



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

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

អង្គជំនុំជម្រះតុលាការកំពូល
Supreme Court Chamber
Chambre de la Cour suprême

ឯកសារដើម
ORIGINAL/ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ (Date): 24-Feb-2016, 12:40
CMS/CF0: Sann Rada

TRANSCRIPT OF APPEAL PROCEEDINGS

PUBLIC

Case File N° 002/19-09-2007-ECCC/SC

18 February 2016

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

The Accused: NUON Chea
KHIEU Samphan

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

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

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

For the Office of the Co-Prosecutors:
CHEA Leang
Nicholas KOUMJIAN
Dale LYSAK
SENG Bunkheang
SENG Leang
William SMITH
SREA Rattanak

For Court Management Section:
UCH Arun

List of Speakers:

Language used unless specified otherwise in the transcript

Speaker	Language
Ms. CHEA Leang	Khmer
The GREFFIER	Khmer
Ms. GUISSÉ	French
Judge JAYASINGHE	English
Mr. KHIEU Samphan	Khmer
Judge KLONOWIECKA-MILART	English
Mr. KONG Sam Onn	Khmer
The President (KONG Srim)	Khmer
Mr. KOUMJIAN	English
Mr. LYSAK	English
Judge MONG Monichariya	Khmer
Judge YA Narin	Khmer

1

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

2 (Court opens at 0905H)

3 MR. PRESIDENT:

4 Please be seated. This is the third day of the appeal hearing.

5 Greffier, could you report on the attendance of the parties to
6 the proceedings?

7 THE GREFFIER:

8 Good morning, Mr. President, Your Honours. Good morning, everyone
9 in and around the courtroom.

10 All parties to the proceedings are present. For the Prosecution,
11 we have Madam Chea Leang and Mr. Nicolas Koumjian. The two
12 accused, Nuon Chea and Khieu Samphan, attended the proceedings.
13 However, Nuon Chea requests to waive his rights to be present in
14 the courtroom.

15 And we have Son Arun, the National Counsel for Nuon Chea, and the
16 International Counsel is absent, that is, Victor Koppe.

17 And for Khieu Samphan, we have Mr. Kong Sam Onn and Madam Anta
18 Guisse.

19 [09.07.01]

20 For the Co-Prosecutors -- for the Lead Co-Lawyers, we have Pich
21 Ang and Marie Guiraud.

22 We have 13 civil parties who are present, including Madam Huot
23 Phalla (phonetic), Mr. Khoem Naret, Madam Sou Sotheavy, Mr. Chau
24 Ny, Madam Pok Sa Em, Madam Pech Srey Phal, Madam Chheum Kong, Mr.
25 Yos Phal, Madam Long Yorn, Mr. Phon Sophat, Mr. Sang Rath, Madam

2

1 Seng Sivutha, and Mr. Im Bun Chhoeun.

2 Thank you.

3 [09.07.53]

4 MR. PRESIDENT:

5 This morning, the Accused, Nuon Chea, waived his rights to be
6 present in the courtroom, and the waiver is attached with a
7 medical certificate by the duty doctor, the reason the Chamber
8 grants Nuon Chea to -- his request to follow the proceedings
9 remotely from the holding cell downstairs.

10 I instruct the AV Unit personnel to link the proceedings to the
11 room downstairs so that the accused can follow.

12 The Chamber would also like to inform the parties that yesterday
13 we adjourned the proceedings on the fourth thematic session, that
14 is, on the Accused's individual criminal responsibility. However,
15 we actually skipped a session where questions had to be put by
16 the Chamber, and this morning, if the Defence Counsel and the
17 Co-Prosecutors wish to make further submission on this thematic
18 session, you may have the floor.

19 [09.09.28]

20 As for the questions put to the Co--Prosecutors -- put to the
21 Co-Prosecutor by the Bench, the floor is also given to you to
22 make your response to those questions.

23 MR. KOUMJIAN:

24 Thank you, Your Honours. We do have some brief comments to make
25 in regards particularly to the question that Judge Milart posed

3

1 to us by email. We'd like to expand upon our answer to that.

2 But just before I forget, I just wanted to add one brief remark
3 regarding the Defence submission that the evidence was
4 insufficient to show that the zone armies were under the control
5 of the Centre.

6 [09.10.23]

7 I think one of the pieces of evidence that absolutely and clearly
8 shows that these zone armies -- one of many pieces of evidence
9 that these own -- zone armies were under the control of the
10 Centre is the undisputed fact that, after the April '75 victory,
11 the Centre took units, divisions and the other units from each of
12 the zones to form a central army.

13 If these were independent militias, they wouldn't voluntarily
14 comply with an order to give their troops over to the Centre
15 army, so this is just another one of many, many facts that show
16 indisputably that this was a hierarchical military force
17 controlled by the Centre, controlled as the DK Constitution
18 provides by the Party.

19 Going back to the question that was posed by email regarding
20 whether it's necessary for the Judgment to have found individual
21 murders beyond a reasonable doubt--

22 JUDGE KLONOWIECKA-MILART:

23 Mr. Prosecutor, maybe the public could benefit from you reading
24 the question in full, that one that was posed on email, because
25 it's not necessarily the same.

4

1 On email, I was asking which murders, according to the
2 Prosecution, have been proven beyond a reasonable doubt, in
3 particular with reference to pieces of evidence on file -- I mean
4 relied on by the Trial Chamber. Thank you.

5 So as for the standard--

6 [09.12.03]

7 MR. KOUMJIAN:

8 I'm looking for the email.

9 JUDGE KLONOWIECKA-MILART:

10 --we were satisfied that you answered in full, but in regards to
11 this email question, we were interested to know which pieces of
12 evidence you consider particularly persuasive.

13 MR. KOUMJIAN:

14 Thank you. We planned to do that, but if I could, I would also
15 like to expand upon our view of why it would be correct for the
16 Trial Chamber not to have entered findings regarding individual
17 murders beyond a reasonable doubt.

18 [09.12.37]

19 Certainly there were findings about murders, but again, our
20 position is that it's necessary to make a finding whenever an
21 incident is charged separately under a legal characterization, to
22 make that finding beyond a reasonable doubt.

23 So in this case, for example, the Trial Chamber made findings
24 about killings during the first forced transfer and this -- and
25 killings by the conditions that were imposed upon people during

5

1 the second forced transfer and also killings at Tuol Po Chrey.
2 I would point out that, actually, the Chamber did not impose any
3 murder conviction in this case because they found, in the end,
4 that the murder charge was subsumed by the extermination. They
5 found, I believe correctly, that extermination includes all of
6 the elements of murder plus the additional element of killing on
7 a large scale. Therefore, they declined to enter the convictions.
8 It was subsumed under extermination.

9 [09.13.51]

10 But if I could briefly review a few other authorities on that,
11 that I didn't get to yesterday.

12 In the -- and for the interpreters, these are in my notes on
13 Question 3, so if I -- I know that they're going to have some
14 trouble with some of the names or my pronunciation of the Rwandan
15 cases.

16 In the appeal judgment in Ntakirutimana, the appeals chamber said
17 that it agreed that customary international law does not require
18 a precise description or designation by name of victims to be an
19 element of extermination.

20 In Rukundo appeal judgment at paragraphs 187 and 189, they held
21 that -- the same appeals chamber held that it's sufficient that
22 the trial chamber -- quote, "had a reasonable basis for
23 concluding that killing on large scale occurred".

24 [09.15.09]

25 Even when no evidence was adduced before the Chamber regarding

6

1 the specific number of deaths, in light of the general context of
2 systematic targeting and killing of Tutsis in the city and the
3 overwhelming evidence of abductions and killings of Tutsis in a
4 nearby city, they upheld that finding that conviction for
5 exterminations in paragraph 190 and 191.

6 Counsel mentioned Stakic. In the trial judgment in Stakic, the
7 Court found simply that it can -- that the number of deaths total
8 can never accurately be calculated. In paragraph 654, they said
9 that they simply found that, on a conservative estimate, more
10 than 1,500 persons were killed.

11 And I think that there's very interesting language in Gacumbitsi
12 appeal judgment, paragraph 89.

13 In that case, the prosecution had pled in some detail the
14 killings. The appellant argued that the trial chamber should not
15 have convicted him of extermination because the prosecution had
16 failed to prove that the individuals specifically mentioned in
17 paragraph 28 of the indictment were killed at this parish.

18 The appeals chamber said it disagreed. Such a showing was not
19 required for an extermination holding.

20 [09.16.45]

21 So it's our position that the Trial Chamber was not required to
22 make findings beyond an individual -- on an individual basis for
23 each killing. Instead, they did what they were supposed to do,
24 look at the elements of murder or exterminations based on the
25 totality of the evidence for each incident and make a finding

7

1 beyond a reasonable doubt that that element was met.

2 Now, I'm going to ask my colleague, Mr. Lysak, to address some of
3 the evidence that we submit shows the power of the evidence that
4 was presented and its capability to support, even individually,
5 convictions of murder beyond a reasonable doubt.

6 (Short pause)

7 [09.17.55]

8 MR. LYSAK:

9 Good morning, Your Honours. As I set up here, I have a number of
10 instances where evidence was heard of killings relating to the
11 evacuations in response to your question, Judge Milart.

12 And the first one came from a witness -- pardon me.

13 We heard Yim Sovann in this trial testify in Court on the 19th of
14 October 2012. This is a witness who was evacuated from Phnom
15 Penh.

16 He describes, and this is at 14.20 and 14.27 of his testimony on
17 the 19th of October 2012, how he witnessed a car on the road that
18 apparently had run out of gas, and people were pushing it. And
19 the Khmer Rouge soldiers were not happy with this. They removed
20 the driver from the vehicle and shot him to death.

21 The same individual, Yim Sovann, also witnessed killings of a
22 group of civilians who had locked the door to their house in
23 Phnom Penh. And when the Khmer Rouge soldiers arrived, they shot
24 the lock, took them out and shot these people. This is in his
25 testimony, same day, at 14.16.

8

1 There are accounts -- probative accounts from other -- others of
2 similar experiences where people who refused to leave were
3 executed. These come, though, from people who submitted
4 complaints, written interviews or civil party applications.

5 [09.20.14]

6 These -- there are 48 accounts, Your Honour, that were relied
7 upon by the Trial Chamber of civilians who were killed during the
8 first -- first evacuation, the evacuation of Phnom Penh.
9 Forty-eight accounts, 32 of which were direct eyewitness
10 accounts, 11 which were given via live testimony, the others
11 through corroborative documents, civil party applications, OCIJ
12 interviews or contemporaneous documents. And these 48 accounts
13 are, for your reference, described in detail in paragraphs 145 to
14 148 of our appeal response.

15 The other -- in relation to the killings of civilians in the
16 first evacuation, the other I would like to point out to you, to
17 Your Honours, civil party Cheng Eng Ly testified about crossing
18 the Monivong Bridge while being forced out of Phnom Penh and
19 witnessed a dead woman on the road whose baby was still alive on
20 top of her. This is what she said, and this is on the 29th of May
21 2013 in this courtroom at 15.32 to 15.34, quote:

22 [09.21.50]

23 "When we were leaving Phnom Penh and we were travelling along
24 National Road Number 1, crossing Monivong Bridge, I saw a crying
25 baby. He was actually crawling over the dead body of his mum. I

9

1 wanted to carry that baby. I wanted to take the baby, but all of
2 a sudden, the soldier carried the baby. They just tore the baby
3 apart. It was a very horrifying scene. I could not imagine any
4 human being who would do that." End of quote.

5 Your Honour, an example where we believe evidence was proved of
6 civilians, people who died because of the conditions -- directly
7 as a result of the conditions of the evacuation.

8 This was Pech Srey Phal who testified in this courtroom on the
9 5th of December 2012, and she testified about the death of her
10 baby during the evacuation. This is at E1/148.1, testimony from
11 10.01 to 10.06 in the morning of the 5th of December 2012 --
12 quote:

13 [09.23.32]

14 "While en route during the evacuation, the Khmer Rouge soldiers
15 did not give us any food, water or sheltered. We left without
16 bringing sufficient food or belongings with us. We used tree
17 leaves to cover the ground and we slept on it, and the food that
18 we brought with us was for a three-day period, and was almost
19 gone.

20 During that period of time, I had a relapse after my baby
21 delivery. I had no breast milk to feed my young baby, and I did
22 not have medicine and I did not have milk. I could only afford
23 water to feed my baby. Unfortunately, my baby died during that
24 evacuation and I did not even know what to do with my dead baby.
25 I was instructed to bury my baby in the forest. It was like an

10

1 animal." End of quote.

2 Your Honours, understand the law. We've already discussed the law
3 from Celebici and cases that wrongdoers take the victims as they
4 find them.

5 [09.24.55]

6 Your Honours are aware of the circumstances of the evacuation
7 where people were ordered to leave -- told they were only leaving
8 for three days and, therefore, left without food, without
9 sufficient resources, and no help was provided to them by the
10 Khmer Rouge.

11 This same person, Pech Srey Phal, also provided another important
12 evidence of killings, deaths that results during the evacuation,
13 and that is specifically seeing people who had been taken out of
14 hospitals who died in the process and were on the roadside. And
15 this is in her testimony again on the 5th of December 2012, from
16 9.49 in the morning to 9.53. She said, quote:

17 "During the course of my trip, I saw a lot of people on the road
18 and people were marching, walking from the Russian hospital. I
19 could see that some people, in particular patients, were pushed
20 on the hospital beds when the IV fluid was still attached to some
21 of them.

22 When we were leaving and by the time we got to Stueng Mean Chey,
23 we saw some dead people on hospital beds. These people seriously
24 sick and because of such situation, they couldn't make it, and
25 the dead bodies were left unattended."

11

1 Your Honours, when you force patients to leave a hospital, no
2 matter how sick, and to travel by foot into the countryside, you
3 know that many of these people are going to die.

4 This is what a British journalist, Jon Swain, who was there in
5 Phnom Penh at this time, wrote in his contemporary journal when
6 he saw this very scene at 7 a.m. in the morning on the 18th of
7 April 1975. This is document E3/51. Let me give you some ERN
8 references. English S00003279, Khmer S00644713, French 00597837
9 to 38. This is what Jon Swain wrote when he saw this scene,
10 quote:

11 [09.27.45]

12 "The Khmer Rouge army was emptying the city and its hospitals,
13 tipping out patients like garbage into the streets. Bandaged men
14 and women hobbled by the Embassy. Wives pushed wounded soldier
15 husbands on hospital beds on wheels, some with serum drips still
16 attached. In five years of war, this is the greatest caravan of
17 human misery I have seen.

18 The Khmer Rouge must know that few of the 20,000 wounded will
19 survive. One can only conclude they have no humanitarian
20 instincts. The entire city is being emptied of its people, the
21 old, the sick, the infirm, the hungry, the orphans, without
22 exception." End of quote.

23 [09.28.43]

24 And in response to your question, Judge Milart, I want to give
25 two or three specific examples of Lon Nol officials, top Lon Nol

12

1 officials, whose killing was proved -- certainly proved beyond a
2 reasonable doubt. And I speak of Long Boret, Lon Non, brothers of
3 Lon Nol. Long Boret was, of course, the Prime Minister. And Sirik
4 Matak, who was the Deputy Prime Minister.

5 The killings of these people, of course, are of particular
6 importance to why we are here today because, on the 26th of
7 February 1975, a statement was broadcast on the radio by Khieu
8 Samphan. This is document -- it is recorded in document E3/117.
9 And the statement from Khieu Samphan broadcast that day stated:
10 "Concerning the seven traitors in Phnom Penh, the National
11 Congress has decided as follows. Traitors Lon Nol, Sirik Matak,
12 Son Ngoch Thanh, Cheng Heng, In Tam, Long Boret and Sosthène
13 Fernandez are the chieftains of the traitors and ringleaders of
14 the treacherous anti-national coup d'état which overthrew the
15 independence, peace and neutrality of Cambodia. On behalf of the
16 FUNK, GRUNK and CPNLAF, the National Congress declares it
17 absolutely necessary to kill these seven traitors for their
18 treason against the nation."

19 [09.30.56]

20 We heard Khieu Samphan's counsel the other day say there was no
21 evidence of Khieu Samphan's intent to kill anyone. Well, you
22 could not have more clear evidence of intent to kill than an
23 announcement broadcast on the radio repeatedly calling for the
24 killing of the top leaders of the Lon Nol regime. You cannot have
25 stronger evidence of intent than that.

13

1 And we heard testimony in this trial about what happened to these
2 individuals, the two specific of the seven super-traitors who
3 remained in the country, Long Boret and Sirik Matak.

4 We heard testimony from Al Rockoff, from Sidney Schanberg and
5 some others. And there are actually -- there are numerous
6 contemporaneous documents as well that establish exactly what
7 happened to these individuals.

8 [09.32.05]

9 Let me briefly take you through it so you have some sense of the
10 proof.

11 In the case of Long Boret, on the day of 17 April, there was a
12 radio broadcast calling for the officials of the Lon Nol regime
13 to surrender themselves at the Ministry of Information. The radio
14 broadcast specifically also indicated that both the troops --
15 both leaders from the North Zone and East Zone militaries were to
16 -- were to be -- report to that location.

17 Both Al Rockoff and Sidney Schanberg went there about 4 o'clock
18 in the afternoon, and they testified that there were about 50
19 people -- 50 prisoners who had been gathered at that point,
20 including Lon Non, Lon Nol's younger brother, and several
21 Generals. Sidney Schanberg identified one of them specifically,
22 Brigadier-General Chhim Choun.

23 You'll find the testimony of Schanberg and Rockoff -- Rockoff's
24 testimony on the 28th of January 2013, E1/165.1 from 11.29 in the
25 morning to 11.57. Sidney Schanberg who, as you know, was the New

14

1 York Times reporter who was in Cambodia at the time covering the
2 war, the 5th of June 2013 at 10.50 in the morning to 11.02 is
3 where they describe the scene at the Ministry of Information.
4 [09.33.59]

5 And they were both present when Long Boret, one of the seven
6 traitors, arrived there and was arrested by the Khmer Rouge
7 military.

8 You'll also find in Sidney Schanberg's testimony and also in the
9 contemporaneous diary of Jon Swain that I've mentioned earlier,
10 an interesting account when they confronted the person who
11 appeared to be the leader of the Khmer Rouge military to find out
12 what was going to happen to these people. And the response was
13 very significant.

14 It was, "The political leaders are coming here in a few days, and
15 they will decide what to do with these people."
16 [09.34.55]

17 These were not revenge killings. This was organized. These were
18 people in radio -- who had radios, who were in contact with the
19 leaders. The evidence on this is very clear.

20 Sirik Matak, the other super-traitor who remained in Phnom Penh,
21 managed to make it to the French Embassy. He was there. Several
22 other of the top Lon Nol officials were there, too, including the
23 President of the National Assembly, Ung Bun Hor, and 55
24 representatives of a group called FULRO. Some of you may know
25 what FULRO was.

15

1 FULRO was an organization of ethnic minorities who had fought
2 from the mountainous region on the border of Cambodia and Vietnam
3 who had fought against both the Vietnamese Communists and Khmer
4 Rouge. Their leader was the former governor of Ratanakiri
5 province. He was also there at the Embassy. And they had sought
6 asylum.

7 And again, we have both testimony from Al Rockoff and Sidney
8 Schanberg, who were there at the Embassy, and we have numerous
9 documents from the French Consul who was there at the Embassy,
10 who was sending reports to his country on what was taking place,
11 that document exactly what happened in that period.

12 [09.36.40]

13 Let me just give you relevant -- starting with the relevant
14 documents that were sent by the French Consul, E3/96 -- strike
15 that, E3/2694, E3/2702, E3/2700, E3/2706.

16 These document the procession of events when these people who
17 were seeking Embassy had to be turned over because of threats by
18 the Khmer Rouge forces that they would otherwise storm the
19 Embassy. And there are detailed accounts of Sirik Matak leaving
20 the Embassy and being taken into custody by the Khmer Rouge
21 forces. Not renegade forces; people who were the official
22 representatives of the Khmer Rouge in the city who were actually
23 called the city committee.

24 And finally, we know what happened to these people. We have it --
25 admissions and announcements that were made.

16

1 [09.38.11]

2 Ieng Sary, in November, early November 1975, was in Bangkok for
3 meetings with leaders there, and he held a press conference. And
4 at that press conference, he announced that Long Boret, Sirik
5 Matak and Lon Non had been executed. The Bangkok Post article
6 where you will find this is E3/604.

7 There were numerous other press reports of the same conference
8 and statements by Ieng Sary, including one from the Washington
9 Post.

10 So an announcement by the government that these people who Khieu
11 Samphan had called for the execution had, in fact, been killed.

12 Both of the accused in this trial have made statements in the
13 past showing their knowledge of this also. Khieu Samphan, in an
14 interview in September 1976, which is document E3/608, stated in
15 that interview, I quote:

16 "Those traitors who remained in Democratic Kampuchea have been
17 executed."

18 Nuon Chea, in his interview by Thet Sambath that is on videotape
19 in evidence, E3/4001R, E3/4001R, at -- it's the video called "One
20 Day at Po Chrey" at 22.07 to 22.11, in response to questions from
21 Thet Sambath confirms that the top leaders of the Lon Nol regime
22 were liquidated.

23 We believe, Your Honours, this is proof beyond any reasonable
24 doubt of the killings of the very top leaders of the Lon Nol
25 regime, killings that are directly connected to both accused in

17

1 this case.

2 (Short pause)

3 [09.41.00]

4 JUDGE KLONOWIECKA-MILART:

5 Just a moment, Counsel. Sorry. We are seeking the relevant parts
6 of the trial judgment -- it's not that we are not listening to
7 you -- to see if, indeed, the Trial Chamber relied and to what
8 findings on these pieces of evidence.

9 It is -- it is -- like -- my impression that the Trial Chamber
10 says in a footnote in its discussion of the policies that it was
11 subsequently reported that these officials were executed, but if
12 you can point me to a more precise finding of the Trial Chamber.

13 [09.41.50]

14 MR. LYSAK:

15 I do have some notes on that, Your Honour. I'll tell you they
16 were prepared for me, so I don't know which part of ---

17 JUDGE KLONOWIECKA-MILART:

18 It's not urgent. We will look for them anyways.

19 MR. LYSAK:

20 Okay. But I do have -- I didn't understand you wanted me to cite
21 the judgment findings, but -- okay.

22 JUDGE KLONOWIECKA-MILART:

23 Because it was my understanding that the officials are being
24 addressed in Case 02.

25 Anyway, as far as I'm -- sorry.

18

1 MR. LYSAK:

2 That is not correct, Your Honour. We heard the killings of these
3 top Lon Nol officials who were taken in as part of the evacuation
4 of Phnom Penh was very much part of the first trial, and I will
5 get -- I have references here to paragraph 503 of the judgment
6 which I think has to do with the top officers.

7 [09.42.48]

8 JUDGE KLONOWIECKA-MILART:

9 This is the one that I'm looking at.

10 MR. LYSAK:

11 Yes. And then I have a number of others. But I know this evidence
12 is discussed at various parts of the judgment. So I'm happy to do
13 some searches.

14 JUDGE KLONOWIECKA-MILART:

15 We'll search it anyway. Thank you very much.

16 [09.43.11]

17 MS. GUISSÉ:

18 Good morning, and thank you, Mr. President.

19 Since you have invited the parties to respond and to make
20 submissions in relation to the questions asked by Honourable
21 Judge Milart yesterday, I would like to seize this opportunity,
22 first of all, since yesterday, we were talking about the
23 responsibility of Mr. Khieu Samphan and since I have been telling
24 you since yesterday about the link, the nexus, between the crimes
25 referred to and Mr. Khieu Samphan himself as regards the decision

19

1 on evacuation, I would like to reiterate what I stated and
2 provide more precise information on what I think.

3 I cannot say that the pleadings of the Co-Prosecutors are nothing
4 but rhetoric. I cannot but say so because, in any case, we are
5 appearing before you after a closing brief at first instance and
6 after the pleadings before the Trial Chamber and after the
7 appeals brief, which are very circumstantial, which you have
8 read. And it is not in a few minutes when we talk on the general
9 approach of evidence that we can give you very precise remarks
10 here. But since that point was dealt with yesterday by the Deputy
11 Co-Prosecutor, I would like to talk about the evacuation decision
12 again and about the basis for the Chamber's findings.

13 [09.45.02]

14 First of all, as regards the particular and extraordinary
15 credibility that the Deputy Co-Prosecutor mentioned yesterday
16 with regard to witness Phy Phuon, alias Rochoem Ton, as I invited
17 you to do yesterday as well and to truly go and see the video
18 footage because when you look at the transcripts, it is not very
19 easy to grasp the atmosphere and the reaction of the witnesses,
20 so you need to see the video footage.

21 But as regards the statements of the witness in question,
22 contrary to what the Co-Prosecutors have said, we have not
23 engaged in a rhetorical exercise. We have looked at the final --
24 the closing arguments to see the difficulties that arose during
25 those proceedings.

20

1 [09.45.59]

2 The -- we should note that the Chamber, in its judgment, is
3 mixing up two meetings and converting those two meetings into one
4 meeting, whereas that witness talked of two meetings. The first
5 meeting was in June 1974, during which the witness said -- and
6 I'm not the one saying it -- that the issue of evacuations was
7 not addressed. And he then talks of a second meeting, the famous
8 meeting held in February 1975 at B-5, and he says that, on that
9 occasion, the issue of evacuations was addressed, and not in
10 detail. And it's at document E295/6/4, paragraph 21. That is a
11 Trial Chamber decision, which means that the Trial Chamber was
12 particularly informed of this evidence.

13 When he was asked is it possible that the evacuation of Phnom
14 Penh had already been discussed during the first meeting in 1974,
15 the answer he gave on 30 of June 2010, at about 13.38.10, "I do
16 not think it was the subject of discussion", he says.

17 And this is what he says again. This time, it's at 31st of July
18 2012, document E1/99.1, at 9.43.40:

19 "I heard only on one occasion at B-5 that they talked about it. I
20 do not have any other details on this subject." End of quote.

21 [09.47.50]

22 And when he talks of the second meeting April 1975, with regard
23 to the participants at that meeting, and he says that Khieu
24 Samphan attended that meeting, and this is what the witness said:
25 "They talked of the evacuation of the town, but did not give any

1 details at that meeting."

2 And here, we are on the 30th of June 2012, document E1/98.1, and
3 it is about 15.22.41.

4 Why are these statements important, aside from the fact that the
5 Chamber mixed up the two meetings because it suited the Chamber.

6 We should say that as of 1974, Khieu Samphan attended major
7 meetings and took part in these decision-making sessions.

8 Why did they talk of the evacuation of Phnom Penh as atrocious
9 things happened then? Phy Phuon says they do not talk about
10 details of the evacuation, which means that they do not talk of
11 the conditions at the time.

12 [09.49.01]

13 Even if Khieu Samphan had been present, which is not established
14 -- even if he was present, we do not receive any details at that
15 meeting as to how the evacuation unfolded.

16 That doesn't mean that, at the time, he knew that they were going
17 to take people out of hospitals and so on and so forth. There are
18 no details provided.

19 This is a key witness of the Prosecution who says so himself, and
20 this brings me to a second point.

21 Why, again, does the Trial Chamber talk of the recurrent pattern
22 of conduct and of evacuations that took place before that of
23 April 1975? Because it needs to establish this recurrent pattern
24 of conduct and which would make them say that they knew that
25 Khieu Samphan was aware of the manner in which the evacuations

1 were carried out.

2 And the Chamber and the Co-Prosecutors forget one key fact
3 because when you talk of evacuations prior to 1975, we are
4 confirming it as a reality, which is not the case. We are in a
5 situation where there's fighting between Lon Nol's army and the
6 FUNK and GRUNK armies. It is not the same situation.

7 And when we are told that he should have known because there had
8 been evacuations before, let me remind you of the evidence on
9 record. And I refer you, for instance, to the examination of a
10 certain Ny Kan, at the hearing of the 20th of May 2012, at
11 10.21.20 who says, "The population was evacuated because of the
12 war."

13 [09.50.51]

14 I'm not the one saying this. It's the witness saying it.

15 Meas Voeun, on the 3rd of October 2012, before 3 p.m., this is
16 what he states precisely. He says that:

17 "At that point in time, only Khmer Rouge and Lon Nol soldiers
18 were there, and fighting with one another."

19 He says earlier that on the battlefield, along National Road 5,
20 people were fleeing to the liberated zone. People didn't stay
21 close to that National Road. Only Lon Nol and Khmer Rouge troops
22 were there, fighting with one another. That is at the hearing of
23 the 3rd of October 2012, somewhat before 15.45.

24 [09.51.42]

25 So we have a conflict between Khmer Rouge and Lon Nol's armies,

1 and we are talking about a situation that happened before 1975,
2 so we have a problem here.

3 At the same time you are talking of a speech by Khieu Samphan at
4 the time when they are going to have the offensive of Phnom Penh,
5 and I heard yesterday on several occasions the Co-Prosecutor --
6 the International Co-Prosecutor say that, yes, it appears that
7 even Khieu Samphan appears to have added names to the list of
8 traitors. Why?

9 These are the traitors who staged a coup d'état in 1970 against
10 the Sihanouk regime. Sihanouk was the leader of the FUNK and the
11 GRUNK, and that is the only person who talked about other names
12 apart of those traitors, was the late King Sihanouk himself. And
13 I refer you to document E3/120.

14 Contrary to what the Co-Prosecutor said, it's not Mr. Khieu
15 Samphan who talked of other traitors. He only referred to Mr.
16 Khieu Samphan in that so-called speech delivered on behalf of the
17 FUNK and the GRUNK. And at the time, it was, indeed, the King,
18 Prince Norodom Sihanouk, who was the head of the GRUNK and the
19 FUNK.

20 [09.52.58]

21 Let us look at document E3/120. He's the one who refers to
22 traitors on several occasions because these are the traitors who
23 staged a coup d'état against him and forced him to go into exile.
24 That is the context we are dealing with when Mr. Khieu Samphan
25 delivers that speech.

24

1 And here again, the Co-Prosecutors are not telling the truth
2 because they talk about people on the side of Lon Nol who came to
3 join the ranks of the GRUNK and the FUNK. And it's -- you can
4 engage in sabotage. You can join the movement. We are soon going
5 -- reaching the end.

6 They are not saying that they'll kill everyone. He is not saying
7 that they'll kill everyone. He talked of those traitors as part
8 of a regime that staged a coup d'état against Prince Norodom
9 Sihanouk, who was the FUNK leader. That is the context in which
10 he made those statements.

11 [09.53.49]

12 To take those elements out of the context and say that this is
13 the germ of the intent to -- to commit a criminal offence on the
14 part of Mr. Khieu Samphan and, a few months later, there were -
15 led this to the atrocities at Tuol Po Chrey, whereas the Chamber
16 knew that he wasn't there at the time, I say that there is a
17 serious derogation from the law. And it's a serious violation of
18 the rights of Mr. Khieu Samphan.

19 You cannot use such factual elements to reach a finding of guilt.
20 Let us remember that we are dealing with a situation before 1975,
21 and it is an armed conflict we are talking about.

22 There is an evacuation. People are fleeing the fighting. There is
23 war raging. And yesterday, we were presented with a speech by Mr.
24 Khieu Samphan after the victory of the GRUNK when the troops of
25 the FUNK and the GRUNK had won the battle, a very important

25

1 battle. And in this context, you are stating that he shouldn't
2 have rejoiced.

3 Explain to me in which armed conflict you do not say that we have
4 won the war and we are happy to have won against the enemy camp.

5 [09.55.02]

6 So it is sad, it is terrible. During the war, people die,
7 unfortunately, but the enemy during the war is the person in the
8 opposing camp. It is the person who is a soldier and who is a
9 member of an armed force, and this is the context in which Mr.
10 Khieu Samphan delivered that speech.

11 And to use this speech to say that he subsequently supported a
12 policy against the enemy after the armed conflict is an egregious
13 error, and this is a point that we must take into consideration.

14 Another remark as regards -- of course, I talked of Phy Phuon on
15 the issue of evacuations.

16 Since the Co-Prosecutor yesterday referred to other evidence that
17 may have been relied on by the Trial Chamber to corroborate its
18 findings, and that is the term used by the Chamber, to
19 corroborate the statement of Phy Phuon, let us remember that Phy
20 Phuon talked of two meetings.

21 The first meeting was in June 1974, and they do not talk about
22 the evacuations. But we are told that the Chamber also used the
23 statements of Nuon Chea.

24 [09.56.20]

25 Nuon Chea spoke on several occasions. He never said that Khieu

1 Samphan was present at any meeting during which the evacuation
2 was discussed or decision to evacuate was taken. I refer you to
3 paragraph 274 of our appeal brief.

4 Furthermore, when I presented the manner in which the Chamber
5 distorts evidence, you do not have to agree with me on the fact
6 that the Chamber may have been right. I am using the element that
7 the Chamber relied on and telling you what the Chamber said
8 regarding that evidence, paragraph 280. Let me remind you of what
9 the Chamber said.

10 They said that they considered that it's very probable that the
11 date of the meeting in June 1974 was set to enable Ieng Sary and
12 Khieu Samphan to attend them and to present to the Central
13 Committee very fruitful results of the meeting with senior
14 officials of the Chinese government and relying on this assertion
15 and the probability because the Chamber wasn't sure there is no
16 specific date on which Khieu Samphan is supposed to have returned
17 to attend that meeting, Khieu Samphan and Ieng Sary.

18 [09.57.35]

19 They used Suong Sikoeun, who do not say that Ieng Sary and Khieu
20 Samphan attended the meeting; paragraph 276 of our appeal brief.

21 Suong Sikoeun said that, at a point we were at the Centre and we
22 saw them leaving for Vietnam. Does he remember the date on which
23 they returned to Cambodia? Absolutely not.

24 Does he tell us what they were able to do at that time? Not at
25 all. But the Chamber extrapolates on this and claims that this is

1 for corroboration purposes.

2 Ieng Sary, who was quoted yesterday by the Co-Prosecutors, said
3 the following -- the Chamber relies on the statements of Ieng
4 Sary to reach the following findings, and that is paragraph 217
5 of our appeal brief.

6 [09.58.27]

7 They say that he is convinced that such discussion, indeed, took
8 place sometime after the meeting in question, and during those
9 meetings, what evidence does -- does the Chamber rely on to say
10 that the discussion took place at that time. Nothing.

11 What is said, and I refer you to the footnotes 657 in the
12 interview with Ieng Sary with Heder, and Ieng Sary refers to his
13 meeting with Pol Pot and says that nothing precisely had been
14 decided in 1974.

15 And when Mr. Ieng Sary talks of his discussion with Pol Pot, he
16 doesn't say that the decision was taken. This is, by the way,
17 what he states in his discussion with Pol Pot, "I responded that
18 to evacuate everyone, and how." And he's saying -- he's talking
19 about Pol Pot.

20 Let us look at the situation in practical terms. And his answer
21 was that we should wait and see how things work out in practical
22 terms.

23 And then Ieng Sary says, on page 6, "I did not attend any
24 decision at which a decision was taken."

25 This the evidence the Chamber relies on to say that a decision

28

1 was taken during the meeting, and even in the course of that
2 meeting, that is what Ieng Sary says.

3 [09.59.49]

4 Then -- and I'd like to refer to our developments in our appeal
5 brief, but when we speak about the use of the evidence, the
6 Chamber relied on evidence that they feel corroborates, but it
7 corroborates nothing at all.

8 The Chamber is relying on evidence, but it's transforming it. And
9 this is exactly what I've been condemning since the beginning of
10 these appeal hearings, so please don't tell me today that this is
11 rhetoric and that we haven't supported our statements.

12 If the Prosecutors don't agree with us, of course, that's their
13 role. But don't tell me, please, that there are no specific
14 elements on the way that we have extracted from the Chamber's
15 reasoning and proved that the Chamber did not reason in a proper
16 way. And this is something I wanted to stress regarding the facts
17 that were discussed yesterday.

18 [10.00.44]

19 A last point -- or two last points, more specifically, regarding
20 the jurisprudence that was mentioned regarding the issue of the
21 scope of in dubio pro reo when we speak about the constitute of
22 elements of the crimes or when we speak about liability.

23 The International Co-Prosecutor quoted the Stakic jurisprudence,
24 and yesterday I said that this was isolated jurisprudence, but I
25 forgot to specify that, in paragraph 416 of this jurisprudence on

29

1 which the Prosecution relies to say that it's only on the facts
2 that -- the principle of pro drubio (sic) applies, in paragraph
3 416, there is no source, there's no legal base in this paragraph.
4 It's an assertion without any kind of legal ground to say why the
5 principle of in dubio pro reo should not apply.

6 Then, regarding the issue of the soldiers who were "hors combat",
7 the Co-Prosecutor says to us that the Martić -- the Martić
8 jurisprudence does not say what the Defence is stating.

9 [10.01.52]

10 I'd like to remind you, however, that the facts in Martić is why
11 I was speaking about "hors combat" and people who are in combat
12 because Martić was speaking about an armed conflict. This is not
13 the situation here with this trial, so the Co-Prosecutors cannot
14 rely on this jurisprudence.

15 Another point regarding the issue which was discussed even today,
16 which is how must a Chamber reason with regard to extermination
17 if there is no prior characterization of murder.

18 Yesterday, I heard from the Co-Prosecution the Limaj
19 jurisprudence that has nothing to do with extermination and which
20 is connected with just identification. But here, I'd like to
21 refer you to the Bagosora appeal judgment, which focuses
22 essentially on extermination and on the different sites and how
23 one should proceed to characterize this.

24 [10.02.59]

25 In paragraph 396, for example, of this appeal judgment, the way

30

1 the crimes of murder and extermination should be articulated when
2 crimes are committed in different sites.

3 And what transpires from this jurisprudence, the Chamber first
4 must deal with the crimes in an isolated way to qualify them as
5 murder and then conclude that the crime of extermination is
6 constituted or, if the criteria of "massivité" is not fulfilled,
7 adopt a global approach and say that the sum of the different
8 murders that occurred in different locations, in view of the
9 evidence, makes up a crime of extermination.

10 And here, while I know it's that we are in an appeal hearing and
11 I'm speaking to you about law, I'm not here just to give you a
12 demonstration, and I'm speaking to you about how the evidence can
13 be linked or not to my client's liability.

14 Whether there were -- of course there were atrocities. I
15 understand that. And of course horrible things happened during
16 the evacuation. That -- of course. We never challenged that. But
17 please, when you speak to me about Khieu Samphan's desire for
18 these crimes to occur, that is completely erroneous. And here,
19 I'd like to react to what the Co-Prosecutors did not say
20 yesterday, that is to say, was there *dolus eventualis* in 1975,
21 with regard to the crime of extermination.

22 I didn't hear an answer to that question. So it's true that law
23 is something that's complex, but -- but we're speaking here about
24 law because this is a Court of law.

25 [10.04.42]

31

1 And in -- under these conditions, the *dolus eventualis* stating
2 that the conditions of the evacuation that might possibly have
3 led to the death of several people, well, can that constitute an
4 element with regard to extermination? No. No, certainly not with
5 regard to the law that existed in 1975.

6 And these are concrete grounds for our appeal. I am not going to,
7 of course, give you the full submission once again.

8 I cannot plead in a few minutes the content of our appeal brief,
9 but please read again the articulation that we make between the
10 facts and Khieu Samphan's liability and the law, and you will see
11 that the Chamber's construction is flawed because there is no
12 proven *mens rea*.

13 [10.05.31]

14 And the Chamber's just scattered the elements. And I was going to
15 forget this, but even with regard the meeting about the
16 evacuation, the Chamber says, look, Khieu Samphan is somewhere --
17 in 1996, maybe Khieu Samphan gave an interview and he said that
18 if not everybody had agreed or if one person had disagreed, we
19 could have stopped the evacuation, but who was Khieu Samphan
20 speaking about at that moment.

21 He is not speaking about everybody in general. He is speaking
22 about the Standing Committee, a Standing Committee that he was
23 never part of during the entire duration of the DK regime.

24 And even more so because since we're speaking here about the
25 decision to evacuate Phnom Penh before, whether it be in '74 or

1 the beginning of '75, but then, as I reminded you, he was not
2 even a member, not even a full rights member of the Central
3 Committee.

4 Even if the decision had been taken by the Central Committee,
5 which was not the case, even if that decision was taken, he had
6 no voice to -- he had no voice in that. So he could have
7 contested it, but on which basis, on which criteria.

8 [10.06.47]

9 So this -- these are the facts with regard to Khieu Samphan's
10 involvement. This is the way the Chamber manipulated law.

11 And why this manipulation? Why can we find this manipulation
12 throughout the entire judgment?

13 An example, democratic centralism. The Chamber explains to us,
14 yes, that everybody was taking part in all decisions whereas we
15 had witnesses who came here and who explained that, in the end,
16 the decisions were in the hands of the Standing Committee and, in
17 particular, in Pol Pot's hands.

18 And they're telling us that, okay, everybody could decide on
19 everything. Why?

20 Because at one point, we have a hard time finding the link
21 between Khieu Samphan and the facts, Mr. Khieu Samphan and the
22 decisions. So this is what we're telling you now in our appeal
23 submissions, and this is what you will find in our appeal brief
24 with elements, with references that we cannot develop further in
25 the few minutes that are given to us here but that do exist.

1 [10.07.43]

2 This is not rhetoric. We have come up with a demonstration which
3 may not -- which the Prosecution may not like, but it is a
4 demonstration.

5 Of course, now I'm open to the Chamber for its complementary
6 questions, but these are the points that I wanted to remind you
7 of in relation to what was said yesterday and today.

8 MR. KOUMJIAN:

9 Your Honours, I would just note that I understood that counsel is
10 just replying to what we submitted on individual criminal
11 responsibility. There was nothing in the schedule for that.
12 We didn't object to it, but we would like an opportunity to
13 briefly respond to what she just said. I'm not going to cover
14 everything.

15 But for example, she did rely upon the testimony of someone
16 called Ny Kan. We'd point you to footnote 359 of the judgment. Ny
17 Kan was the brother of Son Sen. The Trial Chamber there found his
18 testimony inconsistent and, therefore, unreliable.

19 [10.09.04]

20 I'd also point out that Counsel is saying that it's important to
21 put Khieu Samphan's statements in context and absolutely, we
22 agree with that. And that's exactly what the Trial Chamber did.

23 You have to put his statements in context.

24 So when he talks about the necessity to kill the traitors and
25 kill the enemies and the last chance for others to join the Khmer

1 Rouge or share the same fate, it's important to put that into the
2 context of how the increasing brutality of the Khmer Rouge regime
3 from '73 to '75 and the pattern of executions of Khmer Rouge
4 soldiers.

5 [10.09.51]

6 When Khieu Samphan goes on the radio and talks about the great
7 victory after the 17th of April, it's important to put that in
8 context of the absolute misery of millions of people in Phnom
9 Penh who, because of that, what he called great victory, were
10 dying, starving, being displaced from their homes on the roads
11 and he's past them in his car on his way in to the city. He,
12 himself, saw this.

13 So put into context that Khieu Samphan's statements promoting
14 this joint criminal enterprise were done with the full knowledge
15 that -- of the crimes that were occurring.

16 There's a saying in Khmer, I understand, that the back foot
17 follows the front foot. And my understanding is that means that
18 subordinates follow leaders or sons and daughters follow their
19 parents.

20 Khieu Samphan, at all times during this indictment period, had a
21 very key role. He was, and he admits it, the face of the Khmer
22 Rouge.

23 He even had the title of commander in chief even before 1975, of
24 the FUNK forces. He was the person speaking on their behalf and
25 known both to foreigners and to the people of Cambodia. And he

35

1 was the one promoting this enterprise while all these crimes were
2 going on, excusing the crimes and encouraging the crimes.

3 So we agree with Counsel, it's very important to put his remarks
4 in the context of the brutality of that regime.

5 (Short pause)

6 [10.12.08]

7 MR. PRESIDENT:

8 The Chamber will now move to the thematic session on sentencing.
9 And I'd like to invite the Co-Rapporteurs to present the report.

10 JUDGE JAYASINGHE:

11 Mr. President, the grounds of appeal related to sentence. This is
12 the report of the Chamber.

13 The Trial Chamber sentenced both Accused to life imprisonment.

14 Only Khieu Samphan raised arguments specifically against his
15 sentence, which he argued, taint the Trial Chamber's exercise of
16 discretion.

17 [10.13.06]

18 First, Khieu Samphan records that the Trial Chamber sought to
19 reassure the surviving victims and their families, the witnesses
20 and the general public that the law is effectively implemented
21 and enforced and applies to all, regardless of status of rank.

22 Khieu Samphan argues that the statement shows that the Trial
23 Chamber forgot that the accused person should be at the centre of
24 the sentencing decision and not the general public, and that it
25 did not strike the correct balance between deterrence and

1 retribution as purposes of punishment.

2 He argues that the alleged errors are emblematic of the Trial
3 Chamber's purported bias against him. While denying the
4 allegations against him, he argued, secondly, that the Trial
5 Chamber failed to take into account Khieu Samphan's individual
6 circumstances and his alleged limited participation in the
7 crimes.

8 He argues that he should not have received the highest available
9 sentence with reference to the sentencing practices of the
10 International Military Tribunal and the ICTY, given that he was
11 not one of those most responsible perpetrators.

12 [10.14.38]

13 Thirdly, he argues that the Trial Chamber erred in its assessment
14 of aggravating and mitigating circumstances, notably, by
15 erroneous taking into account his position of authority and his
16 level of education and by failing to give weight to his good
17 character.

18 In respect of the latter, he argues that the Trial Chamber's
19 references to his purported good character are contrary to its
20 earlier findings that Khieu Samphan was, indeed, trusted and
21 respected. In Khieu Samphan's submissions, all these errors
22 invalidated his sentence imposed by the Trial Chamber.

23 Mr. President, thank you.

24 [10.15.42]

25 MR. PRESIDENT:

1 I would like now to hand the floor to the defence counsel, Madam
2 Anta Guisse, to make your submission.

3 MS. GUISSÉ:

4 Thank you, Mr. President.

5 Mr. President, Your Honours of the Supreme Court Chamber, it's
6 never easy when we plead for acquittal -- plead for acquittal to
7 also plead at the same time, in even in a subsidiary manner, on
8 the quantum of a sentence which, by definition, we have just
9 explained to you should not be inflicted upon our client.
10 However, criminal justice being the way it is, it is necessary to
11 come up with subsidiary solutions, and we're doing so, even more
12 so because even with regard to the issue of sentencing, the
13 Chamber erred in law and in fact, as in the rest of its
14 reasoning.

15 The Chamber sinned by favouring symbol over law. And here, once
16 again, the Chamber forgot that the sentence concerns the person
17 above all, the person who is going to be subjected to it. And it
18 is -- this is the mere principle of the individualization of the
19 sentence.

20 [10.17.14]

21 I'm not going to be very lengthy about this. I'd simply like to
22 recall our paragraphs in our appeal brief, paragraphs 646 to 658,
23 by reminding you that our criticism is multi-layered, which is
24 the ignorance of the reason of the sentence, absence of
25 individualization of the sentence, errors regarding the

1 aggravating circumstances, in particular, abuse of authority and
2 level of education, and absent -- and failure to take into
3 account mitigating circumstances.

4 The Prosecutors submit that we haven't demonstrated how the
5 Chamber abused its discretionary powers, and they quote the Duch
6 appeal judgment which -- in which the Milosevic appeal judgment
7 is quoted. However, according to this jurisprudence, we can and
8 we should demonstrate why there was an apparent error of
9 discretion, error with regard to the objective of the sentence.

10 [10.18.22]

11 A sentence is about dissuasion and punishment. That's what
12 Nikolic says in paragraph 132. But this does not mean that the
13 accused person in -- or the sentenced person should not be at the
14 heart of the sanction. He must be at the centre of the objective
15 of the sentence, and not of the outside people such as we read in
16 the judgment.

17 And an important point here is that, during its trial, the
18 Chamber was obliged to acknowledge that Khieu Samphan, during the
19 DK regime, only had a symbolic position. The Chamber was not able
20 to find that he had any kind of hierarchical authority over
21 anyone, and did not draw the consequences of this. And
22 necessarily, because we are here before an international
23 tribunal, we are referring to the jurisprudence of other
24 international tribunals, and we reminded you in our appeal brief
25 of the -- of Funk in the Nuremberg jurisprudence, which is very

1 evocative because there may be some kind of parallel if our
2 client is sentenced.
3 Funk was sentenced for crimes of war, war crimes, crimes against
4 peace and crimes against humanity, and he was a member of a body
5 that ordered slave labour for -- and to be deported. But in the
6 context of its judgment, we saw that he never played a key role
7 in the different programs that he might have participated in. And
8 it is under these conditions that he was given a limited
9 sentence.

10 [10.20.17]

11 And I'd like also to refer you to the Galic appeal judgment of
12 the ICTY, paragraph 438 to 456, in which we can see or which it
13 is stated that the only life sentences that were handed down were
14 handed down against individuals who had the highest authorities
15 and responsibilities, and that they had a clear power over the
16 commission of the crimes. And this is not the case with Khieu
17 Samphan.

18 And I would like to remind you with regard to this that the
19 supposed determining role of Khieu Samphan was not demonstrated
20 at all in the commission of the crimes so, of course, the point
21 here is not to reproduce the decisions from other courts, but
22 simply to note that the rather faulty reasoning of the
23 Co-Prosecutors, who are telling us that, yes, the gravity of the
24 crimes would depend on the geography and the date.

25 [10.21.30]

40

1 Here, I must say that I'm a bit confused and disturbed by this
2 argument because I cannot see how we can say that it would be
3 worse to kill in 1975 in Cambodia than in '43 in Germany or in
4 '91 in Yugoslavia. The real -- that is not the real question.
5 The real question is not geography. The real question is the
6 character of the accused, and the question is, did he play a main
7 role and what was his degree of participation. That is the
8 question.

9 And this leads me to another error, or to stress an error --
10 another error from the Chamber because the Chamber retained as
11 aggravating circumstances the supposed authority of Khieu
12 Samphan. And here, I'd like to remind you that -- remind you of
13 the Milosevic appeal judgment, paragraph 302, stating that
14 authority, even at a high level, does not necessarily justify a
15 harsher sentence, but the abuse of this authority, of course, can
16 make up an aggravating circumstance. But we have to note that
17 never the Chamber has explained which authority Khieu Samphan
18 enjoyed and, even less so, which abuse of authority he
19 demonstrated.

20 [10.22.50]

21 And I'd like also to refer you to the Katanga decision on
22 sentence in paragraph 75. I'd also like to refer you to the
23 Sainovic appeal judgment, paragraph 1802. And the constant
24 jurisprudence is clear, abuse of authority is the only
25 aggravating circumstance. It's not authority. It is only abuse of

41

1 authority. And this was not proven in this case.

2 Another error from the Chamber, the degree of education of Khieu
3 Samphan, which is considered as an aggravating circumstance in
4 this case, but the Chamber is basing itself on no legal ground,
5 nor an international law, nor in national law to explain how this
6 constitutes an aggravating circumstance. However, the Chamber,
7 once again, erred by not taking into account Khieu Samphan's
8 character and everything that was said in the proceedings
9 regarding that.

10 And of course, there are the character witnesses who testified,
11 who spoke about Khieu Samphan's character, about his human
12 qualities, but also not only the character witness, but here I'd
13 like to refer to paragraph 656 of our appeal brief. And this is
14 quite rare in a case such as this one.

15 [10.24.09]

16 All people who came to testify before this Chamber always spoke
17 about Khieu Samphan's human qualities, about the fact that he had
18 no power and about the fact that they never saw him say anything
19 negative about anyone. These qualities, these elements in
20 relation to his absence of authority should have been taken into
21 account by the Trial Chamber, and they were not.

22 And therefore, I would conclude by saying that, of course, these
23 errors should invalidate the Chamber's decision with regard to
24 the sentence, but I would not be complete if I did not finish
25 where I started, that is to say, that in our eyes, all of the

42

1 elements that we have developed over the past three days cannot
2 lead to a conviction of Khieu Samphan. You must invalidate the
3 judgment in its totality and acquit Mr. Khieu Samphan.

4 MR. PRESIDENT:

5 Let us have a short break. We have a 20 minute break now, and we
6 will resume at 20 to 11.00.

7 (Court recesses from 1025H to 1050H)

8 MR. PRESIDENT:

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

10 And the floor is given to the Co-Prosecutors.

11 MS. CHEA LEANG:

12 Mr. President, Your Honours, everyone in and around the
13 courtroom, it is now the thematic session on grounds of the OCP
14 appeal, and we have heard the responses from the Khieu Samphan
15 defence team. And I would like now to raise my remarks regarding
16 the sentencing against the Accused.

17 Could you hear me, Mr. President?

18 [10.51.10]

19 As Your Honours are aware, the Trial Chamber held that the
20 maximum sentence that the ECCC may impose, sentences of life
21 imprisonment, most appropriately sanctions the criminal conduct
22 of each of the Accused. The Co-Prosecutors entirely agree, and we
23 ask this Chamber to confirm the sentences of life imprisonment.
24 I will first briefly address why life imprisonment is the most
25 appropriate sentence for the two Accused before responding to the

1 arguments Khieu Samphan raised on appeal in relation to his
2 sentence.

3 As the Chamber held in Case 001 and as followed by the Trial
4 Chamber in the Case 002/01 judgment, the primary factor to be
5 weighed at sentencings is the gravity of the convicted person's
6 crimes. Nuon Chea and Khieu Samphan have been convicted in Case
7 002/01 of the crimes against humanity, of extermination
8 encompassing murder, political persecution and other inhuman acts
9 comprising forced transfer, attacks against human dignity and
10 enforced disappearances -- disappearances.

11 These are extremely grave crimes in and of themselves, and Nuon
12 Chea and Khieu Samphan perpetrated them on a broad scale.

13 The Trial Chamber found that at least 250 Lon Nol officials were
14 murdered at Tuol Po Chrey and a minimum of 2,330,000 to 2,430,000
15 people were victims of crimes committed during the first two
16 phases of the forced population movement. As the Trial Chamber
17 rightly noted, the number of victims is among the highest of any
18 decided case concerning international crimes.

19 [10.53.56]

20 Adding to this gravity, these crimes were committed across large
21 portions of Cambodia, and have had a lasting impact on direct
22 victims, their families, friends and loved ones and, indeed, on
23 the entire nation of Cambodia up to and including present day.

24 The gravity of the crimes is further exacerbated by the
25 circumstances in which they were perpetrated. The fact that many

1 of the victims were particularly vulnerable, including infants,
2 children, the elderly, sick and injured people evacuated from
3 hospitals and pregnant women who had just given birth.

4 Moreover, the involvement of both Nuon Chea and Khieu Samphan in
5 perpetrating these crimes was extensive and substantial. Nuon
6 Chea and Khieu Samphan were among the relatively small group most
7 responsible for the development of the policies that led to these
8 crimes.

9 [10.55.27]

10 Your Honours, the judgment properly referred to them as key
11 actors in the formation of the policies. The evidence amply shows
12 that they knew the crimes would be committed and were involved in
13 implementing them throughout the period encompassed by Case
14 002/01.

15 The evidence demonstrates that Nuon Chea was, along with Pol Pot,
16 the ultimate decision-maker within the CPK and within the DK
17 regime as it implemented these policies. He was Deputy Secretary
18 of the Party, and a member of the Standing Committee.

19 The evidence also demonstrates that Khieu Samphan was a candidate
20 member and, later, a full rights member of the Central Committee,
21 a frequent attendee at the Standing Committee meetings and a
22 trusted confidante of Pol Pot. He disseminated, endorsed and
23 defended the common purpose and policies. He provided
24 encouragement and support to the CPK and utilized his trusted and
25 respected character in that endeavour, thereby facilitating the

1 accomplishment of the crimes, and implemented key economic
2 aspects of the common purpose.

3 [10.57.19]

4 Both Nuon Chea and Khieu Samphan abused their positions of
5 authority and influence to accomplish these crimes, and both Nuon
6 Chea and Khieu Samphan were highly educated and well understood
7 the import and consequences of their actions.

8 In comparison to this, no mitigating circumstances significant
9 enough to overcome these factors are existent in relation to the
10 individual.

11 Nuon Chea has not challenged his sentence on appeal. May Supreme
12 Court Chamber uphold TC decision.

13 Khieu Samphan, however, alleged that the Trial Chamber committed
14 errors in reaching its determination that a life sentence is
15 appropriate for his crimes. He asks that this Chamber impose a
16 fixed-term sentence, but does not identify what fixed-term
17 sentence is requesting -- he is requesting, rather.

18 [10.58.31]

19 As we addressed in our response brief to Khieu Samphan's appeal,
20 we submit that the arguments Khieu Samphan raises have no merit
21 and should be dismissed.

22 Khieu Samphan argues that the Trial Chamber held that he had no
23 actual authority. Khieu Samphan argues that, therefore, he must
24 have played a limited role in the commission of the crimes and is
25 not deserving of a life sentence. However, Khieu Samphan

1 misrepresents the judgment's findings in this regard.
2 While the judgment finds that some of the positions that Khieu
3 Samphan formerly held, such as Deputy Prime Minister, Minister of
4 National Defence and general staff of GRUNK and President of the
5 state presidium in 1976, had limited authority, that does not
6 mean that they were not significant. Judgment notes that, along
7 with Hou Youn and Hu Nim, Khieu Samphan was the public face of
8 the opposition movement and, through his public statements,
9 ordering execution of seven traitors of Lon Nol regime, Khieu
10 Samphan played an important role in bolstering the legitimacy of
11 the movement.
12 [11.00.17]
13 Nor did the Trial Chamber find that Khieu Samphan had a limited
14 role in the CPK itself. Indeed, to the contrary. As already
15 mentioned, the Trial Chamber found that Khieu Samphan was a
16 candidate member of the Central Committee since 1973, and made a
17 full rights member in 1976. He was a frequent and contributing
18 attendee at Standing Committee meetings, a leading member of
19 Office A-70 and had significant supervisory responsibilities in
20 regards to the Commerce Committee, warehouses and power
21 factories, among other formal and informal roles.
22 These were the positions of authority that he abused, and it was
23 in these capacities that the Trial Chamber found that Khieu
24 Samphan made a significant contribution to the joint criminal
25 enterprise and planned, instigated, aided and abetted the crimes

1 at issue.

2 As such, the Trial Chamber found he was a key actor in
3 formulating the policies that led to the crimes, knew the crimes
4 would be committed pursuant to those policies, and that his
5 involvement was extensively and substantial.

6 [11.02.09]

7 Khieu Samphan's arguments that he played a limited role in
8 relation to these crimes are, therefore, meritless. This argument
9 simply evades his criminal responsibility.

10 Khieu Samphan also argues that his level of education, which the
11 Trial Chamber found was aggravating factor for sentencing, has
12 never been contemplated in international law or Cambodian law as
13 an aggravating factor. This is demonstrably false.

14 For instance, the ICTY Trial Chamber in Brdanin at paragraph
15 1114, of their judgment held that:

16 "The accused was an intelligent, university-educated person who
17 knew exactly the imports and consequences of his actions. The
18 Trial Chamber finds that these facts constitute an aggravating
19 factor."

20 [11.03.24]

21 As with Brdanin, the fact that Khieu Samphan was highly educated
22 shows that he was fully able to grasp the nature of his acts and
23 understand their consequences.

24 Khieu Samphan also argues that the Trial Chamber erroneously
25 disregarded evidence of his good character. Mr. President, Your

1 Honours, the Trial Chamber did not disregard the evidence that
2 Khieu Samphan put forward in this regard. Indeed, it considered
3 it and found that Khieu Samphan may have been kind to people in
4 specific instances. However, the Trial Chamber rightfully found
5 that these isolated instances cannot play any significant part in
6 mitigating crimes of the severity of those for which Khieu
7 Samphan has been found guilty. To the extent that any of the
8 mitigating factors have some limited merit, they are vastly
9 outweighed by the gravity of the crimes and the aggravating
10 circumstances.

11 [11.04.48]

12 Similar to this Chamber's finding in Case 001, the outstanding
13 aggravating elements and exceptional magnitude of the crimes for
14 which Khieu Samphan has been convicted neutralize the limited
15 impacts of these mitigating factors.

16 Furthermore, this Chamber also noted in Case 001 that, at the
17 international level, a line of appeal judgments from the ad hoc
18 Tribunals confirms that life imprisonment can stand in spite of
19 mitigating factors where the gravity of the crimes so dictates.

20 Finally, we note that even if Your Honours found some part of
21 Khieu Samphan's argument regarding his sentence persuasive, it
22 should not amend the sentence of the Trial Chamber. This Chamber
23 has itself noted the deference that it affords to the Trial
24 Chamber's determination of sentence and that the parties seeking
25 to have a sentence revised carries a substantial burden in that

1 regard.

2 In the Case 001 appeal judgment, this Chamber, quoting a decision
3 of the ICTY Appeals Chamber, held that the Trial Chambers are
4 vested with a broad discretion in determining the appropriate
5 sentence, including the determination of the weight given to
6 mitigating or aggravating circumstances. As a general rule, the
7 Appeal Chamber will not revise a sentence unless the Trial
8 Chamber has committed a discernible error in exercising its
9 discretion or has failed to follow the applicable law.

10 [11.07.11]

11 Your Honours, we submit that the Trial Chamber has not committed
12 any errors in these regards and, in any event, Khieu Samphan has
13 failed to carry his burden so demonstrating. We therefore ask
14 that this Chamber affirm the life sentences imposed on Nuon Chea
15 and Khieu Samphan by the Trial Chamber as the only sentences that
16 are proportional to their crimes and that accurately reflect
17 their culpability.

18 Thank you, Mr. President and Your Honours.

19 (Short pause)

20 [11.08.31]

21 MR. PRESIDENT:

22 I now move to the appeal of the Co-Prosecutors, which is our last
23 thematic session, and I'd like to hand the floor now to the
24 Co-Rapporteur to present the report.

25 JUDGE MONG MONICHARIYA:

1 Thank you, Mr. President.

2 I'd like now to present the report on the Co-Prosecutors' appeal.

3 The Co-Prosecutors filed an appeal in Case 002/01. They request

4 that the Supreme Court Chamber find that the mode of liability,

5 referred to as the third or extended form of joint criminal

6 enterprise also known as JCE III, is applicable in proceedings

7 before the ECCC. Both the Pre-Trial and Trial Chambers previously

8 found that JCE III was not part of customary international law at

9 the time the crimes were alleged to have been committed and,

10 therefore, not under the jurisdiction of the ECCC.

11 In the trial judgment, the Trial Chamber recalled these decisions

12 and, on that basis, decided not to JCE III any further. Instead,

13 Nuon Chea and Khieu Samphan were convicted for the crimes charged

14 based on other modes of liability.

15 [11.10.21]

16 The Co-Prosecutors' appeal raises, first of all, a question as to

17 its admissibility. With their appeal, the Co-Prosecutors do not

18 seek a change to the dispositive part of the trial judgment, as

19 they do not allege any error that would invalidate it.

20 Nevertheless, they submit that the Supreme Court Chamber has the

21 power to admit legal errors of general significant to the

22 jurisprudence, even if those errors do not have any impact on the

23 decision under review.

24 The Co-Prosecutors submit that this is a self-standing basis for

25 admissibility of appeals, well established in international

1 procedural rules, and operates independently from ordinary review
2 of errors of law under Internal Rule 104.

3 The Co-Prosecutors notes that Internal Rule 105.3 refers to an
4 alleged error invalidating the decision, but not the judgment.

5 [11.11.54]

6 The Co-Prosecutors also refer to jurisprudence of the ad hoc
7 tribunals which, in their submission, supports their position.

8 The Co-Prosecutors avert that the Supreme Court Chamber is the
9 apex judicial body of the ECCC and should have the opportunity to
10 address compelling issues of law, even if they would not affect
11 the ultimate judgment, noting that the ECCC agreement and ECCC
12 law do not provide interlocutory appeals as foreseen under
13 Cambodian law.

14 Finally, they invoked what they described as compelling
15 considerations of international public policy in support of a
16 review by the Supreme Court Chamber.

17 As to the substance of the appeal, the Co-Prosecutors submit that
18 the Trial Chamber erred when it found that JCE III did not form
19 part of customary international law at the time of the crimes
20 and, therefore, was inapplicable in ECCC proceedings. They
21 submit, in particular, that post-World War II case law indicates
22 that this form of liability was firmly entrenched in customary
23 law and that the Pre-Trial Chamber's analysis of the case law was
24 tainted by error.

25 The Co-Prosecutors' request that the Supreme Court Chamber

1 correct this error by declaring that JCE III is, indeed,
2 applicable in the proceedings before the ECCC.

3 Thank you, Mr. President.

4 [11.13.51]

5 MR. PRESIDENT:

6 I'd like now to hand the floor to the Co-Prosecutors to make
7 their submission.

8 MR. KOUMJIAN:

9 Thank you, Mr. President, and Your Honours.

10 I think it would make sense to begin my presentation by answering
11 the question that you asked relative to our appeal on this
12 section, Question 5, which states -- which asks whether the
13 criminal responsibility based on this extended form of joint
14 criminal enterprise would include only crimes that the
15 perpetrator actually foresaw or also those that were merely
16 foreseeable.

17 [11.14.33]

18 I'd like to answer that by citing some of the jurisprudence that
19 already exists about the extended form of joint criminal
20 enterprise, or JCE III.

21 One of the cases where that extended form was utilized was the
22 appeal judgment in *Stakic*.

23 At paragraph 65, the Court -- the Appeals Chamber of the ICTY
24 held that the accused can be found to have third category JCE
25 liability if he intended to further the common purpose of the

1 joint criminal enterprise and the crime was a natural and
2 foreseeable consequence of that common purpose. In other words,
3 liability attaches if, under the circumstances of the case,
4 first, it was foreseeable that such a crime might be perpetrated
5 by one or other members of the group and, second, the accused
6 willingly took that risk. The crime must be shown to have been
7 foreseeable to the accused in particular. And the Stakic appeal
8 judgment cited Kvocka and Tadic.

9 We agree with that. In Kvocka, paragraph 86 of the appeal
10 judgment, they held that what is natural and foreseeable to one
11 person participating in, in this case -- in their case, a
12 systematic joint criminal enterprise, might not be natural and
13 foreseeable to another, depending on the information available to
14 them.

15 [11.16.13]

16 In the Tadic appeal judgment at paragraph 220, talking about the
17 third form of joint criminal enterprise, they held that:

18 "What is required is a state of mind in which a person, although
19 he did not intend to bring about a certain result, was aware that
20 the actions of the group were most likely to lead to that result,
21 but nevertheless, willingly took that risk. In other words, the
22 so-called *dolus eventualis* is required."

23 In Karadzic, there was litigation before that trial began -- I
24 mentioned this yesterday -- about what the third form of joint
25 criminal enterprise -- exactly how it should be defined.

1 [11.17.11]

2 In the Trial Chamber decision, 28 April 2009, again, they
3 mentioned that in determining what an accused first saw, it might
4 be relevant to take into account what was foreseeable to any
5 reasonable person in his position. So that, I think, summarizes
6 what our view is. This is JCE III is a form of *dolus eventualis*
7 in that it holds that when someone joins a group with a common
8 purpose intending to commit crimes within the jurisdiction of the
9 Court, to the extent that there are other possible crimes that
10 their co-participants could commit that are foreseeable to the
11 accused, and he nevertheless accepts that risk and continues his
12 participation, then he should be held responsible.

13 In the appeals chamber decision in *Karadzic* on this issue, where
14 the defence challenged whether JCE III should require a
15 probability as opposed to a mere possibility, in paragraph 8 the
16 appeals chamber held that -- after reviewing the jurisprudence
17 they say, "This convincingly demonstrates that JCE III *mens rea*
18 does not require a probability that a crime would be committed.
19 It is, however, worth noting that the term possibility standard
20 is not satisfied by implausibly remote scenarios. Plotted on a
21 spectrum of likelihood, the JCE III *mens rea* standard does not
22 require an understanding that a deviatory crime would probably be
23 committed. It does, however, require that the possibility that a
24 crime would be committed is sufficiently substantial as to be
25 foreseeable to an accused."

1 [11.19.19]

2 So that's exactly what we are advocating and what we are saying
3 was part of customary international law in 1975, that if anything
4 the jurisprudence of the ad hoc tribunals since that time has
5 simply further defined the elements to the benefit of the accused
6 to make it clear what is required in the mens rea and the actus
7 reus.

8 I think you could even add an additional qualification. I think
9 this is implicit in this jurisprudence that the criminal plan,
10 the common purpose that is criminal, has to increase the risk
11 that this possible crime be committed. And let me give some
12 concrete examples of exactly why this is an issue of importance
13 and how practically the position of the Prosecution and the
14 Defence differ and the Defence, Khieu Samphan's defence can
15 correct me if I am wrong about their position.

16 [11.20.28]

17 What we are saying is that when people agree to commit a crime,
18 intentionally commit a crime such as forcibly deporting people or
19 persecuting a group, torturing individuals and giving orders or
20 plans to kill people and other crimes are a foreseeable, possible
21 consequence in the circumstances, they should be held
22 responsible. The Defence, as I understand is saying, well, if it
23 wasn't his intent they shouldn't be held responsible. A concrete
24 example, we know that in the facts of the cases in this Court and
25 in many other conflicts there were orders to groups to persecute

1 groups of individuals to sometimes torture or to kill.
2 So for example, in many of the German cases, even in the
3 Einsatzgruppen, cases where groups of Jews and other minorities
4 were targeted for killings, there also were laws and instructions
5 that soldiers, Germans could not have sex with Jews. And yet, the
6 evidence, the historical evidence is that many rapes occurred
7 when groups of soldiers were given women to go take away and
8 execute. The same facts will appear in the circumstances of the
9 cases in Cambodia.

10 [11.22.02]

11 So for example about two weeks ago a woman named Ahmad Sofia
12 testified in this courtroom and talked about how a group of Cham
13 women and girls were taken to a house and all those who admitted,
14 identified themselves as Cham were taken outside, taken to a pit
15 where she witnessed their execution. She also said she heard some
16 of them say, "Please don't rape me."

17 We know that much of the evidence in the case shows that often
18 before executions, probably for reasons of saving clothing, the
19 victims were ordered to disrobe before the executions.

20 Now, is it foreseeable when you give militia members including
21 teenage boys, every opportunity to enslave workers for years, to
22 persecute groups, to sometimes to torture in detention women or
23 to execute them, that in those circumstances even if they are
24 told that the Khmer Rouge policy is against rape, that they will
25 in fact sexually assault them? We say absolutely in the

57

1 circumstances, and that will be of course a matter for whatever
2 Trial Chamber hearing such a case to determine. But we will say
3 that it's certainly possible where a Trial Chamber finds that
4 that is a possible consequence foreseeable to an accused, in our
5 submission the law should hold them responsible. It is a
6 foreseeable consequence of the criminal plan that they have where
7 they have willingly taken that risk.

8 [11.23.42]

9 And as I said, we believe that this is rooted, as our appeal
10 brief points out, in the jurisprudence going back to the Second
11 World War.

12 If you look at the planning for the Nuremburg -- particularly the
13 Nuremburg Tribunal, there was a U.N. War Crimes Commission
14 formed, and it would be 1948, with the purpose of advising states
15 on the law to be applied in any subsequent trials.

16 In their report of March 1945, and this is authority 36 that we
17 provided for the appeal hearings, they had examined English,
18 Soviet, French and the Czechoslovakian systems of criminal law.
19 They pointed out it is a common principle to all four systems of
20 law that if, quote, "Several persons act together in pursuance of
21 a common intent, every act done in furtherance of it, by any one
22 of them, is in law done by all."

23 [11.24.49]

24 In their report on holding members of the German government
25 responsible they said such individuals, quote, "[...] must be held

1 responsible like members of a group of wrongdoers for all
2 criminal acts, according to the principle that every act done in
3 furtherance of the criminal purpose by any one of them is in law
4 done by all".

5 And if we look at the statutes that were then established for the
6 Nuremburg and the Tokyo Tribunals, we see again there was the
7 intent to hold all of those that play a significant role in a
8 criminal plan responsible for all the actions of the members of
9 the group. The Nuremburg Charter and the Tokyo Charter, I
10 believe, have identical language, quote:

11 "Leaders, organizers, instigators and accomplices participating
12 in the formulation or execution of a common plan or conspiracy to
13 commit any of the foregoing crimes are responsible for all acts
14 performed by any persons in execution of such plan."

15 [11.26.05]

16 Control Council Law No. 10, which was subsequently set up to try
17 those slightly smaller fish after the Nuremburg Tribunal
18 finished, provided that any person is deemed to have committed a
19 crime who, quote, "[...] was connected with the plans or
20 enterprises involving its commission."

21 What we are now advocating is adopting the jurisprudence that's
22 been developed, articulated, articulating this principle since 19
23 -- since the ICTY began, since Tadic which actually only has
24 further defined it to the benefit of the accused by making it
25 clear what mens rea required; they must actually foresee the

1 crime and accept the risk and their contribution has to be a
2 substantial contribution to the criminal enterprise. It's
3 consistent with how the Control Council Law 10 Judge Advocate in
4 the Martin Weiss case described the common design. He said:
5 "All who join in such common design to commit an unlawful act
6 must take responsibility for all the consequences of the
7 execution of the act if done in furtherance of the plan, although
8 not specifically contemplated by the parties or even if forbidden
9 by the defendant or although the actual perpetrator is not
10 identified."

11 [11.27.40]

12 And I know Counsel has questioned the value to be placed on
13 Control Council Law No. 10 cases. This has been reviewed and
14 challenged by other parties in other cases and the law is quite
15 clear. One case is Erdemovic appeal judgment. This is actually
16 from Cassese's dissenting opinion. He says:

17 "Control Council No. 10 can be regarded as an international
18 agreement among the four occupying powers. The actions of the
19 courts established or acting under that law acquires an
20 international relevance."

21 [11.28.20]

22 So in the cases that we have cited just broadly, what they often
23 show is that, for example, in cases where groups of prisoners
24 were taken with a common plan where it's clear that individuals
25 in the group agreed to their mistreatment, under the Geneva

60

1 Conventions you can't use prisoners for propaganda purposes and
2 you certainly cannot assault them. And if in that mistreatment
3 they were subsequently killed, all were held responsible for the
4 killing when the Trial Chambers found that that was a foreseeable
5 result of the criminal plan.

6 And I think another very good example cited in our brief involves
7 the actual judgment of the IMT and how it was applied to those
8 who were involved in the slave labour program, particularly
9 Sauckel and Speer. What the case seems to hold clearly to us is
10 that those who were involved in procuring individuals as slave
11 labour, even if they didn't want them to be further mistreated,
12 assaulted or killed or starved, they were held responsible for it
13 as a foreseeable result of that criminal plan and that they had
14 continued to participate in that plan while accepting that risk.

15 [11.30.00]

16 Now, the Defence makes a point in, both defence teams in their
17 briefs, that often in both the Control Council Law No. 10 and in
18 the IMT judgment, the accused are found guilty of broad
19 categories, basically war crimes or crimes against humanity
20 without the courts often articulating exactly which of the crimes
21 it is that they are convicting the defendant for, which of the
22 abuses. We think that's just a further example that the law at
23 that time was that when you were participating in the criminal
24 plan, you were held responsible for all of the consequences. The
25 courts didn't feel a need to identify particular crimes,

61

1 individual crimes that the person was responsible for. But many
2 of the decisions make it absolutely clear that they were in fact
3 finding the people guilty of the unintended but foreseeable
4 crimes.

5 [11.31.05]

6 So for example, in Einsatzgruppen they made it clear that murder
7 was the principle charge in that case and they held people like
8 Pohl responsible even if they had indicated that they were
9 opposed to mistreatments of Jews or burning down some synagogues.
10 They were still convicted of the war crimes and crimes against
11 humanity that where the principle charge was murder.

12 Similarly for Speer and Sauckel, if they were not being held
13 responsible for these abuses of the slave labour program there
14 would have been no reason for the court to have mentioned the
15 fact that they said that they were against it, but they knew it
16 was happening. So by indicating that, it's clearly -- it's clear
17 that the courts were extending their liability for crimes that
18 were foreseeable to them.

19 Now, I just want to briefly mention the logic of the Appeal
20 Chamber and Pre-Trial Chamber -- sorry, Pre-Trial Chamber and
21 Trial Chamber. The Pre-Trial Chamber found that the joint
22 criminal enterprise could be severed. We think you have to take
23 that principle as a whole, but they said severed and that the
24 third form, this extended form was not part of customary
25 international law and that to apply it to the accused would

62

1 violate the legality principles, specifically the nullum crimen
2 sine lege, that you cannot punish a person for a crime without
3 law.

4 But if you look at that principle it's something that is
5 absolutely fundamental that everyone in this audience could
6 understand. It's a basic principle of fairness that if something
7 -- if your conduct at the time, there is no reason for you to
8 know there is anything wrong with it, there is no reason for you
9 to know it's illegal, you cannot later pass a law and say, "Oh,
10 now we have decided that your conduct is illegal and we are going
11 to punish you for it". But it's focused on the conduct.

12 [11.33.19]

13 What is the difference between the third extended form of joint
14 criminal enterprise and the first two? Well, the second one is
15 even more ambiguous because the second form also includes
16 foreseeable results. A person just is part of a systematic -- a
17 system of mistreatment and knows that crimes are happening. They
18 are held responsible for crimes that they can -- future crimes
19 that they continue to participate.

20 But in all of these what's necessary for the third form of joint
21 criminal enterprise and the first, is that a person has the
22 intent to commit a crime within the jurisdiction of this Tribunal
23 in this case, and that they make an intentional and significant
24 contribution to the joint criminal enterprise.

25 [11.34.11]

63

1 So there is no way that this principle of protecting innocent
2 conduct can be said to be violated when you say, "Well, yes, I
3 knew that deporting millions of people from a city was going --
4 was against international law but I didn't intend for them to be
5 killed or raped." Now, that is not innocent conduct. That's
6 clear.

7 The principle of nullum crimen sine lege cannot be violated
8 because this is clearly conduct that has been made illegal. The
9 person has both an unlawful mens rea, a guilty mens rea, a
10 culpable mens rea and has made an action, a significant
11 contribution to the joint criminal enterprise.

12 So in our view, it does not make any sense to apply that
13 principle of nullum crimen sine lege to then excuse those who
14 have committed acts, intentional acts violating -- crimes against
15 humanity or war crimes and say, well, we are only going to hold
16 you responsible for the crimes you intended and we are going to
17 excuse you from those that you could foresee and willingly
18 accepted the risk would occur. That violates, in our view, the
19 fundamental principles of justice and the purpose of the nullum
20 crimen sine lege law which is that justice be served.

21 So thank you, Your Honours.

22 [11.35.57]

23 MR. PRESIDENT:

24 Thank you. So now it is a good time for lunch. The hearing will
25 -- the Chamber will resume its hearing at 1.30 p.m.

64

1 Security personnel are instructed to bring the Accused to the
2 waiting room and have him returned into the courtroom before
3 13.30.

4 The Court is now in recess.

5 (Court recesses from 1136H to 1332H)

6 MR. PRESIDENT:

7 Please be seated.

8 The Court is now back in session and it is now time for the
9 submission from the defence team for Mr. Khieu Samphan. You have
10 the floor now, Counsel.

11 MR. KONG SAM ONN:

12 Thank you, Mr. President, Your Honours, everyone in and around
13 the courtroom.

14 I would like to make a response to the OCP's appeal against JCE
15 III.

16 [13.33.19]

17 As Your Honours have read my -- our response and after Your
18 Honours have heard the oral submission by the Co-Prosecutor, none
19 of the arguments of the Co-Prosecutors in relation to JCE Number
20 III can convince the Supreme Court Chamber that the appeal is
21 admissible. As I said, none of the arguments of the
22 Co-Prosecutors can convince Your Honours and nor can they
23 convince Your Honours that JCE Number III is applicable to the
24 ECCC.

25 What we have just heard has made our responses in writing on 28

65

1 January 2015 to the OCP's appeal even more convincing, document
2 F11/1.

3 I would like to emphasize a few main points before answering Your
4 Honours' question on the definition of JCE III.

5 [13.35.24]

6 I will now address Your Honour in relation to four different
7 grounds and I want Your Honours to dismiss this appeal.

8 Number two, I will address Your Honours in relation to the
9 principle of legality prohibiting Your Honours from applying JCE
10 Number III to ECCC and after the two points, I will provide our
11 -- my answer to the question of the Supreme Court's Chamber on
12 the definition of JCE III.

13 As I said, Your Honours, the OCP's appeal is inadmissible on four
14 different grounds.

15 Ground Number 1: The appeal is inadmissible because the
16 Co-Prosecutors have no interest in litigation. The Co-Prosecutors
17 did not appeal the Trial Chamber's Judgment, but a decision which
18 was issued at trial. They have written expressly in their appeal
19 -- quote: "For further clarity, the Co-Prosecutors reaffirm that
20 they do not intend to appeal the positive part of the Judgment or
21 any factual or legal findings in that Judgment." End of quote.

22 This is a quote from document E313/3/1 paragraph 10.

23 [13.38.06]

24 The Co-Prosecutors were not harmed by the Judgment; they,
25 therefore, cannot appeal the case 002/01 Judgment.

66

1 In relation to ground number 2, the appeal is also inadmissible
2 because the Co-Prosecutors have not filed the appeal to the
3 competent court.

4 The Supreme Court Chambers -- the Supreme Court Chamber is now
5 seized of Case 002/01 and the appeal of the Co-Prosecutor did not
6 base on the Judgment of Case 002/01. This morning we heard the
7 Co-Prosecutor quoted the testimony of witnesses from other case,
8 not Case 002/01, in order that they can base the -- those
9 testimony on their appeal. Co-Prosecutor referred to the civil
10 party Ahmad Sofiyah in relation to the treatment of Cham.

11 [13.39.43]

12 Ground number 3: The appeal is inadmissible because the
13 Co-Prosecutors have waived their rights to appeal, so the
14 Co-Prosecutor did not have the standing to file the appeal, in
15 another word.

16 The Co-Prosecutors made a first attempt to appeal a decision
17 which they were not satisfied with; however, they did not use all
18 the procedural means at their disposal. Particularly, the
19 Co-Prosecutors did not rely -- did not file the appeal in
20 accordance with the Internal Rule of the ECCC, Rule 74.2. Rule
21 74.2 states about the right of the Co-Prosecutors to file an
22 appeal against a decision or -- or an order of the
23 Co-Investigating Judges.

24 The Co-Investigating Judges issue a Closing Order on 15 September
25 2010 which stipulated about JCE I and II, not JCE III. And then

1 the -- then the Trial Chamber rescinded or removed the JCE III
2 which was requested by the Co-Prosecutor to be applied before
3 this Chamber.

4 [13.42.19]

5 The decision of Trial Chamber was issued on the 7 August 2014.
6 That decision was filed on the Case 002/02 in paragraph 691 and
7 there you can find the finding about JCE. And the Chamber stated
8 that the JCE III did not exist in the international customary law
9 before 1975, so the Chamber will not decide on the issue of JCE
10 III.

11 So the Co-Prosecutors do not justify the need for intervention,
12 especially by the Supreme Court Chamber on the issue. The issue
13 has already been tried twice, Your Honours, consistently; once
14 before the Pre-Trial Chamber and another time before the Trial
15 Chamber.

16 [13.43.44]

17 The Supreme Court Chamber does not need to intervene merely
18 because the Co-Prosecutors are not satisfied with the established
19 jurisprudence. Therefore, for the four reasons I have just
20 stated, Your Honours, it is clear the OCP's appeal inadmissible.
21 In the event that Your Honours decide to consider the merits of
22 the OCC -- OCP's appeal, Your Honours have no choice but to
23 affirm the conclusion of the Pre-Trial Chamber and the Trial
24 Chamber that JCE III is not applicable to the ECCC under the
25 principle of legality.

1 And now, I am addressing Your Honours in relation to the
2 principle of legality, which prohibits the applicability of JCE
3 III before this Chamber, ECCC.

4 The Supreme Court Chamber is well -- is well-informed of the
5 principle of legality. It is because Your Honours have set
6 guidance for the ECCC judges to comply with.

7 [13.45.25]

8 The Co-Prosecutors have made an exaggeration and inundated Your
9 Honours with jurisprudence and national legislation which are not
10 relevant. They even -- they even distorted this jurisprudence and
11 national legislation in order to make Your Honours come to
12 believe that both the Pre-Trial Chamber and the Trial Chamber
13 have committed errors by concluding that JCE III was applicable
14 -- was not applicable to ECCC.

15 In making a correct and objective analysis of their arguments,
16 Your Honours will find that JCE III was not recognized under
17 Cambodian and international laws between 17 April 1975 and 6
18 January 1979. The notion of JCE III, as we argue before this
19 Chamber, was created only after July 15, 1999.

20 Last but not least, the Co-Prosecutors are unable to prove that
21 JCE III was foreseeable and accessible to the Accused at the time
22 of the alleged crime. It is impossible for the Co-Prosecutors to
23 prove it and it is impossible for the Co-Prosecutors to find any
24 evidence to show that JCE III did exist before the alleged facts.

25 [13.47.28]

1 Nearly -- nearly 40 years after the alleged facts, the Pre-Trial
2 Chamber and the Trial Chamber, which are composed of professional
3 lawyers and Judges experienced in international criminal law, and
4 had, at their disposal -- disposal, all the resources which did
5 not exist in 1975 were not able to assert the existence of the
6 JCE III in 1975. So was JC III foreseeable and accessible to Mr.
7 Khieu Samphan in 1975? The answer is absolutely not. No matter
8 how hard the Co-Prosecutors have tried, JCE is still not
9 applicable to the ECCC.

10 In answering to the question of the Supreme Court Chamber on the
11 definition of JCE III, I would like to give my response as
12 follow: Let me recall the question of the Supreme Court Chamber
13 on the definition of JCE III. That JCE III includes only crimes
14 that the perpetrator actually foresaw or all crimes that were
15 merely foreseeable. To answer your question, Your Honours, I will
16 start by saying that foreseeability is clearly personal to the
17 accused; that is to say, subjective.

18 [13.49.33]

19 Foreseeability is not an objective element and it's not in the
20 sense of foreseeability in general. The crime must have been
21 subjectively foreseeable, according to the information available
22 to the Accused at the time; therefore, to say that the Accused
23 willingly took the risk so that the crime may have been
24 committed, foreseeability should be established based on the
25 Accused and on the basis of the information available to the

70

1 Accused at the time he supposedly joined the JCE.

2 On this particular point, Your Honours, I refer Your Honours, in
3 particular, to paragraphs 365 and 411 of the Br?anin judgment of
4 the ICTY Appeals Chamber dated 3rd April 2007, and paragraph 86
5 of the Kvo?ka judgment on the ICTY Appeals Chamber on 28 February
6 2005.

7 I would add that a general foreseeability that the crime may have
8 been committed is not sufficient either in fact or in law. Only
9 foreseeability of the crime resulting from the furtherance of the
10 JCE common purpose is relevant and necessary.

11 [13.51.42]

12 On this last point, I refer Your Honours, in particular, to
13 paragraph 158 of the Gacumbitsi judgment of the ICTR Appeals
14 Chamber dated 7 July 2006 or I may refer Your Honour to paragraph
15 83 of the Kvo?ka judgment that I have already mentioned.

16 Therefore, JCE III only includes crimes that the perpetrator
17 actually foresaw; however, let me reiterate that JCE III was
18 created only after 15 July 19 -- 1999, so it was beyond the
19 temporal jurisdiction of this Chamber.

20 To conclude, I insistently urge Your Honours to declare the
21 Co-Prosecutors' appeal inadmissible. Thank you, Mr. President.

22 JUDGE MONG MONICHARIYA:

23 Mr. Lawyer, could you clarify for the Chamber what the word did
24 you use; did the perpetrator actually foresaw or was it
25 foreseeable to the Accused? Could you clarify this point?

71

1 [13.53.56]

2 MR. KONG SAM ON:

3 When we prove the mode of responsibility, in particular, JCE III,
4 the Accused, if he does not know that the mode of this -- this
5 responsibility JCE III did not exist, how could we hold the
6 Accused responsible for such a crime since that crime was not
7 accessible to the Accused? This mode of responsibility, JCE, was
8 created only after 1999; so how could you, Your Honour, hold the
9 Accused to be responsible for the crimes which were not
10 stipulated before that period of time?

11 [13.55.09]

12 JUDGE YA NARIN:

13 I have a question. Could you please be more -- be more specific
14 on your submission? So the question might be similar. The Trial
15 Chamber convicted Nuon Chea and Khieu Samphan on different
16 charges; namely, evacuation, persecution, execution, and other
17 inhumane acts and these crimes were resulting from the common
18 purposes. These crimes were not part of the common purposes,
19 rather.

20 The Co-Prosecutor then filed the appeal because they thought that
21 the Trial Chamber did not convict the Accused based on the common
22 purposes. So as you said, if this mode of responsibility was not
23 accessible to the Accused, then the Accused should not be held
24 responsible criminally. So did you want to say that the Accused
25 should not be held responsible at all?

1 [13.57.01]

2 MR. KONG SAM ONN:

3 Let me backtrack, a little bit, Your Honours. The first point is
4 about the inadmissibility of the OCP's appeal. The Chamber is now
5 seized of Case 002/01, not a different case. The Accused -- we,
6 the Defence for the Accused, have filed an appeal against the
7 Trial Chamber Judgment in Case 002/01; however, as I said, the
8 appeal of the Co-Prosecutor did not file against the decision of
9 -- the Judgment of Case 002/01, but they tend -- they filed an
10 appeal against one decision of a -- of the Trial Chamber. So in
11 my submission, this kind of appeal is inadmissible because it's
12 not within the case before us.

13 [13.58.26]

14 And in relation to your question, does the Accused needs to be
15 aware of the mode of responsibility, JCE III, I would like to
16 quote a decision -- I would like to quote a jurisprudence or
17 decision which is only available in English so I'm going to read
18 it in English and I would like to ask the interpreters to help in
19 rendering it into Khmer language.

20 It is I -- it is a -- a case from ICTY, IT99/36/A, document
21 F30/11.1.7 -- .17, rather. It is an appeal judgment of ICTY dated
22 3rd April 2007, so I would like to quote from paragraph 365.

23 [14.00.28]

24 "The mens rea required for finding of guilt differs according to
25 the category of Joint Criminal Enterprise liability under

1 consideration. Where convictions under the first category of JCE
2 are concerned, the accused must both intend the commission of the
3 crime and intend to participate in a common plan aimed at
4 commission. For the second category, Joint Criminal Enterprise
5 liability, the accused must be shown to have personal knowledge
6 of an organized criminal systems and intend to further the
7 criminal purpose of the systems. The Tribunal's jurisprudence has
8 also held that for convictions under the third category of JCE,
9 the accused can only be held responsible for a crime outside the
10 common purpose if under the circumstances of the case: 1) it was
11 foreseeable that such crime might be perpetrated by the one or
12 other members of the group and 2) the accused willingly took that
13 risk, *dolus eventualis*. The crime must be shown to have been
14 foreseeable to the accused in particular." End of quote.

15 [14.02.37]

16 So in relation to JCE III, it is clear that the language that is
17 used in this judgment is that the accused intended to participate
18 or to -- or willingly took the risk and the second part is that
19 the accused should be in a position to foresee what might have
20 happened. So within the context of the question by Your Honour
21 that whether JCE III is simply a form or that the accused had to
22 be aware of the crimes committed as well or whether the accused
23 merely knew that the JCE III was in existence and that they could
24 foresee the crimes that might have to be committed.

25 [14.04.02]

74

1 And they -- these two points are the main points of the JCE III
2 and you could not only rely on only one point of the JCE -- that
3 is, only foreseeability. But the accused, himself, must be aware
4 that a crime might have been committed as a result of a common
5 purpose.

6 JUDGE KLONOWIECKA-MILART:

7 I think you made your point clear, Counsel, and yes, just perhaps
8 one clarification on this point from the OCP, if I may, because
9 yesterday we heard arguments related to JCE that emphasized the
10 dolus eventualis as a form of intent. Today, the prosecutor went
11 back, I would say, to the concept of the ad hoc tribunals that,
12 in practice, worked it out to the effect of -- that would be both
13 dolus eventualis and recklessness combined or -- or you may as
14 well say that the recklessness modes of attribution is broader
15 than dolus eventualis.

16 [14.05.46]

17 And actually, when we were asking this question to the parties
18 in November, we were wondering whether the research undertaken
19 could have broaden the examples of national jurisdictions that
20 utilized the dolus eventualis concept at the date relevant for
21 the Khmer Rouge prosecution -- not prosecution, but the criminal
22 -- alleged criminality.

23 I am familiar with dolus eventualis; it sits well with me given
24 my Polish upbringing in law. I guess the recklessness may
25 resonate better with those who come from the US or common law

1 jurisdictions.

2 And we also understand that there were two cases rather used
3 sweeping attributions and it is thus difficult to untangle and
4 you can interpret different things out of it and indeed, this is
5 what the parties do, not only before this Court, but before the
6 ICTY still do. They interpret what is more beneficial to the case
7 that they are advocating.

8 So I would invite, perhaps, elaboration on these -- on this part
9 of the prosecutor's brief that argued that it was a general
10 principle of law that the JCE III modus of responsibility could
11 be used.

12 [14.07.47]

13 MR. KOUMJIAN:

14 Thank you.

15 JUDGE KLONOWIECKA-MILART:

16 And this I would see deriving also from the national
17 jurisprudence than -- jurisdictions than just the international.

18 MR. KOUMJIAN:

19 Thank you. Thank you for the question, Your Honours, and let me
20 try to explain our understanding of how these various intents,
21 mens rea, differs between the forms of responsibility of joint
22 criminal enterprise.

23 One of the things, of course, that makes this conversation a
24 little more difficult is we all come from different systems that,
25 I believe, all have the same general concepts about punishing

76

1 conduct where the probable consequence is known to the accused,
2 but use a slightly different language.

3 [14.08.40]

4 So when we're talking -- and now, I think it's important to
5 distinguish the submissions we made yesterday about JCE I, the
6 basic form, and the intent required from the submissions we made
7 today about the third category of joint criminal enterprise.
8 It's our submission that the third category includes the concept
9 -- it -- it applies the basic civil law concept of dolus
10 eventualis, not recklessness -- dolus eventualis to foreseeable
11 crimes by co-participants in the joint criminal enterprise where
12 the accused could foresee the risk and reconcile himself with the
13 risk and accepted that. That is our understanding of the
14 difference between recklessness and dolus eventualis.

15 [14.09.31]

16 Recklessness does not require that the accused have reconciled
17 themselves with the result; it simply requires behaviour that
18 doesn't meet society's standard of care.

19 Dolus eventualis is a different concept. It requires that the
20 accused actually is in the position and could foresee the risk
21 and you judge whether he foresaw the risk by his position, the
22 information available to him. And I think on this point and the
23 submissions counsel made, just now, on the fifth question; we're
24 in agreement. It has to be that the accused, himself, the court
25 views could understand the risk and reconcile him with -- himself

1 with it.

2 That's different from what we were arguing yesterday about the
3 first form and the basic form of joint criminal enterprise. We
4 were indicating that the word "intent" includes what in civil law
5 is normally called *dolus directus* of either the first or second
6 degree. We're saying that intent does not mean only that that is
7 -- the crime is the object, but it includes where the accused
8 knows that the crime -- and there's various ways of expressing
9 this, that there's a likelihood that the crime is going to occur.

10 [14.10.58]

11 In the trial judgment, they've used the word "substantial
12 likelihood" in talking about that in the making their plans, for
13 example, for the evacuation of Phnom Penh, the second forced
14 transfer, the Accused were aware of the substantial likelihood
15 that the crimes would occur.

16 Your Honours, in one of the questions, I believe, talked about,
17 in the second question, the ordinary course of events the crime
18 could or would occur. They say it cannot be would because nothing
19 in the future is known for certain and I would say that to say in
20 the ordinary course of events, the crime could occur; that's an
21 expression that I think is very close to substantial likelihood.

22 [14.11.47]

23 I suggest that substantial likelihood is a better phrasing for
24 the following reasons:

25 First, as I mentioned yesterday, joint criminal enterprise, all

78

1 the courts including this one, have found that it comes under the
2 statutes prohibition on committing crimes and in Lukic versus
3 Lukic -- Lukic and Lukic, excuse me, the ICTY appeals judgment,
4 they talked about that the commission means either intending the
5 crime or being aware of the substantial likelihood that the crime
6 would occur.

7 It's also consistent with the language that this tribunal has
8 used and other tribunals have used for other modes of liability
9 such as ordering and planning. We don't think it makes any sense
10 to express that differently; it would only add to confusion. So
11 for example, if you have a military operation -- we know that law
12 is this -- and you're aware of the substantial likelihood that
13 your order or your plan will result in crimes, you're held
14 responsible for ordering or planning.

15 Why would it be different if another individual contributes to
16 the order or the plan, wasn't one of the original orderers (sic)
17 or planners, makes a substantial contribution with the knowledge
18 that that -- that these crimes -- a substantial likelihood that
19 these crimes would occur; why would you treat the two of them
20 differently? We think it's important and international law would
21 benefit from consistent language.

22 [14.13.26]

23 I don't think, in practice, there's going to be a difference in
24 whether you use -- how courts apply, whether you use in the
25 ordinary course of events or if you use the word "substantial

1 likelihood." And I point out, there's a book in the library
2 that's edited by Judge Bohlander called "Mens Rea in
3 International Criminal Law."
4 If you look at how different systems all apply to various
5 expressions of mens rea that they have, you -- you'd see that
6 when they -- faced with actual facts, they all find that criminal
7 conduct, where the persons knows that there's a good probability
8 or likelihood that the crime will result, is punishable and
9 that's found to be intentional.

10 [14.14.13]

11 So that's the distinction that we have. We think dolus eventualis
12 is not part of JCE I; it's JCE III. JCE I includes dolus directus
13 of the first and second degree.

14 I hope it clarifies something.

15 JUDGE KLONOWIECKA-MILART:

16 Thank you very much. I also recall that -- to add to this
17 confusion -- confusion, that the -- the counsel for Khieu Samphan
18 argue in 395-396, "The substantial likelihood standard belongs to
19 JCE III and thus, the Trial Chamber should not have convicted
20 based on substantial likelihood under JCE I."

21 But I guess as a working concept, we can accept that the whole
22 JCE is just a -- a name and then what does -- what really counts
23 is what was required of the accused and where is the -- the wrong
24 in his conduct which is reproached and whether this norm was
25 foreseeable at the time.

80

1 But I -- thank you -- thank both parties for -- for the answers
2 to -- to this question that came from us.

3 (Short pause)

4 [14.16.04]

5 MR. KOUMJIAN:

6 Your Honour, if -- I don't want to interrupt. Of course, we
7 welcome any questions, but I just want to let you know that when
8 you do not -- if you do not have further questions, there was a
9 request yesterday for some citations that we're prepared to
10 provide the Court, my colleague, Mr. Lysak, whenever Your Honours
11 feel that's appropriate.

12 JUDGE KLONOWIECKA-MILART:

13 Meanwhile, I'll -- I, of course, retrieved the paragraph 555 of
14 the Judgment which attributes, seemingly, the deaths of the three
15 officials to -- under the chapter titled "Murder", although not
16 quite explicitly. But any other citation and -- and, of course,
17 all the footnotes accompanying it, but any other citations would
18 be welcomed.

19 MR. LYSAK:

20 Yes, thank you, Judge Milart. We were actually -- we were
21 referring -- I did want to briefly address that, but we were
22 referring to the discussion yesterday about the evidence relating
23 to Udong and I had promised to come back to you with some
24 specific references, cites to references. Let me give you those
25 references.

81

1 [14.17.37]

2 And the issue here was what evidence is there to show that Khieu
3 Samphan or Nuon Chea, for that matter, knew of what had -- and
4 the atrocities or crimes that had taken part in Udong when they
5 were discussing this as part of a model to go forward with the
6 evacuation to Phnom Penh.

7 I had mentioned that we had heard from Steve Heder in this
8 courtroom. That was on the 10th of July 2013, 1433 through to
9 1440 in the afternoon and 1512 through to 1514. Heder, who you
10 all are familiar with, actually went to Udong the day after the
11 Khmer Rouge had taken out the population of 30,000. He went up
12 there the very next day. He said there was only a handful of
13 people who were left, maybe a couple of dozen who he spoke to who
14 provided him information on what had taken place, including that
15 there had been executions on the spot of categories of people. As
16 I mentioned too, he actually saw some bodies that had been left
17 behind of six, about six Buddhist nuns.

18 [14.19.00]

19 I mentioned Nou Mao yesterday. He also testified about the Udong
20 evacuation. He had been a commune-level cadre in Udong district.
21 You will find his testimony on the 19th of June 2013 at 09.20 in
22 the morning and 11.31 to 11.33. He talks about information he
23 received at a commune meeting about the people being evacuated
24 and talks about there being many casualties of people dying from
25 starvation and disease because they were moved to an area where

1 there was no food.

2 The third source person who testified here who I want to make
3 sure you are aware of is expert Philip Short. He had conducted
4 research on this that took place at Udong, interviewed local
5 villagers among other things, and he had written in his book
6 about the population being evacuated, and what he had been told
7 which is that officials and uniformed soldiers were separated
8 from the rest, led away and killed. He testified about this on
9 the 7th of May 2013, the afternoon around 1334 to 1338 and when
10 he was asked about what he had found about Udong, he described it
11 as - quote: "consistent with what had happened before and of
12 course with what happened afterwards."

13 [14.20.47]

14 I will note that Short was not the only expert, an author who
15 looked into Udong who reached this conclusion. David Chandler who
16 also testified here, in his book "Tragedy of Cambodian History",
17 E3/1683, page 231, talked about 20,000 people being led off --
18 out into the countryside where class enemies among them were
19 executed.

20 Ben Kiernan, also in his book, talked about the evacuation. This
21 is in "The Pol Pot Regime", E3/1593, page 80 talking about the
22 evacuation and executions of uniformed Lon Nol soldiers.

23 The last two things that I think are most pertinent to the
24 question you asked, Judge Milart, about Khieu Samphan's knowledge
25 of what took place in Udong. There is a speech that Khieu Samphan

1 gave while he was in North Korea on the 5th of April 1974, so
2 about two, three weeks after the Khmer Rouge had captured Udong
3 and evacuated the people out.

4 [14.22.15]

5 The speech you will find in E3/167, E3/167. And it included a
6 reference to what had taken place in Udong with -- this is what
7 Khieu Samphan said that day:

8 "On 18 March, our people's National Liberation Armed Forces
9 liberated another city, Udong, by annihilating all the puppet
10 soldiers along with their reinforcements. In other words, over
11 5,000 enemies were eliminated, 1,500 of whom were captured." End
12 of quote.

13 This is significant obviously because it shows Khieu Samphan was
14 in the loop. He was receiving detailed reports about what took
15 place in Udong.

16 And the other document I want, a piece of evidence to bring to
17 Your Honours' attention, because of the importance of Udong to
18 the Cambodian people, this being a historic royal capital, there
19 was significant public reaction to some of the atrocities that
20 took place there.

21 In document E3/195, which is a report from the U.S. embassy on
22 the 9th of April 1974, there is a description of an open letter
23 that was written to the leaders of the Khmer Rouge by the supreme
24 patriarch of the largest Buddhist sect in Cambodia. This was
25 something that was broadcast on the radio.

1 [14.24.08]

2 The leader of this Buddhist sect, this is what the report
3 describes him saying - quote:

4 "His Eminence took the KC" -- the U.S. embassy reports used KC as
5 a shorthand reference for the Khmer Rouge -- "took the KC to task
6 for the destruction of Udong with its many pagodas and cultural
7 treasures and pointed out that they are serving North Vietnamese
8 genocidal expansionist goals by continuing to kill innocent
9 fellow countrymen. He appealed to the KC to show compassion by
10 allowing villagers to return to their native land and monks and
11 laymen to return to Udong." End of quote.

12 [14.25.08]

13 So the point of this document, of course, Your Honours, is that
14 there simply is no issue -- can be no issue that Khieu Samphan
15 and the other leaders were aware of what took place in Udong,
16 both through their own internal communication systems and from
17 the public statements that arose as a result, including this
18 letter from one of the top Buddhist leaders in the country.

19 Your Honour has already noted what I was going to say in regard
20 to the issue of the inclusion of the Lon Nol killings. As you
21 indicated, the first sentence of the findings of murder includes
22 a reference to those top officials and a site to that paragraph.

23 Let me just say one, a couple more things on that issue. The
24 Khieu Samphan statement that I mentioned to Your Honours, this
25 was not as counsel indicated, a normal statement made in the

85

1 course of warfare. There are plenty of those in the record which
2 we are not citing where Khieu Samphan and the role that he had is
3 trying to rally, rally the forces. This was not that. This was a
4 decision, an announcement of an intent to kill the top leaders of
5 the Lon Nol regime, not to kill soldiers in combat, to kill the
6 top leaders, civilian and military. That is unlawful. So I don't
7 think that the Defence can dismiss this as talk in the time of
8 warfare.

9 [14.27.09]

10 I neglected to mention one thing also to Your Honours which is
11 the evidence that Khieu Samphan himself wrote these statements.
12 We heard from a number of cadres who worked at the command
13 headquarters and two of them spoke to this issue. One, an
14 individual named Kim Vun who worked at an office called B-20
15 which in the pre-'75 period dealt with publications on behalf of
16 FUNK and also sending reports that would be broadcast. He
17 testified that the statements that they would send came from
18 Khieu Samphan.

19 And Phy Phuon again, who testified that the main thing he saw
20 Khieu Samphan doing at S-71, the Party headquarters in the
21 pre-'75, period was writing. In his words, he was writing
22 documents all the time. So any notion that these were not
23 statements coming from Khieu Samphan is refuted by the testimony
24 of this witness.

25 [14.28.23]

86

1 One last point before I sit, we've heard the assertion that Khieu
2 Samphan was a symbolic leader who had no voice, that he hadn't
3 become a full rights member of the Central Committee till 1976. I
4 do want to direct Your Honours to one significant piece of
5 evidence on that. Ieng Sary himself in an interview stated that
6 before Khieu Samphan became a full rights member in 1976, before
7 that he was a de facto member of the Central Committee. You will
8 find that in interview E3/3198.

9 I am not going to address the wealth of evidence that we have put
10 before both the Trial Chamber and addressed in our briefs about
11 the actual role of Khieu Samphan, his participation in Standing
12 Committee meetings, the fact that he worked, lived and worked
13 together with Pol Pot and Nuon Chea on a daily basis not only in
14 the pre-'75 period at S-71 and B-5, but at K-1 and K-3, the Party
15 headquarters after.

16 We've heard from many witnesses in this courtroom who worked at
17 K-1, who worked at K-3, who worked at that who described the
18 relationship between these three people, how they worked
19 together, they worked daily. When there were significant meetings
20 when the zone leaders came in, the three of them were there.

21 [14.30.16]

22 And in Khieu Samphan's own words talking about Pol Pot and Nuon
23 Chea, "We did nothing separately". That was Khieu Samphan's own
24 description of his relationship with Pol Pot and Nuon Chea.

25 So to call him a symbolic leader, in our respect, simply does not

87

1 accord with the evidence. This is a man who worked, was in the
2 very inner circle of the top regime.

3 And I think I have covered the issues here, so unless you have
4 any further questions about Udong or the Lon Nol executions, I
5 will cede the floor.

6 MS. GUISSÉ:

7 Mr. President, with your leave if there are no further questions,
8 may I take a few minutes to respond to the points that have just
9 been made? And I may also make some remarks on JCE III.

10 I beg your pardon.

11 [14.31.56]

12 MR. LYSAK:

13 I am sorry. Before -- sorry to interrupt. I have been informed
14 one of the cite I gave you was to the wrong document, so I want
15 to make sure that that's corrected.

16 The Ieng Sary interview where he testifies or where he stated
17 that Khieu Samphan was a de facto member of the Central Committee
18 before he became a full rights member is actually document
19 E3/573, E3/573. I think I gave you a -- I gave you a wrong, the
20 wrong reference for that one.

21 MS. GUISSÉ:

22 So perhaps I should start by clarifying one point regarding the
23 joint criminal enterprise of type III. I would refer you to
24 F11/1, notably paragraph 75 in which we said that we will talk
25 about domestic law, that is domestic law, Cambodian domestic law

88

1 at the time, particularly to the fact that regardless of the name
2 given to it, the principle and constituent elements of joint
3 criminal enterprise were not part of Cambodia domestic law in
4 1975. This is just a reminder.

5 [14.33.25]

6 One point as well as regards Udong in response to what the Deputy
7 Co-Prosecutor has just said, we are told that Short talked about
8 what happened in Udong, and we should bear in mind that Short was
9 an expert on the matter.

10 The question is - what -- a question was put to him by the
11 Defence. The Defence asked: What were the sources in this
12 document E1/903? And it is about -- after 13.37.27, at the
13 hearing of the 27th of May 2013, and he is asked to give the
14 authorities regarding Udong, and he says that he discussed with
15 the villagers. And the question put to him was as follows: "When
16 you discussed the matter with the villagers, did the people who
17 personally witnessed -- did the persons witness these events or
18 they wrote them for you?"

19 [14.34.32]

20 And his answer was -- the question was: "How many people in the
21 region did you discuss the matter, if you remember?" And the
22 answer was: "It is difficult to say. I spoke with a number of
23 villagers on a number of various issues. Some of them referred to
24 this. At least one or two persons spoke about Udong specifically,
25 but I don't remember exactly. It will rely on what the expert

1 witness, Short, said in this issue regarding Udong. He said he
2 spoke to one or two persons but that he wasn't very sure."

3 That is the first point.

4 [14.35.17]

5 Witness Nou Mao was also referred to. That witness has a
6 particular history because he was called to try to corroborate
7 what Phy Phoun said regarding the evacuations. Bearing in mind
8 his testimony, the Chamber was not able to rely on his testimony
9 in this matter, particularly when we are talking of Udong.

10 It is true that he had functions in the rear front of the war.

11 And this is what he says and it -- that is the hearing of the
12 19th of June 2013, document E1/209.1, and it is shortly before
13 11.36.37:

14 Question: "Did you personally see the persons who were evacuated
15 from Udong?"

16 Answer: "No, I did not see them with my own eyes."

17 [14.36.17]

18 And after 11.36.37 he says that, "I didn't witness this
19 personally" but he expressed later that, "At that meeting there
20 were representatives of the various communes who came to talk
21 about their successes and victories against the opposing forces
22 in Udong."

23 So these testimonies echo what I said this morning, that is to
24 say that when we talk of the evacuation of people, evacuation of
25 people from Udong, we can confirm that what was said corresponded

90

1 to the withdrawal of various forces. We note that there were
2 victories on the side of Lon Nol and the opposing forces. This is
3 the clarification that I wanted to make

4 [14.37.11]

5 Furthermore, another important point worth mentioning is that
6 today we talked about a number of things saying that Mr. Khieu
7 Samphan was a de facto member and that he had more powers than
8 one would think. There is an important principle here which is
9 part of what the Chamber recognized in paragraph 77 of the
10 Judgment which is to say that these evolutions - or these changes
11 were based on the principle of secrecy -- sovereign independent
12 democratic centralism.

13 So starting with the principle of secrecy, this is a matter I
14 haven't spoken about sufficiently during these hearings but we
15 definitely mentioned it in our appeal brief. This principle of
16 secrecy was something that was constantly referred to by all
17 witnesses who appeared to testify before this Chamber, and if we
18 look at the number of times when the principle of secrecy was
19 referred to, we would have a colossal number.

20 [14.38.24]

21 And this principle of secrecy is something that was also recalled
22 by Mr. Khieu Samphan, something that underpinned the functioning
23 of Democratic Kampuchea and their leaders. So to say that perhaps
24 we have copies of WRIs of certain members of the Standing
25 Committee or certain meetings of the Central Committee that Khieu

91

1 Samphan attended let me recall that we have only two meetings.
2 They refer to when he took the floor and he spoke about a
3 particular field which corresponded to his duties and
4 responsibilities and what he said was limited only to his
5 functions and was related to information he received.
6 And we should bear in mind that the principle of secrecy is the
7 very first principle underpinning the establishment of that
8 regime. And again, the question remains open: If he was a de
9 facto member of the Standing Committee, why did they have to wait
10 for so long before he was promoted to rank of full rights member?
11 [14.39.43]
12 There were limits to what he was able to know or what he was in a
13 position to know and never, never, never has the Chamber been
14 able to establish any role related to criminal activities. And
15 we've talked about his role in the commerce department; we've
16 talked about his role in receiving diplomatic delegations, his
17 role relating to messages he delivered outside of Democratic
18 Kampuchea. But no one ever talked about his role, nor his
19 military duties and responsibilities. And this was validated by
20 the Chamber.
21 And this is important when we are talking of military matters.
22 Let me remind the Chamber that when we are talking of the
23 evacuation or movements of the population, or at least the ones
24 we discovered as part of this Case 002/01, these evacuations
25 which are the bedrock of the so-called recurrent pattern of

1 conduct. This was said by Nuon Chea and many witnesses as regards
2 to all these movement of civilians, these were done under the
3 responsibility of the armed forces.

4 [14.40.52]

5 So this is the context under which we should view this matter and
6 we should bear in mind that it is not true that they knew
7 everything because practically all the witnesses, or at least the
8 majority said as part of this trial, that he did not know all
9 what they claimed that he knew. I wanted to clarify this for the
10 Chamber.

11 MR. PRESIDENT:

12 I have a question directed to all parties to give their personal
13 understanding.

14 I have heard the submission in the defence team for Mr. Khieu
15 Samphan that the Trial Chamber erred in not summoning -- the
16 Trial Chamber committed an error in failing to summon Heng
17 Samrin.

18 This Chamber would like to ask the parties to provide their view
19 on the precise legal remedy that the Accused should be afforded
20 in the event that this Chamber finds that the Trial Chamber
21 committed an error in not calling Heng Samrin. In particular, to
22 what extent may this Chamber draw from Heng Samrin 's interview
23 with Ben Kiernan's inferences in favour of the Accused?

24 So you can proceed now, International Counsel for Mr. Khieu
25 Samphan.

1 [14.43.05]

2 MS. GUISSÉ:

3 Thank you, Mr. President.

4 I am in a very delicate situation because the application to call
5 Heng Samrin was filed by the Nuon Chea team and I cannot speak on
6 his behalf.

7 But let me recall that at a point in time I did state that we are
8 discussing the mode of responsibility and the joint criminal
9 enterprise. We are talking of a common purpose and members of the
10 joint criminal enterprise which means that if you want to have a
11 clear vision of the file, we need to talk to people who can talk
12 about the precise goals and policies of Democratic Kampuchea.

13 [14.43.50]

14 So I believe it is very important. It is all the most -- it is
15 important all the more so because we've had a decision by the
16 Trial Chamber which does some -- in which we find some dissenting
17 attitudes on the part of the International Judges and we know
18 that it is not possible to return to the Trial Chamber. If in
19 your deliberations you consider that it was necessary to call Mr.
20 Heng Samrin to appear and testify, I do not see any other
21 opportunity for us to open the debate and to enable the parties
22 to discuss the matter, because we cannot return this issue to the
23 Trial Chamber, particularly as regards the remedy you can offer,
24 the legal remedy you can offer in this particular matter.
25 I don't know whether I have answered your question.

1 [14.44.56]

2 MR. KOUMJIAN:

3 Mr. President, Your Honours, we've submitted in our appeal brief
4 our joint view that the decision not to call Heng Samrin was
5 within the discretion.

6 Clearly, it is well known that there was a disagreement even
7 among the prosecutors about whether to object to him being
8 called. But what we jointly stated is that there is nothing in
9 Heng Samrin's purported evidence that would be exonerating.
10 So we do not have any objection, if Your Honours feel he should
11 have been called, to Your Honours drawing whatever conclusions
12 from the notes of Kiernan that are favourable to the accused that
13 you can find.

14 [14.45.40]

15 We would point out, of course, that the notes refer to a meeting
16 in May of 1975 after this wave of executions of Lon Nol top
17 officials had occurred, after the people had been evacuated, at
18 least a month after the people had been evacuated after, out of
19 Phnom Penh and after the executions at Tuol Po Chrey. So as we've
20 submitted in our brief, there is nothing in our view that is
21 exonerating about it.

22 But if Your Honours feel that he should have been called, we have
23 no objection for you drawing whatever favourable inferences you
24 can find in that interview.

25 (Short pause)

1 [14.46.45]

2 MS. GUISSÉ:

3 Thank you, Mr. President. I forgot to give a reference to the
4 Chamber, first of all regarding Udong, to confirm what was said
5 regarding the different toeing -- movements and the fighting that
6 took place at that location at different times. I am referring to
7 document -- declassified U.S. document, E3/195 and the ERN in
8 English -- I believe it's only in English, 00412706. And in this
9 document we should bear in mind are contextual elements, and I
10 forgot to point this out earlier.

11 We are citing telegrams and other documents from the United
12 States. We should nevertheless bear in mind that the Lon Nol
13 troops and those of the FUNK and the GRUNK were in opposition. We
14 have the Lon Nol supported by the United States and we are in a
15 Cold War period. So we have two factions that are speaking
16 effectively and engaging in propaganda activities each in their
17 camp. So it's important and this is what the document, whose ERN
18 I have just given you, states.

19 [14.48.41]

20 Sorry, I forgot to say that I will be speaking in English.

21 "The radio continued also to focus on Udong, claiming that the
22 developments there show that the 'Khmerization' of the war by the
23 U.S. has collapsed, and alleging that the embassy 'was furious at
24 the clique of running dogs' for failing to recapture the city.

25 The radio also alleged that 80,000 persons came to the 'Liberated

96

1 Zone' from Udong and elsewhere between March '14 and March '18."
2 So here again I am referring to what was said over the radio and
3 what was said in such messages. We should not forget that when
4 people are at war they use propaganda and they use the airwaves.
5 So they use radio programs. They make speeches on the radio. They
6 clearly have to engage in propaganda and this is what is done. We
7 have such propaganda when we are in a war situation. So this is a
8 contextual element I would like you to take into account.

9 [14.49.55]

10 This is the last point I want to make, and this is the last
11 reference I will be providing because I don't want to use your
12 time too much.

13 Mr. Phy Phoun talks about the fact that he saw Mr. Khieu Samphan
14 writing at certain places in the jungle. What was he writing
15 exactly? Some people have explained that speeches were written by
16 different leaders. Some speeches were read over the radio that
17 were attributed to this person or the other, but no one knew
18 exactly who had written or delivered what message. Let us
19 remember that we were in a war, a serious situation. So whatever
20 was written and delivered on the radio was not written and
21 delivered by the same person.

22 [14.50.56]

23 So Khieu Samphan was in the jungle writing and the witness never
24 said that he had access to what he wrote, document E1/111.1 at
25 13.56.18: "The statements he delivered had several pages. I do

97

1 not know exactly how long they were, all of them. Some were 10
2 pages long. I don't think Mr. Khieu Samphan wrote those
3 statements alone. In the hierarchy of the FUNK, this initiative
4 was impossible without the decision of Prince Norodom Sihanouk."
5 End of quote.

6 This is again something that the witness said. This is the last
7 reference I wanted to give to the Chamber.

8 MR. PRESIDENT:

9 So there are no more questions from the Bench.

10 So in accordance with 109.5 of the ECCC Internal Rules, Nuon Chea
11 and Khieu Samphan will have the opportunity to address the
12 Chamber directly at the end of the session. However, Nuon Chea
13 has waived his right to address finally before the Chamber.

14 [14.52.32]

15 So I was informed that Khieu Samphan would like to address the
16 Court finally before this Chamber for a period of 10 minutes.

17 So you have the floor now. Please take the Accused to the
18 accused's stand.

19 (Short pause)

20 [14.53.55]

21 MR. KHIEU SAMPHAN:

22 Mr. President, may I sit?

23 MR. PRESIDENT:

24 Yes, you may sit.

25 MR. KHIEU SAMPHAN:

1 Thank you.

2 Good afternoon, Mr. President and good afternoon, Your Honours.

3 Good afternoon to everyone who is present. My sincere respect to
4 venerable monks residing in pagodas throughout the country, to my
5 beloved countrymen.

6 First of all, allow me to express my sincere thanks and gratitude
7 to the Supreme Court Chamber to express my opinions.

8 I am confident that the Supreme Court Chamber is aware of the
9 approach the Trial Chamber took in this trial which led to my
10 conviction to life imprisonment. The Trial Chamber had a
11 pre-judgment of my guilt. With that determination it sorted and
12 distorted evidence in order to confirm its prior decision.

13 [14.56.52]

14 I have limited knowledge in legal and technical terms to submit
15 to Your Honours that the Trial Chamber distorted the evidence in
16 my case. My lawyers have spoken better in this regard.

17 What I want to say today and what I want my countrymen to hear is
18 that as an intellectual I have never wanted anything other than
19 social justice for my country. At that point in time I submitted
20 several proposals to reform economies gradually in order to
21 establish the foundation for economic independence for my country
22 and to achieve a certain social equilibrium so there won't be too
23 large a gap between the poor and the rich.

24 How could this be deduced that I wanted to see the killings of
25 those men, women and children or that I was a member of a joint

1 criminal enterprise intending to kill the population?

2 [14.59.23]

3 Of course, in the 1960s I wanted the economic reforms of the
4 Sihanouk regime and I was against the policy of Lon Nol. However,
5 I was also an independent intellectual with my own convictions.
6 At the time I believed in the prince and that is why I came back
7 into his government in the hope of making changes from within.
8 With its independence and neutrality policy, he dared to refuse
9 to be placed under the umbrella of the Southeast Asia Treaty
10 Organization of the Defence, which is a military pact established
11 by the United States of America through Southeast Asia after the
12 defeat of France at Dien Bien Phu.

13 I thought that from this position of independence, the prince
14 would be able to adopt my proposal for a necessary reform to lay
15 the basis for economic independence for the country and make it
16 able to do without foreign aid, especially the U.S. But I
17 realized that it was merely an illusion. I noted that in fact he
18 practiced a double-face policy. He held other hand to the
19 socialist countries, but on the other he allowed Lon Nol to lead
20 repression against progressive and patriotic forces. And that's
21 how I was forced to flee into the forest.

22 [15.02.25]

23 In the context of the facts of the time met by the struggle for
24 independence of colonial peoples and the Cold War, while I was in
25 the jungle I saw the CPK leaders who demonstrated their

100

1 patriotism in their fight against Lon Nol and the United States
2 by relying on their own independent self-mastery and self-reliant
3 forces. I was convinced that after the war, they would be able to
4 cope with the huge challenges of reconstructing the economies,
5 the livelihood of the entire population while defending its
6 national independence and sovereignty which was hard won with the
7 greatest sacrifice of the people and nation.

8 [15.04.03]

9 To define the so-called policy of the Communist Party of
10 Kampuchea, the Trial Chamber followed the same approach as that
11 of the Co-Investigating Judges and Co-Prosecutors. They only
12 looked at what happened in the bases. They failed to find out if
13 such implementation at the local level consistent with the
14 original objectives and directions that were established.
15 This is a fundamental issue for me. I shall shout loudly that I
16 never wanted to agree to any policy that is against the Cambodian
17 people. I have never wanted any policy that involves crimes
18 against the population, as alleged by the Trial Chamber.

19 [15.05.33]

20 What I heard during the Court hearings and what I have read
21 during my many years of detention confirms my belief that the
22 revolutionary ideology, which I believe, was misguided by people
23 who clung to their power of feudal lords. They were the people
24 who wanted to retain their privileges and were concerned about
25 their interests and did not understand that it was their duty to

101

1 make every effort for the welfare of the population.

2 [15.07.08]

3 Throughout the investigations and trial, the Co-Investigating
4 Judges, the Co-Prosecutors and the Trial Chamber all allege that
5 I had the power in the decision-making process. In reality I was
6 never given such a right. This is a distortion of facts. In
7 reality it is the opposite. Today, Your Honours have my files and
8 my life in your hands. I do not have any more hope for the Trial
9 Chamber as they even wanted to prevent me from working on my
10 appeal briefs. And Your Honours have the appeal briefs by me and
11 my lawyers.

12 I ask you to please examine the evidence objectively with an open
13 mind and without any prejudice even though I know that they want
14 to make my case a symbol of condemnation.

15 [15.09.31]

16 I cannot find words to alleviate the suffering of the Cambodian
17 people. All I can say is that I never had the intention to commit
18 crimes or contributed to the commission of crimes during the
19 evacuation of Phnom Penh, the event at Tuol Po Chrey or in the
20 context of what the Trial Chamber called the second phase of
21 forced movement of the population. I never wanted any crimes
22 committed against the population nor participated in any plan to
23 do that at any time during the period of Democratic Kampuchea
24 regime.

25 And that is what I would like Your Honours to keep in mind when

102

1 you make your decision in this case. Thank you, Your Honours.

2 [15.11.35]

3 MR. PRESIDENT:

4 This concludes today's hearing and the appeal hearing.

5 I would like to take this opportunity to thank the parties for
6 their submissions over the past three days. I also would like to
7 thank the Court officers, interpreters, greffier, security
8 personnel and everyone else inside and outside of the courtroom
9 who have contributed to this hearing.

10 The Supreme Court Chambers are now retired to deliberate on the
11 appeals brought by Nuon Chea, Khieu Samphan, as well as the
12 Co-Prosecutors. Once the deliberations are concluded and the
13 judgment on the appeals drafted, the judgment will be pronounced
14 in open court. A scheduling order for that hearing will be issued
15 in due course.

16 Security personnel, you are instructed to take the Accused to the
17 detention facility, and the hearing is now closed.

18 (Court adjourns at 1513H)

19

20

21

22

23

24

25