwachande MUMBA

The Accused: KHIEU Samphan

Lawyers for the Accused:
KONG Sam Onn
Anta GUISSE

Lawyers for the Civil Parties:
PICH Ang
Megan HIRST
TY Srinna
VEN Pov

Trial Chamber Greffiers/Legal Officers:
SEA Mao
Peace MALLENI

For Court Management Section:
SOUR Sotheavy

For the Office of the Co-Prosecutors:
CHEA Leang
Brenda J HOLLIS
SENG Bunkheang
Nisha PATEL
Helen WORSNOP
Ruth Mary HACKLER
William SMITH
Vincent de Wilde d'ESTMAEL

List of Speakers:

Language used unless specified otherwise in the transcript

Speaker	Language
The President (KONG Srim)	Khmer
Judge Maureen Harding CLARK	English
Judge SOM Sereyvuth	Khmer
Judge Chandra Nihal Jayasinghe	English
Ms. CHEA Leang	Khmer
Mr William Smith	English
Ms. Helen Worsnop	English
Ms. Anta GUISSE	French
Mr KONG Sam Onn	Khmer
Greffier	Khmer

P R O C E E D I N G S

(Court opens at 0917H)

(Judges enter the courtroom)

MR. PRESIDENT:

In the name of the United Nations and the Cambodian people, the Supreme Court Chamber opens an appeal hearing for the parties against the judgment of the Trial Chamber in Case 002/02 dated the 16th of November 2018 and delivered on the 28th of March 2019.

Here, Khieu Samphan is a Co-Accused raising several grounds of appeal.

This is also the hearing of the Co-Prosecutor's appeal on a single ground.

Today, the conversation of the Supreme Court Chamber is as follows. I, the Presiding Judge, Kong Srim, Judge Chandra Nihal, Judge Jayasinghe, Judge Mong Monichariya, Judge Som Sereyvurth, Judge Florence Ndepele Mwachande Mumba, and Judge Ya Narin and Judge Maureen Harding Clark.

We are joined remotely by the Supreme Court Chambers Reserve Judges, Judge Sin Rith and Judge Phillip Rapoza.

The greffiers are Mr. Sea Mao, Ms. Peace Malleni.

Greffier, please report the presence of the parties.

[09.20.26]

THE GREFFIER:

Mr. President, Your Honours, the Co-Prosecutor – the National Co-Prosecutor, Madam Chea Leang, and the International Co-Prosecutor

present, and also here with us we have the presence of Mr. Kong Sam Onn and Ante Guisse, the Co-Lawyers for the Accused. And the Accused, Khieu Samphan, is also present in today's hearing.

As for the Co-Lead Lawyers, Mr. Pich Ang and Megan Hirst are all present.

Please be informed, Mr. President and Your Honours, all parties are present in their respective locations, so the Supreme Court Chamber can now proceed the hearing.

MR. PRESIDENT:

Today we proceed the appeal, and the appeal is dated – and today, it is the hearings against the Co-Prosecutors and also the parties on a – particularly the hearing of the Co-Prosecutor appeal on a single ground.

The Supreme Court Chamber has received extensive written submissions in which the parties have set out their arguments in support of their appeals and the responses thereto. The appeal hearing is an opportunity for the parties to highlight the most important aspects of the appeals and to clarify arguments in relation to their essential grounds of appeal and to reply to arguments contained in the responses to the appeal briefs.

[09.23.12]

It is not the purpose of this appeal hearing to simply rehearse the written submissions, nor is it a mechanism for parties to raise matters of fact or law that were not previously set out in their submissions on appeal. I invite the parties to keep this in

mind when making their submissions.

The appeal hearing also provides the Judges of the Supreme Court Chamber with an opportunity to ask the parties for clarification of their submissions and to address questions that are conducive to the determination of the appeal. The Judges may ask questions throughout the appeal h earing, and there is also time reserved for the Judges to ask additional questions at the end of each session if necessary.

[09.24.21]

The Supreme Court Chamber has to open the hearings from – remotely because of the COVID-19 pandemic. To avoid disruptions during remote participation, parties are asked to mute their microphones when they do not have the floor. All parties shall use video cameras when presenting their submissions.

Should parties wish to raise an objection, they are asked to not interrupt the speaker and, instead, wait for their turn to take the floor. In the event of any technical or translation difficulties, the proceedings may require to be paused until the issue is resolved by the administration.

In order to ensure an efficient use of time and to permit the Accused, the parties, every opportunity to present their appeals, the Chamber has decided to split up the grounds of appeal into six thematic sessions.

The first five sessions concern the appeal brought by the Accused, who has submitted several hundred grounds of appeal alleging

factual, legal and procedural errors. These grounds have been gathered into thematic sessions to make it easier for all to follow the appeal hearing.

[09.26.10]

The parties were invited to consider the provisional timetable for this appeal hearing. Having received those observations, the Chamber has tried to accommodate the parties by incorporating their suggestions into the final timetable attached to the Scheduling Order.

The first sessions, which is to start immediately after this introduction, will focus on the grounds of appeal relating to the alleged unfairness of the proceedings, starting with the Accused's main submission. This ground challenges the validity of the Trial Chamber's two-step delivery of its judgment.

The second session, which is set to follow, will focus on the Trial Chamber's jurisdiction.

This will be followed by a third session dedicated to the grounds of appeal alleging errors relating to the crimes for which the Accused was convicted. As was outlined in the Trial Chamber's findings, the Accused was convicted of a senior leader of the Communist Party of Kampuchea who engaged in a Joint Criminal Enterprise which resulted in the commission of crimes against humanity directed against civilian population of Cambodia, grave breaches of the Geneva Conventions directed against Vietnamese and genocide against the Vietnamese in Cambodia. Khieu Samphan was

also convicted of aiding and abetting murder with dolus eventualis.

[09.28.02]

The next session, that is, the fourth session, will focus on the Accused's individual criminal responsibility for the crimes for which the Accused was convicted.

At the conclusion of the arguments relevant to individual criminal responsibility, we will start with a session on the Accused's arguments regarding the sentence imposed by the Trial Chamber.

Finally, we will come to the appeal of the Co-Prosecutors.

As to the conduct of the individual sessions, following the procedures adopted in the appeals in Cases 001 and 002/01, each session will start with the relevant report of the Co-Prosecutors dealing with their particular appeal themes.

[09.29.04]

As President, I appointed three teams of the Co-Rapporteurs for these appeals that include the appeal by the Co-Prosecutors. Given the large number of grounds of appeal submitted by the Accused, the Co-Rapporteurs' reports do not include an attempt to summarize all the submissions on appeal. Rather, the reports serve as an introduction to the relevant section and an overview of the issues raised on appeal.

If a particular argument or ground of appeal is mentioned in the report, this means that the Co-Rapporteurs have particularized it as being in need of further elucidation with specific examples and

references. Other grounds of appeal have not been overlooked but are incorporated into the main themes described above or are already adequately argued.

[09.30.22]

Following the Co-Rapporteurs' reports, the parties will be invited to address the Chamber in the Order indicated on timetable. The parties are instructed to try to stay within the time allotted to them. Should it appear that particular aspects of the submissions require more time, the Supreme Court Chamber may, if it considers that the matters require further constructive and useful arguments, permit the party additional time to supplement their submissions.

I wish to indicate as well that there is also time allocated towards the end of the hearing for questions by the Supreme Court Chamber should it deem them necessary.

Finally, in accordance with the Internal Rule 109.4, I would like to inform the Accused, Khieu Samphan, that he has the right to address the Chamber bearing in mind his fundamental right under Internal Rule 21.d to remain silent.

As reflected in the timetable, a time has been specifically allocated to Khieu Samphan for him to address the Chamber last during the closing sessions – session, rather. However, he may choose when he wishes to address the Chamber, whether at the end of the appeal submissions or at the end of the Co-Prosecutor's appeal session or, indeed, at the beginning of the appeal hearing.

[09.32.19]

Now I would like to ask for clarification from the Accused. I'd like to ask the Accused whether he would like to clarify his position now or at a later time, or towards the end of the appeal hearing.

MR. KONG SAM ONN:

My respect to Mr. President, Your Honours. Mr. Khieu Samphan would like to make a statement at the end of the appeal hearing. Thank you.

Also, Mr. Khieu Samphan would like to submit a request. He would like to use the bathroom frequently during the hearing and I'd like to seek your permission so that he can use the restroom.

Thank you.

[09.33.32]

MR. PRESIDENT:

Regarding Khieu Samphan's request to make his statement toward the end of the appeal hearing, there should be no issue there. The Bench does not have any objection, and it is outlined in the timetable.

As for his request to use the bathroom during the hearing, the Chamber does not object to that. Whenever he needs to use the restroom, he doesn't have to make a request again to the Chamber. He can simply visit it and return to the hearing.

And I would like now to move to the first session of the appeal hearing.

I'd like to invite the Co-Rapporteurs to present their report.

Thank you.

JUDGE JAYASINGHE:

Good morning. I am associated beyond the Bench, the Judge (inaudible) for the presentation of the Co-Rapporteurs' report on grounds of appeal relating to fairness of the proceedings.

[09.35.26]

The appeal's main submission is that, by failing to issue Reasons for Judgment on the day the judgment was announced, the Chamber committed a serious error of law rendering unlawfully – rendering the unlawfully-announced judgment void for procedural defect. The subsequent issuance of the Reasons did not cure the defect.

His submission goes further, asserting that the Judges of the Trial Chamber were *functus officio* when the full reasoned trial judgment was delivered on the 28 March 2019 and the Chamber's action in delivering that reasoned judgment was an arbitrary act and ultra vires.

In the alternative, the Accused submits that the entire trial was conducted in an unfair manner such that throughout the trial his fundamental rights as recognized under the legal framework of the ECCC were not respected. This includes the Trial Chamber's biased approach to the guiding principles of criminal law and proceedings found in its previous adjudication of Case 002/01 and the biased approach to evidence all of which had the cumulative result of rendering his trial unfair. He

thus requests the reversal of his conviction and sentence.

[09.37.00]

The Accused provides further specifics with regard to the biased approach and submits for example that the Trial Chamber violated the principle of legality by failing to apply the correct legal criteria in its examination of whether the crimes for which he was charged or the modes of liability found were sufficiently accessible and foreseeable to him in 1975.

This includes whether the chapeau elements of crimes against humanity and grave breaches of the Geneva Conventions were met.

In particular, he alleges that the Trial Chamber attached improper weight to the gravity of the crimes rather than applying the law existing at the time and concludes that these errors of law violated his right to be heard by an impartial tribunal. He submits that the Trial Chamber's incorrect approach amounted to errors of law leading it to reach erroneous findings on which the convictions were based.

[09.38.06]

Further, the Accused challenges the Trial Chamber's unclear and expansive approach to the scope of Case 002/02 which led it to consider facts outside the scope of the case and facts that were irrelevant to the charges. He argues that these errors violated his rights to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence as provided by Article 14 of the ICCPR.

These errors of law, he argues, demonstrate the Trial Chamber's lack of impartiality.

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

[09.39.30]

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

The Accused argues that the Trial Chamber's bias is further demonstrated through its re characterization of the crime of extermination to the crime of murder with reduced mental element of dolus eventualis. This, he submits, was without notice to him, thus violating his rights to be informed of the nature of the charge against him and to have adequate time and facilities for the preparation of his defence.

The Accused may wish to address the Chamber on why this issue requires to be further re-litigated.

Furthermore, the Accused alleges that the Trial Chamber inconsistently applied the principle that there would be no

importation of criminal responsibility between the two cases. He may wish to develop this submission in view of the Trial Chamber's approach and this Chamber's guidance that while Case 002/01 served as a foundation for a more detailed examination of the remaining charges and factual allegations against the Accused in later trials, it was made clear by the Trial Chamber and this Chamber that there shall be no importation of criminal responsibility between cases and that factual findings are not to be transposed from Case 002/01 to Case 002/02. [09.41.08]

Accordingly, while evidence remained formally common to the severed cases, this commonality did not extend to findings and common factual elements in all cases resulting from Case 002 must be established anew.

The Accused submits that the Trial Chamber's refusal to accede to his request to recall witnesses from Case 002/01 was inconsistent with their decision to permit the introduction of hundreds of statements from Cases 003 and 004 later in the trial. These statements did not distinguish between exculpatory and inculpatory evidence, and thus prolonged the trial, violating his rights to an adversarial trial and to be tried without undue delay. [09.42.04]

The Accused may consider focusing here on what exculpatory evidence was overlooked.

The themes of bias and unfairness are, it is alleged, further

demonstrated in the interlocutory decisions concerning evidentiary matters made during the course of the trial. These decisions amounted to discernible errors in the exercise of the Trial Chamber's discretion causing prejudice to him. These decisions relate to the sequence of hearing witnesses, the admission of evidence during the trial pursuant to Rule 87.4, the admission of evidence from researchers and historians who did not testify before the Trial Chamber, the disclosure of evidence from Case Files 003 and 004, the Trial Chamber's failure to reopen the trial proceedings and admit statements of two specific witnesses which were disclosed during the deliberation phase of the trial, and the Trial Chamber's approach to evidence generally.

[09.43.08]

The arguments of unfairness include the Trial Chamber's failure to apply the evidentiary standard of beyond reasonable doubt, the practice of allowing witnesses to review their prior statements before giving testimony in court, the prioritization of expeditiousness over the ascertainment of truth, the approach to certain specific types of evidence, especially the use of the Accused's own statements and publications, the reliance on evidence obtained through torture, the reliance on hearsay evidence and on documents of alleged questionable provenance.

It is submitted that the Trial Chamber applied different approaches when dealing with inculpatory as opposed to exculpatory evidence and its approach to the probative value of civil party

evidence.

The cumulative effect of these violations rendered his trial unfair to such extent that the Supreme Court Chamber should intervene to reverse his conviction and sentence.

[09.44.08]

The Chamber would welcome specific references in relation to the alleged uneven treatment of evidence, particularly to the exculpatory evidence that the Accused considers was ignored or treated differently.

The ground – this concludes my part of the report, and the grounds of appeal relating to the sentence will be delivered by another Judge, Judge Monichariya.

Thank you.

MR. PRESIDENT:

Next I'd like to hand the floor to the Defence counsels to make the briefing.

Thank you.

MR. KONG SAM ONN:

Thank you, Mr. President. Good morning, Your Honours. Good morning, everyone.

My name is Kong Sam Onn, the National Co-Lawyer for Mr. Khieu Samphan. I'd like to provide our ground for the appeal that we submitted to Your Honour, Mr. President, and all the Benches of the Judge who announced the judgment.

[09.45.42]

Our request or brief is extraordinary due to the extraordinary circumstances.

The Trial Chamber declares and announced the judgment deciding our client, Mr. Khieu Samphan, to be convicted for several crimes and convicted him to a life imprisonment. However, on that day, the Trial Chamber failed to provide the reasons for the judgment despite the required – the clear requirement by the ECCC Internal Rules.

The Chamber declares that the reasons will be provided in due course without providing the clear deadline and the reasons for that.

Three days later, we launched our appeal before the Supreme Court Chamber, declaring – requesting the annulment of this illegal judgment and the Supreme Court Chamber actually rejected our appeal while waiting for the reason for the judgment, and then the Trial Chamber issued its reasons in late March 2019, that is, almost six months after the judgment's announcement.

[09.47.10]

We raised about the annulment of the judgment again before the Supreme Court Chamber in part of our appeal, the Co-Prosecutors standing behind the judgment in 2019 by the Supreme Court Chamber in order to make the Court believe and reject our appeal.

However, we would like to remind Your Honours that you did not decide on the merit of that judgment. Instead, you claimed that our appeal cannot be accepted because it does not fall within the

categories that stipulated in the Internal Rules.

It is true that Internal Rules does not allow the Trial Chamber to issue a judgment into status. Rather, the Internal Rule clearly prohibits and clearly stated special rules for the announcement of the judgment would require the reasons and it has to be written on the day of the announcement. And based on the Rule 101 on the format of the judgment, the judgment shall be put into parts, allow me to quote:

"(a) on the arguments based on facts and law leading the Chamber to issue the decision; and (b) on the judgment itself." (As read)

[09.48.58]

Also, the judgment has to be signed by the Judges and the greffier, by the latest, the day of the announcement. That is – let me repeat. It shall be signed on the day of the announcement of the judgment. And this is clearly expressed in Rule 102 of the Internal Rules as well.

On the pronouncement of the judgment during a public hearing, all judgments shall be pronounced in a public hearing and a summary of the – of the judgment has to be read loudly and a copy needs to be copied – and a copy needs to be sent to all parties, and it needs to be disseminated.

The Rule states that in the absence of the Accused during the pronouncement, then the Accused needs to be notified by his counsel and, in this case, the time period for the appeal begins on the day of the notification.

[09.50.04]

In order to protect the Trial Chamber, the Co-Prosecutor relies on Internal Rule 104. That's the period of the appeal begins from the date of the announcement or the day of the notification of the judgment where it is appropriate or the notification of the judgment, which is appropriate, does not mean that the Trial Chamber would have other options to provide the reasons at a later period.

And this is clearly stated in Rule 102, that it's in the absence of the Accused during the appeal from the day of the pronouncement of the judgment. We cannot ignore this fact as the Co-Prosecutor did. And this is clear, that in the Cambodian law the situation or the provisions are essentially the same.

And allow me to request Your Honours to review Article 381 and 382 as well as Article 360 and 361 of the Code of Criminal Procedure.

And why did the Chamber violate the Internal Rules? The Trial Chamber never explained why. It is serious because, in the end, the Trial Chamber issued a written reasons and Mr. Khieu Samphan appealed. And that is the conclusion by the Co-Prosecutor that it is not serious and that there is no problem there, but for us, this is a problem, a big problem because in order to provide justice, the Judges need to respect the law.

[09.52.08]

The Judges are the guarantor of the law, of the respect of the law as well as to respect the rights of individuals, and if Judges do

not respect their own law, that's the end, and that will be a failure in the judicial aspect. It means that we live in the – we do not live in a state of law and there will be no trust on the judiciary.

And the Trial Chamber does not respect the law when they declare a final and critical judgment, which is its main mission, that is, the judgment on the guilty or not guilty of the Accused, including other impacts, as you may know, about the judgment on Mr. Khieu Samphan, not only that it is illegal, but also, it is committed illegally and at the discrimination against Mr. Khieu Samphan, which is unfair.

[09.53.12]

For several months, Mr. Khieu Samphan did not know about the reasons and could not lodge his appeal, and during these months of inability under the lacunae in the law that he could not exercise his right, he could not do anything. And this delay for several months without any reason cannot be compensated, in particular based on this ungrounded judgment.

Whatever is raised by the Co-Prosecutor, it's going to be a problem, a big problem. And also, the Co-Prosecutors themselves have issues within a separate context, but it's not as serious as in this judgment, and that the Internal Rule does not specify specific rules regarding the judgment. That is the decision on the severance of the case and where the Trial Chamber was delayed in providing written reasons.

And based on the submissions by the Co-Prosecutor in document 153 in paragraph 23 and 25 and 29 of their submission, the Co-Prosecutor appealed against the not receiving of the Reasons for the Judgment 25 days after the pronouncement. And they raised the serious impacts on the effective implementation or the enforcement as well as the other various impacts on parties in various paragraphs, including paragraph 23, as well as the trust of the public on the judicial administration in paragraph 25 as well as the loss of opportunity by parties in paragraph 29.

[09.55.35]

So it is clear that when the judgment to release Mr. Khieu Samphan would be appealed against by the Co-Prosecutor and would raise about the serious impact, it is unfortunate that the Co-Prosecutor only see what fits their interest.

And in International Criminal Court, there is a new case regarding the appeal by the prosecutor against a released judgment which was orally issued before providing the written reasons months later in the case of Gbagbo and Goudé. Judges of the Trial Chamber explained during the judgment that they did it that way in order not for the accused not to be detained during the time awaiting the reasons for the judgment. And the first ground of the prosecutor is the violations of the statute of the ICC.

[09.56.40]

And on the 31st of March 2021, the Court of Appeal rejected this grounds of appeal on the grounds that, for this specific case, the

Trial Chamber did not commit any fault in providing the priority to the basic right of the accused, which was to be released based on the norm in order to ensure the fundamental right to have a fair trial.

Your Honours, you will see the reference documents in the list of our authority documents that we attach some excerpts.

And we have not found any other cases where Trial Chamber fails to respect its own Internal Rule when they issued a judgment.

In the case of Mr. Khieu Samphan, it's not about his release. The Trial Chamber did not provide any explanation and there is no immediate circumstance which would justify the Trial Chamber to not respect his rights to defence. In these circumstances, Your Honours, there is no other option besides annulling the judgment and despite the fact that the Co-Prosecutor raised that the Internal Rules does not clearly specify the annulment of a judgment, but for an illegal act committed outside the judicial framework or contradictory to the judicial framework would not be legally valid.

[09.58.37]

In addition to Your Honours, you made that similar declaration, and let me give you three examples.

Quite a long time ago, in 2012, Your Honours made an announcement that at the ECCC did not issuance of a written judgment would lead to annulment, which is different from other decisions. And that is the decision of the Supreme Court. It's document E174/2/1/4.

And at paragraph 35 of our appeal brief, it is clear to say that, despite the fact that the Internal Rule does not specifically mention this provision, and on the 29th of January 2020, Mr. President and Your Honours declared that the submissions of the brief beyond the scope of the jurisdiction of the ECCC and cannot be accepted and would not be considered, and that is your decision, document F50/1/1/2, paragraph 12.

[10.00.15]

And in addition, on the 10th of August 2020, in Cases 004/02, the decision in document E004/2/1/1/2, Your Honours noticed that on the illegality of the act in the Closing Order of the Investigating Judge shall be null and void. That is in paragraph 51 and 53. And you made the following decision, "for the invalid act could not lead to a proper or legitimate result."

If it is clear that the agreement in the ECCC nor aims to bring to justice senior leaders of the Democratic Kampuchea and those responsible for the crimes, this has – this is mentioned in paragraph 68.

In this case, the Trial Chamber rendered a judgment in violation of the legal framework of the ECCC and fails to carry out its mandate and mission in accordance with the law. The judgment against Khieu Samphan has no legal effect. It is – it should be null and void, so I am requesting the Supreme Court Chamber to reject – reverse the Judgment 002/02 dated 16 November 2018.

I thank you very much, Your Honours.

[10.02.58]

MS. GUISSE:

Good morning Mr. President, your Honours, I follow the lead of my colleague Kong Sam Onn, of course regarding where we are with our appeal and, first of all, I shall recall what was said by a great French author of the 19th century, Mr. Pierre Joseph Proudhon, which comes to mind when we talk about equitable procedure, "Justice is human. It is all human, and nothing but human." And because it is human that monitoring equity of a procedure is as crucial – is so crucial in a criminal trial because being human also means being fallible.

When we stand before the Judges in a courtroom, we are, of course, expressing respect for their function as per the law, but from the bench where they sit and below their robes, they remain, nevertheless, men and women, that is to say, beings who are fallible, who can make mistakes sometimes through decisions that are based on conscious or subconscious prejudice and notions that can prevent them from being as unbiased as is necessary to guarantee equitable process. And hence, the role of the Defence is to act as guardian for the rights of the Accused during the trial and afterwards, as staunch criticism when appealing a ruling.

[10.04.34]

That involves, through the hearings and through all the pages of the judgment, ensuring that the major guidelines and principles of a fair trial are respected.

Throughout our appeals submission, we have listed our assessment of a partial, a biased appreciation of the evidence. In the taking into consideration of evidence presented to the Court, the selective approach for certain witness testimonies and the systematic absence of exculpatory elements, for instance, as regards the questions asked by the Defence, and we've mentioned all this in our brief, and specified what exactly was prejudicial for Mr. Khieu Samphan.

I´m obviously not going to be able to recall all of those points today. The President has clearly stated that that is not the purpose of today´s hearing. I would simply like to mention certain examples in terms of our critical approach to the ruling issued by the Trial Chamber.

[10.05.41]

And before I go to the core of this topic, I would like to say that we shall be responding to the Supreme Court gradually as we go, theme by theme, over the next few days. We have sought to integrate the various questions of the Chamber in our presentation, and when something is not answered during the presentation, we shall ask our questions at the end of each presentation.

I also wanted to voice an overall general comment at the outset because this concern comes up several times in our report, Mr. President, Your Honours, to the effect that sometimes we revisit questions that have already been examined, in particular in

respect of Case 002/1, and this particularly applies to paragraph 5 of your report on the issue of requalification of the crime of extermination into a crime of murder.

And I shall be dwelling on this when this theme is covered notably when responding to the Prosecution, but I would like to recall that our general position on this issue as we revisit it, and it seems important to methat it is understood that our positioning is based on Decision 11 from the Special Panel after our request. [10.07.28]

We filed a request, indicating that we feared that the fact that the Supreme Court had already heard a number of facts and elements in law under Decision 2/1 for trial 002/1, our fear was that this could have a negative impact on Mr. Khieu Samphan in terms of his access to the necessary jurisdictional degree and because a number of issues in law and in fact had already been determined, so we take into consideration the decision of the Special Panel, this decision and decision 11, as I stated earlier, in particular paragraphs 73 to 75, where it is stated that there was a major overlap of issues de jure and de facto. That is what the Special Panel stated. So that's in paragraph 73.

The Special Panel recalls that it should be presumed the Judges are in a position to maintain their freedom of spirit regarding any certainty, personal certainty or inclination that would be non-relevant and repeats that the overlapping of issues without affecting any criminal responsibility is not sufficient to reverse

the presumption of impartiality of Judges.

And under 74, the Special Panel considers that Co-Lawyers do not demonstrate that a reasonable observer would consider that the Judges being challenged might not be impartial when they make a decision on the appeal relevant to Case 002/2 because of the overlapping of issues in Cases 002/1 and 002/2.

[10.09.48]

And at the end of Paragraph 75 of this decision, it is indicated that the Special Panel agrees with the Co-Lawyers, that is, the Defence, that the appeal in Case 002/2 before the Supreme Court is the court of last instance for Khieu Samphan, but the mere fact that the Judges being challenged made a determination on 002/1 does not affect their impartiality. It is thus, in the light of these observations, that we do not fear fully appealing Case 002/2, and we are certain that some issues raised in 002/1 must be evoked in the interest of procedural fairness and to guarantee the rights of Mr. Khieu Samphan, we needed to reopen this case since we are in a position, for the Case 002/2, to provide additional answers that were not raised in Case 002/1. However, our time is limited. Consequently, on the issue of procedural fairness, I shall dwell on mainly three points: first of all, the violation of the principle of legality in general; second, the manner in which the Chamber requalified certain facts without giving the Accused the possibility to express comments prior to requalification, and thirdly, the issue of the use of documents in violation of the

Convention Against Torture.

[10.11.13]

I shall, afterwards, respond to any questions of the Chamber that I will not have covered in dealing with these three issues, in particular, with the examples of the Chamber that has taken certain conclusions verbatim from text from Case 002/1 and examples of negligence of the burden of proof.

First of all, in regards to violation of the principle of legality, these are general comments at the outset because I am taking into consideration your reports in paragraphs 2 and 22 where you state that you prefer that we reference errors in law as regards the violation of the principle of legality on the characterization of the crimes, which we raised with regard to specific crimes, but here I shall concentrate on the overall principle that guided the Trial Chamber or, rather, poorly guided the Trial Chamber in its determination. And I shall explain why it is important and fundamental in the context of this trial.

At best, our grounds of appeal were not understood, and were at worst distorted by the Prosecution, and I shall be referring to those points during my presentation.

Now, the issue of legality was mentioned in our brief F54 in paragraphs 550 to 573. We were referring to our final brief in Case 002/2 in paragraphs 300 to 380..

[10.13.15]

Our first criticism is that major errors in law were committed by

the Chamber in terms of the principle of legality. This is a cardinal principle in criminal law, but it was treated as a kind of formality, an empty shell.

It seems that considering the nature of the crimes, it's not necessary to determine the technical definition of the crime or accountability to see whether the law applicable at the time of the facts was foreseeable and available to the Accused. So, in view of the gravity of these crimes, an exception was created to replace the very careful examination that would have been required. But the principle of legality can have no exception, in any circumstances, including in times of war or other exceptional situations of danger to the public, such as terrorism.

If the gravity of the crimes takes precedence everything else, the Chamber made an erroneous determination in law, but also, this was an unacceptable decision on the part of judges who are supposed to respect the values of democratic society, and the rule of law. A total lack of objectivity and impartiality was thus displayed, and this is at the core of our grievance, and we have clearly stated this in our appeal brief.

[10.14.37]

We shall not revisit this in detail now. I simply wanted to mention a few points to respond to the Prosecution, from our appeal brief.

The Prosecution says, and this is no surprise, it takes up the reasoning of the Chamber with a few additional elements which are

not convincing, anyway. So, they refer to the jurisprudence in terms of the Second World War principle of legality. This is a very opportunistic interpretation of the jurisprudence of the European Court of Human Rights, and it provides certain factual elements.

Now, with regards the jurisprudence after the Second World War in terms of the principle of legality, this principle of legality was debated a number of times before the ECCC. And we see that this is the first time this jurisprudence is mentioned. And why?

Well, that jurisprudence was abundantly criticized by authors, by attorneys, by practitioners because it is worthy of criticism. In the haste – hasty trials after the war, the point was to set an example more than to uphold the law.

[10.16.09]

Even in the examples used by the Prosecution in itsn footnote 121 for paragraph 32 of its response, the ruling that it cites, is incomplete,,it states that considering the positions occupied by certain people in the Reich government, among which were those of the Accuseds, they were aware of treaties due to their duties, but they do not mention the additional phrase of "at least some of them", and this is important.

Aside from the fact that this precedent is worthy of criticism, this citation is also incomplete. Likewise, the interpretation of the Prosecution as regards the jurisprudence of the European Court of Human Rights is very opportunistic and above all, extremely

biased.

In paragraph 36 of its response, the Prosecution states that in that in ECHR jurisprudence, there is a distinction where the assessment of the gravity was not deemed relevant because the crimes were very technical or financial. And on the other hand, cases where facts were so serious that their criminal nature was obvious, whatever the technical definition of the crime. [10.17.46]

And the Prosecution cited the ruling [I/A], which is, and it is important to highlight this is an isolated precedent. Based upon it, it's not possible to extend this notion to the whole jurisprudence of the European Court of Human Rights. For the rest of the jurisprudence, it is very clear that the definition of the crime should prevail, whether or not it is a serious crime.

In the context of our brief, we have abundantly quoted a number of decisions, I will not cite them all as there are many, but in particular, the decision in Vasiliauskas vs. Lithuania, handed down, and this is important by the Grand Chamber in 2015, with regard to genocide, which is the crime of all crimes. This ruling made no distinction based on the gravity of the crimes when considering the principle of legality.

Furthermore, beyond jurisprudence, there is also the issue of an advisory opinion delivered by the European Court of Human Rights, and the ECHRis probably the best – in the best position to comment its own jurisprudence, so when you have an advisory ruling – when

you have an advisory opinion, P162019001 dated 29 May 2020, which is of course added to our list of sources, the Grand Chamber issued a ruling specifically on the reference legislation in terms of defining a crime and criteria for comparing criminal law in force at the time of the crime and criminal law as it has been amended. And in this advisory opinion, the Grand Chamber recalled the general principles of its jurisprudence in terms of the requirement for legal certainty and foreseeability, stemming from article 7 of the Convention on the Principle of Legality. And never is any reference made to the gravity or the seriousness of the crime, but only to those elements of the definition of that crime.

[10.19.59]

By way of an example, in its paragraph 60, that advisory opinion, the ECHR recalls gives an example recalling that the qualitative conditions of accessibility and foreseeability must be fulfilled both for the definition of a crime and for the sentence that it will entail.

It furthermore says in the following paragraph that:

"The scope of the notion of foreseeability is largely dependent upon the text in question, the scope covered and the number of recipients." (As read)

No mention is ever made to the gravity or the seriousness of the crime as a criterion to exclude strict adherence to the principle of legality.

And the third point of the Prosecution is to say that the elements of crime and modes of responsibility would have been accessible to Khieu Samphan because he would have analyzed international commercial law in depth. This is in paragraph 33 of the Prosecution's response.

[10.21.10]

Now, this argument and the idea that he would have been informed of the sovereignty of the states, or that because he spoke a few words of English, I don't see how under those conditions, he would have been able to understand the definition of the crimes and modes of responsibility, or that this would have been accessible to him during the course of his research, which had absolutely nothing to do with international criminal law.

Therefore, the Chamber did, indeed, commit an error in its assessment of the principle of legality. There is nothing in the Prosecution's response to demonstrate that the Chamber did not commit this error, and above all, we note that the Prosecution did not respond to our arguments that the Chamber cannot avoid the necessary and meticulous assessment in a context where we are examining the determination of international Community law some 40 years ago because we are now in 2021 and the closing decision was handed down in 2010. But the facts and the law which must apply to Mr. Khieu Samphan go back to 1975 to 1979.

It is, therefore, important to keep this in mind, all the more so since the procedure on this issue before the ECCC and the manner

in which we experienced it, as Judges, Parties and the Accused, demonstrates that modes of responsibility and certain crimes were not easily foreseeable. And the best example of this is the Joint Criminal Enterprise.

Whether it be the Prosecution, the Chamber of first instance or the Supreme Court, each one gave different constituent elements.

[10.23.10]

The Chamber failed to overcome the obstacle of determining what was the generally accepted legal practice, and I gave you paragraphs 569 to 571 of our appeals brief. The Chamber did not carry out the necessary examination. Rather, it applied a law which did not exist at the time of the facts, both for the crimes as for the modes of responsibility, and we will come back to this during the sessions dedicated to this matter.

The second topic that I wish to tackle is the requalification as murder with *dolus eventualis*.

I would like to recall our position in our appeals brief, paragraphs 135 to 157, where our position was the following.

We were not informed of this requalification. Secondly, the Chamber introduced a new constituent element, which was a *dolus eventualis*, and there was an element of impartiality on the part of the Chamber. The reply of the Prosecution in paragraphs 85 to 92 of their brief can be summarized in three points.

[10.24.43]

The first is the Chamber did not introduce new constituent

elements. We were informed by Judgment 2/1. And even if there had been a lack of information, there would not be invalidation because we had the possibility of facing this in appeal, and the Civil Parties supported the Prosecution's position on this matter.

On the introduction of the new constitutive elements which the Prosecution challenges, first of all, our response, or rather I will remind you. One of the problems when you speak first is that you need to recall the positions of the Parties in order to respond to them and to make clear what we are responding to. And I hope that this will be taken into account by the Chamber when the pleading time is computed.

Paragraph 47 of the reply of the Prosecution indicates that the Supreme Court Chamber and more importanlty, the Co-Investigating Judges responsible for the *saisine* decision in Case 002/2, all interpreted the moral element of extermination as *dolus eventualis*. And at this point, we respond that no, prior to the closing order, the only jurisprudence that was available was, in fact, the Duch ruling.

When the Co-Investigating Judges handed down their Order, the Duch ruling was the only internal precedent, which was entered in 2009, yet the Co-Investigating Judges never assessed the moral element of extermination. Of course, that the first instant Chamber did include the notion of *dolus eventualis* in the definition of extermination, yet this moral element was not interpreted as including *dolus eventualis*.

[10.26.40]

And I send you back to paragraphs 13-178 to 13-179 of the Closing Order, in which it is very clear… these are the articles that we are interested in.

There is no *dolus eventualis* in the elements that are reported by the Prosecution, and this is confirmed by Article 13-182 of the Closing Order which refers to the Stakić) ruling of 20 March 2006 where there was an intent to kill, far from *dolus eventualis*

And it's even more clear if one re-reads paragraphs 1380 to 1390 of the Closing Order.

I apologize. It would appear that I speak too fast for the interpreters, so I'm going to try to slow down, but I am concerned about the time that we have available.

So let me return to this.

In the Closing Order, paragraphs 1380 to 1390, it is clear that the moral element of extermination contains no *dolus eventualis* – that is, the intention to kill. And there is a clear difference here between the charges of extermination and those of murder with *dolus eventualis*, and this is all the more clear when you look at paragraphs 13-173 to 13-180 of the Closing Order, which I would ask you to refer to.

[10.28.20]

The murder charge clearly includes *dolus eventualis*, unlike that of extermination, and the Co-Investigating Judges clearly decided to not charge the Accuseds with murder for the difficult living

conditions, but they instead only charged them with extermination. They could have done both, as they did in other cases. Concerning the living conditions, for instance, they did not make this choice. They simply chose the concept of extermination. So it is clearly the case that they saw a difference between the two intents, and it's important to underscore this.

Turning to jurisprudence which was quoted by the Co-Investigating Judges on the applicable law, the Prosecution makes a selective enumeration of this jurisprudence because we hear quoted three elements of jurisprudence which, if one takes a close look at the footnote 5263 of the Closing Order, there are 13 precedents cited. And the three sources which have been put forth by the Prosecution, these three sources out of 13, deal exclusively with first instance cases, the Blagojevich judgment, which evokes *dolus eventualis*, the Kayishema and Ruzindana ruling, which speaks of negligence, and lastly, the Stakić, which is explicitly contradicted in terms of negligence as *dolus eventualis*.

[10.30.12]

And so the Prosecution deliberately ignored the other sources, and it is clear that there is no mention of indirect harm.

I'll try to go quickly and say that in the three rulings that have been mentioned by the Prosecution, there is no mention or, rather, no, the three speak only of the material elements, the ruling on [U/I] speaks of direct harm, and the four other rulings are considered exclusively with the material element, which means that

we cannot say that we are founding a decision on that jurisprudence, the Co-Investigating Judges mentioned with regard to *dolus eventualis.*

It is also incorrect to say that in the Duch ruling, the Supreme Court would have interpreted a moral element of extermination as *dolus eventualis*, because the Duch ruling – or rather, the Duch ruling in paragraph 323 does make a clear distinction between the moral element of persecution and of extermination. And it states in the three paragraphs prior, in paragraph 320, and I quote, in footnote 716:

[10.31.35]

"The definition of 'extermination' as a crime against humanity, as given by the Chamber is not a part of matters raised by the [U/I] and, therefore, this will be examined by the Supreme Court exclusively from a legal point of view, which means that the moral element of extermination was never taken into consideration." (As read)

Therefore, in order to respond to the Prosecution concerning the Chamber of the first instance, there was no general consensus either before the Closing Order or after ruling 2/1, and the Prosecution's shifting definition of *dolus eventualis* in the sentencing is flagrant. There is a indeed new constituent element here.

Concerning the fact that it is alleged that we were informed ahead of time, which is the second argument of the Prosecution, there is

no addition obligation of the Chamber because it would appear that we were informed, it is alleged that we were informed through Ruling 2/1, and we should have, they claim – we should have defended ourselves and sought clarification.

The jurisprudence mentioned in this regard is certainly not applicable because when the issue relates to the jurisprudence, notably of the European Human Rights Court to see at what point correct information was provided, we need to look at the ruling…

[10.33.28]

JUDGE CLARK:

…deal with it while it's fresh in my mind.

Two things that you just mentioned very, very briefly, but it seems to me they might be important, is that you said that the recharacterization introduced a new element, and you didn't actually say what that element was. And then you also mentioned a little earlier that a moral element was never taken into consideration.

I'm a little confused about the meaning of "moral element". Could you say it to me in French and then maybe I could understand? The "moral element" is new to me. I'd like you to explain.

Thank you.

[10.34.23]

MS. GUISSE:

Well, very obviously what I am thinking of is *mens rea*, then the new element, when I speak of the new element, I am speaking of the

dolus eventualis in the framework of extermination.

What I am saying is that we could not be usefully prepared – as the defence of Khieu Samphan, prepared to defend him on the charges of murder, which included *dolus eventualis*when we were working on a defence for the crime of extermination, which includes absolutely no *dolus eventualis* in the case of *mens rea*. There is an intention to kill. Period.

I hope that answers your question.

JUDGE CLARK:

It is the importance issue. Perhaps we should ask you at this stage, do you need more time to address this particular aspect of recharacterization and, if so, when would you like to be afforded that time? Because it seems to me that you have only addressed it in very few minutes, and it's possible that you might need more time.

[10.35.49]

MS. GUISSE:

I confirm to you that any additional time will certainly prove useful to prevent me from speaking so fast that not everyone can follow what I'm saying.

But in any event, the distinction that I am making in order to reply to your question of determining when we would like to have additional time, I think that it would be logical for me to have this additional time at the end of our explanations if the Chamber can agree to this, but I leave it to the Supreme Court Chamber and

Judges to determine when this would appropriate. But as far as I'm concerned, I think that the additional time should come at the end of our intervention in order that everything be stated in one single block.

[10.36.46]

JUDGE CLARK:

(No audio)

MS. GUISSE:

Thank you.

In the meantime, I will continue and recall that extermination was never defined in order to integrate element of *dolus eventualis* and that in the Trial Chamber, during the proceedings, the Supreme Court was not yet seized of the matter, that the charges as they were listed in the Closing Order simply contained a crime of extermination and we could not imagine that there would be a recharacterization – a recharacterization with *dolus eventualis* without us being asked to provide our own observations during the proceeding before the Trial Chamber.

And I would like to recall the jurisprudence of the European Court of Human Rights, which is in paragraph 138 to 146 of our appeal brief, in which it is very clear that when recharacterization is being contemplated, it should not be implied, for instance, through observations made by civil parties but this recharacterization must be clearly indicated either by the Chamber or the Prosecution in order to enable the Defence to provide its

own observations in regard to it.

[10.38.08]

And there is further precedent here which supports this, and that is footnote 169, paragraph 146 of our appeal brief, where we mention the ruling on [U/I]. And so we indicate there and we confirm firmly that the lack of information was characterized in previous jurisprudence, but the Supreme Court is seized of this matter, it is obligated to inform us, yet neither the Civil Parties or the Defence were informed, only that the Chamber and the Prosecution were aware of this, and so logically in our defence, we defended against the charge of extermination which, to us, was the only charge included in the Closing Order.

And we were told by the Prosecution that this entailed no prejudice, which is false because Ruling 002/1 refers to the procedure in general, and the Prosecution tells us that we need to take this concept globally and look at the procedure as a whole to see if there is a remedy possible.

[10.39.17]

Now, the problem here is that as part of the appeal before ECCC – is that you are appeals Judges, but you are also the Judges of last resort and the decision – and the decisions that you handed down, whether in the Duch ruling, paragraph 17, or in ruling 002/1, paragraph 88 or 89– you state that you are not returning lightly to the issues of proof and observations. And this means that in these conditions, that if we lose the chance to invoke our

arguments from the first instance, we're not sure that we will be able to recover this ground by the time of the appeal. So this is an important point.

I would like to recall as well your jurisprudence, F 46/2/4/2 of 22 November 2019 where, following a request by Nuon Chea's Defence, you reaffirmed the limits of your examination in appeal. And so the prejudice is there, and the only remedy is either invalidating the ruling or an acquittal.

Now, the third is the violation of the Convention against Torture, which was raised in paragraphs 271 to 286 in our Appeal Brief, where we stated that the Court, in fact, violated Article 15 of the CAT and this is very clear, it interpreted the text in a way which goes beyond the clear text of the Convention and which specifies that the only exception to the utilization under proscription or prohibition, rather, of the use of elements linked to torture was simply to establish that a statement was made.

[10.41.24]

And the Chamber knew this quite clearly because, at the time, it itself noted this in its decision 2-350 part 8, paragraph 72 where it noted this very clearly. Yet, the Chamber decided to use this differently by using the content of the document which had been jeopardized by the issue of torture, not only with regard to the people who were accused of torture, but also to establish other facts along with the torture. And this goes so far beyond that I remind you that Madame Judge issued a dissenting opinion, which

was well-founded.

The Prosecution is telling us that there was no error, that all the elements obtained under torture, that the Chamber had the right to use this evidence obtained under torture for other purposes than to establishing the truth of these elements, that the evidence from the notebooks or records kept by interrogators could be used and that the statement by Duch on conversations he had with detainees at S-21 about the Accused could also be receivable. Furthermore, they are claiming that there would be no prejudice.

Just based on the last element cited by the Prosecution alone, a document in which the behaviour of the Accused described during a conversation with Duch, during a conversation with a prisoner at S-21 is enough to show that there was prejudice.

[10.43.16]

We should like to reply to say that the scope of Article 15 admits no exception, and we would like to recall in this respect that the decision of the Supreme Court, F 26(12) in paragraph 34, clarifies that the Supreme Court considers that the normative value of Article 15 is sufficiently precise for the application of this provision to not require any enabling legislation. So the Supreme Court Chamber itself had decided that Article 15 of the CAT should be strictly applied, stating, and this is where the Prosecution is extrapolating, simply stating that when the record contains information stemming from torture, when the record contains

information from people other than the torture victim, for example, the person who committed the torture, that information cannot be used other than to establish certain circumstances, in particular, the questions asked, the persons present, the facts, and the mode of torture. That is all. Paragraph 68, ruling F 26(12).

In no case could the statement be used for other ends. And in your paragraph 47, you also said because you were aware of the possible risk of overstepping those bounds here, saying that information received under torture are not admissible as evidence even if they may have probative value.

So we would simply like to ask you to apply your own jurisprudence and throw out any evidence stemming from torture used by the Chamber, that is, I refer you to paragraph…

[10.45.27]

MR. PRESIDENT:

Could you please postpone for a moment? The IT Unit needs to change a DVD.

Thank you.

(Short pause)

Allow me to inform the parties that for the Defence counsel, could you please let the Chamber know how many more minutes you need? If it is only a few more minutes, then we can continue.

Thank you.

[10.46.43]

MS. GUISSE:

I think I shall need at least 10 minutes, given that I have yet to respond to the Chamber in regards to elements of evidence and exculpatory evidence, so I would really need 15 minutes, understanding that I might also be able to raise these issues again at some other moment during the rest of our presentation this week.

But at this point, 15 minutes seems reasonable to me.

MR. PRESIDENT:

The Chamber will allow you 15 more minutes.

Thank you.

MS. GUISSE:

Thank you, Mr. President.

So I understand that I'm to use those 15 minutes now, or did you want to – did you want us to have a break? I'm not sure if I fully understood.

MR. PRESIDENT:

You may continue for 15 more minutes, and then we take a short break.

[10.48.36]

MS. GUISSE:

Thank you, Mr. President.

So as stated earlier, the elements used by the Chamber in the documents obtained via torture are the notebooks referred to in my

brief in paragraph 289. Even if the Prosecution tells us that these notebooks are actually further away from the interrogations than the notes of the interrogators, which is not the case, because, the records were used by the Chamber, they are not just lists, the content of all this was used by the Chamber as corroborating evidence and I refer you to the ruling's paragraph 115, and to the issues we have elaborated in our paragraph 290 of our Appeal Brief.

The witness testimony of Duch is also affected by torture, concerning a rumour from a Mr. Pang detained at S-21 at the time when, according to Duch, he allegedly mentioned the presence of Khieu Samphan at conversations at the Permanent Committee on the fate of Chou Chet. And here again, I refer you back to our brief, paragraph 1868 which discusses these matters of the ruling in its paragraph 42-28.

[10.50.11]

In this part of Duch's witness testimony, in which he claimed that he learned from Pang that Khieu Samphan during deliberations on the fate of Chou Chet, is affected by torture, and once again I remind you that in the decision that we are contesting, the Trial Chamber had stated that there was a presumption of coercion that was generalized at S-21and so there was the presumption of torture. The Chamber did not apply this presumption, because it wanted to use this piece of evidence against Mr. Khieu Samphan. Appeal BriefThere is a necessary affirmation from the Chamber's

conclusion, and I refer you to paragraph 1868 of our Appeal Brief. Now, to respond to the Chamber as regards the general prejudice against Khieu Samphan with the use of these documents that stem from torture these were used by the Chamber to feed into the political notion of a policy of the elimination of enemies. This had to do with the alleged knowledge by Khieu Samphan of these arrests, and once again the records from Kraing Ta Chan were used as corroboration.

On the issue of paragraphs 4 to 6of your report, Mr. President, where you ask which factual elements from Case 002/1 were imported to Case 002/2 by the Chamber, I would like use some examples. The administrative structures, which were practicallya cut and paste and related to the role of Khieu Samphan particularly as regards the issue of liability, and I will use the example of the inaugural speech cited in paragraph 159 in our Appeal Brief, where we see that the Chamber makes the same mistake as in Case 002/1 when, in effect, this factual aspect had been rejected by the Supreme Courts and we had put forth the fact that the words that were attributed to Khieu Samphan had actually been delivered by somebody else.

[10.52.46]

And in spite of the differing conclusions, despite the final conclusions, despite the fact that there is a ruling that says something else, the Chamber has, nevertheless, done a cut and paste of that text without even revisiting it.

Furthermore, there's also an example with the use of the Meas Voeun witness testimony which appeared in paragraphs 4233 to 34 of the grounds for judgement, where none of the elements put forth by the Defence are taken into account. This appears in paragraph 1878 of our Appeals Brief.

[10.53.32]

There are also several examples of the issue of burden of proof. But obviously I am going to discuss the refusal to bring François Ponchaud and Steve Heder back for questioning, they were major witnesses that we wanted to have in Case 002/02. It is important to note that it is a real problem in terms of respecting evidence and the rights of the Accused because for the whole of Case 002/2, we requested the presence of only seven witnesses, including those two that I have mentioned.

The reason given by the Chamber to say that they would not be summoned again, and – because they had given testimony on several things outside the scope of Case 002/1. They had already appeared in Case 002/1. This, to us, is very revealing of the Chamber's bias, while during Case 002/1, we were only authorized to question witnesses on the facts concerning Case 002/1, the Chamber authorized the witness Sao Sarun, who appeared in Case 002/1, be questioned on everything, because at the time there were concerns about his health, but that did not stop them from having him back for questioning in Case 002/2.

And I refer you to paragraph 169 in our Appeal Brief. And so even

Sao Sarun was questioned on everything under the framework of Case 002/1, this is a double standard. The Chamber expected Sao Sarun, I believe, to have inculpatory material as regards marriages, although this was not the case, so they summoned him again, whereas Ponchaud and Heder, who have an experience not only with Cambodia, but also, in the case of Steve Heder, with the ECCC procedure, would have been highly useful regarding in particular the issue of the Cham. I refer you to paragraph 1567 of our Appeal Brief.

I'd also recall that the Chamber, and this is one of the prejudices that we face, has used statements by Steve Heder and by Mr. Ponchaud on the matter of the Cham, but we have not had the possibility to question them on this.

Now, Mr. Ponchaud, a French man who lived in Cambodia for decades, who is very, very cognizant of Cambodia, who was living here during the period prior to the arrival of the Khmer Rouge just prior to 1975, he had lots of things to say about moral principles as regards the matrimonial policy, but they were ignored. And I refer you to our brief in paragraph 1595, and he also had things to say regarding cooperatives, regarding the way in which rice cultivation was organized.

[10.56.32]

Steve Heder also had things to say about that. In paragraphs 1503, 2130, 170 of our brief, we mention these points. Unfortunately, we could not have the witness testimony of those two persons in Case

002/02.

The time factor was mentioned by the Prosecution, saying that they had already been heard. And we need to recall that when we were in 002/1, we were not looking at 002/02. We were not going to dedicate our precious time talking about things outside the scope of Case 002/1. In contrast, as we see the Chamber was more than generous in its responses to requests from the Prosecution to introduce new elements, but there is a double standard, once again. We, the Defence, requested only seven witnesses for Case 002/2, and we were given only two.

[10.57.28]

The Chamber also used the testimony of researchers and historians who did not appear before the Trial Chamber. This was the case in 002/1 and 002/2, with Ben Kiernan. There again I refer you to our Appeal Brief paragraph 1458.

Ben Kiernan was quoted many times in the grounds for judgment in 31 – paragraphs 1391, for example, 3199, 3370, 3371, , 3746, 3876, and many others. That author was extensively quoted without us having the opportunity to interview him. And this, I think, is prejudicial to the defence of Mr. Khieu Samphan.

Possibly the greatest illustration of the biased approach of the Chamber, and I draw your attention to paragraph [U/I] of our brief, is the fact that this person was convicted for the crime of extermination in Phnom Kraol. Mr. Khieu Samphan was convicted for extermination in Phnom Kraol, whereas in the body of the judgment

the Chamber had said that there was no – that the – that crime had not been established, with regard to the events that took place at the Phnom Kraol Security Centre.

So here again, from our point of view, at any rate, we have the clear demonstration of the fact that a particular result was sought for ex ante and that then they looked for the evidence that would confirm it.

Now, one more example, and I will end with this, considering that everything else will be mentioned more specifically in the context of the role of Khieu Samphan and how the Chamber ruled regarding Khieu Samphan's awareness his contribution, but there's a last example that, to me, is a perfect illustration of the fact that things are always seen in an inculpatory fashion and mischaracterized by the Chamber in its rulings, is that in Case 002/1 the Chamber used a document, "A Revolutionary Flag. And I would like to refer to E3/25, which is used in the ruling in paragraph 109.

[11.00.13]

And the same citation is used in Case 002/2. In Case 002/1, the Chamber used this passage from the "Revolutionary Flag" to say that the cities were evacuated and that this affected absolutely everyone with no exception. And in Case 002/2, the same document is quoted to mention the specific measures that were applied particularly to the Vietnamese. And I refer you to 384 of the ruling.

And for it to be very clear, to the Supreme Court Judges, I shall quote the excerpt exactly as it is in that paragraph 2(1). It is stated in a large excerpt that, and it is the except that starts in paragraph 108, of the ruling in 002/1:

[11.01.21]

"This line of the Party comparing residents as the enemy was very judicious because, without any inhabitants,"the country found itself without an army or an economic force."(As read)

Quoting this paragraph, the Chamber recalled the fact that, at the time, the method of Khmer Rouge was to evacuate the entire population of the cities, so that in case of a conflict with the Lon Nol army, there would be nobody left. And in the ruling in 002/2, their uses the same passage to say that, and it quotes the excerpt of the "Revolutionary Flag", the reference of which you have in paragraph 108 and 109 of Case 002/1. It said:

"We had evacuated absolutely everyone, including the Vietnamese, Chinese, the soldiers and policemen, and thus we reinforced our demographics at the expense of the enemy." (As read)

And this passage is used in 002/2 to state that there were particular or specific measures taken against the Vietnamese, so this is an illustration of the manner in which the Chamber, in fact, managed to distort the evidence or use partial evidence to achieve its goals.

So I will stop here, and thank you for the extra time that you've granted.

[11.03.04]

MR. PRESIDENT:

It is now time for the break, so the Supreme Court Chamber will take a short break from now until 11:30 when we will come back. Thank you.

(Court recesses from 1103H to 1129H)

MR. PRESIDENT:

The Court is now back in session.

Next, I would like to invite the Co-Prosecutors to make the submissions.

You have the floor.

MS. CHEA LEANG:

Good morning, Mr. President, Your Honours.

[11.30.12]

Now, my colleague and I will address the Court about the fair trial grounds.

The Appellants claim that the trial was unfair permeates his whole appeal argued viewed in different ways. It is of course his rights to challenge every reviewable aspect of this trial, assuming those challenges meet the standard of review. However, as my colleagues will discuss in more detail, his challenges fail as the correct articulation of the law and the mass of evidence on which the judgment was based directly, they prove them.

Despite his sometimes-vitriolic assertions, Appellant filed to establish that the Trial Chamber was biased against him; that it

violated his fair trial rights; that it convicted him for crimes of which it was not seized, or convicted him of crimes not legally recognized when committed.

[11.32.23]

Know that the Appellant, Mr. Khieu Samphan, demonstrate that he was convicted of crimes which were not proved beyond a reasonable doubt. Mr. Khieu Samphan also fails to establish the assertion that underlies his entire appeal; that he knew nothing, saw nothing, and heard nothing of the crimes for which he stands convicted.

In addition, the Appellant, Khieu Samphan, fails to establish that his conduct does not make him responsible for those crimes. Contrary to the Appellant's assertions, the evidence underlying his convictions is extensive, diverse, and compelling. It builds a case that leaves only one conclusion: that is his guilt of the crimes.

The Appellant was one of the key leaders of the CPK who committed cruel and barbarous crimes against his own people for his and his party's own political and ideological goals. Appellant's conduct contributed to the commission of the crimes before you in a myriad of ways, which the Prosecution will discuss in more detail during this oral submissions. His contributions left Cambodians suffering in pain and agony, including untold numbers to their last breath.

[11.34.45]

The reasoning of the Trial Chamber underlying the convictions and

sentence for genocide, crimes against humanity, and grave breaches of the Geneva Conventions is logical, detailed, and thorough. Its cogency is based on a correct articulation and application of the law to a highly collaborative body of evidence. The totality of this evidence proves Appellant's guilt as convicted, based on his participation in a joint criminal enterprise and his aiding and abetting of crimes. We rely on the Prosecution's written response which sets out in detail why Appellant's 256 grounds of appeal should be dismissed. Our oral submissions will focus on answering the Chamber's questions and addressing issues, the Prosecution submits, would benefit from further comment. However, before I hand the floor over to my colleague, Mr. Smith, to continue our response to the Appellant's fair trial arguments, I would like to outline some of the systematic errors that the Appellant Khieu Samphan repeats throughout his appeal.

[11.36.40]

The first group of errors relates to the Appellant's failure to meet the standard of Appellate review. He fails to do this in several ways.

Number one, he fails to demonstrate that the Trial Chamber made errors of law or fact. He fails because he either makes no attempt to identify the error or is unable to establish that one could.

As to the alleged legal errors, the Appellant Khieu Samphan fails to demonstrate any errors in the Chamber's articulation or application of the law.

As for factual errors, Appellant Khieu Samphan fails to show that the Chamber's factual findings were unreasonable; that no reasonable trier of fact could have reached them, based on a holistic assessment of the evidence.

He also does not establish why the Chamber should disturb these factual findings. In particular, when the Trial Chamber Trial Judges had the opportunity to personally observe the witnesses, several parties, and the accused, placing them in a more advantageous position to assess the reliability and capability of their evidence and weigh up and decide which evidence they preferred, in addition to their opportunity to assess and weigh a large body of documentary evidence with the in-court testimonies. [11.39.05]

Number two, Appellant Khieu Samphan fails to meet the second part of the standard of review to warrant Appellate intervention. He does not show that the alleged legal errors invalidated the judgment in whole or in part, nor does he show that without the alleged error a different verdict would have been entered. Regarding the alleged factual errors, he fails to demonstrate that the Chamber occasioned an actual miscarriage of justice, created a reasonable doubt as to his guilt, or that the alleged errors were critical to the verdict reached. [11.40.07]

The Appellant Khieu Samphan also fails to show that the alleged prosecutorial errors resulted in a grossly unfair outcome in the

judicial proceedings, which is a necessary requirement for judicial intervention. Nor has he demonstrated that the Trial Chamber's exercise of discretion was so unreasonable as to force the conclusion that it fails to exercise its discretion judiciously. In no instance has Appellant Khieu Samphan demonstrated a lack of care, wisdom, or caution by the Trial Chamber.

I am now turning to the second group of errors that occurred systematically throughout the Appellant Khieu Samphan's arguments. These flaws relate to the Appellant's overall incorrect approach to assessing the facts, the underlying evidence, and the Trial Chamber's reasoning. This incorrect approach defeats his allegations of error.

First, the Appellant Khieu Samphan approaches the Trial Chamber's reasoning in a piecemeal and isolated manner. Rather than looking holistically at the reasoning across the entire judgment as required, he incorrectly limits his analysis to selected portions of it. A proper holistic reading of the judgment makes clear that the reasoning is comprehensive and correct, bearing in mind that he Trial Chamber is not required to articulate every step of its reasoning in detail, and it is presumed to have properly evaluated all of the evidence before it.

[11.42.41]

Similarly, when assessing the evidence supporting the Trial Chamber's findings, the Appellant uses the same incorrect

fragmented approach rather than reviewing the evidence in its totality as required by this Chamber or other international tribunals dealing with cases of similar magnitude.

Another key flaw in Appellant Khieu Samphan's challenges to the Judgment is his assertion that every fact must be proven beyond a reasonable doubt to prove the elements of crimes or modes of liability. The Chamber has made clear; not all facts in a case must be proved beyond all reasonable doubt; rather, the totality of all the relevant facts must prove the elements of the alleged crimes or forms of individual criminal responsibility beyond a reasonable doubt.

[11.44.20]

For the reasons which will be argued in more detail by my colleagues, as well as the reasons set out in our written response, Appellant's 256 appeal grounds should be dismissed and the convictions and sentence which Appellant has earned through his conduct should be affirmed.

I will give the floor to my colleague, Mr. Smith, to continue our submissions in relation to the Appellant's challenges to the fairness of the trial.

Thank you.

MR. SMITH:

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

When you unpack the Appellant's grounds alleging that he was treated unfairly by the Trial Chamber, little is established. The

process, in fact, confirms the Trial Chamber was conscientious to ensure his fair trial rights were protected, and while ascertaining the truth.

In its 2,259-page Judgment, based on over 14,476 documents, including other evidence, the Chamber meticulously details their process and reasoning, providing clear evidence for the fairness of the trial.

[11.46.07]

Today, of the 35 appeal grounds relating to the impartiality of the Chamber, fairness of the trial, legality, its procedures and assessment of evidence, I will focus my remarks on the Appellant's primary ground of appeal requesting that the Judgment be nullified and his grounds relating to the impartiality of the Chamber.

First, as to the Appellant's argument the Judgment should be nullified as it was not issued on the same day it was pronounced, this lacks merit as such a process is not in breach of the ECCC procedure Rules or international practice.

[11.46.53]

The Chamber had an obligation to do two things: announce publicly a summary of its disposition and findings, and issue a full Judgment, with reasons. It did both.

Internal Rules 101 and 102, when they're read together contain no express requirement that these two acts occur on the same day. In any event, where there's a question regarding the consistency of the ECCC procedure with international standards, Article 33 New of

the ECCC law allows the Chamber to look for guidance at the international level. At this level, no such same-day requirement is required.

As submitted in our response to the Appellant's earlier appeal on the issue, the Procedural Rules at the Yugoslavia Tribunal, Rwanda Tribunal, Mechanism for the International Criminal Tribunals, and the Special Tribunal for Lebanon expressly allow for such practice. With Trial Chambers at the Yugoslavia Tribunal, Rwanda Tribunal, and the Special Court for Sierra Leone all having pronounced verdicts together with a judgment summary before publishing the written judgment.

Importantly, the Appellant was not prejudiced by this procedure. The time period for his Notice of Appeal did not commence until after the reasons for Judgment were issued. Rather than the procedure being to his detriment, it was to his benefit as it effectively gave him an extra four months to begin his appeal preparations. By the size and complexity of this appeal, it appears that this time was fully utilized.

[11.49.01]

Turning now to the issue of impartiality; the Appellant's argument that the Trial Chamber erred by not addressing issues of impartiality raised by him in their Judgment is not established for three reasons. First, at paragraph 113 to 115, the Chamber held that the proper procedure to raise allegations of impartiality is pursuant to Internal Rule 34, which require the

Appellant to do so as soon as the issue arose.

Second, in any event, some of the issues raised by the Appellant had already been previously rejected by the Special Panel in his earlier Rule 34 Application to disqualify the Chamber Judges.

And, third, regarding the procedural substance of their complaints, the Chamber referred them to the reasons they provided when the criticised procedural actions took place. Consequently, the Appellant establishes no error by the Chamber.

[11.50.15]

If the Appellant had wished to raise further issues as to the Chamber's impartiality during the trial, it should have done so when they believe they arose, pursuant to Rule 34.

As to the substance of the ground that the Trial Chamber lacked impartiality because it convicted him of crimes in Case 002/1, this issue was already litigated before the Special Panel on the 30th of January 2015, who dismissed the Application after a lengthy analysis and found there was no bias or appearance of bias if the same Chamber heard Case 002/2.

As to admissibility of this ground or this argument, there is no right of appeal from the Special Panel's, decision pursuant to 34.8, and as appeals against conviction and sentence under Rule 104 must be based on an error of law or fact, this ground is inadmissible. Solely challenging the impartiality of the Chamber fits into neither requirement.

In any event, as to the merits, the Appellant has not established

any error of impartiality of the Chamber. His argument that it was not humanly possible for it to disregard factual and legal findings made in Case 002/1 from influencing Case 002/2 is simply not made out.

[11.51.53]

In short, the Appellant applies the wrong test to establish lack of impartiality. He insufficiently acknowledges the high presumption of the impartiality of Judges and insufficiently acknowledges the measures taken by the Chamber to ensure that it was impartial.

So what were these measures? First, the Chamber held that it would only import evidence into Case 002/2 that was subject to adversarial debate by the Appellant. In your severance Decision, Your Honours acknowledged this was an appropriate process so as not to repeat relevant evidentiary proceedings from one case to another where the evidence has been led by the same parties before the same Judges.

[11.52.48]

Secondly, they held that all the imported evidence would be re-evaluated with all the evidence admitted in Case 002/2, excepting that they may reach different conclusions. And, third, they held that they would not import any legal or factual findings, including any findings of the Appellant's individual criminal responsibility for Case 002/1 crimes into Case 002/2. Indeed, in this case, the findings made by the Chamber do not evince, reveal,

or prove that criminal responsibility was attributed in Case 002/2 from Case 002/1. Many of the types of crimes are different, and of those that are common, the very nature of them are distinct in terms of the identity of victims, time, place, circumstances of their occurrence, and the underlying policies and temporal scope within which they were committed. Similarly, the nature of the Appellant's participation in these policies and his intent to commit the underlying crimes is based on different findings. For example, the Appellant's argument that as the Chamber made a finding as to the existence of a Regulation of Marriage Policy in Case 002/1, it was obvious they would decide the same again in Case 002/2 also fails. First, although the Chamber found there was a Regulation of Marriage Policy before and during the DK period, in Case 002/1 it did not make any findings as to whether or not such policy involved the commission of crimes. They concluded evidence concerning the nature and implementation of the Policy of Regulation of Marriage and its extent would be the subject of Case 002/2. That's at paragraph 130 of E313.

[11.55.02]

So to conclude, the Appellant has not established with convincing evidence, either in law or fact, the Trial Chamber lacked impartiality in Case 002/2 because they heard a trial of a related case in Case 002/1. Similarly, as to the allegations of bias, the Appellant easily makes them but fails to demonstrate them. The recharacterization issue is a good example. He argues bias is

demonstrated as he was given no notice of the possibility that the Chamber would legally characterize the crime of extermination to murder with *dolus eventualis* for deaths arising out of the conditions at the four charged worksites. However, the Appellant fails to properly acknowledge that this Chamber's Case 002/1 Appeal Judgment delivered in November 2016 during the Case 002/2 trial put him on notice that recharacterization - I've been told to slow down, Your Honours.

[11.56.15]

Thank you; I see your hand.

Put him not on notice of recharacterization of the extermination charges in Case 002/2 could, in fact, occur. Such notice was clear, as this Chamber in Case 002/1 performed an identical recharacterization in analogous circumstances to the Trial Chamber in Case 002/2 when you confirmed that the *mens rea* for extermination only included direct intent. The Appellant cannot now complain of a lack of opportunity to address this issue when he did not take the one given to him by the Trial Chamber before the end of the Case 002/2 trial where he was asked to raise any issues arising out of the Case 002/1 Judgment.

JUDGE CLARK:

Mr. Smith, can I interrupt? Is it the case of the Prosecution that --

MR. SMITH:

Sorry, Judge, I'll just put my --

[11.57.31]

JUDGE CLARK:

-- months after a very voluminous judgment was delivered and the parties were in the middle of preparing their closing submissions, that that was sufficient notice of the possibility of recharacterization? I'm just curious to know if you looked at that carefully; one month to read the enormous judgment and also no specific direction in the notice from the Trial Chamber that there was any particular aspect of the Appeal Judgment that they considered might affect the Defence case on possible recharacterization? Just interested to hear what you have to say about that, Mr. Smith.

(Microphone not activated)

[11.58.48]

MR. SMITH:

I apologize, Your Honour, my microphone was off.

As practitioners, professional practitioners before this Court, once the Case 002/1 Judgment was passed down, it was incumbent on all parties, including the Appellant, to at least have a reasonable review of that Judgment to see how that may, in fact, affect the Case 002/1 trial. And that was made clear by the Trial Chamber by intentionally putting aside a session in which the parties were able to put forward any issues that arose out of that Judgment. The Chamber had an understanding that parties would have reviewed that Judgment, and it's reasonable to take that view.

But, in any event, Your Honours, the Appellant chose not to take that opportunity when that opportunity arose. There must be some limits of acceptability of staying silent and then complaining much later. No prejudice was suffered by the Appellant as up until the Case 002/1 Appeal Judgment was issued, all of the crime site evidence had been covered in trial and all parties had worked on the basis that the *mens rea* extermination included *dolus eventualis*. And on that basis, the Defence were not prejudiced in the presentation for the challenging of that case.

[12.00.48]

Murder with *dolus eventualis* is a lesser and included - a lesser included offence from extermination with *dolus eventualis*, even though that was corrected by the Supreme Court. So the Appellant was not prejudiced in the challenging of the case.

Further examples of unsupported allegations by the Appellant are seen throughout his brief; however, I'll focus on a core issue he raises regarding the treatment of exculpatory evidence.

The Appellant incorrectly argues the Chamber either omitted or treated exculpatory evidence unevenly compared to inculpatory evidence.

First, as a starting point in its Judgment, the Chamber expressly stated in assessing the evidence it was obliged to identify and consider exculpatory and inculpatory evidence together. On a full review of the Judgment it's clear that the Chamber methodically addressed all elements of relevant evidence and arguments, both

inculpatory and exculpatory, to arrive at their conclusion.

[12.02.03]

Some observers may look at this judgment and question why it's so long. Clearly, on a close review, there's this balancing of evidence and issues that have required the space. Ironically, the Appellant's argument that the Chamber was biased against him by allowing the Prosecution to disclose to him newly received statements from Cases 3 and 4 on the basis that they may contain exculpatory material is simply wrong. To the contrary, the Chamber recognized the Prosecution was fulfilling its duty to the Appellant under Rule 53.4.

The duty was outlined by this Chamber, holding that the Prosecution is required to disclose to the Chambers and the parties any material in their possession that may suggest the innocence or mitigate guilt of the accused or affect the reliability of the evidence. This duty is a component of a fair trial and accords with the prosecutorial role of assisting the Court in ascertaining the truth.

[12.03.15]

The fact that the Prosecution also sought to admit this material under Rule 87(3) and 87(4) to assist the Court in ascertaining the truth is independent of their Rule 53(4) obligations to disclose. Indeed, it's rare when an accused objects to the disclosure of evidence that is clearly relevant to his case.

More broadly, this ground raises the fundamental question of the

inevitable broad scope of potentially exculpatory evidence in cases of such magnitude; and, consequently, the scope of the obligation to disclose. In every witness statement, particularly those spanning lengthy periods, there will necessarily always be differences in witness accounts on details of criminal events, on implementation of policies, on understanding of administrative and communication structures, they will arise out of a witness's opportunity and ability to observe, recall, and a willingness to do so.

[12.04.18]

Now, whether the sum total of all the material provided to the Appellant ultimately exculpates or mitigates his guilt, that requires an assessment of the evidence in its totality. However, contrary to the Appellant's argument, it's not for the Prosecution to attempt to outline every potential piece of exculpatory evidence in a relevant statement contrary to his view. The Appellant himself is best placed to judge that what he believes is potentially exculpatory or could mitigate his guilt. So rather than these disclosures being a breach of his fair trial rights, it's, in fact, the protection of them, it places the Appellant on an equal footing to the Prosecution by having access to relevant information that may assist him to effectively defend his case.

Your Honours, if I now briefly move to the issue of the error the Appellant states in relation to the Chamber breaching the principle of legality.

At Ground 85 he states that when defining both crimes and modes of responsibility - sorry. The Chamber breached the principle of legality when defining both crimes and modes responsibility; that the Appellant wholly misinterprets that principle. It's not an exaggeration to say that he's asking you to find that because he was not given a textbook on international criminal law in Khmer in 1975, he should be acquitted of all charges.

[12.06.29]

I'd like to stress that, with very limited exceptions, the Appellant does not contest that the crimes for which he's been convicted or the applicable modes responsibility were part of customary international law in 1975. From his brief, he is simply saying that they were not accessible and foreseeable to him. This claim doesn't stand up to scrutiny for a number of elemental reasons.

Looking first at accessibility; in claiming that all of these crimes and modes responsibility were inaccessible to him in a language he could understand, he ignores that every Chamber of this Court, the European Court of Human Rights, and the Judges at the Yugoslavian Tribunal Appeals Chamber have all confirmed that crimes and modes of responsibility under customary international law are accessible to the accused. On top of that, Cambodia was a signatory to the Genocide Convention, and all the Geneva Conventions by 1975.

[12.07.44]

Turning now to foreseeability. In essence, the Appellant claims that it was impossible for him to have seen that participating in a criminal plan to wipe out Cambodia's Vietnamese population, to enslave swathes of Cambodians in co-operatives and worksites, and force them to work tirelessly in unsafe conditions without even subsistence rations or sufficient medications; to arrest and imprison them in security centres without charge; to subject them to the most inhumane conditions; and to torture and kill them without trial could possibly attract criminal responsibility.

Thank you, Your Honour. I'll slow down.

(Microphone not activated)

MR. SMITH:

Sorry; my microphone went off.

Your Honours, by consistently focusing on whether the technical definition of crimes and modes was foreseeable, the Appellant seems to misunderstand the applicable test. It is not whether there is a cast iron guarantee of future conviction at the time the crime was committed, but whether criminal responsibility was foreseeable. When we are talking about a man's knowing participation in some of the most atrocious crimes known to humankind, we submit the answer could not be more obvious.

[12.09.35]

Your Honours, I think our time might be up but I wonder whether I could have an extra five or 10 minutes, just to comment on some of the examples raised by the Appellant in relation to exculpatory

information not being treated properly?

THE PRESIDENT:

You're allowed to continue for another five minutes.

MR. SMITH:

[12.10.18]

Your Honours, the Appellant states that he was unfairly treated when the Chamber allegedly placed more emphasis on inculpatory evidence than exculpatory evidence. The example that the *Revolutionary Flag* that was used in Case 002/2 had a more full quote than the quote that was used in Case 002/1 because it included information in relation to the Vietnamese, that does not show lack of impartiality by the Chamber. It simply shows that the Chamber were ensuring that Case 002/1 issues were kept to Case 002/1 and the more relevant information in relation to the Vietnamese from the *Revolutionary Flag* was introduced into Case 002/2.

In relation to the Appellant's example that Khieu Samphan's speech that was delivered by someone else, and Your Honours found that in the Case 002/1 appeal, was included in the Judgment in Case 002/2, that only highlights the point made by Appellant's counsel that all Judges are human; mistakes can happen.

But the question is, of course, on appeal does it meet the two-pronged test: was there an error and would it lead to a miscarriage of justice? Based on all of the evidence before the Chamber, we would submit that clearly doesn't.

[12.12.16]

In relation to Appellant's allegation that the Trial Chamber used evidence that was tainted by torture, they noted the example of Pang. That example that they gave, it was not clear from the information that they gave in their brief whether or not Peng, who had known Duch for a number of years, whether he had been detained at S-21 at that stage or whether in fact such information had come to him prior to him arriving at S-21.

As far as witnesses not being called that Khieu Samphan, the Appellant, had requested, the witnesses, Heder and Ponchaud, were heard in Case 002/1. They were heard on all of the issues in relation to Case 002/2. Witnesses were able to do that whilst they were there. But they weren't able to testify on issues that weren't within their expertise.

The Appellant had an opportunity to hear those witnesses and an opportunity to question those witnesses on Case 002/2 issues even in Case 002/1 for that very reason, to try and avoid, where possible, witnesses returning in the second trial.

[12.13.51]

As far as the expert, Ben Kiernan, the Trial Chamber made all attempts to try and have that witness come to court, that expert come to court, but, unfortunately, that wasn't possible within the time available.

It's not an error of the Chamber to use expert accounts in their Judgment as support of their findings, and consequently, the

weight to be placed on them when they haven't been cross-examined needs to be taken into account.

Your Honours, unless you have any further questions, that concludes our remarks.

JUDGE CLARK:

May I ask one very small question?

Am I correct in saying - correct me if I'm wrong - were Ponchaud and Heder not heard at a time when the Severance Order had not yet been made? In other words, that the evidence was given at a time when all issues were relevant?

[12.15.18]

MR. SMITH:

As to - Your Honour, as to the particular dates, I will have to come back to you on that. But as to whether or not they were able to be questioned on Case 002/2 issues, as well as Case 002/1, they were.

The question arose whether one of the witnesses had the ability to give evidence on a particular topic, and it was held that it wasn't in that person's field of expertise. But other than that, they were able to testify in relation to Case 002/2 issues.

As far as the date, if I can get back to Your Honours on that.

That concludes our submissions, Your Honours.

THE PRESIDENT:

You have concluded your submissions so we will take the break for lunch. And we will come back at 1:30 p.m.

[12.17.03]

Security guards, please return the accused back to the detention facility and bring him back at 1320.

The court is now in break.

(Court recesses from 1217H to 13300H)

MR. PRESIDENT:

Please be seated. The Supreme Court Chamber is now back in session.

Greffier, could you please report the attendance of the parties?

[13.31.46]

THE GREFFIER:

Mr. President, Your Honours, for the parties, we have the presence of Chea Leang, deputy co-prosecutor William Smith, and for the co-defence counsel, we have Mr. Kong Sam Onn and Ms. Anta Guisse, and the accused, Khieu Samphan. For the lead co-lawyers representing the Civil Parties, we have Mr. Pich Ang and Ms. Megan Hirst. And we have five Civil Parties present, including Mr. Sang Yon, Ms. Soung Pong (Phonetic), Ms. Chhev Pich, Ms. Po Dina, and Mr. Ming Pang (Phonetic).

Thank you. So all parties are present, Mr. President.

MR. PRESIDENT:

The Chamber now will resume. This morning we adjourned at the conclusion of the brief by the co-prosecutor. Now I'd like to give the floor to the lead co-lawyers for their submissions. The floor is opened.

[13.33.33]

MS. HIRST:

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

Since it's our first appearance in this hearing, I'd like to begin with a few introductory remarks before turning to the topic of the fairness of the proceedings.

Our submissions throughout these appeal hearings are made on behalf of the 3,865 victims who have the status of civil party in case 2, or in some cases, on behalf of their surviving family members, because hundreds of Civil Parties have passed away already during the very long course of these proceedings.

[13.34.49]

As Your Honours know, five Civil Parties are in attendance for this hearing today, although because of COVID, they're not here in the room with us.

But there are many other Civil Parties who are not able to be here in person.

We want to emphasize that they are all parties in this case and our submissions are made on behalf of all of them.

The Civil Parties are among the people who suffered the consequences of the crimes which Your Honours must rule upon and many of the Civil Parties do continue to suffer those consequences even today. For them, the crimes are not a legal abstraction. They are a very real part of their lives.

We ask Your Honours to keep that in mind during your deliberations and to issue the judgement as expeditiously as possible.

The judgement must also be accessible to the Civil Parties, not only theoretically, but also practically. Civil Parties must be invited to attend the delivery of the judgement and they must all be able to meet with their lawyers in order to discuss what the judgement means.

Before the Trial Chamber, Civil Parties repeatedly emphasized, in this case, their desire for this Court's work to serve as a basis for educating future generations of Cambodians about their history, thereby contributing to a future which is free from the atrocities they themselves experienced.

We ask Your Honours to ensure that the final judgement can serve as a basis for that educational process, and specifically to consider ordering in explicit terms that the Court undertake community outreach so that the judgement can be known and understood.

[13.37.03]

In today's session, I'll address three fair trial issues which are of the most relevance and interest to the Civil Parties in taking into account the points we've heard this morning from the defence, but also those points which were identified in Your Honours co-rapporteur reports.

Firstly I'll address the fair trial rights of the Civil Parties.

Secondly, claims from the defence of unfair treatment regarding

some categories of evidence, and with a particular reference to civil party evidence. And thirdly, claims of bias.

[13.37.45]

Your Honours, Khieu Samphan's arguments in this appeal often seem to assume that the rules in existence with the fairness of the proceedings exist only for the benefit of the accused. They even argued in their submissions on the 12th of March, that's F60/1, that Civil Parties do not have a direct interest in the fair trial issues litigated this appeal.

That approach misconceives the rational and nature of fair trial guarantees. Of course, Khieu Samphan does have a right to a fair trial, as did Nuon Chea.

But the defence does not own the issue of a fair trial. A fair trial is of interest to all of us. Fair trial rules create the level playing field between all parties and it's that level playing field which is the way in which we ensure a correct result in the case, a correct account of what happened, and a judgement which has reliable findings which can deliver on the victim's right to truth.

Fair trial is also important because it maintains the legitimacy and the credibility of this institution, and without those things, the process would lose much of its value to the public and the Civil Parties.

Your Honours have previously recognized that Civil Parties are entitled to a fair trial. That's in decision F26/2/2 Paragraph 7.

[13.39.37]

Of particular interest and importance to the Civil Parties are their rights to transparency, their right to expedition, and their right to certainty.

And throughout this hearing, we will be repeatedly returning to those last two rights in particular.

And why is this relevant? It's relevant because when assessing whether the proceedings were fair, Your Honours must bear in mind that the Trial Chamber was required not only to ensure fairness to Khieu Samphan, but to ensure fairness to all the parties.

I want to focus on one example to demonstrate the issue.

Khieu Samphan complains that the verdict was announced before the full reasons were published.

We agree with the submissions of the OTC on why that was not a violation of the Court's procedural rules. And more than that, we emphasize that Khieu Samphan has been unable to identify any prejudice which resulted to him from this.

[13.40.52]

On the other side of the picture, Civil Parties have a clear right to an expeditious verdict. And that right was furthered by announcing the verdict as soon as it was irrefutably known.

Delaying would have meant imposing a further weight on the Civil Parties, in circumstances when they had already waited many years and when too many parties had already passed away without seeing judgement in the case.

Khieu Samphan has referred this morning to the ICC Appeals Chamber decision of the 31st of March this year in the Gbagbo and Blé Goudé case.

Your Honour, that decision only supports our position. The ICC Appeals Chamber ruled that it was permissible for a judgement to be announced before reasons, before reasons were given, and it pointed out explicitly that the Trial Chamber was required to balance procedural rules against basic human rights principles.

In paragraph 166 of that decision, the Appeals Chamber said:

"[T]he Trial Chamber strove to balance what it saw as two obligations. On the one hand, the need to provide a full and reasoned opinion at the same time as the decision and, on the other hand, the obligation to interpret and apply the Statute 'in a manner consistent with internationally recognised human rights' pursuant to article 21(3) [of their own statute]."

[13.42.46]

Now it is true, as Khieu Samphan's counsel has pointed out, that in that case, in the Gbagbo case, the right which was being balanced against the separation of verdict and reasons was the liberty of the accused.

But the ICC Appeals Chamber certainly did not suggest that that was the only human right which could be balanced against the separation of verdict and reasons.

[13.43.15]

In fact, the Chamber explicitly recognized that procedural

guarantees exist in international trials, not only for the benefit of the defence, but:

"…for the benefit of the parties, the victims and the general public…"

That's at paragraph 161.

Khieu Samphan's other fair trial arguments in their appeal brief suffer from the same difficulty. They fail to account for the rights and interests of the other parties, including the Civil Parties. That is true for their arguments concerning disclosure, admission of new evidence, and the decisions of persons to testify.

The point is that the meaning of fairness on any given issue is not for Khieu Samphan alone to dictate. The Trial Chamber bore the difficult task of balancing fairness as between all the parties. That is the requirement set by internal rule 21, paragraph 1.

I want to turn now to my second topic, which is a question of the treatment of evidence, and specifically, the claim made by Khieu Samphan that exculpatory evidence was ignored or treated differently from inculpatory evidence.

[13.44.42]

This is an assertion which is made repeatedly throughout the defence appeal, but usually with little or no elaboration.

The reality is that the defence is simply agreeing with the outcome of the Trial Chambers findings. Nowhere has it been shown that the Chamber took an impermissible approach when weighing the

evidence.

In his appeal brief, Khieu Samphan went somewhat further than he did this morning, and in some places, argued that civil party evidence was given preferential treatment.

I think that's an issue of particular importance to the Civil Parties, and since it's also mentioned in Your Honours co-rapporteur report at paragraph 9, I'd like to elaborate on that question briefly and explain why we say it's incorrect.

[13.45.39]

And I'll explain by reference to one example, which concerns the regulation of marriage.

I hope it gives the sense of the type of complaints which are made throughout the defence appeal concerning the treatment of evidence.

Khieu Samphan says that the Trial Chamber was wrong when it found that people were forced into marriage. And it says particularly at paragraph 1,383 of the Appeal Brief that the Trial Chamber wrongly disregarded evidence which it says was exculpatory.

The evidence in question was evidence given by cadre who claimed that consent was sought from couples before they were married.

In fact, the Trial Chamber did identify and carefully consider the evidence of those cadres.

With that consideration, those reasons can be bound in the trial judgement. For example, paragraphs 3605, 3609, 3612, 3617, 3673, and 3675.

But the Trial Chamber also had before it strong inculpatory evidence from numerous Civil Parties and witnesses saying the contrary. They testified that they had no real choice but to marry when Angkar ordered it.

[13.47.28]

And Your Honours can refer, for example, to paragraphs 3618 to 3622, and 3673 of the Trial Judgement.

The Trial Chamber weighed and considered both the inculpatory and the exculpatory evidence and it gave reasons for its conclusion, namely that while consent might have been sought in some formal sense, it was not genuine consent because of the coercive context. And we can see that explained in the Trial Judgement at paragraphs 3623, 3673 to 74, and 3676.

The Chamber also assessed that at least some of the cadres were seeking to minimize their own responsibility and it therefore discounted their credibility at paragraphs 3609, 3613, 3623, and 3675.

The Trial Chambers conclusions were carefully explained over several pages. And I hope that’s clear already from the number of paragraph references which I’ve just read out.

[13.49.58]

Those paragraphs contain an entirely reasonable assessment of both the inculpatory and the exculpatory material.

Now, Khieu Samphan objects to the fact that the Trial Chamber took account of the self interest of cadres in minimizing their own

responsibility. And the defence appears to argue that the Trial Chamber failed to take into account some equivalent reason for dishonesty from Civil Parties.

Our Response Brief deals with the question about civil party evidence generally at paragraphs 185 to 195.

And as we explained there, Civil Parties do, of course, have an interest in the proceedings, but a significant part of that interest lies in establishing the truth about the crimes which occurred and having the truth known and understood. Lying would be a complete betrayal of that objective.

We cannot simply assume that having an interest always implies dishonesty. Each piece of evidence must be assessed individually on its own merits.

And it's worth reflecting on whether people would really have a motivation to lie about their own experience of forced marriage. [13.50.35]

The Trial Chambers findings regarding cadres reflect the reality that people do sometimes lie in order to protect themselves, including to protect themselves from judgement within their own communities.

The suggestion that Civil Parties would lie in order to falsify a claim that their marriages were forced is a very different thing. Speaking about having to have been forced to marry, speaking about having been denied a traditional wedding, these things are a difficult personal subject for many people to discuss. They may

even be the subject of stigma for some people.

If anything, a person who sought to protect himself or herself would remain silent, not fabricate this kind of experience.

[13.51.36]

More generally, we strongly disagree with the defence's suggestion that civil party evidence was somehow treated as inherently preferential and more reliable than other evidence.

The Trial Chamber explicitly stated at paragraph 49 of the judgement that it would assess civil party evidence case by case, as it did for evidence from witnesses, and that is what the Trial Chamber did in practice.

At paragraphs 314 to 316 of the case 2.1 Appeals Judgement, Your Honours affirmed that that is the correct approach.

There's one final point which I want to address today, because it was raised by Your Honours in their fair trail rapporteur report, and that is the allegation that bias arose out of the links between case 2.1 and case 2.2 and the use of mostly the same judges to hear both of those cases.

This morning Khieu Samphan referred to the decision of the Special Panel of the Supreme Court Chamber, which is document number 11.

[13.53.00]

It wasn't entirely clear to us, and I apologize to counsel for the defence because these may we well be simply a matter of interpretation, but it wasn't entirely clear to us how that decision was being relied on.

Our position is, in any event, that that decision is not relevant to the question before Your Honours on this issue.

Document 11 concerned defence allegations of bias among the judges of this Chamber, the Supreme Court Chamber.

But in this appeal, Your Honours are asked to rule on the validity of the Trial Judgement.

The only question of bias which can be relevant to the validity of the Trial Judgement concerns allegations of bias against the Trial Chamber judges.

[13.53.53]

The question was determined by a special panel of the Trial Chamber in the decision of 30 January 2015.

We have real concerns that the possibility of reopening that issue at this late stage and what the impact would be on the legal certainty of these proceedings.

Legal certainty is a key principle in this or in any legal system and in this Court, it's enshrined in Eternal Rule 21, paragraph 1.

The principle means that once a matter has been formally determined judicially in a particular case and between the parties to that case, it is res judicata. It cannot be reopened.

If that principle was set aside, it would reek havoc with the functionality and legitimacy of the system because the parties need to be able to rely on the finality of rulings in order to take further action in the proceedings.

The Special Panel decision in this case was rendered in the

extremely early stages of the evidentiary hearings in case 2.2.

[13.55.14]

At the date of the decision, only seven days of evidence had been heard, only five people, including two Civil Parties, had appeared to give evidence before the Trial Chamber.

At that point, had the Special Panel found that there was a reasonable apprehension of bias, it would have been feasible for a new Trial Chamber to be constituted, but the Special Panel found that there was no bias. And the consequence was that the trial proceeded with the existing judges and the entire remainder of the trial phase took place on that basis. A further 180 persons, including a further 61 Civil Parties appeared to give evidence over two years. Enormous time and expense were expended in reliance on the matter having been determined already with finality.

Civil Parties appeared and spoke to the public about matters of intense personal importance to them, relying on the fact that the judges before whom they appeared were empowered to hear and decide on those matters.

[13.56.41]

Now, arguably, one circumstance in which this question could be reopened is if new material demonstrating potential bias had been produced which was not before the Special Panel when it issued its decision in 2015.

But no new material has been pointed to by the defence. The only

possible reference in the Appeal Brief to a new development is the vague reference in the case -- in paragraph 129 to the case 2.2 Trial Judgement.

There, Khieu Samphan simply asserts that the Trial Chamber "obviously followed the findings" from case 2.1 without analysis or references.

This morning I heard a further point which appears to relate to this question, and that's the factual finding which was repeated across cases 2.1 and 2.2 regarding Khieu Samphan's involvement in an inaugural speech.

It's hard for us to imagine how an isolated finding of that kind, in one paragraph of a judgement of more than 2,000 pages, could suffice to reopen this issue after so many years and so much reliance placed on the finality of the Special Panel decision.

[13.58.15]

We say those references from Khieu Samphan fall very far short from demonstrating a basis to reopen a matter which has already been finally determined.

One final word more generally about the other allegations of bias which are made throughout the Appeal Brief.

As we addressed in our Response Brief at paragraphs 86 to 87, we're concerned about the way in which unsupported allegations of bias have been made in a somewhat casual, and at times, even flippant way, throughout the defence appeal.

[13.58.58]

These claims could have the effect of undermining the credibility of this institution without any basis.

Civil Parties want these proceedings to be fair and effective, and that requires ensuring the legitimacy of this Court.

In order to protect that legitimacy, we ask Your Honours to make it clear in the final judgment that while allegations of bias are taken seriously, in this instance, they have simply been made without substantiation.

And that concludes my submissions for this session.

[14.00.00]

MR. PRESIDENT:

Next is the session on questions by the Chamber and I would like to invite judges on the bench, if you have any questions. You have -- you can have the floor now.

[14.00.50]

JUDGE SEREYVUTH:

The Bench does not have questions so we can move to the report of the co-rapporteurs. So I would like to invite co-rapporteurs to make the report.

Co-rapporteurs report for the session on grounds of appeals relating to the Trial Chamber jurisdiction.

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

First, it is submitted that certain facts relied upon to establish crimes were outside the scope of the juridical investigation of the co-investigating judges, they were not included in the co-prosecutor's introductory submission or in any supplementary submissions.

[14.02.23]

The accused argues that this included facts relating to crimes committed at Tram Cooperatives, Trapeang Thma Dam, and more 1st January Dam worksites, as well as Phnom Kraol, Kraing Ta Chan, and Au Kanseng Security Centres.

The submission also includes internal purchase throughout the (inaudible) apart from those which occurred in the north zone in 1976 and in the east zone in 1978, the treatment of Buddhists at Tram Kak Cooperatives and of facts concerning a national wide policy towards Buddhists and the treatment of the Cham which went beyond the facts which occurred after 1977 in Kang Meas and Kroch Chhmar Districts.

The same argument applies to the treatment of the Vietnamese outside Svay Rieng Kampong Chhnang Provinces and incursions into Vietnam.

The accused challenges the consideration of all facts for crimes committed during these criminal episodes and that these crimes that are alleged to fall outside the scope of the investigation, which include crimes against humanity of murder, deportation, enslavement, torture, imprisonment, extermination, prosecution on

political, religious, and racial grounds, and other inhuman acts of enforced disappearances and serious attacks on human dignity, as well as genocide of the Vietnamese.

[14.04.53]

As a follow through -- through that appeal ground, the accused disputes the rejection by the Trial Chamber when it found that his challenges through the (inaudible) jurisdiction or charges raised in his closing brief were untimely.

The accused disputes the interpretation of internal rule 89 and submits that this erroneous interpretation of Rule 89 of the internal rules means that any findings of criminal liability reached in relation to the above crime sites and criminal episodes, insofar as they relate to facts that were not part of the introductory submission or supplementary submissions, must be set aside.

The Chamber would like the accused to explain why he did not raise these allegations first before the co-investigating judges and the pre-trial Chamber, and second, when the trial commenced through preliminary objections and to provide specific references as to when he raised them at the pre-trial stage and they were not determined as asserted in his appeal submissions.

[14.06.46]

Second, it is submitted that certain charges in the closing order lack sufficiency or clarity to meet the minimum standard of proof to charge the accused for those crimes.

It is submitted that the Trial Chamber erred in law when it rejected his submissions challenging the lack of credible, serious, and consistent evidence underpinning the charges.

The Chamber would welcome clarity between the pre-trial findings by the co-investigating judges which relates to the charges in the closing order and then findings of guilt by the trial chamber of certain charges in the closing order.

The Supreme Court Chamber was unable to follow the point being made in the accused's Appeal Brief.

Third, the Trial Chamber misinterpreted the closing order by considering crimes that were outside of the Trial Chamber's subject matter jurisdiction. This error of law resulted in the Trial Chamber adjudicating facts outside the scope and led to findings which should now be reversed.

Such findings include facts relating to the crime against humanity of persecution on political grounds of new people, Khmer Republic soldiers, and real and perceived enemies at various worksites and security centres.

[14.09.10]

All factual findings in relation to the genocide and crimes against humanity of murder and extermination targeting the Vietnamese in the Democratic Kampuchea Territory and waters and the crimes against humanity of murder and political persecution of the Cham impugned under this challenge to subject matter jurisdiction.

[14.09.51]

Fourth, facts that were excluded through severance were included by the Trial Chamber which then adjudicated facts outside its jurisdiction.

The Trial Chamber had no competence, therefore, to hear facts relating to the crimes against humanity of persecution on political grounds and other inhuman acts relating to forced movement of the Cham and enforced disappearances of the Vietnamese.

Likewise, the accused submits that the Trial Chamber was not seized of facts relating to crimes against humanity of other inhuman acts through forced transfers of the Cham during population movement phase two because he was already convicted of the same crime in case 002/01.

This Chamber would like specific references to the part of the particular severance decision that was misinterpreted.

Finally, I would like to conclude the report on the grounds of appeal relating to the Trial Chambers jurisdiction.

Thank you, Mr. President.

[14.11.49]

MR. PRESIDENT:

According to the schedule, we will have the short break and followed by the submissions of the defence for Khieu Samphan. So we will take a short break and we will comeback at 1440H.

(Court recesses from 1412H to 1438H)

THE PRESIDENT:

I would like now to hand the floor to the co-defence counsel for the defence for Mr. Khieu Samphan to make their submissions. Thank you.

MS. GUISSE:

Thank you, Mr. President. As was recalled by the reporter, a substantial number of our grounds for appeal has to do with the many examples of how the scope of the *saisine* has been exceeded, and this has had an impact after in terms of how the facts have been heard and examined by the Chamber. We of course refer you to our Appeal Brief for more details, but given the time, I shall focus on responding, on replying to your questions, and to the Prosecution and Civil Parties.

[14.39.50]

I would like to go back to what my colleague, of the c=Civil Parties, who recalled in the brief from 12 March 2021 document F60/1, and I would like to recall that we have never said that the Civil Parties could not discuss issues related to procedural fairness. However, what we said was that we should not have to respond to the Civil Parties with regard to the *saisine*, and that is why I am bringing this up now, Civil Partiesbecause this does not have to do with their specific interests but with their general interests, which are already covered by Civil Partiesthe Prosecution.

As you know, I am a French lawyer and I come from the civil law

tradition, like my colleague Kong Sam Onn, and on principle, we have no issues with Civil Parties taking part in the proceedings. However, certain limitations are imposed on that participation, specifically in the ECCC, and these limitations were established by you, yourselves. However, and this is the only thing we stated when we made our comments on the Chamber's calendar, we have to note that there is a major shift in terms of the Civil Parties speaking to the sentence, which is an absolute prerogative of the Prosecution as my -- as my distinguished colleague, Kong Sam Onn, will be able to elaborate later on.

[14.41.38]

I'd like to recall, to be very clear, the framework that you established in your decision, F10/2, of 26 December 2014, for Case 002/01, which was also reiterated in your decision, of 6 December 2019, F52/1, and according to your jurisprudence, the Civil Parties' right to respond Civil Partiesshould be subject to certain limitations, which is motivated and justified in view of the role that is played by each party, and in view of the need to respect the fundamental rights of the Accused, in particular, equality of arms.

You had decided in F10/2, paragraph 17, that the arguments set out in the proposed response from the Civil Parties must relate to grounds directly affecting Civil Parties' rights and interests. Furthermore, you had also said that it was up to the lead co-lawyers to endeavour to avoid repetitiveness and overlap with

issues already covered by the Co-Prosecutors' projected response to the defence Appeal Briefs. So the Civil Parties have a role of intervening in a limited fashion in a complementary fashion to the Prosecution, to issues that directly affect their specific rights and interests, and not in general, so as to Supplement the Prosecution.

[14.43.36]]

And once again, to summarize, this is because the Prosecution is the party that acts on behalf of the general interest, which includes the general interest of the Civil Parties. Though this intention was noted in their request to respond to our Appeal Brief, those intentions were largely beyond the facts, because they exceeded the limits that you had set, notably by evoking the grounds for appeal in the civil matter, which does not directly impact the specific rights and interests of the Civil Parties, and which more importantly had already largely been addressed by the Prosecution. The reasons put forth by the Civil Parties were far too vague, as Civil PartiesCivil Parties

in paragraphs 115 to 117 of the Civil Parties' reply brief, they indicated their right to judicial security, and for the ruling to be satisfied. That is not in line with what you established in your legal precedent, and I also refer you to your ruling 002/1 F36, paragraph 81, in which the reasons listed are too general, and as regards the arguments of the Civil Parties. In fact, with regard to the *saisine*, and I will come back to this because I will

have to answer it the Civil Parties have positioned themselves differently from what they had announced initially. Very often, indeed, they repeat what is already said by the Prosecution and they sometimes add additional argumentation, even sometimes with a legal position which is openly contrary to that of the Prosecution.

[14.45.18]

I shall -- I shall return to this point.

The two minimal comments put forth regarding the way in which they defended their position in terms of the *saisine* was to claim that the parties did not have their time for the Civil Parties and witnesses to speak on these facts and that witness testimony should not be without merit or without use. I speak before of all parties when I say that I believe when I say that no statement from any Civil Party has ever been without use. When they were questioned or when they spoke to another point, in error, the Chamber has always found ways of using their statements Civil Partiesthroughout the entire ruling.

Finally, the interventions by Civil Parties are a tool for the *saisine*, as it is necessary to recall that the Prosecution is there to protect the general interest and that we must maintain equality of arms. We are here as the defence counsel to Khieu Samphan, whereas the Prosecution has a very substantial team, so I would like to note that the violation of the principle of equality of arms should not be any more flagrant than it already is.

[14.47.01]

Now, as regards the categories of facts with which the Chamber is not seized: We have mentioned a number of grounds for appeal concerning convictions for facts that we believe were not part of the regular jurisdiction of the Chamber, and these facts can be divided into four types. First, there are facts going beyond the jurisdiction of the Co-Investigating Judges. Secondly, the facts for which facts of the -- for which the charges were insufficient to refer the case for trial. Third, the facts which were not legally qualified in the Closing Order, and fourth, the facts excluded by the Chamber when it severed and then reduced the Prosecution, so we're speaking only in terms of *in rem* jurisdiction here.

So the four types of facts can be regrouped into two categories: On the one hand, errors by the Co-Investigating Judges which would lead to faults in the Closing Order, that's what I would call Category A; and errors in interpretation by the Chamber, that would be Category B, and this has to do with interpretation by the Chamber of the Closing Order and of its own severance decision. Understanding that the errors of the Co-Investigating Judges would be errors in the initial work that they conducted in terms of the scope of the jurisdiction.

[14.48.49]

Now as regards timeframes, regarding the moment when we raised our challenges: In an ideal world where the internal rules of ECCC

would not be limited as they are today, we would and should have been able to raise all our challenges prior to the trial. This is a very central issue because the Chamber has stated that our challenges were inadmissible because they were tardy, and we are appealing against this today.

The Prosecution and Civil Parties speak at length on this point, and you too are raising a question for us in this respect, and I shall respond. A bit later, I shall revisit the issue of our challenges regarding facts under Category B, but for the time being, I shall stay with Category A, everything that has to do with the errors of the Co-Investigating Judges during the investigation and the point when they submitted their Closing Order.

[14.50.11]

So first of all, the first question: Why we did not raise these issues with the Co-Investigating Judges and with the Trial Chamber? You raised this in your paragraph 14 of your report. And we will answer that later.

So at one point, you ask that we provide specific references as to the time -- the timing of our challenges during the preliminary phase. I do not have the references you are alluding to in our Appeal Brief, so it is difficult to know what you are referring to, because I think that there should be jurisdiction here, and at no point have we have ever supported having raised our objections during the pretrial phase.

Now, to answer the second part, as to we did not raise the objections with the Co-Investigating Judges and the Pre-Trial Chamber, I must clarify, but my response will be strictly legal and will not refer to our experience, personally. My colleague came into this case file in late 2011, and I arrived here in early 2012, after the filing of preliminary objections in February 2011. So we cannot speak on behalf of our predecessors, but as defence for Khieu Samphan we can speak to the legal aspects and to the obstacles that we encountered in terms of raising objections at that time.

[14.52.03]

As I was saying in my preamble, this is fundamental problem in terms of the Internal Rules of the ECCC. This concerns not only Khieu Samphan, but all the Accused under this jurisdiction. Namely, that Rule 74 of the Internal Rules, which governs appeals against the Closing Order, give no recourse to the Accused in terms of an *in rem saisine* or jurisdiction. Rule 89 of the Internal Rules, which governs the filing of preliminary objections before the Chamber, which is disqualified by the Closing Order once it becomes permanent, not allow for such recourse, either.

Now, I will address…

I am seeing that the Prosecution would like to take the floor.

MS. WORSNOP:

I can hear almost nothing, nothing of the Defence's submissions. I'm listening to the English channel, and it's either broken up or

completely absent, and obviously, I would like to hear what the defence counsel is saying. Would it be possible for that to be rectified, or otherwise, for us to have a short break?

[14.53.55]

THE PRESIDENT:

If the Co-Prosecutor cannot hear the submission by the co-defence counsel, please could you repeat what you have just said?

MS. WORSNOP:

Yes. Yes, Your Honour. As I said, I cannot -- cannot hear any of the submissions being made by the defence counsel. I'm listening to the English channel, and they're either broken up or non-existent. And obviously, I would like to hear what the defence counsel is saying, so I was asking if it might be possible to rectify that in some way, or otherwise, take a short break to resolve the issue. I'm sorry for the interruption.

THE PRESIDENT:

The IT Unit, could you please check as to -- from which segment the Co-Prosecutors could not hear the submission made by the co-defence counsel for the Accused so that she can repeat that portion?

[14.55.40]

MS. WORSNOP:

Sorry, Your Honour. I think the problem is an ongoing one. It continues to be crackling and broken up. It actually applies to all of her submissions so far, but obviously I'm particularly

interested in her direct submissions on the grounds that she just raised.

MS. GUISSE:

Chairman, I'm not sure whether I need to speak French so that the interpreters can interpret me.

THE INTERPRETER:

Is the English channel audible? The interpreter now is asking. Is the English channel audible? One, two, three, four, five. The English channel is live. The English interpretation is being provided. Is the English interpretation on the English channel audible and clear?

[14.57.08]

THE PRESIDENT:

And for the National Co-Prosecutor, could you hear the submission made by the co-defence counsel?

MR. CHEA:

Yes, I could hear it, but there is an interference in the channel.

THE PRESIDENT:

IT Team, could you please check the co-defence counsel's microphone? Maybe the battery is running out?

MS. WORSNOP:

I'm sorry, Your Honour. I don't think the problem is with the defence counsel's microphone because it's an ongoing issue irrespective of who is speaking.

THE PRESIDENT:

The IT Unit is checking the issue, and I will inform the parties of the solution to this technical problem.

[14.58.34]

MS. WORSNOP:

Thank you very much, Your Honour.

(Technical problem)

[15.03.05]

THE PRESIDENT:

The technical team has fixed the issue. I would like to ask the Co-Prosecutors, where -- from where could you -- that you could not hear the submission of the Defence team?

Once again, I would like to ask the Co-Prosecutor, the International Co-Prosecutor, I would like to know from where that you could not hear the submission of the co-defence team?

MS. WORSNOP:

Your Honour, we understand that you may have been speaking just now, but we didn't hear anything on the English channel or on the French channel, also nothing from my channel. So on no channels there was no transmission.

THE PRESIDENT:

Testing, one, two, three. I am speaking. I could hear the Khmer channel loud and clear, and I could not hear the interpretation while the International Co-Prosecutor was speaking a while ago. So could you please indicate to the Bench once again, International Co-Prosecutors, from where that you could not hear the

interpretation?

MS. WORSNOP:

Thank you, Your Honour. To be honest, most of the submissions made were difficult to understand, but I heard almost nothing of defence counsel's direct submissions on *saisine*. So if possible, if you could ask her to begin there I would be very grateful. So just a clarification. I mean after her submissions regarding the Civil Parties' role.

[15.05.56]

THE PRESIDENT:

In order -- in order not to waste our time, I would like to ask all the parties if you could not hear the submission or the interpretation, please indicate to the Bench quickly, because it was 10 minutes later that the International Co-Prosecutor mentioned the issue. So in order to be clear, I would like to invite the defence team to restate what you have submitted.

MS. GUISSE:

Well, Mr. President, I'll start from the beginning, but of course I won't be repeating everything verbatim since I often adapt to the manner in which I respond to the proceedings.

[15.07.20]

So I first spoke to the *saisine* by stating that I would focus on the answers to your questions and replies to the Prosecution and the Civil Parties, and I then responded to the Civil Parties' intervention whichis noted in our submissions of 12 March 2021,

F60/1, concerning the fact that we have never challenged their right to raise or to dispute the issues concerning the fairness of procedure, whereas we felt that we should not have to speak to the Civil Parties on the issue of *saisine*, such as the crime and sentence are the prerogative of the Prosecution, which represents the general interest of the parties, and the general interest of the Civil Parties in particular. Once those general interests had already been defended, by the Prosecution, it was important to not repeat that. And there were limits as to the Civil Parties' response to our Appeal Brief. Civil PartiesAppeal BriefAnd I also stated that the question was not a question of principle, given the fact that my colleague Kong Sam Onn and myself both come from a civil law tradition and so we have no problem with the intervention of Civil Parties in principle. Our problem is the shift that occurred and the fact that the Civil Parties went beyond the limits of their intervention, going so far as speaking to the appeal, which is once again a specific prerogative of the Prosecution, and my colleague will speak to that later.

[15.09.31]

And to be complete, I had quoted, and I will quote again, your decision, F10, of 26 December 2014, which was issued in Case 002/1, and again recalled in Case 002/2 in the ruling dated 26 December 2019, F52/1. And in your jurisprudence you indicated that the right of response of Civil Parties needed to be restricted, and that this was justified by the role to be played by each party

and the need to respect the fundamental rights of the Accused, and particularly, the equality of arms. And I then referred to your ruling F2 in paragraph 17, where you had indicated, quote: "First, the arguments set out in the proposed response by the Civil Parties must relate to grounds directly affecting Civil Parties' rights and interests; and second, that the lead co-lawyers must endeavour to avoid repetitiveness and overlap with issues already covered by the Co-Prosecutors' projected response to the Defence Appeal Briefs."

[15.10.50]

And the reason for the limits that you restated is the fact that the Prosecution is already acting on behalf of the general interest, which includes the interests of the Civil Parties; and therefore, that the Civil Parties needed to intervene in limited fashion as they complement to the Prosecution on issues directly related to their specific rights and interests, and not to intervene as a supplement to the Prosecution, which would be a breach of equality of arms.

I also stated that I could not but observe that in the response to our appeal the Civil Parties had exceeded their officially stated intention, which was to specifically respond to and address the specific interests of the Civil Parties, and this was a mention of their submissions that you had quoted in paragraph 17 of this -- of ruling -- no, of F10/2. It was footnote, actually, a footnote recalling your F10/2 jurisprudence.

And what I said was that in the framework of the response to our Appeal Brief the Civil Parties had addressed the *saisine*, –when this matter does not directly affect their specific rights and interests, but it rather indirectly affects their general interests, which are already defended by the Prosecution and that the Prosecution had already covered this issue at length.

[15.12.43]

I also added that the reasons put forward in order to do this were overly vague, according to your jurisprudence, because their Response Brief in paragaphs 115 to 117, they noted their right to judicial security, and secondly, satisfaction that the judgment would reflect what they had experienced.

Now, of course, we do not wish to challenge the Civil Parties'right to judicial security in their rights, or the rights of any other party; however, what we stated was that this was not in line with the jurisprudence from ruling 002/1, F36, paragraph 81, which states that these elements were too general for you to be able to accept them within the limits that you had set. Because in their brief, the Civil Parties repeat what was already said by the Prosecution, sometimes even adding supplementary arguments, which in and of themselves fly in the face of the judicial position of the Prosecution.

[15.13.56]

And the mention in their brief, in paragraphs 159 and 180, of the general grievances which they may have, for instance, that there

was time given by the Civil Parties which they had lost, and that their testimony would have become useless, I replied that one reproach that could not be levelled at the Trial Chamber was that you could not use the testimony of Civil Parties, even if they had been summoned to give testimony in error, but the Chamber always found a way to use the statements made by the Civil Parties.

And I also added that these -- having made these observations, I could go to the heart of the different categories of facts with which the Chamber had not been regularly seized, and I recall that there were four kinds. First of all, facts exceeding the *saisine* of the Co-Investigating Judges; secondly, facts for which the charges were insufficient refer to trial; and three, facts which were not judicially characterized in the Closing Order, and four, the facts that were excluded by the Chamber when it severed and then reduced the scope of the Prosecution. And when we are talking about these four types, we are only doing so with reference to the *saisine in rem*.

[15.15.46]

Now, there you've kept four types regrouped in two categories, Categories A and B; A being errors of *saisine* relating to errors initially made by Co-Investigating Judges, which are at the heart of the errors in their Closing Order; and secondly, Category B, the facts related to errors of interpretation by the Chamber in the Closing Order and its own decision to sever.

I also raised the question of schedules, on other words, the time

when the challenges were raised, stating that in an ideal world, in other words a world where the Internal Rules could be -- operate differently, we could have and should have been able to raise the types of facts of Category A, that is, the errors committed by the Co-Investigating Judges, prior to trial. We also indicated that this is a central question since the Chamber had stated that our challenges were not admissible because they were tardy, and the Chamber, in this matter, committed an error of law, which is the reason for our appeal. The Prosecution and the Civil Parties responded to this at length, asking question on this topic themselves, which shows that this is an important issue.

[15.17.24]

I will later come back to the issue of our challenges relating to Category B, in other words, errors of interpretation by the Chamber, which can be raised only at the time of trial, and at this point I will start, of course, with the errors committed by the Co-Investigating Judges and the -- and -- which led to the errors in the Closing Order.

I was explaining earlier that I was going to respond -- that we had not raised issues with the Investigating Judges and the Pre-Trial Chamber. And to respond to your question, which was twofold, the first was to determine what specific references to specific moments in time, or rather why we had not raised these issues with the Co-Judges and the Pre-Trial Chamber and secondly, you asked for specific references concerning the time when we raised these

challenges duringthe pretrial phase.

Now, to answer the second part of your question, I indicated earlier that since we didn't know specifically which part of the Appeal Brief you were referring to, Iknow there was some confusion or misunderstanding because we do not recall having ever having stated that we raised these issues in the investigating phase. [15.19.17]

And to come back to the first part of your question, the reason why we did not raise these grievances with the Co-Investigating Judges or the Pre-Trial Chambers, I had to add further detail to say that we would respond only to the legal matter, because my colleague, Kong Sam Onn and I both came after the filing of the preliminary objections, which was in February 2011. My colleague began working on this case at the end of 2011, and I came beginning of 2012, which meant that we could not speak on behalf of the counsel who were here at that time, but what we could do was put up an overall defence of Khieu Samphan, looking at the facts and the law. And looking at the law, we were in a position to observe that there were objective limits that were imposed by the Internal Rules, which go beyond the scope of Mr. Khieu Samphan's case, and which unfortunately states that the possibilities of a challenge made by the Accused during the investigation phase are complicated and difficult. And I mentioned Rule 74 of the Internal Rule concerning arguments against the Closing Argument.

[15.20.42]

And you specified that that rule, Rule 74 provides the Accused with no recourse the decision with regard to the *saisine in rem.* And I also stated that Rule 89 of the Internal Rules governs the filing of preliminary objections with the Trial Chamber, as noted in the final Closing Order does not allow this, either. And I am coming to a point where…

[15.21.17]

MS. WORSNOP:

My apologies for yet another interruption. We have lost all English translation.

THE INTERPRETER:

One, two, three, interpretation English channel. Interpretation English channel. One, two, three, interpretation English channel.

MS. GUISSE:

Mr. President, I hope it's the very end of what I was saying that was missed, because I'm not sure I'll be strong enough to repeat – this last part for for a third time.

THE PRESIDENT:

Defence lawyer, you may resume. It is not your error; it is the error of the technical equipment. I would like to invite the Defence team to start from Internal Rule 74. You can start from that point.

MS. GUISSE:

Very good.

So I was saying that there was a fundamental problem in the Internal Rules of ECCC, and this goes beyond the case of Khieu Samphan because it regards appeals. In Rule 74 of the Internal Rules, which governs appeals against the Closing Order provides no recourse for the Accused against a decision in terms of *saisine in rem*, and I described that earlier, and Rule 89, which governs the filing of preliminary objections with the Trial Chamber. When the Chamber is seized by a final Closing Order, the Internal Rules do not enable this, either.

[15.23.56]

I will address these two rules in order. But I also need to remind you that the Chamber, within its ruling, used Rule 89 to declare that our challenges were inadmissible. For this reason, in our Appeal Brief where we criticize the decisions of the Trial Chamber and the ruling, we mentioned only Rule 89 because that is rule is the reason for our grievances in terms of the motivations of the judgment.

I had to clarify this in response to what the Civil Parties seem to be reproaching us for in their response to our brief, in paragraphs 140, 142 to the effect that we would allegedly have omitted mentioning Rule 74. We did not omit it, but the Chamber was simply not motivated by that rule, and so we did not have a reason to expand on that point. But today, I address it, reminding you that in paragraph 334 of our Appeal Brief, we consider that error to be an error of law and not an error of appreciation, as

is also noted in paragraph 137 and 160 in the response of the Civil Parties.

More specifically, as regards Rule 74(3) that says that a Closing Order cannot be appealed before the Pre-Trial Chamber, this is very clear. In Rule 74, entitled "Decisions Susceptible to Appeal Before the Pre-Trial Chamber," subparagraph 3 lists the decisions of the Co-Investigating Judges that the Accused and persons under investigation can appeal. There are nine such situations, numbered A to I. And the decision to refer a case to trial is not one of the decisions susceptible to appeal, pursuant to Rule 74. The only possibility in this article is to challenge aspects of the Closing Order in connection with the overall jurisdiction of the ECCC, that's the little A, and in little F, as relates to the provisional detention or judicial supervision in the Closing Order prior to referring the case for trial.

[15.26.36]

These are explanations that we provide in our final brief in para 70-, and in document E467/6/4/1, we explain that an Accused sent for trial could not appeal against the referral in general, but only certain provisions of this Closing Order, including the two I have just recalled.

Furthermore, in our final brief, I recall the decision of 20 May 2010 issued by the Pre-Trial Chamber, and another decision, also issued by the Pre-Trial Chamber of 11 April 2014, and I refer you to our final brief, in paragraphs 244 to 255. And I will also give

you the references of the decisions. So it is the decision issued by the Pre-Trial Chamber in May 2010, reference D97/14/15; and the decision from April 2011 one is D427/1/30, especially paragraphs 45, 47, and 85.

[15.28.13]

We recall those two decisions, recalling that the May 2010 decision prior to the Closing Order issued in September 2010, the Pre-Trial Chamber had concluded that only challenges on jurisdiction could be received by virtue of Rule 74(3)(a). These challenges are not part of the internal civil law system, but rather it is similar to that of ad hoc tribunals.

In other words, the challenges regarding the commission of a crime and the mode of responsibility, and the principle of legality. The issues of the errors we highlighted in the Closing Order do not impinge on jurisdiction, and that is the problem. This is what the Pre-Trial Chamber is saying, that grounds along those lines, that is the errors contained in the Closing Order, needed to be submitted to the Chamber. The Prosecution recognizes this in paragraphs 271 and 272 of its response, and they also recognize that we cannot appeal the referral decision, we can only do it on the basis of issues of legality and not on issues of *saisine in rem*. And so this also has to do with the insufficient evidence. The Prosecution also recognizes these different issues contained in Rule 76 of the Internal Rules, which address requests to nullify during the investigation phase. The Prosecution mentions

this rule in its response, and yet recognizes that this rule only applies prior to the issuance of a Closing Order and therefore it does not apply to the Closing Order itself. Consequently, it recognizes that defects are to be submitted to the Trial Chamber. The Civil Parties, in paragraphs 125 and 155 of their response, have a position that is contrary to that of the Prosecution, stating that a Closing Order can be appealed, and that based on these grounds, our arguments are inadmissible.

[15.30.55]

Then, the Civil Parties interpret Rule 76(7) of the Internal Rules that is completely out of line with ECCC jurisdiction, and even with the understanding of the Prosecution. Rule 76, which evokes the possibility of addressing and correcting these procedural irregularities- and here, for clarity's sake, I'd like to read Rule 76(7)(i): "Once the Closing Order is definitive, covers, if applicable, all issues of nullifying the prior proceeding,"- and I would like to draw your attention to the word "prior,"here- "further nullification may be invoked at the Trial Chamber or the Supreme Chamber." The prior proceeding.

For lawyers from the tradition of civil law, like us, that is the rule we are familiar with, which covers procedural irregularities, which are addressed by the referral order. On the other hand, it is not "self-cleaning". And that is the real problem, here. Once the order was issued, if the Co-Investigating Judges made a mistake in that Closing Order, they cannot remedy their own

mistakes. It is logical.

[15.32.24]

Consequently, the rule in Article 76(7) does not apply because we could not lodge an appeal against the Closing Order, and if we had been able to do that, of course we would have been able to raise the issue of the pre-trial period. But we were not able to appeal the Closing Order based on the *saisine in rem.* These contradictions between Rule 74 and 76 are a perfect illustration of the problem that the Accused face when it comes to the Internal Rules, which I raised earlier. And this problem is particularly striking when you compare this -- these Internal Rules of the ECCC with those of other tribunals, such as the Special Criminal Court in the Central African Republic, which is a situation that is very similar to that of ECCC.

That is, we are speaking of the Internal Rules of the SCC, which stems from a major procedural law before the Special Criminal Court in the CAR, which is a hybrid tribunal, which, of all the international tribunals, has the procedural framework that is most similar to that of ECCC, where you have an investigation phase based on the Romano-Germanic legal system, based on, in which the Civil Parties play a considerable role. So it really is a jurisdiction that is very similar to that of the ECCC.

The regulation of the SCC, as in the case of Article 76(7) here, provides for the correction and nullification of the procedural acts during the investigation phase in its Articles 104(G), 108,

and 110. However, and herein lies the difference with the ECCC, the Accused can lodge an appeal against the ruling referring them to trial. I draw your attention to Article 107 of that regulation, which is the equivalent to Rule 74 of our own Internal Rules. Since there are similar provisions on grounds for appeals, the jurisdiction of the court, along with Article 75, 74(3)(a), the request to be recognized as a civil party, rejecting the return of the matter under *saisine*, et cetera, et cetera. There are very similar things between the two jurisdictions, but in little "f" of Article 107 of the SCC in the Central African Republic, there is a the possibility of appealing the decision referring the case for trial once the investigation phase has been completed. This provision does not exist in the ECCC. This little comparison illustrates the procedural difficulty that our Accused here encounters at the ECCC, and which the Accused in general faced at the ECCC.

[15.35.40]

If in the context of Article 74 of our Internal Rules, if we had had an equivalent provision, as I just described in the Special Criminal Court's Rules of Procedure and Evidence, we would not be in the same situation that we're encountering today. Our Rule 74 does not enable us to appeal the Closing Order. It only allows us to appeal the jurisdiction of the ECCC, and here I'm referring to personal jurisdiction, which was raised by Khieu Samphan's defence during the investigation. Also, for the Accused Ieng Sary at the

time, there was the issue of the amnesty that he received. This is the type of general jurisdiction here at the ECCC that is relevant here and not the *saisine in rem*.

And that jurisdiction from Article 74, is the same as in Article 89 in terms of to the pretrial exceptions before the Trial Chamber. For the same reason, we could not raise our challenges at that time. Khieu Samphan's defense was also not able to raise our objections at that time.

Rule 89 does not remedy the problems relating to Rule 74 or the lack of a provision for appealing the referral decision, which is at the very heart of the challenge we are facing. However, the Trial Chamber has used the situation to avoid examining the issue, against all expectations, whereas before that nobody had interpreted Rule 89 as authorizing the filing of objections to the *saisine in rem*, and not, the Chamber used these grounds to rule that our arguments were inadmissible. That is the issue at the heart of our appeal.

[15.37.51]

Yet, it is very clear that the jurisdiction mentioned by Rule 89 is exactly the same as that in Rule 74, and the same as what is mentioned in Rule 98, which is dedicated to the ruling, and we have explained this very clearly in our Appeal Brief in paragraphs 337 through 339. Once again, I make a comparison with the Rules of Procedure and Evidence for the SCC in the Central African Republic, recalling their Articles 107 and 113. Reading

their Article 113, one sees that that article covers appeals against decisions by Investigating Judges, that is Article 107, and the preliminary exceptions in Article 113, and this clearly has to do with the jurisdiction of the Court, which has nothing to do with *saisine in rem*, which is the reason why we have our grievances today. So the Chamber could not qualify our preliminary exception challenges as being tardy without making an error in law.

But we're speaking of defects in the Closing Order itself. There is no provision for this matter to be examined by the Pre-Trial Chamber or by the Chamber prior to the trial. And without these provisions in the Internal Rules to this effect, the Chamber should have examined them on the basis of the right of the Accused to an equitable trial during the trial.

[15.39.39]

And I would like to recall our paragraph 346 in our brief. I insist that this examination was necessary on the basis of equity, because even if you consider that our challenge came in belatedly, which of course we challenge for the reasons I have just elaborated, the Chamber should have still examined these at minimum on the basis of the equity of the procedure in view of the importance of this aspect.

Additionally, the precedent cited by the Prosecution relies heavily on this point. In its Response Brief, the Prosecution refers to the 2012 response, so that is the Prosecution’s response

to our brief in paragraph 268, stating that the Duch ruling makes a distinction between the matter of jurisdiction, first of all, due to a lack of knowledge of a fundamental rule or, and the lack of knowledge of a rule of procedure.

I saw the Prosecution rising. Did I miss something?

MS. WORSNOP:

Can you hear me?

[15.41.36]

MS. GUISSE:

I hear the Prosecutor very well. I just saw the Prosecution rising at one point, and I thought perhaps there was another technical glitch or something else. If there is no problem, I'll continue.

MS. WORSNOP:

Problem with the interpretation, but I think it's been resumed. So I think we can continue. Sorry.

JUDGE CLARK:

I'm sorry, I think we might have lost a line that was important between the changeover of the interpreters. So "rejecting it as tardy", I have (inaudible) and then something happens between "lack of knowledge of fundamental rules"; something was lost there.

MS. GUISSE:

Okay. Right, let me try to go back to this.

What I was saying, in any event, was that the jurisdiction of Rule 74 had nothing to do with the *saisine in rem* and that in any

event it was an issue which the Chamber should have considered, if only on the grounds of equity.

And here, I refer you to paragraphs 347 to 350 of our brief, and what I said was that the decision handed down in Case 001, the Duch ruling, which was quoted by the Prosecution in paragraph 268, made a distinction between types of lack of jurisdiction, on the one hand that due to a lack of knowledge of a fundamental rule, or the second type, due to alack of knowledge for a rule of procedure.

[15.43.51]

And the Prosecution bases its argument on the fact that you stated in Case 001, that in order to appreciate the admissibility of an objection to lack of jurisdiction raised before the Chamber or the Supreme Court Court on the foundation of Rule 89, you make a distinction between these two types of lack of jurisdiction. For the Prosecution, and that is in paragraphs 259 and 270 of their response, the objections due to the lack of jurisdiction would be due to a lack of knowledge of a rule of procedure.

[15.44.35]

It reveals that the first rules, the first one I mentioned, on the fundamental rules may be raised at any time, but that the second type, on the rules of procedure, that raising these objections can be foreclosed.

The proceedings could then be corrected of any irregularities. And the Prosecution maintains that we would then be dealing with a

case recall that we are only talking about problems related to the jurisdiction in the Rules of Procedure. And so we would be foreclosed. And yet, the Prosecution reminds us that the challenges of the type we have raised were examined by the Pre-Trial Chamber and found to not represent objections to the jurisdiction. I refer you to paragraph 272 of the Prosecution's response.

However, the Prosecution, even though the Pre-Trial Chamber said the opposite, stated that our objections are challenges to lack of jurisdiction in the sense of Rule 89. And there I would refer you to paragraphs 276 and 277 of the Co-Prosecutors'response.

The reason for which the Prosecution claims that our objections have not targeted jurisdiction of the ECCC, but *saisine in rem* on the basis of procedural irregularities in the Closing Order, the only explanation for this characterization, apart from the fact that it's the only one which suits them because otherwise we'll foreclose, it seems that our challenges do not take aim at the jurisdiction of the ECCC in general, in fact, personal jurisdiction, it is not a matter of general jurisdiction, but a matter of jurisdiction on the facts, the*saisine in rem* of the Chamber on the basis of defects in the Closing Order where it constitutes, quite obviously, objections on the basis of lack of knowledge of the rules of procedure, according to the Prosecution, whereas quite on the contrary, we say it is a fundamental rule.

[15.46.49]

And in order to convince you of this, I am going to use your own decision cited by the Prosecution. You need only to reread your own jurisprudence to observe that our objection could not in any way be characterized as an objection on the basis of the acknowledge of rule of procedure, but rather, for a fundamental rule.

And I take you back to the Duch decision, from 03 February 2012, 001, F28, paragraphs 28 to 37, and in your decision, you said in footnote 78, that the lack of knowledge of a rule of procedure for instance, an order to appear, which was not served on the Accused within the rules and must therefore be null, or one jurisdiction which was seized instead of another, those are the examples you gave for a lack of knowledge of a rule of procedure. And on the other hand, a lack of knowledge of a fundamental rule, for instance, in the case of amnesty or a statute of limitations, the distinction between the two types of lack of knowledge of these rules determines whether or not the proceedings are susceptible to being terminated, and to nullify the legal foundation of the conviction on appeal.

[15.48.17]

Our challenge has nothing to do with the subpoena to appear which was not served within the Rules or the wrong jurisdiction, but it has to do with the exceeding the *saisine* of the Co-Investigating Judges, which could not investigate and refer to judgment outside of their legal attribution.

These are errors of law, and therefore fundamental, and not procedural errors at all. They are well within the category of fundamental rules. And our challenge, therefore, is of a nature to put an end to prosecution and reduce the legal grounds of the conviction. This really is an issue of fundamental rules.

And this in fact could have been examined by the Chamber, and –not only that, the Chamber should have done this. And the fact that our challenges were raised in the tardy fashion or not could not confer any sort of jurisdiction to the Chamber, which had none since the Closing Order with which it was seized was in fact defective. And if, pursuant to the Internal Rules, they could have been taken to the Pre-Trial Chamber as an appeal of the Closing Order, you'll see that the charges could have been dropped. This is evidence that goes back to fundamental rules.

[15.49.49]

And erroneous interpretation is due to the fact that the Prosecution totally misinterpreted Rule 89 and your jurisprudence and justifies this interpretation by the finality of the preliminary objections, that is, the scope of the trial before it began and the guarantee of an orderly and rational trial. I will cite paragraph 278, which also invokes the legal framework of the ECCC, and affirms that, I quote, "If the Pre-Trial Chamber circumscribes that the grounds for appeal which can be used by the Accused to challenge a Closing Order by taking it to the Trial Chamber and a challenge is similar to ours, nevertheless, it is

imperative that the Closing Order take its final form before opening of trial." That is what the Prosecution tells us.

And our response to that is that the legal framework of the ECCC does not provide for an appeal of the Closing Order taken as a whole, and it is unfortunate to say that the Pre-Trial Chamber confirmed its position, and I refer you to paragraph 278 of the Prosecution's response, that Rule 89 provides that the Chamber will make its decision on the preliminary objections, either immediately or at the same time as the judgment on substance, pursuant to Rule 89(3) of the Internal Rules, and that according to the Supreme Court, Rule 89(1)(a) therefore has limited application.

[15.51.15]

An Accused, and that's in the Duch ruling, paragraph 35, has the right to present at any time, and I insist at any time that he feels is timely and important for the defence of his interests, an objection of lack of jurisdiction that is likely to lead to the charges being dropped.

That is exactly where we are…

What I said was that the legal framework of the ECCC does not allow for an appeal of a Closing Order, which was confirmed by the Pre-Trial Chamber because Article 89 provides that the Chamber shall render its decision on preliminary objections either immediately or at the same time as the judgment. That's Rule 89(3) of the Internal Rules.

And according to the Supreme Court, in the Duch ruling, and so you have a clear clarification in Rule 89(a) is of limited application because, and as it said, as you said, and I'm sorry, sometimes I say it, sometimes I say you, when I'm talking about the Supreme Court –an Accused has a right at any time that he feels is timely for the defence of his or her interests an objection to jurisdiction, whether manifest or late and susceptible of ending the prosecution.

[15.52.55]

And so there was an error committed by the Court to say that we were tardy in submitting our objection. We were allowed to do this at any time.

And to respond to the Prosecution on the issue of the definitive framework of the trial, if we look at both Case 002/1 and Case 002/2, we see that this was a rather indefinite framework given the different problems of severance, knowing that the jurisdiction was not final until the day before the closing of hearings on the substance. And this is Supreme Court ruling 29 May 2014, EC3/9/1/1/3, paragraph 74. This to say that the argument used by the Prosecution to say that we were, as the Chamber stated, foreclosed, is not in line with the jurisprudence of the Court.

[15.54.06]

Also, there is another decision of the Supreme Court following an appeal by Ieng Sary in Case 002/1, is the decision of the Supreme Court of the 19 March of 2012, the E95/8/1/4, paragraph 10, where

one finds that the Supreme Court said that the immediate appeal of the defence of Ieng Sary in the decision of the Trial Chamber was not admissible, declaring that a definition of crimes against humanity in 1975 did not require a link with an armed conflict. And the Pre-Trial Chamber had come to the opposite conclusion in its Closing Order and the Supreme Court stated in paragraph 10 of the ruling I just referenced, that, "the Trial Chamber is not in any case bound by the legal characterization of the facts adopted by the Pre-Trial Chamber or the degree of certainty of the charges against the Accused, which is nothing unusual." Therefore, contrary to what the Prosecution claims, it is not imperative that all of these matters be resolved prior to the trial. The Prosecution then produced national jurisprudence to tell us that notably, pursuant to French law, it is possible to appeal an order, rather,

I'm quoting French jurisprudence which I'm not going to get into the detail of, and I hope that the Supreme Court will have mercy on me given the various technical problems so that I may come to the conclusion of my pleadings, recalling that the context of French law is totally different. Why? Because in criminal matters it is perfectly possible to appeal an indictment. The jurisprudence cited by the Prosecution in its response applies to misdemeanor cases. This is not applicable,

[15.56.28]

so we cannot -- we're not discussing the same thing and we cannot

apply the same thing from the French correctional system,. Within that system, even if there is no possibility of appealing the referral, the Appeals Chamber can nevertheless find that the order is null and void.

And that is what I included in our sources. There is a ruling from the Criminal Chamber of the Supreme Appeals Court of 20 October 1998, which quotes Article 385 of the French Criminal Code, which indeed indicates that the Appeals Chamber has jurisdiction to declare a referral order null and void. So here again there is no absolute position.

[15.57.16]

Finally, the Prosecution undertakes an opportunistic interpretation of Rule 89, even though it never responded to our argument in front of the Trial Chamber, until it was time to respond to one another's briefs at the hearing. In conclusion, all I can say is that we are not responsible for the original sin of the Internal Rules, and there cannot be a denial of justice on that basis.

I will now come to the different types of facts for which there was a decision that exceeded the *saisine*, first, the facts that exceeded the *saisine* of the Co-Investigating Judges, second, insufficient evidence at the end of the investigation, third, facts that were not used in the Co-Investigating Judges legal characterization of the facts, and fourth, facts that were excluded by the severance in Case 002.

I'll start with insufficient evidence, and I will be brief because I think it is important that I also go over the other points to respond to the question from the Supreme Court on the facts that we felt did not constitute sufficient evidence, or rather, which we felt were insufficient evidence. Briefly, I am going to summarize or give you the references in our Appeal Brief, the references in the Closing Order and the reference in the two types of rulings in order to answer the questions that raised in your report.

[15.58.57]

Concerning the facts cited in our Appeal Brief, paragraphs 445 to 447 and paragraphs 924 to 931 of our Final brief, and these are the facts cited in the Closing Order D427 and paragraph 312, and in the Reasons for Deicion where it is considered in paragraphs 1142 to 1145. Concerning the discriminatory treatment of the New People in Tram Kak, this was dealt with in paragraphs 448 to 450 of our Appeal Brief, which referred to our Final Brief, paragraphs 942 to 948, and in the Closing Order, it was examined in paragraph 305, and in the Reasons for Decision, it was dealt with in paragraphs 1176 to 1179.

Concerning the third type of facts for which we feel there is insufficient evidence, surveillance and disappearance of the elders of the Khmer Republic, this was in paragraphs 451 to 456 of the Appeal Brief, which was raised in the Closing Order in paragraphs 319 and 498, and in ruling 465 in paragraphs 1175 and

1177 to 1179. Oh, and I forgot a certain number of references, 1175, 1177 to 1179. But if you need more complete references I can do it during the question time.

[16.00.58]

On the specific facts concerning the Co-Investigating Judges exceeding their jurisdiction, as was seen earlier, there were the preliminary objections, which were deemed tardy. That is not the case. And I will give you an example to demonstrate that there was actually only one that was examined, and that was the deportation of Vietnamese, and it was erroneously rejected.

And I remind you that at the beginning of Case 002, prior to the severance, the defence of Ieng Sary had also tried to raise this objection before the Pre-Trial Chamber and it was rejected on the grounds that it had to be brought before the Trial Chamber. The defence of Ieng Sary then raised the issue at the Chamber prior to the trial, and not in the context of preliminary objections, as the Prosecution claims, but 10 days after the deadline for preliminary objections, in the context of a request for nullification of parts of the Closing Order. And I refer you to paragraphs 343 to 346 in our brief.

We took up again the argument of Ieng Sary before the Trial Chamber. It was rejected, and we were told that, and I remind you of the Chamber's Reasons for Decision, that even admitting that the scope of the investigation might have been controversial, this issue should have been raised prior to the opening of the trial or

during the investigation phase. So basically, the Chamber refused to look into this.

We raised the issue again in our Final Brief 002/2 to avoid a denial of justice. I refer you to ourbrief E457/6/4/1, paragraphs 213 to 276. I'm not sure whether the Chamber was asking when we might have raised this earlier, but that is indeed the time when we raised that question. And we state here that the examination on the substance in the Reasons for Decision was based on erroneous arguments.

[16.03.27]

So taking into the consideration the introductory brief, it should be re-examined in the light of all the supporting elements. In its Reasons for Decision, the Chamber should have reviewed its decision, and examined the matters of substance (unintelligible) as the introductory brief is less detailed than it should be in the Closing Order. We need to examine the introductory rules, along with the supporting elements, or rather, the evidence to determine the actual facts with which the Co-Investigating Judge were seized.

Now, as regards our appeal, we challenged this point, and I refer you to paragraphs 351-366… Mr. President, I see that I have a lot more issues to address and I am far from done. I would like to ask for an extension for more time. I do not know how much more time I have left, I suppose I have five minutes, and I cannot cover all these fundamental issues in only five minutes.

THE PRESIDENT:

Can you inform the Chamber how much time you need?

MS. GUISSE:

Mr. President, I think I would need at least 20 minutes. I know that this means extra time, but the difficulties that we're encountering in this appeal and our interventions is that we are responding to the different parties for the first time. We're criticizing the Chamber and at the same time, we are responding to the different briefs of the Prosecution and the Civil Parties, it is true that it is a lot, we are also trying to answer your questions, so we are trying to cover a lot of ground, trying to keep within the same time frame as the other parties that already responded. That's my motivation for asking for extra time.

[16.06.05]

THE PRESIDENT:

Since we are running out of space on DVD, I will allow the IT team to change the DVD, and the Bench will consult your request.

(Short pause)

[16.08.38]

MS. GUISSE:

Mr. President, apologies. If I may. I see that you are having your discussion, but to be absolutely transparent, I think 20 minutes will not be enough. I would need 30 minutes. I had thought that I would manage to fit within the allocated time, but these issues in law are so complex and there are so many references, in order to

make sure that everything is clear, that I cannot possibly be clear without giving enough time to these points. And this is our only opportunity to respond to the different points of the other parties and the Prosecution, and it's our only appeal.

THE PRESIDENT:

Obviously the submissions have been submitted already, and you have also repeated some of the submissions. We have given to you one hour already. The actual time is 35 minutes for you. After deliberation, the Bench will allow you ten more minutes and you can sum up what you have not yet submitted before the Bench. So you can have 10 minutes more.

[16.10.31]

MS. GUISSE:

So I have to make a very difficult choice here. I shall simply indicate that in our Final Brief we raised the issue of avoiding, we must avoid a denial of justice. In paragraphs 351 to 366, we said that the judges are seized of facts which are provisionally qualified, and they are not evidence. So if you look at the footnote in the Closing Order, of a (unintelligible) with which the Chamber is seized. We indicate that this is even more the case for drafting an indictment with a legal qualification of the facts, knowing that it is an obligation, it is important that all the facts that will be examined in the trial be mentioned, and we should not learn of them only from a footnote.

The Prosecution says that the Pre-Trial Judges said otherwise.

They also refer to the French jurisprudence, stating that there would be extensive jurisprudence to this effect in France, but the context here is obviously very different. We don't have cases of this magnitude in French jurisprudence, and the introductory rules that we have in France are much shorter than the hundreds and hundreds of pages which we must examine before the ECCC. Furthermore, a specific rule in ECCC regarding the form of the of indictments has to do with the complexity of the investigations, and it is impossible to have anything similar to this at the national level, and the procedure has to be pragmatic and ensure a fair trial. So to tell us that we could have been informed of certain points in the initial via a simple footnote, as the Prosecution is trying to tell us and the Chamber supports, is akin to telling us to look for a needle in a haystack.

[16.13.26]

This context was taken into account, and I refer you to the Supreme Court jurisprudence, which noted the difference of context between domestic and international, which is the ruling of 3 June 2011, E50/2/1/4, and I'd like to recall that in Rule 67(2), the Closing Order must mention the identity of the Accused, the facts with which the person who is charged; and otherwise, and the qualifications retained by the Co-Investigating Judges, as well as the nature of the criminal responsibility, otherwise it is null and void. And this is what we are stating.

There is no more interpretation into Khmer I'm told.

THE PRESIDENT:

The Defence team, could you please slow down? The interpreter could not follow you.

MS. GUISSE:

Well, yes, that's the problem of trying to summarize it all in just 10 minutes. I'm trying to sort of fit everything into the time that is much too short.

[16.14.54]

The Prosecution is blaming us for making an artificial distinction between facts and evidence. And the contradictions of the Prosecution must be resolved because in paragraph 357 of its response, it says that we regularly and correctly underlined the fact that the Chamber was seized with facts and not evidence. But when we refer to the issue of Vietnamese people in territorial waters, all of sudden we no longer are right, and a footnote is sufficient. So once again, obviously we have mentioned all of the grievances contained in our brief in paragraphs 367 to 438.

The third type of facts going beyond the *saisine* are facts that were not legally qualified in the charges against Khieu Samphan. Facts of Type 3 noted in our brief, in paragraphs 87, 97, 458 and 464 are relevant here. That is the reference in our Final Brief, in paragraphs 87, 97, and in our Appeal Brief, paragraphs 458 and 464, our main difficulty -- I'm being told once again that there is no interpretations.

The third example of overstepping ithe *saisine*, which I mentioned,

that is, the facts exceeding the *saisine*, which were never legally qualified and which are retained against Khieu Samphan in spite of it all. This is a criticism that we expressed in our Final Brief in paragraph 87 to 97, and in our Appeal Brief, paragraphs 458 to 464. And we state that the Chamber were seized with facts and only the facts which are mentioned in the Closing Order and that are legally qualified.

[16.17.09]

And this comes from the fact that the order (unintelligible). At the time, the International Co-Investigating Judge mentioned, and I refer to our Appeal Brief, paragraph 461, many unnecessary conclusions were reached. And we need to sift through it all. It is necessary to sift between what was truly prosecuted and everything that was mentioned, between what was legally qualified, and the facts that are simply mentioned, without later being legally qualified as charges. This is what comes from the Closing Order. And I refer you to our Appeal Brief, paragraphs 435 to 438 and then 520 and 521.

I wanted to give you a very eloquent example in terms of the treatment of Vietnamese people and how it is possible to move from one fact to another. To be prosecuted only for Svay Rieng and Prey Vieng and all of a sudden having evidence coming from the whole territory.

[16.18.40]

I -- I'm not at liberty to do this now, I shall mention this again

when we revisit the crimes, which means that I can now conclude, since my time, allocated time is coming to an end.

There's the fourth category of exceeding the *saisine* in jurisprudence, the facts that were excluded in the severance. I refer you to paragraphs 531 to 559 of our brief. Responding to the question of the Supreme Court regarding the Vietnamese and forced disappearances in Tram Kak. In our Appeal Brief, paragraph 547, we refer to paragraph 3352 of the Reasons for Decision, in which the Chamber recognized that the facts of forced disappearances of Vietnamese were a measure specific to the Vietnamese and were not included in Case 002/2 due to the severance. It was noted in footnote 1305 and the annex to the severance, which I also reference in our Appeal Brief.

I also refer you to our explanations in our Final Brief, 457/6/4/1 in paragraphs 1930 and 1931. So it's not a matter of a problem in interpretation of the severance order, the problem is when the Trial Chamber recognizes that it is not seized with certain facts, as do the Judges, which is the problem at the heart of our appeal. I also refer you to paragraph 538 to (unintelligible), on the Cham and displacement of populations, and in our Final Brief, E457/6/4/1 in paragraphs 1527 and 1569, which are on elements that were already part of Case 002/1. I also refer you to paragraph 43 of the severance order. And to reach a conclusion, I would like to state that in Case 002/2, the Chamber was seized only of facts of forced displacement due to religious persecution against the Cham.

[16.21.21]

So I shall close at this point with regret. I regret not having the time to develop everything in Khieu Samphan’s defense. shall see how I can manage to fit them in the next few days. Thank you.

THE PRESIDENT:

Next, I would like to invite the OCP to address the court, to make submission.

MS. WORSNOP:

Good afternoon, Mr. President, Your Honours, and parties. My name is Helen Worsnop.

[16.22.36]

Around a fifth of Appellant's grounds, that's 51 in total, Grounds 2, 38 to 84, 123 to 124, and 134, address the question of *saisine* in Case 002/2. That's to say which facts are within the scope of Case 002/2 and rights of determination by the Trial Chamber.

In our written response, at paragraphs 245 to 272, we set out the background law, jurisprudence, and principles with the aim of clarifying some of the conceptual or procedural issues relevant to these grounds. Today, I'll focus my submissions on why Appellant's arguments on each of the four types of *saisine* should fail.

By the four types of *saisine* grounds, I'm referring to appeal grounds Types 1, 2, 3, and 4, using the same definitions as those found in our written response.

As we progress through the *saisine* types we will move forward in

time through the procedural history of Case 002. Yet one thing remains constant, and that's Appellant's failure to accept that the Trial Chamber was seized by a valid Closing Order which it had the authority to interpret. The Trial Chamber had no obligation to go behind the Closing Order, and the onus was on the Appellant at all times to seek redress for any perceived procedural defect as soon as he was aware of it. Instead, he acquiesced in the scope of Case 002/2 almost without exception for nearly 10 years.

[16.24.28]

Starting at very beginning, with Type 1, the introductory submission grounds. This represents the majority of Appellant's *saisine* grounds, and I'll dedicate most of my time here.

I say at the very beginning, deliberately, as Type 1 grounds, that's Grounds 39 to 59, and 123, are those in which Appellant claims that certain facts are not within the scope of Case 002/2 because they were not within the Co-Prosecutor's introductory or supplementary submissions, and as a result, we stand here in 2021 debating an introductory submission that was filed in 2007. Our primary submission is that with the exception of Ground 41 concerning the deportation of the Vietnamese, these grounds were or are time-barred.

[16.25.25]

It's the Appellant's case that the Co-Investigating Judges should never have investigated these facts and should never have included them in their 2010 Closing Order. Yet, as we heard earlier from

defence counsel, neither Appellant nor any of these three co-accused in Case 2 appealed the scope of the Closing Order on this basis, with one single exception, and that's Ground 41. Despite having access to the case file since November 2007, Appellant never complained about the scope of the investigation, never issued any requests for annulments of any part of that investigation under Rule 76(2), and of course none of the explanations given today regarding the inability to appeal justify a failure to address these issues under the annulment mechanism. They said nothing after the Closing Order was issued and never raised this as a preliminary objection before the trial started, and never said a word when the Trial Chamber severance decision defined the scope of Case 002/02 to include these facts. Only when two Case 2 trials had been completed did Appellant finally most, and even then not all, of these issues in his trial brief on the 2nd of May 2017.

The Closing Order defines the scope of both the trial and the judgment. It's in everyone's interests, including the Accused's, to have the scope of the case defined before the trial begins. It might be tempting to look at the Type 1 appeal grounds and think that the overall shape of the case is the same, and so the impact of Appellant's tardiness is not particularly significant, and yet, to some extent Appellant's appeal has chipped at facts here and there.

[16.27.28]

But imagine if after the trial was over Appellant successfully argues that S-21 didn't fall within the scope of Case 002/2, or the facts giving rise to charges of forced marriage and rape. The ECCC would have spent valuable time on irrelevant segments and risked unnecessarily retraumatizing victims, all because the Appellant sat back and acquiesced in the trial about whose scope he had been on full notice since the Closing Order. The same principle holds.

[16.28.01]

In its Case 1 appeal judgments at footnote 74, this Chamber concurred with the conclusion of the ICTY Trial Chamber in *Milutinović* when it said that the requirements take preliminary objections before the start of trial existed. And I quote, "In order not to render moot, the monumental undertaking of an international criminal trial."

End of quote.

With very narrow exceptions, the Trial Chamber's role is to try the cases as being given, not to reopen the pre-trial phase and reanalyze every line of a valid Closing Order. The rules and jurisprudence are very clear on this. What happens pre-trial stays pre-trial.

Rule 79(1) mandates that the Trial Chamber is seized by the indictments. Rule 76(7) determines that the Closing Order cures all procedural defects in the investigation.

We differ from the Civil Parties slightly in that we take the view

that Rule 76(7) doesn't apply directly to Closing Orders themselves, they can't cure their own defects where the matter is not open to appeal, but it does represent the clear delineation between the pre-trial and trial phases of proceedings.

Now as you've heard today from defence counsel, there is the procedural quirk in the case that has been repeated again in Cases 3 and 4 that means that there were a few loose ends after the pre-trial stage, and that's the scope of pre-trial appeals.

[16.29.41]

As the Defence rightly points out, when a Type 1 issue was brought before the PTC on appeal in Case 2, that being the deportation question in Ground 41, the PTC declined to deal with it. It considered it an inadmissible challenge alleging a defect in the indictments and passed it forward to the Trial Chamber. So, whilst we agree that the PTC should have dealt with the scope at the pre-trial stage, it did not.

In theory at least, Appellant was deprived of his right to appeal and was entitled to raise issues before the Trial Chamber. I say in theory because the deportation issue was raised before the PTC by Ieng Sary and not the Appellant, who didn't take the issue on until the Trial Chamber expressly offered it to him in 2014. Appellant himself raised none of the Type 1 grounds at any form in the pre-trial stage.

[16.30.44]

But the Trial Chamber was right to find that this does not entitle

Appellant to raise the issue whenever he pleases. The preliminary objections mechanism in Rule 89(1) exists in the same spirit as Rule 76(7) to ensure that the scope of trial is clear before it begins. This Chamber confirmed that in the Case 1 appeal judgments at paragraph 28. And as we know, Rule 89(1) comes with an express 30 day time bar which expired in early 2011.

Appellant contends that this matter should not be considered time-barred under Rule 89(1) as the Trial Chamber found because the preliminary objections regime doesn't apply to the factual jurisdictional issues and so it was not available to him. He argues that it applies instead to legal jurisdictional issues.

And in speaking about legal jurisdictional issues, Appellant seems to be referring to what this Chamber called absolute jurisdiction when assessing the admissibility of a challenge to jurisdiction pursuant to Rule 89(1)(a) in Case 1. On the other hand, factual jurisdiction is a type of what this Chamber called procedural jurisdiction.

[16.32.02]

And so to review the difference, whether a matter falls within the subject matter or temporal jurisdiction of the ECCC, for example, are questions of absolute jurisdiction. Procedural jurisdiction refers to a Court's ability to exercise that power in a particular case in view of the implementation of all the applicable procedural roles.

Since Appellant is challenging the *saisine* of the Trial Chamber

based on alleged procedural defects in the investigation and Closing Order and not the jurisdiction of the ECCC itself, we submit that these are clearly procedural jurisdictional challenges, and I shall use this Chamber's terminology from this point on.

[16.32.48]

Appellant's position in his appeal is directly contradicted by the Supreme Court Chamber's jurisprudence. In Case 1, this Chamber made clear that both types of jurisdictional challenge fall within the Rule 89(1) procedural, sorry, preliminary objections regime; however, it explained that while the 30 day deadline does not apply to absolute jurisdictional challenges, it does apply to procedural jurisdictional challenges which must be raised within the Rule 89(1) time limit. If they are not, they are cured by the progression of proceedings.

And this is fully in line with what the French, sorry, fully in line with the French procedural law that this Chamber cited, and the rationale I talked about as to why matters at this time should be resolved before trial, and why failure to do so constitutes a waiver.

As such, the Trial Chamber was correct to consider all Type 1 grounds time-barred under Rule 89(1) with the exception of what is now Ground 41. For the same reasons, we submit that Ground 44, regarding accidental deaths at the 1st January Dam, which has been raised for the time on appeal, is inadmissible.

[16.34.08]

If this Chamber moves to consider Appellant's submissions on the merits, we submit that they must all fail in any case. Each of the facts challenged did fall within the scope of the Co-Prosecutor's introductory and supplementary submissions for the reasons we set out in our written response at paragraphs 281 to 305.

But I would like to address some matters of principle today. In an attempt to exclude facts from Case 002/2, Appellant adopts a narrow interpretation of the Co-Prosecutor's submissions that are simply not supported by either law or common sense. Rule 53(1) states that the Co-Prosecutors were obliged only to provide a summary of the facts and the legal characterization of alleged -- the alleged offences where they had reason to believe that crimes had been committed. It's illogical to expect the introductory submission, which is drafted after a preliminary investigation, to contain the same level of detail as the Closing Order drafted after a full judicial investigation. If it had to, the judicial investigation would be redundant.

[16.35.25]

Jurisprudence from the PTC and from France makes clear that the Co-Investigating Judges are not only allowed but obliged to investigate and issue a Closing Order in respect to all facts alleged by the Prosecutor in the Introductory or any Supplementary submissions, and the parameters of the investigation must be defined by looking at the submissions as a whole. This means that

the judges' obligations extend not only to the facts set out in the text of submission, as Appellant suggests, but to its footnotes and annexes, as the Trial Chamber correctly found. In this case, the Co-Prosecutors explicitly directed the judges to the attached schedules.

The jurisprudence shows that the obligation to investigate and pronounce also extends to circumstances surrounding the facts expressly stated in the submissions and to connected facts, such as causes and consequences. This is especially important when they are relevant to the legal characterizations put forward by the Co-Prosecutors.

[16.36.37]

So the facts that are explicitly set out in the submissions are not a straitjacket. An obligation for the Co-Investigating Judges go back to the Co-Prosecutors every time, for example, a work site death occurred through overwork rather than starvation, would be completely unworkable and contrary to the charged person's own rights to an expeditious investigation. Simply put, the judges are required to paint the full picture sketched out by the Prosecutors.

Your Honours requested focussed arguments on the Trial Chamber's jurisdiction to adjudicate facts in relation to enslavements at sites comprising Phnom Kraol. We understand this to be a reference to Appellant's Ground 48, which is a Type 1 ground.

[16.37.30]

The crux of the Appellant's argument is that the Co-Prosecutors only seized the judges with facts of forced labour at the K-11 site, and that the facts of forced labour in the Closing Order relating to K-17 and Phnom Kraol Prison are outside the scope of Case 002/2.

Appellant raised this issue for the first time in his May 2017 Trial Brief after the completion of Case 002/2, and the Trial Chamber correctly considered it time-barred under Rule 89(1). In any case, the Co-Prosecutors did seise the Co-Investigating Judges with forced labour at all three sites.

The introductory submission at paragraph 64 referred to Phnom Kraol Security Centre. As Appellant highlighted, the description and evidence referred to appears to relate to K-17. However, as the investigation proceeded it became clear that there were a number of connected sites run by Sector 105. The Co-Prosecutors issued a supplementary submission, that's D202, in September 2009 explaining this and referring to K-11, which the description makes clear also includes K-17, and Phnom Kraol Prison.

[16.38.51]

The evidence cited in the footnotes refers to all three sites and includes facts of forced labour at each. For example, in her WRI, Aum Mol describes working during her time at K-11. In the WRI of Chan Tauch, a former prisoner at K-17, he talks about being forced to work beating jute seeds. Similarly, Uong Dos describes being forced to labour while he was detailed at Phnom Kraol Prison.

Turning now to Type 2 grounds, the insufficient evidence grounds. Grounds 62 to 64 all relate to the Tram Kak cooperatives. In these, Appellant seeks to exclude facts for which he alleges there was insufficient evidence for indictments. Our position here is very straightforward. Appellant's Type 2 grounds were also time-barred pursuant to Rule 89(1) for broadly the same reasons as Type 1.

Appellant had all the information he needed when the Closing Order was issued, yet he failed to appeal the Closing Order or raise any preliminary objection under Rule 89(1) within the 30 day deadline. In any case, as we set out in paragraphs 310 to 314 of our response, the merits fail as Appellant simply hasn't demonstrated that there was insufficient evidence to reach the balance of probability standard of proof.

[16.40.28]

In Grounds 62 and 64, he compounds his erroneous Type 1 Ground 39 that the Co-Investigating Judges' *saisine* was limited to eight Tram Kak communes. That apart, Appellant reads the evidence in isolation and consistently ignores the contextual and corroborative evidence in the Closing Order.

Turning now to Type 3, the Closing Order interpretation grounds. These are Grounds 60, 65 to 81, 124 and 134. We continue to procedurally move forward through the case as these grounds concern the Trial Chamber's interpretation of the Closing Order. Appellant is claiming that the Trial Chamber made findings that

fell outside the scope of Case 002/2. Each ground turns on its own facts, and I refer Your Honours to our written response. However, I would like to reiterate two points of principle which both the Trial Chamber and this Chamber have previously emphasized.

First, the Trial Chamber is limited by the facts contained in the indictment, that it is for the Chamber to interpret the Closing Order. Where an Accused requires clarification of the *saisine* during the course of trial, the onus is on him to raise it as soon as he is aware of it.

[16.41.56]

Second, jurisprudence from every ECCC Chamber, as well as a wealth of jurisprudence from other international tribunals, confirm that an indictment must be read as a whole, considering each paragraph in the context of others.

I also briefly note that a number of Appellant's Type 3 grounds are either externally or internally contradictory. And to give you a couple of examples:

The first. Ground 65, which is a Type 3 ground, claims of the Closing Order does not seise the Trial Chamber with deaths other than those from starvation at the Tram Kak cooperatives. This is in direct conflict with Ground 40, which asserts that the Co-Investigating Judges exceeded their *saisine* by including in the Closing Order facts relating – I'm sorry, facts relating to deaths other than starvation.

[16.42.51]

In the same way, in both Ground 60, labelled by the Appellant as a Type 1 ground, and Ground 80, labelled as Type 3, Appellant argues that the Co-Investigating Judges erred in including facts relating to the treatment of Vietnamese in the Closing Order in violation of their *saisine*, just as he did in his closing brief. Yet at the same time, he alleges that the Trial Chamber erred in finding the same facts were included in the Closing Order.

Finally, Type 4, the severance grounds. These are Grounds 2, 82 to 84 where the Appellant primarily challenges the Trial Chamber's interpretation of its own severance decision and related annex which set out the scope of Case 002/2.

Here, we rely on our submissions in our written response which set out in detail how Appellant simply misreads the plain wording of the decision and annex and presents a narrower interpretation of the scope of Case 002/2 than those documents allow.

[16.44.02]

In Ground 83, Appellant incorrectly alleges that the Chamber was not seized of facts relating to the crime against humanity of other inhumane acts through forced transfers of the Cham during population movement two because he was already convicted of the same crime in 2/1. He completely ignores the express statements from the Trial Chamber in Case 002/1, that it would not make findings in that case concerning those factual allegations.

And finally, turning now to the Trial Chamber's use of what Appellant claims to be out of scope evidence. In Ground 3,

Appellant first claims that the Trial Chamber erred in relying on evidence outside the temporal or geographic scope of the Closing Order. First, to clarify a given context; second, to establish by inference the elements, in particular, the *mens rea* of criminal conduct occurring during the material scope. And third, to demonstrate a deliberate pattern of conduct.

[16.45.11]

We submit that this assertion of an error should be summarily dismissed as unsubstantiated. Appellant does not support his appeal submissions at all. In fact, he simply cross-refers to his closing brief in which he contradicted his current arguments. He described the principle that the Chamber is entitled to rely on these types of evidence as well-known and widely applied at the ECCC.

In any case, this principle has been accepted at the ICTY, the ICTR, the SCSL and the ICC, and I refer Your Honours to the references in our Response Brief in that regard.

For the rest, in Grounds 3, 112, and 180, Appellant alleges that a range of facts, such as facts relating to the Khmer Krom or Buddhists outside Tram Kak, are not within the scope of Case 002/2, and so the Trial Chamber erred in relying on evidence relating to those facts for any purpose.

Appellant errs in each assertion, making two fundamental mistakes of both law and logic. First, he confuses the scope of the crime base, that's the -- that's the facts for which the Trial Chamber

can enter convictions against him. For example, the forced labour at Phnom Kraol we discussed earlier. He confuses that with the scope of Case 002/2 in its entirety.

[16.46.40]

The scope of the case far exceeds the crime base and includes, among other things, facts that are required to prove the *chapeau* elements of the crimes or the charged modes of responsibility. For example, facts relating to JCE policies or Appellant's intent. So just because a fact is not part of the crime base scope doesn't mean that they're not within the scope of Case 002/2. This is expressly set out in the severance annex.

Second, as the Supreme Court Chamber has already explained in the Case 002/1 appeal judgement, and we submit is clear as a matter of common sense, evidence may relate to more than one fact. Appellant tries to tie evidence exclusively to certain facts and then claim that those facts are outside the scope of Case 002/2. But this ignores that evidence relating to facts outside the scope may legitimately be used to prove facts within the scope.

[16.47.42]

So the Trial Chamber did not err, and Appellant himself acknowledges the Chamber didn't enter convictions that exceeded the scope of the crime base, they simply used evidence for other legitimate purposes. For example, evidence of the treatment of Buddhists outside Tram Kak is relevant to establish CPK policy against the Buddhists with the purpose of proving JCE liability.

Evidence of cross border fighting between the CPK and Vietnamese forces was legitimately used to prove the existence of international armed conflict.

In the same way, it was lawful to rely on evidence of exchanges of Khmer Krom personnel to prove that crimes were committed against the Vietnamese and where the Khmer Krom were victims of enforced disappearances from the Tram Kak cooperatives which are within the scope of Case 002/2.

Unless Your Honours have any questions that concludes my submissions.

[16.49.10]

THE PRESIDENT:

The Bench does not have any questions at this stage.

And we are now concluding the proceeding for day one, and tomorrow we will recommence at 9:00 a.m.

Security personnel, please take the Accused back to the cell and bring him back tomorrow at the time specified in the Scheduling Order.

And the Chamber is now adjourned.

(Adjourns at 1650H)