



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
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TRANSCRIPT OF APPEAL PROCEEDINGS

PUBLIC

Case File N° 002/19-09-2007-ECCC/SC

16 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

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List of Speakers:

Language used unless specified otherwise in the transcript

Speaker	Language
Ms. CHEA Leang	Khmer
The GREFFIER	Khmer
Ms. GUIRAUD	French
Ms. GUISSÉ	French
Judge KLONOWIECKA-MILART	English
Mr. KONG Sam Onn	Khmer
The President (KONG Srim)	Khmer
Mr. KOUMJIAN	English
Judge MWACHANDE-MUMBA	English
Mr. PICH Ang	Khmer
Mr. SMITH	English
Judge YA Narin	Khmer

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

2 (Court opens at 0910H)

3 MR. PRESIDENT:

4 Sit down.

5 On behalf of the United Nations and the Cambodian people, the
6 Supreme Court Chamber of the ECCC announce the resumed appeal
7 hearing of the appeals brought by Nuon Chea and Khieu Samphan
8 against the Judgment of the Trial Chamber of 7 August 2014, and
9 the Co-Prosecutor's appeal regarding the applicability of the
10 notion of Joint Criminal Enterprise in its extended form in Case
11 002, dated 19 September 2007, where the -- where Nuon Chea and
12 Khieu Samphan were charged.

13 Greffier, could you report the attendance of the parties and
14 individuals to today's proceedings?

15 [09.11.58]

16 THE GREFFIER:

17 Mr. President, all parties in the appeals proceeding in Case
18 002/01 are the Co-Prosecutors, who are present; and the defence
19 teams are all present, except the International Counsel for Nuon
20 Chea, who is absent with no reason. The Lead Co-Lawyers for civil
21 parties are also present.

22 We also have 14 civil parties present for today's proceeding --
23 that is, on the 16 of February 2016, including Lay Bony, Mann You
24 Suh, Khen Sok, Chhorn Kimkhorn, Ou Dav, Chhat Kim Chhun, Madam
25 Teu Ry, Madam Yim Sovann, Madam Som Soth, Madam Phen San, Madam

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1 Phin Than, Madam Chhat Vun, Madam Krot Ly, Madam Chan Socheat.

2 These are the 14 civil parties who are present today.

3 Mr. Nuon requests to follow the proceedings remotely from the
4 holding cell downstairs. Thank you.

5 [09.14.14]

6 MR. PRESIDENT:

7 Nuon Chea has waived his right, and the waiver is dated 16
8 February 2016, attached with a medical report which is confirmed
9 by the duty doctor for the Accused. He has requested to waive his
10 rights to follow the proceedings from the room downstairs.

11 As the waiver is of a proper form, the Chamber grants Nuon Chea
12 his request to follow today's proceedings remotely from a holding
13 cell downstairs.

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

16 [09.15.30]

17 As you will recall, the Supreme Court Chamber initially scheduled
18 this hearing from 17 to 19 November 2015. However, the Chamber
19 was forced to adjourn the hearings and to reschedule it because
20 Nuon Chea was not legally represented following his National
21 Co-Lawyer's decision not to return to the courtroom following the
22 morning break.

23 The Chamber subsequently found that the National Co-Lawyer's
24 conduct amounted to misconduct. In order to ensure that Nuon
25 Chea's legal representation is secured at all times, the Chamber

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1 also instructed DSS to appoint a standby duty counsel for Nuon
2 Chea, who is in the courtroom today.

3 However, the standby duty counsel will only take over if Nuon
4 Chea's co-lawyers decide to absent themselves from the hearing.

5 As I explained already at the hearing last November, the purpose
6 of this hearing is to hear the parties' submissions on the
7 appeals, in particular, to reply to arguments contained in the
8 responses to the appeal briefs.

9 [09.17.25]

10 The parties also will have an opportunity to comment on the
11 additional evidence the Chamber has admitted and to respond to
12 the Chamber's questions, some of which have already been
13 communicated to the parties. However, the Chamber may ask
14 additional questions in the course of the hearing.

15 In order to ensure an efficient use of time, the Chamber has
16 decided to split up the appeal hearing into six thematic sessions
17 grouping the various grounds of appeal.

18 The first five sessions concern the appeals brought by Nuon Chea
19 and Khieu Samphan. The appellants have submitted several hundred
20 arguments in support of their respective appeals alleging
21 factual, legal and procedural errors. The Chamber has attempted
22 to group them to make it easier for the public to follow the
23 appeal hearing.

24 [09.18.50]

25 In an annex to the initial scheduling order for the appeal

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1 hearing, the Chamber indicated which grounds of appeal and
2 paragraphs from the appeal briefs should be discussed in the
3 respective sessions. I should highlight that, sometimes, this
4 categorization was not easy to make and some grounds of appeal
5 could fall into more than one of the sessions.

6 The first session, which is to start immediately after this
7 introduction, concerns the grounds of appeal alleging violations
8 of the Accused fair trial rights, as well as the issue of whether
9 the ECCC's Internal Rules are unconstitutional and illegal.

10 The second session concerns the grounds of appeal related to the
11 Trial Chamber's overall approach to the evidence. This session is
12 scheduled to commence today after lunch.

13 At the end of the day, time is reserved for the Supreme Court
14 Chamber's questions on the subjects covered during today's
15 sessions.

16 [09.20.23]

17 Tomorrow morning, we will start with a session dedicated to the
18 grounds of appeal related to the crimes for which the Accused
19 were convicted. After lunch, the Chamber will commence with the
20 session on the grounds of appeal related to Nuon Chea's and Khieu
21 Samphan's individual criminal responsibility.

22 We shall conclude this session in the morning of day three of the
23 hearing. Also, on Thursday morning, the Chamber shall hear
24 submissions in relation to Khieu Samphan's arguments on appeal
25 regarding the sentence imposed by the Trial Chamber.

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1 Thursday afternoon is dedicated to the appeal of the
2 Co-Prosecutors, and there is time allocated for final questions
3 by the Chamber.

4 During this last part of the hearing, the Accused may also
5 address the Chamber in person, if they so wish, in accordance
6 with Internal Rule 109.5.

7 [09.21.39]

8 As to the conduct of the individual sessions, in compliance with
9 the applicable procedural rules, notably Internal Rules 108.5 and
10 109.4, each session will start with the report of the
11 co-rapporteurs. I appointed the co-rapporteurs for the appeals of
12 Nuon Chea, Khieu Samphan and the Co-Prosecutors in June of last
13 year to address each aspect of the appeals.

14 Given the size of the appeals and the large number of grounds of
15 appeal, the co-rapporteurs' reports do not attempt to summarize
16 comprehensively and in detail all the submissions on appeal.

17 Rather, they serve as an introduction to the relevant session and
18 as an overall view to the general public of the issues raised on
19 appeal.

20 If a particular argument or ground of appeal is not mentioned in
21 the report, this does not mean that the co-rapporteurs have
22 overlooked it.

23 Following the co-rapporteurs' remarks, the parties will be
24 invited to make their submissions in the order indicated on the
25 timetable. The parties are instructed not to go beyond the time

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1 allotted to them, as we are running on a tight schedule.

2 [09.23.28]

3 Should it appear that particular aspects of the submissions
4 require more time, the Chamber has discretion to afford parties
5 additional opportunities to supplement their submissions in the
6 time reserved for the Judges' questions. This will not be done
7 routinely, but only if strictly required.

8 Furthermore, in keeping with Internal Rule 109.4, I would like to
9 inform Nuon Chea and Khieu Samphan once again of their
10 fundamental rights under Internal Rule 21(d). This provision
11 reads as follows:

12 "Every person suspected or prosecuted shall be presumed innocent
13 as long as his/her guilt has not been established. Any such
14 person has a right to be informed of any charges brought against
15 him or her, to be defended by a lawyer of his or her choice and,
16 at every stage of the proceedings, shall be informed of his or
17 her right to remain silent."

18 [09.24.53]

19 Before I move to the first session of the appeal hearing, there
20 are two more procedural issues that I would like to address.

21 During the last proceedings, after the Chamber granted the floor
22 to Nuon Chea, Nuon Chea and his defence team did not wish to make
23 any further submissions at the appeal hearing. This is also clear
24 in their later appeal briefs as well as in their new submissions
25 for the reconsideration for the admission of new evidence.

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1 Also, yesterday afternoon, the Supreme Court Chamber received an
2 email from the defence team which confirms that the Defence does
3 not intend to make any submissions during the appeal proceedings
4 or to respond to any questions by the Bench.

5 It is clear that Nuon Chea does not wish to make any submission
6 during the appeal proceedings. Based on this ground, the Supreme
7 Court Chamber will make decision relying on the thousands of
8 pages of his appeal briefs. However, the Chamber would like to
9 inform Nuon Chea that this is the last chance for Nuon Chea to
10 make submissions on the substance of the pending appeals.

11 [09.27.04]

12 And once again, the Chamber would like to inform Nuon Chea that
13 if he still stand by his decision not to make submission at this
14 stage and whether he fully comprehends and accepts the
15 consequences of this decision. However, if he wishes to change
16 his mind, he shall inform the Chamber before the start of its
17 thematic sessions.

18 I would like to record that the timetable of the hearing which
19 was communicated to the parties as an annex to the scheduling
20 order of 23 December 2016 (sic) provided for time for submissions
21 of Nuon Chea. Obviously, since Nuon Chea maintains his position
22 and will not make submissions, the timetable will have to be
23 adapted.

24 The other parties shall be prepared to make their respective
25 submissions earlier than what is foreseen in the timetable of 23

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1 December 2016 (sic).

2 [09.28.07]

3 Second, the Co-Prosecutors filed a request seeking the Chamber's
4 authorization to rely on additional authorities in their
5 submissions at the appeal hearing. So far, no responses to this
6 request have been filed. I therefore would like to invite the
7 party to indicate whether they are opposed to the Co-Prosecutors'
8 request and, if so, on what grounds.

9 I would like now to hand the floor to the defence team for Khieu
10 Samphan.

11 MS. GUISSÉ:

12 Good morning. Thank you, Mr. President.

13 We, the Khieu Samphan team, are not opposed to the use of new
14 sources by the Co-Prosecutors. We are of the view that, to the
15 extent that the Supreme Court Chamber had indicated the last time
16 that, depending on the way the proceedings would unfold, it would
17 be possible for the parties to provide additional sources even at
18 the end of closing arguments. It is more appropriate to have that
19 before the pleadings, but we would like to be able to respond to
20 them. And of course, if we have any additional submissions to
21 make, we will do so.

22 That is the position of the Khieu Samphan team.

23 [09.29.49]

24 MR. PRESIDENT:

25 I would like now to hand the floor to the Lead Co-Lawyers for

1 civil parties.

2 MS. GUIRAUD:

3 Thank you, Mr. President. Good morning, everyone.

4 We do not have any objections to the use of these documents by
5 the Office of the Co-Prosecutors.

6 MR. PRESIDENT:

7 Since there are no objections by the party, the Supreme Court
8 Chamber hereby decides to grant the Co-Prosecutors' request.

9 I would like now to move to the first session regarding the
10 grounds of appeal relating to fairness of proceedings and
11 constitutionality of the Internal Rules.

12 The co-rapporteurs already made their remarks in the previous
13 hearing. For that reason, we now move immediately to the remarks
14 or submissions by the parties regarding this thematic session on
15 the fairness of proceedings and the constitutionality of the
16 Internal Rules.

17 And first, I'd like to give the floor to the defence team for
18 Khieu Samphan.

19 [09.31.32]

20 MR. KONG SAM ONN:

21 Thank you, Mr. President. Good morning, Your Honours. Good
22 morning, parties, and good morning, everyone in and around the
23 courtroom.

24 I'd like to make my remarks regarding the appeals. This is in
25 relation to the fairness of the proceedings at the trial stage as

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1 well as at the investigation stage. I'd like to make the
2 following remarks.

3 Every accused has the right to a fair trial. This is fundamental
4 throughout the world, and it is also fundamental in Cambodia.

5 [09.32.30]

6 The Extraordinary Chambers in the Courts of Cambodia is supposed
7 to be a model court, a model court for the international
8 community, as well as a model court for Cambodia. This ECCC was
9 established in Cambodia following an agreement reached between
10 the United Nations and the Royal Government of Cambodia,
11 specifically emphasizing the rights of the accused to a fair
12 trial as enshrined in Articles 14 and 15 of the International
13 Covenant on Civil and Political Rights, to which Cambodia is a
14 signatory. And that is also stipulated in the ECCC agreement, and
15 the law on the establishment of this Court which was promulgated
16 by the late King Father Norodom Sihanouk, which insists on
17 respect for the accused's rights.

18 [09.33.51]

19 The Article 35 New of the ECCC law even specifies that the
20 accused has the right, at least, to these minimum guarantees.

21 According to the law and the human rights principles, Khieu
22 Samphan was entitled to at minimum. He did not have it.

23 From the outside, one might think that this is the case, that
24 Khieu Samphan was entitled to lawyers to defend him. Khieu
25 Samphan was part of the same scenario during the Democratic

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1 Kampuchea regime as he was the Democratic Kampuchea showcase. We,
2 his lawyers, were the window to give credibility to this Court.
3 In reality, trial Judges have never had the intention of letting
4 us do anything other than decoration, especially not allowing us,
5 as defence lawyers, to perform our duty effectively.
6 Despite all the fundamental guarantees insistently referred to in
7 the law and in some fundamental Internal Rules of this model
8 court and despite appearances, Khieu Samphan did not receive a
9 real criminal trial. He did not have a fair trial, and that is a
10 shame for the international community and, especially, it is a
11 shame for Cambodia for allowing this injustice to continue upon
12 human beings as well as upon Khieu Samphan.
13 And I'd like to hand the floor now to my international colleague.
14 [09.36.12]

15 MS. GUISSSE:

16 Mr. President, Your Honours, the Judges of the Supreme Court
17 Chamber, it is with a strange sense of déjà vu that I take the
18 floor today before you. Just about -- more than two years ago, in
19 this -- these same robes and in this same courtroom, at this same
20 desk, I addressed the Judges of the Trial Chamber and I urged
21 them to have a critical and impartial approach.
22 To say that we, on this side of the Bench as the Defence at the
23 time of the closing arguments, we hoped to see another result
24 would be a lie. The signs were there. They were there throughout
25 the duration of the proceedings. And the Judgment of the 7th of

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1 August 2014 only confirmed our fears.

2 As a matter of fact, the trial took place and, today, Mr. Khieu
3 Samphan is appealing the Judgment. That trial was not the trial
4 of Mr. Khieu Samphan as an individual. It was the trial of a
5 regime, a regime that was defeated and a regime that the
6 international community had already condemned. And in this
7 general condemnation, it had also condemned beforehand Mr. Khieu
8 Samphan.

9 [09.37.56]

10 As I said in October 2013 at the time of the closing arguments
11 before the Trial Chamber, the irony of history is such that the
12 person who is the symbolic representative of Democratic Kampuchea
13 has also turned out to be the symbolic convict, to the detriment
14 of law and a fair trial.

15 Because we are in Cambodia before an international jurisdiction,
16 we cannot but establish an analogy with another trial that took
17 place in this part of the world in the 1940s before the
18 International Military Tribunal for the Far East, the famous
19 Tokyo trial.

20 That tribunal would have been charged with trying war criminals,
21 Japanese war criminals after the second World War, has very
22 disturbing similarities with the trial before us today.

23 [09.39.02]

24 In Phnom Penh, as in Tokyo, the trial took place in a country
25 that had suffered massive bombardments of the United States. In

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1 Phnom Penh, as in Tokyo, the trial took place following difficult
2 political negotiations. In Phnom Penh, as in Tokyo, the trial
3 faced financial difficulties. It was conducted by several Judges
4 drawn from several countries.

5 In Phnom Penh, as in Tokyo, the trial lasted more than two years.

6 In Phnom Penh, as in Tokyo, the accused were represented by
7 lawyers. And in Phnom Penh, as in Tokyo, the judgment that
8 condemned them unexceptionally had hundreds and hundreds of
9 pages, and yet the Tokyo trial was characterized as cosmetic
10 justice.

11 It was so much talked of and criticized that, today, no one dares
12 refer to its juris - to its case law.

13 Alas, Mr. President, Honourable Judges of the Supreme Court
14 Chamber, we are obliged to level the same criticisms at the trial
15 before the Trial Chamber.

16 [09.40.34]

17 As in Tokyo, the law as it was applied is questionable. As in
18 Tokyo, the evidence is also questionable. We have seen a mass of
19 documents of doubtful authenticity.

20 As in Tokyo, the key figures never appeared as accused or as
21 witnesses. As in Tokyo, the accused were carefully chosen in
22 order not to disturb the government in power. And as in Tokyo,
23 the accused were convicted in advance.

24 Well, unfortunately, yes, in Phnom Penh, as in Tokyo, before the
25 ECCC, there hasn't been a fair trial of Mr. Khieu Samphan because

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1 the purpose of the trial was never really to try him, but to
2 sentence him and convict him. That was the only objective.

3 Unlike the Tokyo trial, Mr. Khieu Samphan, before the ECCC, has
4 the right to appeal the judgment, and that is why we are here
5 before you in these appeals hearings.

6 [09.41.58]

7 These appeal hearings, which are very complex, are being held in
8 an extremely tense atmosphere. I will not revisit the incidents
9 that coloured our appearance before your Chamber, but I would
10 like to say that there was a lot of tension at the time of the
11 drafting of our appeals brief. And the crucial nature of that
12 appeal was at the very heart of Mr. Khieu Samphan's
13 preoccupations, and we, as his defence counsel, have given
14 priority to these appeals proceedings because it is obvious, Mr.
15 President, Your Honours of the Supreme Court Chamber, that when
16 you have been sentenced to life imprisonment, the appeal is
17 crucial.

18 The facts are serious. The facts are painful. It is difficult to
19 remain composed and calm when the stakes are so high, but we are
20 in a court of law.

21 We are not talking of facts. For simply talking about facts and
22 history, we are talking about facts because, at the end of the
23 day, the law has to be applied. And the application of the law
24 must take place with the objective detachment and the serenity
25 that beholds a fair trial. That has not been the case before this

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1 -- before the Trial Chamber.

2 [09.43.32]

3 So to criticize in 210 pages a judgment that was 777 pages long
4 in French, it is not an easy task at all. I would even tell you
5 that it is impossible, and our task was made even more difficult
6 by the fact that the Judgment reflects the manner in which the
7 trial was conducted -- that is, in total confusion.

8 I will revisit that issue when we deal with the general approach
9 of the trial, but bear in mind that, in our brief, we laid
10 emphasis on the massive errors of fact and law and, in the part
11 on a fair trial, we had to sacrifice certain things but you
12 shouldn't think that this part on a fair trial is something that
13 we relegate to the back burners. Not at all.

14 This trial, a fair trial, has been at the very heart of our
15 struggle since the beginning of the trial. It is the leitmotif of
16 our brief.

17 [09.44.58]

18 Convicting Khieu Samphan was the goal. He had to be convicted
19 before he passed on. The end justifies the means. In any case,
20 that is what we gathered from the reading of the Trial Chamber
21 Judgment.

22 And the Judges convicted him following repeated and deliberate
23 violations of the principles of a fair trial in an opportunistic
24 manner, and it is not in the 35 minutes that are given to us
25 today that I'll be able to go into all these breaches, but I will

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1 give you a few examples that would illustrate my point, striking
2 an emblematic examples of the problems that have dogged this
3 entire trial.

4 The original sin committed by the Trial Chamber, for a start, is
5 that it did not rely on the evidence to judge Mr. Khieu Samphan
6 to determine whether the evidence was enough for Mr. Khieu
7 Samphan to be convicted beyond reasonable doubt.

8 [09.46.08]

9 The Chamber set out with the conviction that Mr. Khieu Samphan
10 was guilty and that they had to arrange, interpret, manipulate
11 and distort the evidence in order to find Mr. Khieu Samphan
12 guilty. We have already told you, and I refer you to our
13 application before your Chamber for an immediate stay of
14 proceedings in 2013. We said that the only solution was a stay of
15 the proceedings at the time because it was impossible, in view of
16 all the breaches of Mr. Khieu Samphan's right to a fair trial, to
17 arrive at a result that would be correct and in line with
18 international standards.

19 [09.47.12]

20 You responded at the time that -- saying that it was too early
21 and that, in the appeals, we would be able to present our
22 grievances. We are appearing before you today, Mr. President,
23 Honourable Judges of the Supreme Court Chamber.

24 Since your decision of October 2013 in which you told us that we
25 have to wait for the appeals, new evidence was brought to the

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1 fore, and it only confirmed that it was never a question of
2 conducting a fair trial of Mr. Khieu Samphan.

3 An extraordinary Court, yes, extraordinary. But let us remember,
4 nevertheless, that however extraordinary it may be, this
5 jurisdiction must comply with the rules in order that the trial
6 may be fair vis-à-vis the accused. The charges have to be
7 extremely clear and must be defined punctiliously. And I refer
8 you to paragraph 13 of our appeals brief.

9 [09.48.18]

10 The proof is that the Chamber, throughout these proceedings, only
11 violated the principle of its con -- temporary jurisdiction. In
12 criminal proceedings, we have to try the accused in light of the
13 facts of the case. Period. And beyond the violation of the
14 temporary jurisdiction, we have this problem of the severance,
15 which was not practicable, which is such that, today, before you,
16 we are pleading and appealing a decision which was taken on the
17 basis of four policies, four policies of the CPK, whereas the
18 facts show that we are examining the facts relating to the five
19 policies in the second trial segment.

20 So the Trial Chamber sought evidence outside the scope of that
21 trial segment to convict Mr. Khieu Samphan, and yet the
22 Co-Prosecutors said the group of experts which was at the very
23 heart of the constituted works of this Tribunal -- it says in the
24 report of 18th of February 2013, that it was possible to seek
25 elsewhere the sources of planning and incitement, and yet they

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1 omit to mention paragraph 149 of the report, which states that
2 the jurisdiction of such a tribunal should be limited to the
3 period of Democratic Kampuchea -- that is, the 17th of April 1975
4 to the 7th of January 1979.

5 [09.50.15]

6 However, when you read that judgment, you would find that there
7 is a considerable portion of the Chamber's findings which stray
8 out of that temporal jurisdiction. Under such circumstances, it's
9 not a question of simply talking of the context.

10 Yes, it is important to talk about the context if we're talking
11 of the historical context, but there are findings, and I refer to
12 all the parts regarding what has been referred to as the
13 recurrent pattern conduct, which was such that you had to look
14 out of the temporal jurisdiction for evidence, which should not
15 have been allowed within the temporary jurisdiction of the
16 tribunal.

17 [09.51.09]

18 So they talked of this report. In view of the establishment of
19 the tribunal, several recommendations were made in that report,
20 including the recommendation that there should be no Cambodian
21 Judges in that Court. Yes.

22 They said the prosecutor should not be -- the prosecutor and the
23 statute didn't follow those recommendations. They, instead,
24 followed recommendations regarding the temporary scope.

25 Let us be clear on this matter. These recommendations regarding a

1 temporary jurisdiction limited between 17th of April 1975 to 7th
2 of January 1979 was aimed at not involving other parties in the
3 conflict - that is, the United States and Vietnam, but regardless
4 of the reasons that led to the adoption of this temporary
5 jurisdiction.

6 It was incumbent on the Trial Chamber as regards the drafting of
7 the statutes of the ECCC, they could have relied on the
8 experience of the international tribunals. They knew that there
9 was the principle of strict interpretation of provisions
10 conferring jurisdiction to international tribunal.

11 In not respecting these rules that were clear, the Trial Chamber
12 violated Mr. Khieu Samphan's right to a fair trial.

13 [09.52.49]

14 Another example is the manner in which the deliberations were
15 conducted.

16 In order to understand the partiality of the Trial Chamber, the
17 determination to convict Mr. Khieu Samphan, which underpins its
18 judgment, let me give you an emblematic example.

19 Analyzing or establishing an analogy between the testimonies of
20 two witnesses, Witness Phy Phuon, a key witness in Case 002/01
21 because he is the only witness who argued that Mr. Khieu Samphan
22 took part in a meeting during which the decision to evacuate
23 Phnom Penh was taken. That is the only witness.

24 And I would like to establish the analogy between Mr. Phy Phuon's
25 examination and that of Mrs. So Socheat -- that is, the wife of

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1 Mr. Khieu Samphan. And you would see that the demonstration is
2 clear.

3 And when I say that the demonstration is clear, I'm not only
4 asking you to refer to the transcripts of these two witnesses,
5 but to also see the video because the video footage and the words
6 speak volumes.

7 [09.54.20]

8 This was a Defence witness. He was the first to appear, and in
9 the hearing of the 1st of August 2012 at about 11.49. He was
10 examined by Ieng Sary counsel. And during the Defence
11 examination, when the witness was confronted with contradictions,
12 this is what the President of the Chamber said:

13 "Counsel, you cannot make statements to disturb the witness. You
14 can do so during your closing arguments."

15 And then he tells the witness, "Mr. Witness, you do not have to
16 answer the question."

17 And the President goes on to say:

18 "Counsel, please rephrase your question and avoid putting
19 questions that are aimed at intimidating the witness and
20 undermining the confidence of the witness in light of what he has
21 just said."

22 So the Trial Chamber absolutely had to protect that Chamber.

23 [09.55.34]

24 And when it was my co-counsel's, Vercken's turn to cross-examine
25 the witness, the President spoke to the witness and told him to

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1 remain strong. That was the transcript of 2nd August 2012.

2 Then, when it was the turn of Mrs. Socheat to appear, and here we
3 can say that she did not enjoy the same favours. And it was
4 another ball game. They were not protecting her, but in addition
5 to that, they assaulted her somehow verbally.

6 Let me refer you to the 11th of June 2013 hearing, and it was
7 Judge Lavergne examining her.

8 You should look at the video footage because you do not see the
9 tone, the face and all that underpinned the functioning of these
10 examinations.

11 JUDGE KLONOWIECKA-MILART:

12 Counsel, excuse me. Could you refer me to the paragraph of your
13 brief? We are trying to make some notes. It would facilitate it.

14 [09.56.53]

15 MS. GUISSSE:

16 I will find this just in a moment. If you please allow me, Your
17 Honour, I will give you the reference in a moment.

18 JUDGE KLONOWIECKA-MILART:

19 Sorry, I didn't mean to interrupt your stream of thought; I will
20 find it myself, then. I thought you had it handy. Thank you.

21 MS. GUISSSE:

22 But I will get back to you in a moment with the exact reference.

23 In any case, it is in the part where we discuss the meetings when
24 the evacuation was discussed and the evidence that was used by
25 the Chamber in that regard. So I'd like to give you the reference

22

1 to the transcript during which Judge Lavergne questioned this
2 witness. And you will note this upon reading the transcript.
3 Here, I am being informed, however, that it is paragraph 41 of
4 the appeal brief. And during this hearing of 11 June 2013, Judge
5 Lavergne, who is supposed to be impartial, behaves like an
6 intimidating prosecutor who apparently is annoyed and, therefore,
7 Ms. So Socheat is faced with rhetorical questions that are
8 condescending and disparaging.

9 Once again, please look at the videos.

10 [09.58.18]

11 We are here dealing with a completely different way of treating a
12 witness compared to Phy Phuon and, in fact, the Co-Prosecutors
13 were given extra time to question, I should say, or to
14 interrogate, in fact, this witness. And the Prosecution goes even
15 beyond what was criticized -- what the Defence was criticized
16 about when Phy Phuon was examined because, on 11 June 2013, at
17 around 3.58 in the afternoon, this is what is said. And this is
18 the prosecutor speaking:

19 "Ms. So Socheat, I would like you to react to what follows. My
20 hypothesis is that you and your husband got together to set up a
21 testimony concerning a supposed departure from K-3 and in a
22 deliberate and dishonest and cynical way, in an attempt to lie to
23 this Chamber and to deceive all of the Judges. What may you say
24 to this?"

25 [09.59.25]

1 And of course, we object at that point. And this objection is
2 overruled.

3 Here, it's -- the idea is not about intimidating or not the
4 witness. We're not asking this witness to remain strong. We're
5 not explaining to the Prosecution that they should wait for the
6 final submissions. No.

7 After all, this is an exculpatory witness, so this witness can be
8 destroyed, so to speak. And this witness who almost became an
9 accused person, and it is only towards the end of the examination
10 on 12 June 2013 between 10.28 and 10.31 when the civil party
11 lawyers spoke, that the President reminded, after the Defence
12 objected, that yes, indeed, certain things cannot be said before
13 the Court.

14 So this hearing was a turning point for Mr. Khieu Samphan and for
15 his defence team. It was clear at that moment that this double
16 standard -- this double standard is what was behind the Chamber's
17 thought process. And this was proven to us, and it was proven to
18 us that the aim of the proceedings was only to keep everything
19 that was inculpatory and to hide under the carpet anything that
20 could be exculpatory.

21 [10.00.56]

22 And speaking about partiality here means speaking about new
23 elements that you have admitted before your Chamber, and here I'd
24 like to refer to a video of Judge Cartwright. And also, I'd like
25 to refer to excerpts of Marcel Lemonde's book. Marcel Lemonde was

1 a former Investigating Judge.

2 Let's first speak about Judge Cartwright's video, document
3 E305.12.38R. And the full transcripts of her statements are on
4 the case file as well.

5 In November 2013, Silvia Cartwright, who was a Trial Chamber
6 Judge during Case 002/01, a Judge who participated in the
7 deliberations in this case, is invited, apparently, to an event
8 in Washington D.C., and she's filmed at the Aspen Institute.

9 [10.02.01]

10 And November 2013, the date is important because we pleaded in
11 October 2013, so here we're speaking about the beginning of the
12 deliberations here. And honestly speaking, I must tell you that I
13 have a hard time understanding how a magistrate of this calibre,
14 of this professional calibre, was able to think that she could
15 say such things in public. However, she did speak this way, and
16 this is what she said.

17 She speaks first about the -- first, she spoke about the
18 political context and she explained that "since the tribunal does
19 not meet the political vision of the Cambodian government" -- we
20 should remind that Cambodia has the same leaders since the end of
21 Democratic Kampuchea -- that - "who apparently did everything
22 possible to neutralize the tribunal and to corner it", and she
23 added to this, and I quote again:

24 [10.03.05]

25 "We can say that the discussions between the United Nations and

1 the Cambodian authorities allowed us to retain a group of
2 potential accused persons who were delivered on a silver platter
3 to the tribunal."

4 "Delivered on a silver platter to the tribunal." No comments.

5 And she also speaks about her Cambodian colleagues. After having
6 spoken about the political context and after having characterized
7 this regime as atrocious -- here we're speaking about the
8 beginning of the deliberations. And she said, when she was
9 speaking about the defendants, that:

10 "Sometimes they provided explanations, but their explanations
11 were not convincing."

12 And she -- and she continues regarding her Cambodian colleagues,
13 and she says that she heard them sometimes, and I quote:

14 "grumble, grumble to express their disagreement with certain
15 statements they hear."

16 [10.04.06]

17 And she adds to this that if -- occasionally, the Judges can
18 remain quiet while grumbling and she hears them because she is on
19 the Bench, she believes, and I quote: "that this is nothing in
20 comparison to what they could say and what they could do."

21 This is what Judge Cartwright said in public, whereas the
22 deliberations in Case 002/01 had just started. So of course, she
23 may be free to speak about the political context of Cambodia and
24 she may speak about her colleagues, okay, but what is extremely
25 concerning here is when she expresses her personal opinions. And

1 she was part of the Bench, and the Bench was supposed to try in
2 full impartiality, and this is what she says.

3 I do not believe that there exists anything that can be
4 considered a fair trial, and it's very, very difficult in this
5 context to have one. And she adds to this:

6 "But as far as I'm concerned, the most important thing is
7 fighting impunity."

8 That's it. Here, we have summed up in a few words, a few words
9 coming from the mouth of a member of the Bench -- of the Trial
10 Chamber Bench, that she can deal with a trial that is not exactly
11 fair because what matters is fighting impunity. So fighting
12 impunity prevails over the fairness of the trial.

13 [10.05.58]

14 So we all went to law school. We all know that a fair trial is
15 the only way to see justice being done and that, without a trial
16 -- a fair trial, the object of a trial fails. It is the duty of
17 the Judges to guarantee the fairness of the procedure and to be
18 the guarantors and the guardians and, in the end, we're obliged
19 to come up with this bitter conclusion: three Cambodian Judges
20 who have a difficulty listening to evidence without reacting in a
21 negative way given their experience and a Judge from New Zealand
22 for whom what matters the most is fighting impunity, even if the
23 trial is not exactly fair. And as I mentioned earlier, a French
24 Judge who is behaving like a prosecutor.

25 When we sum up things in this way, Mr. President, Your Honours of

1 the Supreme Court, you will understand that there was no
2 possibility for a fair trial. This was never the objective, in
3 fact. And the Judgment is the clearest demonstration of this.

4 [10.07.06]

5 Another element of evidence, the excerpts from Marcel Lemonde's
6 book, the former -- a former Co-Investigating Judge at this
7 Court, who explains to us, document E189/3/1/7.1.2, at ERN
8 00893651, that when he arrived at the ECCC and he befriended a
9 Cambodian Judge who told him to be wary of all Cambodian
10 magistrates, and he underlines "magistrates". Either they were
11 living in fear of the government in place or they were close to
12 this government, but none of them was reliable and none of them
13 was independent.

14 This is what the former Co-Investigation Judge, who was behind
15 the Closing Order, says to us. The Closing Order which indicted
16 our client, Khieu Samphan.

17 He also speaks about the pressures from the government in place
18 and, in the same document, ERN 00893657, he explains that,
19 because of governmental pressure, capital witnesses who
20 absolutely had to be examined were not examined.

21 [10.08.30]

22 And he also speaks about the reticence of the American government
23 by saying that he was never able to obtain the CIA archives on
24 Cambodia that contained -- I quote, "interesting elements for the
25 investigation".

1 And when we asked to put these excerpts before the Court or to
2 put Marcel Lemonde's -- excerpts of Marcel Lemonde's book before
3 the Court and to remind that if that -- there was here a desire
4 to manipulate evidence at the start, and we were refused. And
5 what's interested in this book by Mr. Marcel Lemonde, here again
6 -- and here is an excerpt that we wanted to place on the case
7 file, and the Trial Chamber refused this request.

8 And it's on page -- it's page 202 of this book. And this is what
9 he says regarding what guided him when he wrote the Closing
10 Order. He explains that, given the fragility of this tribunal,
11 given the age of the defendants, the future is uncertain. And he
12 said that:

13 [10.09.38]

14 "It seemed to us important to write the Closing Order as -- with
15 the idea in mind that there was going to be no trial of the Khmer
16 Rouge. So here, we can take -- we include factual historical
17 elements that were not necessary but that seemed important in
18 case our decision would be the only trace left by this tribunal
19 regarding what happened in Cambodia between 17 April 1975 and 6
20 January 1979."

21 The Chamber did not admit this excerpt of Marcel Lemonde's book,
22 and when we read the judgments, we have to ask ourselves if there
23 isn't some kind of recurrent modus operandi coming from the Bench
24 with regard to this case because we have to note that this
25 judgment that we are appealing now is not a criminal judgment. It

1 is a document for history.

2 And here, I must say a few words about a report that made a lot
3 of noise recently by the Asian International Justice Initiative
4 and East-West Centre which criticized the tribunal and criticized
5 the way the Trial Chamber proceedings took place, and it made a
6 lot of noise. And I'd like to reassure everyone, we do not have
7 any particular opinion with regard to this organization but, as a
8 jurist, when we have certain principles in mind, when law means
9 something to us, of course, there are legal failings that shock
10 us when we read the judgments and when we have followed the
11 proceedings.

12 [10.11.21]

13 As I reminded you earlier, the Chamber already ruled on the
14 existence of a JCC to which allegedly Khieu Samphan participated.

15 MR. PRESIDENT:

16 The defence for Mr. Khieu Samphan, you almost run out of time. We
17 would like to know whether you have many more submissions to
18 address the Chamber.

19 You are running out of time. You were allotted 35 minutes for
20 submitting your arguments, so please be a little bit brief on
21 your submissions.

22 [10.11.56]

23 MS. GUISSÉ:

24 I apologize, but the French booth tells me that they're not
25 getting any sound, so -- but I don't understand Khmer, but I

30

1 understand that you're telling me that I'm running out of time.
2 Well, I will finish by telling you that, in the face of these
3 elements that I'm talking about, you are facing a very heavy
4 responsibility.

5 MR. PRESIDENT:

6 You are running out of time, so it is now 10 past 10.00.

7 MS. GUISSÉ:

8 Well, I heard you, and I understood you, Mr. President. I simply
9 wanted to conclude my submission.

10 And I simply would like to request you to apply law the way it
11 should be applied and not to act like the Trial Chamber and to do
12 as you, yourself, indicated in a decision of the 26 June 2013 at
13 paragraph 6, to make sure that, as your colleagues of the
14 European Court of Human Rights indicated, to guarantee rights
15 that are not theoretical, but that are concrete and real.
16 And that's what we're requesting from you. And this is why --
17 this is what we're requesting from you while condemning the lack
18 of fairness that the Trial Chamber demonstrated.

19 MR. PRESIDENT:

20 It is now time for our morning break. We will take a 20-minute
21 break from now and resume at 20 to 11.00.

22 The Court is now in recess.

23 (Court recesses from 1013H to 1041H)

24 MR. PRESIDENT:

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

31

1 Now it is time of the submission by the OCP, so you can proceed
2 now, Co-Prosecutor.

3 [10.42.50]

4 MS. CHEA LEANG:

5 Good morning, Mr. President, Your Honours, everyone in and around
6 the courtroom.

7 Today we reach a further important stage in the adjudication of
8 criminal responsibility of Nuon Chea and Khieu Samphan for crimes
9 committed during the Democratic Kampuchea regime four decades
10 ago.

11 This appeal hearings deal with those charges which the Trial
12 Chamber decided to sever and heard in the first part of Case 002,
13 what is now known as Case 002/01, charges of crimes against
14 humanity committed during the forced transfer of the population
15 of Phnom Penh in April 1975, a further forced transfer between
16 zones that started later that year, and a massacre of former
17 soldiers and officials of the Lon Nol government, also in April
18 1975.

19 [10.44.08]

20 Litigation in this case started with the Co-Prosecution's
21 introductory submission filed with the Co-Investigating Judges in
22 July 2007, eight and one-half years ago.

23 Since that time, this institution has ensured that a team of
24 experienced and capable national and international lawyers have
25 represented the Accused throughout the proceedings before four

1 separate Judicial Chambers: the Co-Investigating Judges, the
2 Pre-Trial Chamber, the Trial Chamber and now Your Honours, the
3 Supreme Court Chamber.

4 [10.45.00]

5 Hundreds of witnesses were interviewed during the investigation,
6 and tens of thousands of pages of documents placed on the case
7 file. Many dozens of legal motions have been litigated before
8 these four Chambers, resulting in important developments in
9 international criminal jurisprudence that will have significance,
10 long after this institution has closed its doors.

11 The trial on the charges in Case 002/01 began with the opening
12 statements in November 2011, and ended on 31st October 2013.

13 During the two years of trial, the Court heard from 92 witnesses,
14 civil parties and experts.

15 The lawyers representing the appellants were given the
16 opportunity to question each of these witnesses. This figure of
17 92 witnesses does not include the two appellants, who each gave
18 limited testimony before indicating they wished to exercise the
19 right to remain silent and not to answer any more questions.

20 [10.46.27]

21 Nevertheless, on the final day of the trial's oral arguments,
22 both appellants took advantage of the opportunity given them by
23 the Trial Chamber to have the final word, and each gave a speech
24 without being obliged to answer any questions.

25 All parties, including the appellants, were given the opportunity

1 to present documentary evidence and to challenge those -- to
2 challenge documents sought to be admitted by the -- by other
3 parties.

4 The Trial Chamber, after having examined all of the evidence,
5 found both appellants guilty of multiple charges of crimes
6 against humanity and sentenced them to life imprisonment. Both
7 appellants have appealed their convictions in Case 002/01 and
8 claim the trial was unfair.

9 [10.47.40]

10 Last November, when the appeal hearings were scheduled to begin,
11 Your Honours allowed Nuon Chea to make a further public statement
12 where he called the proceedings a "mockery of justice" and said
13 that he had instructed his counsel to boycott the appeal
14 hearings.

15 Nuon Chea claimed -- and I quote, "You refused to give me even
16 the chance to tell the Cambodian people my side of the story."

17 Your Honours, Nuon Chea has had every chance to tell the
18 Cambodian people his side of the story. His side of the story,
19 however, has repeatedly been found unconvincing.

20 In Case 002/01, Nuon Chea started to testify, but then decided he
21 did not want to answer any further questions from the Prosecution
22 or the Judges. Nuon Chea chose to remain silent, which is his
23 right, respected by this Court. But it is disingenuous for him to
24 assert his right to remain silent, then tell the public that he
25 was denied the right to tell his side of the story.

1 [10.49.18]

2 Last November, Your Honours gave Nuon Chea another opportunity to
3 state his grievances with this appeal, and even listened
4 patiently even while he attacked your own judicial integrity.
5 What his statement made clear is that he does not want to engage
6 in a real debate about the strength of the evidence and the
7 fairness of proceedings because the more the public learns about
8 those proceedings and the evidence produced, the more obvious it
9 is that his complaints are meritless.

10 In the trial of this case, a great deal of time, money, effort
11 and patience has been expended to ensure that the findings are
12 based on facts, based on evidence and that the process was
13 fundamentally fair. In criminal cases dealing with massive
14 atrocities, it is simply impossible to call every possible
15 witness to testify. Millions of people witnessed the crimes of
16 evacuation of Phnom Penh and other crimes of the Khmer Rouge, and
17 obviously, all of them cannot testify.

18 The Tadic trial chamber recalled that courts have long recognized
19 that an accused is entitled to a fair trial, not a perfect trial.
20 In order to complete a trial within a reasonable period, any
21 court dealing with such complex cases must make difficult
22 choices.

23 [10.51.32]

24 It must select only the most relevant witnesses and must ensure
25 that the parties confine their questions to issues relevant to

1 the case. However, the strategy of the appellants in this case
2 has been to do everything possible to shift the focus of this
3 trial away from the crimes of the Khmer Rouge by any means
4 possible.

5 Of course, they do not want the Court or the public to pay
6 attention to the evidence of the policy they promoted that led to
7 the deaths of millions of Cambodians. The evidence of guilt of
8 the appellants is simply overwhelming. This is why Nuon Chea has
9 long said he knows he will be convicted.

10 Like other accused in history who know the evidence of their
11 guilt is too obvious to contest, Nuon Chea's tactics from the
12 beginning have been to try to discredit the Court and turn the
13 trial into political theatre.

14 [10.52.55]

15 His lawyers even stated in their response to the Co-Prosecutor's
16 opening statement that they intended to act as court jesters
17 during the trial.

18 Despite these provocations from Nuon Chea's lawyers, the trial
19 remained focus on ensuring a fair trial. When the Trial Chamber
20 limited Defence questions or arguments to those relevant to the
21 charges, they were simply doing the job required of any competent
22 court anywhere in the world.

23 Your Honours, I believe that the ECCC Court serves two very
24 important purposes.

25 First, it demonstrates that those responsible for the gravest

1 crimes cannot escape accountability, no matter how senior their
2 rank or how much time has passed.

3 Secondly, it teaches Cambodians and the rest of the world that a
4 just society is based on the rule of law, and all persons are
5 entitled to a fair process, both victims and the accused.

6 Listening to Nuon Chea's speech in November where he lectured
7 Your Honours on fair trial rights, I was struck by how obviously
8 this Court has succeeded.

9 [10.54.50]

10 Now, even Nuon Chea acknowledges the importance of a fair trial,
11 although his own regime destroyed all courts and operated under
12 no law, instead, executing those they suspected of disloyalty,
13 relying on confessions extracted by torture rather than real
14 evidence, and providing no trial or legal representation at all.
15 There is a video in evidence in this case where Nuon Chea tells
16 his biographer that he had no regrets about the killing of those
17 he suspected of disloyalty, as he considers those smashed to have
18 been, "enemies of the people". So, one of the successes of this
19 institution and this trial is that we have shown the world, and
20 even convinced Nuon Chea, that justice requires law and a fair
21 process.

22 Nuon Chea falsely equates the independence of ECCC Judges with
23 their willingness to grant his requests or lend credence to his
24 arguments, no matter how irrelevant.

25 [10.56.38]

1 The record shows that both the Trial Chamber and this Chamber
2 have carefully considered all of his requests and arguments.
3 Indeed, this Chamber even took the extraordinary step of calling
4 three additional witnesses on appeal solely on the request of
5 Nuon Chea. Yet when those witnesses appeared before this Chamber,
6 their evidence not only did not provide any exoneration for Nuon
7 Chea, they further confirmed his guilt.

8 In their appeals, both appellants complain that the Court relied
9 on statements and writing of persons who did not testify at
10 trial, and they claim that such evidence is unreliable. But it is
11 a fundamental principle in civil law systems, such as those of
12 Cambodia and France, that Judges can admit such evidence.
13 Further, in the jurisprudence of all of the international
14 criminal tribunals, such as out of court statements and hearsay
15 writings, are admissible as long as the Judges consider the
16 nature of the evidence in deciding what weight to give to it. The
17 appellants themselves asked the Court to admit statements of
18 witnesses who did not testify.

19 [10.58.34]

20 In his speech in November, Nuon Cheam claimed the most serious
21 violation of his fair trial right was the failure of the Trial
22 Chamber to summons Heng Samrin to testify. In his appeal brief,
23 Nuon Chea asserted that no living person was more directly and
24 personally responsible for the evacuation of Phnom Penh than Heng
25 Samrin. But in his own statement during trial, Nuon Chea

1 contradicted this when he admitted that he and other Party Centre
2 leaders, not division and regiment commanders like Heng Samrin,
3 planned and ordered the expulsion of the population from
4 Cambodian cities.

5 Heng Samrin was not even present at the early April 1975 meeting
6 at which the plan to attack and evacuate Phnom Penh was conveyed
7 by the Centre to division commanders.

8 Two witnesses testified in Case 002/01, Meas Voeun and Ung Ren,
9 who both held the same rank as Heng Samrin in 1975 and who both
10 participated in the forced transfer of the population of Phnom
11 Penh.

12 [11.00.17]

13 In his appeal, Nuon Chea claims it was critical to ask Heng
14 Samrin what were the orders that commanders received about what
15 to do with those who refused to leave the city, yet when Meas
16 Voeun and Ung Ren testified, Nuon Chea's lawyers never asked them
17 questions about orders on how to empty the city.

18 Nuon Chea put great emphasis on notes of an interview Ben Kiernan
19 conducted with Heng Samrin about a meeting where Nuon Chea spoke.
20 This meeting took place between 20 and 25 May 1975, a month after
21 the massacre at Tuol Po Chrey and the forced evacuation on Phnom
22 Penh, so it could have little effect on those convictions.

23 In any event, the notes of Heng Samrin's interview were admitted
24 into evidence and are part of the record considered by the Trial
25 Chamber.

1 In those notes, Heng Samrin said that Nuon Chea had instructed
2 the cadre present at the meeting to "komchat" the people of the
3 old government. Those familiar with the Khmer language knows that
4 "komchat" means to get rid of or eliminate.

5 [11.02.02]

6 The former Lon Nol officers and officials who still survived by
7 May 1975 were already removed from their positions and scattered
8 around the country by the forced transfer policy. There can be no
9 doubt in the context at that time that Nuon Chea's order meant to
10 kill all those who remained, which the evidence shows is exactly
11 the policy that was implemented throughout this regime.

12 Nuon Chea claims Heng Samrin was critical as his only character
13 witness. He does not explain why he chose a man whom Nuon Chea
14 accuses of betraying the Khmer Rouge and with whom he was at war
15 for 20 years. The only character trait Nuon Chea has ever claimed
16 Heng Samrin would testify to was Nuon Chea's dedication to the
17 Cambodian revolution. How Nuon Chea's dedication to the
18 ultra-radical and ruthless revolution that the Khmer Rouge
19 imposed on the Cambodian people could possibly cast doubt on Nuon
20 Chea's convictions in this case, he fails to explain.

21 [11.03.25]

22 Nuon Chea's final ground of appeal is most revealing of the kind
23 of evidence he relies upon and the weakness of his case.
24 He claims the Trial Chamber denied him a fair trial by failing to
25 consider evidence obtained by torture at places like S-21. He

1 asks that Your Honours rule that accused persons, even those
2 responsible for torture, should be allowed to use this evidence
3 for their own benefit despite the ban on the use of such evidence
4 in the internationally-recognized Convention Against Torture.

5 This apparently is a key part of Nuon Chea's side of the story,
6 evidence obtained by starving, beating, humiliating and
7 electrocuting victims until they would say whatever their
8 interrogators wanted them to say.

9 [11.04.43]

10 Your Honours, throughout the pre-trial trial and appeal stages in
11 this case, both Accused have been provided with a team of
12 experienced and competent counsel who have aggressively followed
13 their instructions about how to defend their case. They have each
14 been given extensive opportunities to examine all the witnesses
15 who testified, to propose and challenge documentary evidence, and
16 to put forward all relevant arguments in both oral and written
17 form.

18 The Defence failed not because the Trial Chamber was unfair, but,
19 rather, because the evidence showed that these crimes were
20 committed and that both Nuon Chea and Khieu Samphan played key
21 roles, making them criminal responsible for the suffering that
22 resulted. Their trial was fair, and their convictions justified
23 by the evidence.

24 Thank you. I will now hand the floor to my colleague to further
25 address grounds raised.

41

1 Thank you.

2 [11.06.42]

3 MR. SMITH:

4 Good morning, Your Honours. Good morning, counsel.

5 Your Honours, as you're aware, the appellant, Nuon Chea, hasn't
6 made a response to our brief, so I'll direct my remarks towards
7 the brief and the comments made by counsel for Khieu Samphan
8 today.

9 In terms of the arguments that Nuon Chea (sic) has made in
10 relation to the fairness of the trial, we submit that the
11 arguments made in our brief, our 300-page brief that was filed in
12 April last year, substantially shows that those arguments of fair
13 trial rights that were breached were not demonstrated.

14 In fact, Your Honours, the Prosecution's position is that this
15 trial was extremely fair, quite the opposite to what's being put
16 forward by Khieu Samphan's counsel today.

17 Khieu Samphan's counsel has said they've had to sacrifice
18 something in their briefs in relation to the argument on fair
19 trial rights, and we submit that by looking at that brief, what
20 they sacrificed was their argument -- they sacrificed the
21 demonstration of how this trial is allegedly not fair.

22 [11.08.06]

23 And also today, Your Honours, at the hearing today, defence
24 counsel have also sacrificed the demonstration of that argument.
25 Admittedly, that can't be put across in a short period of time,

1 but by the use of metaphors, analogies, referring to the Tokyo
2 Tribunal, and saying that it's the same thing here without
3 showing it is not argument.

4 By referring to the way a witness or two witnesses were
5 questioned in Court by the Prosecution, the Defence and a Judge
6 does not demonstrate that the Tribunal was impartial, questions
7 that are amongst thousands and thousands and thousands of
8 questions over an 18-month trial and a three-year trial process.
9 Incidents don't demonstrate that a Chamber is acting impartially.
10 In fact, if we look at that incident they referred to, the Judge
11 in that incident wasn't stopping the Defence from asking
12 questions of Phy Phuon. He just said, "Please rephrase the
13 question".

14 Phy Phuon was one of the most credible witnesses that came to
15 this Court, a high level member of the CPK and the Ministry of
16 Foreign Affairs that admitted to the policies, the criminal
17 policies of the CPK.

18 [11.09.55]

19 The fact that Judge Lavergne questioned the wife, the wife of
20 Khieu Samphan, is the role of the Judge in a civil law trial to
21 be convinced about the level of the credibility of witnesses.
22 This is not a common law trial where the Judge's role is to stay
23 out of the process. It's quite appropriate for a Judge to
24 question, and the Prosecution and the Defence are to assist the
25 Court.

1 By referring to a conference that Judge Cartwright went to in
2 November at the end of the trial hearings after all the evidence
3 has been heard, after two years or an 18-month trial and nine
4 months of pre-trial, what the Defence are asking you to find is
5 that Judge Cartwright's knowledge that she had and the mind that
6 she had after hearing the evidence for that two-year period
7 somehow biased her from hearing the trial before it began, before
8 she heard the evidence.

9 [11.11.22]

10 Your Honours, in that conference, Judge Cartwright expressed that
11 the -- the difficulties of the Cambodian judiciary historically,
12 the fact that the judiciary has come out of a situation of
13 conflict, Khmer Rouge period and the following, and that's all
14 that expression was.

15 As far as her comments in relation to the trial -- trial being
16 fair, when you look at that video, Judge Cartwright says the
17 trial was fairish. And as my colleague has said, there's no
18 perfect trial, but we would submit this was fundamentally fair.

19 In relation to the remarks of Judge Lemonde in his book, if
20 someone told him of political interference in the Cambodian
21 judiciary, that is not the measure to determine whether or not
22 that Trial Chamber, in fact, was acting in a non-independent
23 manner.

24 [11.12.26]

25 In fact, Your Honours, in the Defence brief, Khieu Samphan only

1 offers about a handful of examples of decisions that, in fact,
2 they say would show that the Trial Chamber was acting unfairly.
3 It takes more than a handful of decisions, Your Honours, to
4 determine impartiality.

5 Your Honours, the Defence also referred to an error by the Trial
6 Chamber in taking into account evidence that occurred before the
7 jurisdiction of the Court, this is evidence that occurred in
8 1974, 1973 that related to the acts and conduct of the accused.
9 Your Honours, the Defence is referring to a case of Nahimana, an
10 ICTR case, where it was quite clear that the decision in that
11 case is up to looking at the intention of the drafters of whether
12 or not they wanted to include acts of commission that would
13 assist in the commission of a crime to be included in
14 deliberations.

15 And what they found in Nahimana was that, in the case of ICTR,
16 that statute, the drafters explicitly wanted to exclude planning
17 acts that occurred before the temporal jurisdiction of the Court.
18 That temporal jurisdiction of the Court began four months before
19 the genocide in Rwanda occurred.

20 But here, Your Honours, that's clearly not the case. The Khieu
21 Samphan defence have not demonstrated that the drafters of this
22 statute wanted the acts of Khieu Samphan, the planning acts,
23 policies, etc., that occurred before the 17th of April 1975 to
24 not be considered in determining their involvement in crimes
25 committed after 17th of April.

1 [11.14.52]

2 If they did so, that would mean that the senior and most
3 responsible for the crimes, the planners of the crimes, their
4 acts could not be considered in determining whether they were
5 involved in the crimes committed after the 17th of April.

6 Your Honours, there's no argument that was the intention of the
7 drafters, to exclude that. In the case of Nahimana, there's clear
8 argument that the intenders of the statute wanted only acts that
9 precipitated four months prior to the crimes occurring to be
10 included. That is not the case here.

11 Your Honour, defence counsel raised the issue of the charges were
12 clear and not defined. You've read that in their briefs.

13 [11.15.48]

14 The defence for Khieu Samphan was the only team that didn't
15 appeal the Severance Orders by the Trial Chamber. After the two
16 Severance Orders were made, they didn't appeal either of them.
17 There was no lack of certainty in terms of what Khieu Samphan was
18 facing. He was quite aware that he was facing the charges of
19 forced transfer and then, when the additional crimes were added,
20 one year later, he was also aware that he was facing the crimes
21 at Tuol Po Chrey and the policies that related to that.

22 And when we're talking about fundamental fair trial rights,
23 obviously, the protection of that guarantee is to make sure that
24 no one is convicted of a crime that they're unaware of, they
25 don't understand, that they can't defend or they can't challenge.

1 In this case, Khieu Samphan was only convicted of crimes in
2 relation to forced transfer emanating out of those policies.
3 He was only convicted for the crimes in relation to the
4 executions at Tuol Po Chrey and that emanated out of the policy
5 to target Khmer Republic officials; he was convicted of nothing
6 else and that's what protection of making sure or Trial Chamber
7 guaranteeing that the fundamental fair trial right to know what
8 you're being charged with so you not convicted of something that
9 you're unaware of -- that that right is not violated. He was
10 convicted of nothing that he was unaware of

11 [11.17.57]

12 JUDGE KLONOWIECKA-MILART:

13 Counsel, could you help me please? In addition to the averment
14 that the fair trial right was violated by the lack of sufficient
15 notice of the charges, there is an argument related to fair trial
16 issues in that the Defence did not know or was not allowed to use
17 evidence that went out of the scope of the charges defined by the
18 Severance Order. Yet, later, the Trial Chamber used evidence from
19 outside, so to say, events as it deemed fit.

20 And we would be interested to -- to hear about this averment of
21 certain imbalance in the deriving of the evidence that was
22 related to -- to events outside the -- of the scope of the
23 charges and not allowing the Defence to derive from events laying
24 outside -- outside of the charges, but it -- whether you would
25 address it here or in the approach to evidence section. In any

1 event, it would be -- it would be interesting for us to hear on
2 that.

3 [11.19.12]

4 MR. SMITH:

5 Yes, thank you, Your Honours. I can address it now or I -- I see
6 the time. Can I have five further minutes just to finish some
7 remarks in response and perhaps, then, if I can address it at
8 question time? Thank you.

9 Your Honours, in relation to this trial and the fundamental fair
10 trial rights, Khieu Samphan was promptly informed of the nature
11 of the charges. He knew about those charges in September 2010
12 when the indictment was issued. He knew about them when the scope
13 -- the reduced scope of the Severance Order came into place in
14 September 2011 and he knew about them in October or
15 September-October 2012 when they added the extra crime site.

16 [11.20.22]

17 The documentation, the reports, the orders from the Trial
18 Chamber, the transcripts from the -- from the trial show that,
19 consistently, he was well aware of the charges that he was facing
20 and he was not convicted on anything more than was within the
21 scope of case file 002/01. That fundamental right was protected.
22 It was important to sever the trial even though parties may have
23 disagreed. The only party that didn't disagree was the Khieu
24 Samphan party. They certainly weren't confused enough about the
25 severance of the trial for the period that the trial continued,

1 but now they come to say to the Court and say, "We're confused
2 and we didn't know what we were facing."

3 The other grounds that Khieu Samphan argues were not protected
4 was -- was his right to an effective defence. He couldn't file --
5 the filing of replies was an inconsistent practice. The practice
6 of reconsidering requests by parties was inconsistent and
7 therefore, it was uncertain for him to know what the rules were.

8 [11.21.50]

9 I ask Your Honours to look at both of those practices, to look at
10 both of those documents, and the Trial Chamber were absolutely
11 consistent throughout the trial in how they treated the filing of
12 replies and how they treated reconsideration.

13 Your Honours, they complain about the questioning of witnesses
14 and yet they had -- they had half the time or the Defence had
15 half the time as the Prosecution and civil parties which is
16 consistent with international standards.

17 They complain that they couldn't make oral submissions in the
18 Court by using two or three examples of when they're objected to.
19 That's not -- not being able to make submissions before the Court
20 when a judge interrupts you on one or two occasions because your
21 questions are repetitive or not relevant.

22 [11.22.43]

23 They complain that they didn't have the opportunity to challenge
24 documentary evidence or discuss it in the next session. This
25 Trial Chamber had one of the most extensive and exhaustive

1 systems to challenge the large numbers of documentary evidence
2 than we -- that we know of in international criminal law. Thirty
3 days of admissibility and probative value hearings in relation to
4 the documents, with no witnesses, was provided by this Chamber to
5 this Defence and they say, "We didn't have an opportunity to
6 challenge."

7 And just to conclude, Your Honour, when they talk about they
8 didn't have enough space in their closing brief, of which they
9 had 125 pages plus another extra 20 which is 145 ,plus the
10 ability to use endnotes instead of footnotes to lengthen the
11 brief, they say they didn't have enough space when they decided
12 to use footnotes and not lengthen -- not lengthen their
13 submission.

14 [11.23.54]

15 Your Honours, perhaps we can, as one final word -- and -- and
16 this is -- this is that issue of sacrifice. I think when you read
17 their brief, it's absolutely true, they sacrificed to demonstrate
18 their arguments and show how any violations of fair trial rights
19 invalidated the judgment. They did sacrifice that; you can see
20 that when you read it and that was also done today.

21 And when you look at their brief, their main argument is not
22 that, individually, every alleged error or the violation of their
23 fair trial right would invalidate the decision or cause a
24 miscarriage of justice; they're saying that, cumulatively, that
25 would lead to an invalidation of the judgment or miscarriage of

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1 justice.

2 But what Khieu Samphan defence haven't shown is the effect of any
3 of these alleged errors which, as you know, we've argued are not
4 errors singularly, they haven't showed how those errors, if they
5 existed, how they compound on each other to invalidate the trial.

6 [11.25.10]

7 We argue the Trial Chamber went to great lengths to make sure
8 this trial was fair because of the importance of it and any of
9 these incidents that the Khieu Samphan team raised in their
10 brief, even if one or two of those errors occurred, which we
11 debate, none of them, cumulatively, would make this trial unfair
12 when you look at long -- how long it went, ability to call
13 witnesses, question witnesses, present documents, debate
14 documents, and have final statements.

15 So, Your Honours, our position is that when you look at the
16 evidence, when you go deep into the evidence -- 5,800 documents
17 and the process that occurred over the 3-year period that the
18 Trial Chamber had control of that file, it was absolutely and
19 fundamentally fair.

20 Thank you.

21 [11.26.23]

22 MR. PRESIDENT:

23 Let we now close the first thematic session of the appeal
24 proceedings. Due to the changes and the time lapse let we now
25 continue a little bit further on the second grounds of the appeal

1 related to the overall approach to evidence and I would like now
2 to give the floor to the co-rapporteurs.

3 JUDGE YA NARIN:

4 This is the co-rapporteurs report for session on grounds of
5 appeal related to the overall approach to evidence.

6 Several grounds of appeal brought by Nuon Chea and Khieu Samphan
7 challenged the overall approach of the Trial Chamber to the
8 evidence on which it based the convictions. These arguments may
9 be grouped as follows:

10 First, a category of arguments relates to the allegation that
11 the Trial Chamber erred by limiting opportunities for
12 investigation or that, generally, the investigation was not
13 conducted properly.

14 [11.28.01]

15 Here, Nuon Chea and Khieu Samphan aver that the investigation
16 into Case 002 carried out by the Co-Investigating Judges was
17 flawed by procedural irregularities and that the Trial Chamber
18 did not correct these problems because it failed to carry out
19 additional investigations and at the same time, insisted that the
20 Defence is not entitled to carry out its own investigation.

21 Second: A category of arguments relates to the Trial Chamber's
22 practice of allowing witnesses and civil parties, appearing
23 before it, to review their prior statements and confirmed their
24 content when appearing before the Trial Chamber. The Trial
25 Chamber limited the questioning of those witnesses and civil

1 parties to clarification and credibility issues.

2 The Appellants argue that this approach by the Trial Chamber
3 amounted to an error.

4 [11.29.19]

5 Third: A category of arguments relates to the alleged violation
6 of the Accused right to confront the evidence against them. In
7 particular, it is submitted that the Trial Chamber erroneously
8 disallowed questions by defence counsel aimed at challenging the
9 reliability of the evidence based on purported errors and
10 misconduct during the investigation.

11 Fourth: A category of arguments relates to the Trial Chamber's
12 reliance on out of court statements.

13 Nuon Chea and Khieu Samphan submits that the Trial Chamber erred
14 in the standard it applied to admit out of court evidence such as
15 written witness statements collected in the course of the
16 judicial investigation, civil party applications, and victim
17 complaints.

18 [11.30.26]

19 They also submit that the Trial Chamber failed to correctly
20 assess the reliability and probative value of the written
21 statements, did not provide sufficient reasons for its decision
22 to rely on written statements and erroneously relied on written
23 statements to establish key facts that were in dispute between
24 the parties.

25 Fifth: A category of arguments relates to the Trial Chamber's

1 decision to rely in the Judgment on testimony of the civil
2 parties from the substantive hearing as well as the testimony
3 relating to the impact of the crimes on them; specifically,
4 statements of suffering and victim impact testimony.

5 The Appellants argue that the Trial Chamber's reliance on this
6 testimony was wrong and disregarded the low probative value of
7 such testimony.

8 Six: A category of arguments concerns the Trial Chamber's
9 assessment of the testimony of witnesses who appeared before it.

10 The Appellants allege several errors in the Trial Chamber's
11 assessment of the probative value of both fact and expert
12 witnesses.

13 [11.31.48]

14 Finally, there are several specific arguments regarding the Trial
15 Chamber's approach to evidence, including its treatment of
16 hearsay evidence, assessment of secondary sources, and
17 application of the beyond reasonable doubt standard.

18 Nuon Chea also challenges the Trial Chamber's finding that
19 torture-tainted statements are inadmissible in the proceedings.

20 This concludes our report on the grounds of appeal relevant to
21 the second session.

22 Thank you.

23 MR. PRESIDENT:

24 Thank you. We need to adjourn now for our lunch break and the --
25 the Chamber will resume this afternoon at 1.20 p.m.

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1 Security personnel, you are instructed to take the Accused to the
2 detention facility and have them returned this afternoon before
3 1.20 p.m.

4 The Court is now adjourned for lunch.

5 (Court recesses from 1133H to 1334H)

6 MR. PRESIDENT:

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

8 The Chamber received an email via the greffier from the defence
9 team for Mr. Khieu Samphan, that the defence counsel for Mr.
10 Khieu Samphan would like to include the authority or relevant
11 documents before the Chamber and the defence team for Mr. Khieu
12 Samphan would like to address the Chamber on this request, so you
13 have the floor now.

14 [13.35.09]

15 MS. GUISSSE:

16 Yes, thank you, Mr. President. The mail that was sent echoes the
17 decision and our position this morning, that is to say that, it
18 is a doctrine or document that was produced by the Co-Prosecutor.
19 It is a document that we'd like to use in the section regarding
20 crimes, but we disclosed it earlier so that the parties may take
21 stock of it before this session starts. So it is a doctrine or
22 document responding to the sources produced by the
23 Co-Prosecutors.

24 MR. SMITH:

25 Good afternoon, Your Honours. We have no object to the documents

1 going in.

2 [13.36.13]

3 MR. PICH ANG:

4 We do not have any objection to the use of those -- those
5 documents.

6 MR. PRESIDENT:

7 Thank you. So the Chamber admit -- decided to admit this document
8 into the case file so that we can use as the basis for decisions.
9 Next, the floor is given to the -- the defence team for Mr. Khieu
10 Samphan to address the Chamber relating to grounds of appeals on
11 fairness of proceedings -- rather, on overall approach to
12 evidence.

13 MS. GUISSSE:

14 Thank you, Mr. President. As you, yourself, pointed out this
15 morning when you referred to the discussion on the fair trial and
16 the general approach to evidence, it is very difficult to -- to
17 draw the line between the two areas; both are related and that is
18 why I am able to respond to the Co-Prosecutor when he says that
19 we do not demonstrate unfairness. And we did so by analyzing, in
20 each case, the problems and the findings and the manner in which
21 the Chamber reached those findings and the manner in which the
22 Chamber used the evidence tendered.

23 As I pointed out this morning, the 777 pages of the Judgment of
24 2014, are the result of distortions and confusion; distortion of
25 the rules and contempt of the rules that should govern the

1 evaluation of evidence in criminal law.

2 [13.38.11]

3 And in this regard, I would like to refer you to a very fine,
4 dissenting opinion of the international -- the judge of the
5 international court, Mrs. Christine Van den Wyngaert in the
6 Katanga document, paragraph 172. And she points out that the
7 intime conviction cannot stand up against the required standard
8 of proof and the dispassionate rigour it demands.

9 Dispassionate rigour, which means, Mr. President, Your Honours,
10 the Judges of the Supreme Court, that the Trial Chamber didn't
11 show proof of dispassionate rigour; quite the contrary is what
12 happened.

13 On the other side of this courtroom, the prosecutors tell us that
14 it's the judges overriding discretion and their intime
15 conviction. Yes, they have the overriding authority to exercise
16 their discretion, but there are a number of rules that have to be
17 complied with as part of the exercise of their sovereign duty of
18 discretion.

19 First of all, the decision should be reasoned. Secondly -- and
20 this is an important point we raise in our appeal brief -- there
21 are rules that must be followed when you try to follow the
22 approach.

23 [13.39.53]

24 As part of the assessment and administration of evidence and
25 assessment of evidence, there is a principle which is the very

1 bedrock of criminal law and it is that doubt must always benefit
2 the accused and it is a contrary that we have observed in the
3 manner in which the Trial Chamber assessed the evidence.
4 Given the short time that is allotted to me, I cannot give you an
5 exhaustive list of examples, but I'll give you some striking
6 reasons and refer you to the jurisprudence, the Furundzija trial,
7 paragraph 79; Kunarac, paragraph 41; and Naletilic, paragraph
8 603; and a point that is essential in the manner in which the
9 Chamber manage or badly managed the evidence -- the issue of the
10 inferential method is essential.

11 [13.40.58]

12 Let me quote the Tadic document, paragraph 240, and here the
13 talk is of the analysis and the issue of inference as part of the
14 analysis of evidence and we are told that when the evidence
15 allows more than one reasonable finding, the Trial Chamber cannot
16 draw the inference that is least favourable to the Accused.
17 Unfortunately, throughout the Judgment of the 7th of August 19 --
18 2014, we have only a series of findings and these are
19 unfavourable to the Accused when there are many.

20 I refer you again to the Krnojelac judgment, 67, Ntagerura,
21 paragraphs 304, 306 and 399, which also reiterate this principle.
22 Similarly, we also referred you to those points. I refer you to
23 paragraph 202 of our brief, "doubt must always benefit the
24 accused."

25 [13.42.22]

1 And contrary to what the prosecutor said this morning, it is not
2 a question of using metaphors; we should remind the parties of
3 the law. We are looking at the violations of this principle in
4 each of the findings which is not the only reasonable finding and
5 which, in this case, was the only reasonable finding that the
6 Defence presented. There were other explanations.

7 And this makes me to revisit what I said this morning and to tell
8 you, the Supreme Court, that the Defence was able to present
9 exculpatory evidence or were capable of examining witnesses, but
10 whatever the arguments we presented, whatever inconsistencies we
11 presented as part of our examination of witnesses, these elements
12 were never taken into account by the Trial Chamber. There's a
13 problem; we had to present defence evidence and we -- it is
14 important to know how the Chamber assesses this evidence and that
15 is where we have the obligation of fairness; that is where we
16 have double standards.

17 [13.43.37]

18 The list of errors and violations of -- made by the Chamber with
19 regard to the assessment of evidence, as I pointed out, we see
20 many errors in the inferential method. We have contradictions and
21 inconsistencies that are never -- never taken into account. There
22 was massive use of written statements with low probative value
23 which were used as essential evidence. And this brings me to the
24 issues that are used out of the scope of the trial before 1975;
25 for instance, in order to demonstrate or try to demonstrate that

1 there was movement of the population before 1975; whereas, there
2 was a recurrent pattern of conduct and the Chamber is basing
3 itself on written statements and practically no witness before
4 this Chamber appeared to -- to testify to this issue, so it was
5 not possible for the Defence to discuss these issues.

6 [13.44.41]

7 Why is it important for the Chamber to do so? It is because, as I
8 told you this morning, it is not simply a question of distortion
9 of the evidence; the Chamber has to construct the situation in
10 order to get into a predefined prima facie case of a finding of
11 guilt. It would not find such evidence, would look for it
12 elsewhere and what the Chamber did regarding the movement of
13 population is typical and the Chamber did so in order to set
14 aside the most responsibility to rule that he knew what had
15 happened before and so we conclude that he agreed to and
16 participated in the Joint Criminal Enterprise prior to 1975. We
17 have no evidence that shows that he really participated in the
18 decision-making process or the implementation of the decision to
19 transfer the population, but they took this evidence from the
20 prior period among the hodgepodge of documents.

21 Another violation of the Chamber's approach to evidence is the
22 use of expert witness testimony. We have the treatment by means
23 of double standards of evidence. We are not taking only one or
24 two cases; we're analyzing all the factual errors made by the
25 Chamber with regard to the different crimes in respect of the

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1 different charges in this trial and we have a series of examples.
2 [13.46.35]
3 Paragraph 544 and 545 of our brief, we have two copies of records
4 of interview on which the Chamber relied to conclude that Khieu
5 Samphan actively participated in some meetings of the Standing
6 Committee. And we have 16 copies of WRIs and Khieu Samphan only
7 spoke in two of those WRIs and he was only presenting a report
8 and yet, the Chamber relies on this to say that Khieu Samphan
9 actively participated in some meetings of the Standing Committee.
10 We have some substantial issues on evidence on record to say that
11 he was an active member of the Standing Committee.
12 How come he was so active that he had so much power, so much
13 authority, as the Chamber claims, so much power in the Standing
14 Committee; how come throughout the Democratic Kampuchea period,
15 he was never designated member of that Standing Committee? How
16 come? Whereas, we are arguing, and it is another element in the
17 flaws made by the Chamber and the distortions, they claim that
18 Khieu -- Khieu Samphan had been in contact with the CPK since the
19 1960s; whereas, he was never at school with Pol Pot?
20 [13.48.13]
21 How come the Chamber doesn't draw other inferences from the fact
22 that it was only sometime in 1976 -- that is well after the
23 evacuation decision -- that Khieu Samphan became a member of the
24 Central Committee; previously, he had only been a candidate
25 member. These are issues that should be raised before a Court

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1 that is examining the most serious crimes and determining the
2 guilt of Mr. Khieu Samphan.

3 This is another example of the manner in which the Chamber
4 interpreted evidence. We've had a number of pieces of evidence,
5 testimonies, explaining that Khieu Samphan did not have authority
6 and so on and so forth and it is only on these two WRIs that the
7 Chamber relied to say that he actively participated in the
8 Standing Committee, so we have a problem of fairness and the
9 manner in which the Chamber assessed the evidence and we denounce
10 this lack of fairness which is illustrated by such shortcuts.

11 Another example, since the Co-Prosecutor told us this morning
12 that Phy Phuon was one of the key witnesses as senior official of
13 the Ministry of Foreign Affairs, we were not able to observe the
14 same thing, because when Phy Phuon came to testify before the
15 Trial Chamber, he was a guard and a driver; he was not an
16 official of the Ministry of Foreign Affairs -- a senior official
17 of the Ministry of Foreign Affairs. I've already referred to the
18 problems that we face in the manner in which the Chamber tried to
19 protect the witness when we confronted him with these statements.

20 [13.49.53]

21 The issue of Khieu Samphan's participation in the supposed
22 meeting regarding the evacuation of Phnom Penh, all that was used
23 to corroborate that statement -- and I would like to remind the
24 Chamber, once more, that we raised issues regarding the veracity
25 and probative value of these statements -- there was no other

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1 testimony and if they're going to take into account all the
2 exculpatory evidence, for instance, guards will explained how
3 meetings were held and the fact that there was a distance between
4 the guards and the venue of the meeting which prevented them from
5 seeing what happened, so they're not looking at the written
6 statements of the witness and a statement before the Chamber.

7 [13.50.48]

8 When we tried to confront the witness with these facts, we are
9 deprived of the right to speak, so the -- the witness doesn't
10 talk of evacuation he talks of a military attack.

11 Furthermore, we have another example of a -- a demonstration of
12 the construction made by the Chamber. In the deliberations, the
13 Trial Chamber looked at documents that they had not admitted into
14 evidence and they said, "This document can be useful to support
15 our argument." So they looked at a telegram and said that since
16 the telegram said that he had returned sometime in May 1974; that
17 is, return to Cambodia, that he left one country on such and such
18 a date means that he didn't attend the meeting. So they used
19 testimony by Nuon Chea that contradicts Phy Phuon's testimony and
20 they said that it corroborates Phy Phuon's version.

21 And the Chamber will, again, use an interview by Ieng Sary in
22 which he refers to a meeting he had with Khieu -- Khieu -- with
23 Ieng Sary regarding the evacuation and we don't know where the
24 information came from and he said that the -- I believe that --
25 aside from that meeting, I believe there was a meeting somewhere.

1 I don't know how they corroborate such a -- a construction.

2 [13.52.12]

3 We had the possibility of presenting evidence, but the Chamber
4 expressly needed to find evidence that would corroborate, so to
5 speak, the conviction. So they're saying that they're not
6 impartial. They -- they have their preconception and they want to
7 confirm it.

8 And regarding this point, we arrive at two conclusions from the
9 Chamber: Khieu Samphan returned to Cambodia in June 1974, when
10 the meeting took place. When he came back, we don't know. That's
11 pure supposition on the part of the Chamber.

12 And here, what's even most evident; it's written black and white
13 in the Judgment in paragraph 139 of the Judgment: "The Chamber
14 deems that it's very probable that the June 1974, meeting was set
15 in such a way to allow Khieu Samphan and Ieng Sary to attend it
16 and to present to the Central Committee of the CPK very fruitful
17 results of their meetings with senior Laotian Chinese leaders."

18 [13.53.14]

19 Who said that? Nobody said that. No witness spoke about this. No
20 witness said that they were expecting Khieu Samphan and Ieng
21 Sary. No Nuon Chea, no Ieng Sary said that they were present
22 And even more disturbing regarding this meeting, Phy Phuon speaks
23 about two meetings and in the footnotes -- in the numerous
24 footnotes that are supposed to support the Chamber's theory, the
25 Chamber only speaks about one meeting because it suits the

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1 Chamber to do so. So yes, treatment of the evidence, of course,
2 sovereign discretion of the Chamber, but when this leads to
3 distortion, there's a problem of fairness and it's a problem of
4 the management of the evidence.

5 And there are many other errors I can refer you to in paragraph
6 125, 156, 158, etc., of our appeal brief. I don't want to go into
7 the details; I don't have much time, of course, but they are
8 elements that are interesting to note in the way the Chamber
9 handled the evidence.

10 [13.54.20]

11 It says that Khieu Samphan apparently participated through
12 education sessions in the promotion of the hatred between --
13 against the citizens -- the city people. This was paragraph 164
14 regarding the issue of the CPK and their supposed hatred of the
15 citizens, but it completely omits to quote, however, Phy Phoun,
16 whom they find so important, who explains -- and here I'd like to
17 refer you to paragraph 163 of our appeal brief -- that explains
18 that before 1975, Khieu Samphan was promoting national union in
19 the gathering of all forces possible beyond peasants and workers.
20 So here we're in complete contradiction with a -- a joint -- with
21 a criminal enterprise that started before 1975, in which a -- a
22 hatred of city people was promoted.

23 [13.55.12]

24 So these are examples of distortion of the evidence by the
25 Chamber. And there are many, many other examples. I know that I

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1 don't have much time and I'm going to try to proceed as fast as I
2 can.

3 Now, the question of the written statements -- 1,399 written
4 statements that were admitted in this trial, on 15 August 2013,
5 that is to say, a little time before that we -- before we started
6 drafting our final briefs and it's clear that it's not in the
7 limited amount of pages that were given to us in these briefs,
8 that we could analyze completely in depth 1,399 written
9 statements.

10 And when we speak about the problems of the written statements,
11 there's several written statements that are written statements
12 that have been taken before the Co-Investigating Judges. They're
13 also written statements that were made by civil parties and here
14 I have to say a few words about this. Regarding the written
15 statements of the civil parties and we have seen here, during the
16 proceedings, in a very clear way, many, many times that there
17 could be an enormous gap between what was said in the written
18 statements and what was said here before the Chamber by the civil
19 parties.

20 But okay, we based ourselves on this in order to sentence Khieu
21 Samphan on the basis of population movements. You have the
22 example here with Sam Sithy, that was part of a written statement
23 that was used. He was not a civil party, but it was a written
24 statement and when he came to -- before the Chamber, he gave a
25 different story.

1 [13.56.40]

2 Now, regarding the issue of the civil parties, as well, once
3 again, we do not have the same position as the Nuon Chea team
4 but, however, there is an issue with regard to the Chamber's
5 management of the civil party statements. Because, basically
6 speaking, there were two types of hearings; there were hearings
7 when civil parties would -- were questioned as any other witness
8 and they would testify, but there were also special hearings on
9 the effect of the crimes where, normally, we were supposed to
10 speak about the suffering of these victims. And in the different
11 documents that the Chamber issued for these hearings it makes, at
12 each time, a difference.

13 [13.57.26]

14 And here I'd like to refer you to E235/5. I'd like to refer you
15 to document E276 -- 267/3 where each time they make a difference
16 between a civil party statement and a normal statement where --
17 and we should remind you of this -- regarding the statements of
18 suffering, there was extremely limited time that was granted to
19 the Defence to question the civil parties and therefore, because
20 the Chamber had announced that it was going to determine the harm
21 suffered, so obviously, we were not able to exercise our rights
22 in the same way as for the witness, but here, however, once
23 again, the Chamber based itself on these statements of suffering
24 despite the way the evidence was examined during the proceedings.
25 And I can continue on and on to speak about the lack of

1 thoroughness, about the formation of the evidence by the Chamber,
2 and maybe I could speak about the experts too and maybe I might
3 be more available to you to answer questions because I don't have
4 much time but, however, still, I have to tell you all, Mr.
5 President, and Your Honours of the Supreme Court, that the
6 accumulation of distorted evidence -- of biased evidence or with
7 very little probative value does not give any more conviction to
8 your findings.

9 [13.58.55]

10 And here I'd like to address the Co-Prosecutors who tell us,
11 "Yes, of course, the evidence is a global package." No. I can
12 simply tell you that the sum of distorted evidence, no matter how
13 numerous this evidence, may be is still distorted. An
14 accumulation of distorted evidence is distorted evidence. It's
15 not because we distort x and y and z witness statements or
16 documents that we can arrive -- that we can manage to forget that
17 we have distorted the evidence and that is the problem and that
18 is where we see the clear demonstration of a lack of impartiality
19 from the Chamber and this is what we're asking the Supreme
20 Chamber to sanction.

21 We're not doing this simply because we are just defence lawyers,
22 no, and that we're acting on ill faith; we're asking you to
23 sanction this in order to respond to what I said to you this
24 morning. Because in the context of a trial of this kind, it's
25 important to demonstrate dispassionate rigour which is something

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1 that is on -- that you're responsible for.

2 [14.00.04]

3 MR. PRESIDENT:

4 I'd like now to hand the floor to the Lead Co-Lawyers for civil
5 parties.

6 MR. PICH ANG:

7 Good afternoon, Mr. President, Your Honours, parties to the
8 proceedings and the general public in the public gallery. My name
9 is Pich Ang and my international colleague is Marie Guiraud. We
10 are the representatives of the civil parties. We would like to
11 make some remarks relation to the points raised by the defence
12 team.

13 All the points raised by the defence team in their appeal briefs
14 concerning the civil parties are appropriate. However, what we
15 are going to say here are not meant to replace what have been
16 stated by the Prosecution. It is supplementary to what has been
17 stated by the Prosecution and it is important for us as civil
18 party representatives to do so.

19 The defence team for Nuon Chea alleged that there were errors of
20 law in the Trial Chamber's reliance on civil party applications.
21 The Nuon Chea appeal alleges that the Chamber relied extensively
22 on civil party application without any consideration of the
23 dubious circumstances under which they were created.

24 [14.02.18]

25 It is also alleged that the Trial Chamber committed an error in

1 considering civil party applications as evidence to make
2 conclusions without giving the Defence an opportunity to
3 cross-examine those civil parties.

4 We would like to state that, initially, the civil party
5 applications were reviewed by the Office of the Co-Investigating
6 Judges and they were subsequently admitted as evidence. The civil
7 party applications reviewed by the Co-Investigating Judges are
8 considered by the Co-Investigating Judges that the facts raised
9 in those applications are credible and indeed, the
10 Co-Investigating Judges understands the method where the
11 applications were made.

12 [14.03.26]

13 The Defence also alleged that there were circumstances that
14 raised doubt in the applications of those civil parties and we
15 stance (sic) that this statement is simply incorrect. They did
16 not consider all the circumstances surrounding the way the
17 applications were made.

18 We as Lead Co-Lawyers for civil parties actually include the --
19 those statements in our list of documents in 2011, and all
20 parties were aware, since that time, that the civil party
21 applications would be used by us as evidence.

22 Furthermore, parties were given opportunities to object, to use,
23 or to review those documents and they can also use those
24 documents during the confrontation with civil parties and
25 witnesses. They could also use those documents during the key

1 document presentation.

2 In addition, all parties can request to those civil parties to be
3 summoned for cross-examination if necessary.

4 Those civil party applications do not speak of conducts and
5 character of the Accused and for that reason; judges can use
6 these applications as evidence without the need to summons them
7 to testify in person.

8 [14.05.19]

9 In addition, the Trial Chamber used these civil parties'
10 statements where they were corroborated with other evidence. Such
11 use by the Trial Chamber is in line with the principle of fair
12 trial. And what were raised by the defence team for Khieu
13 Samphan, that the information by the civil parties when they were
14 questioned was different from what were provided in the civil
15 party applications, this do happen. However, it was to a minimum
16 and they should not be considered having an impact on the proper
17 statements of the civil parties.

18 The defence team for Nuon Chea, on their 23rd ground, alleged
19 that the civil party lacks the appropriate safeguards intended to
20 protect the integrity of evidence because of the facts that they
21 do not take an oath before the Chamber and that civil parties are
22 entitled to meet freely with their lawyers or that civil parties
23 are allowed to discuss the experiences with other civil parties.

24 [14.07.04]

25 In relation to taking an oath, we are of the view that civil

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1 parties are a party to the case and they can testify and they do
2 not need to take an oath. That was decided and ruled on several
3 occasions by the Trial Chamber, in particular in August, November
4 2011 and again in 2013.

5 This practice was also stipulated in the Court of the Kingdom of
6 Cambodia in the Internal Rules as well as in the French laws that
7 civil parties are not obliged to take an oath.

8 However, this does not mean that the civil parties without taking
9 an oath are not allowed to testify. Civil parties are a party to
10 the proceeding and can speak before the Chamber and their
11 testimony can be used as evidence.

12 This same situation applies to the accused as they can do all
13 what I have just described without having to take an oath and the
14 Bench is not obliged to rely on the testimonies of the civil
15 parties. The Chamber at its discretion can consider and make the
16 assessment on the credibility of those testimonies, case by case.

17 [14.09.00]

18 The defence team for Nuon Chea allege that other practices
19 relating to civil parties is based on the premise that a civil
20 party being at par with the witnesses. Civil parties, as we just
21 argued, are a party to the proceedings. They are not witnesses.

22 In addition, they may also have distinctive interests different
23 from that of the witnesses who are entitled to lawyers and the
24 civil parties can have access to case files and can attend court
25 hearings at all stages of the proceedings.

1 Furthermore, the defence team for Nuon Chea alleges that the
2 Trial Chamber erred in law in holding that the weight given to
3 civil party testimony be assessed on a case by case basis in
4 light of the credibility of that testimony.

5 [14.10.29]

6 We would like to reinstate our position that, in fact, all
7 parties can question the civil parties and -- rather, the Lead
8 Co-Lawyers would like to reinstate that the testimony of civil
9 parties may be questioned for clarification against the civil
10 parties and of course it is up to the discretion of the Bench to
11 consider their testimonies on a case by case basis and that has
12 been the practice in the Trial Chamber.

13 And, finally, the defence team alleges that civil parties who
14 were summoned to testify should not speak about facts as the
15 facts given by the civil parties during their testimony should
16 not use, that is, during their statement of harm and suffering.

17 In fact, allow me to remind you again that all parties had an
18 opportunity to question those civil parties who are summoned to
19 give their impact statement. They had the opportunity to ask
20 about the facts related to those particular civil parties.

21 What has just been read by Defence Counsel Anta Guisse, that the
22 Defence did not have an opportunity to question civil parties, or
23 that the opportunity was limited, I would like to counter that
24 argument that usually the civil parties did not avail themselves
25 to use that opportunity to question the civil parties -- the

1 Defence, rather.

2 And of course they can also request to summon those civil parties
3 for cross-examination if they wish to, namely the civil party
4 Chau Ny who was summoned for providing the impact statement and
5 later on the Defence requested the civil party to be
6 cross-examined. So it is not reasonable for the Defence to
7 mention facts related to him or to her during the statement of
8 harm and suffering.

9 [14.13.35]

10 Civil parties who were summoned to testify wanted to search for
11 the truth and they did not need to say anything which was untrue.
12 They could speak about the truth and only about their suffering.
13 This is my part on the submission. And with your permission I,
14 Mr. President, I want to turn the floor to my international
15 colleague, Marie Guiraud.

16 THE PRESIDENT:

17 Lead Co-Lawyers, in fact, your time has run out. Anyway, the
18 Chamber will grant you five more minutes. Please use the time
19 wisely.

20 [14.14.33]

21 MS. GUIRAUD:

22 Thank you, Mr. President. I will try to limit my remarks to the
23 five minutes you have allotted us.

24 I would like to revisit three of the points mentioned in the
25 report that was presented before the lunch break; the possibility

1 that the Defence had to confront the evidence that was provided
2 by civil parties, the admissibility of such evidence particularly
3 in light of the significant volume of written documents tended
4 into evidence and, lastly, the manner in which the Chamber
5 assessed the probative value of the evidence adduced by civil
6 parties.

7 In its judgment, and my colleague recalled that, the Trial
8 Chamber used a number of civil party applications to
9 "corroborate". I insist on this term which is very fundamental to
10 corroborate a number of factual findings. I would also like to
11 insist on this particularly important term, "factual findings",
12 "corroborating factual findings".

13 The Trial Chamber does not use those documents to demonstrate the
14 participation of the Accused in the crimes they were charged
15 with. In their respective briefs, both accused challenged the
16 manner in which the Chamber used the evidence that was adduced by
17 civil parties. Nuon Chea and Khieu Samphan both considered that
18 the Chamber had committed factual errors and errors of law with
19 regard both to the admissibility of evidence and their probative
20 value.

21 [14.16.43]

22 It is important to recall and to point out here that none of the
23 accused, whether we are talking of Nuon Chea or Khieu Samphan,
24 identified in their appeal briefs any particular finding of guilt
25 with regard to a specific crime in view of the precise factual

1 allegations that were directly affected by the errors alleged.
2 None of the accused demonstrated how those alleged errors either
3 allowed for the invalidation of the judgment or any consideration
4 that there was a miscarriage of justice which are nevertheless
5 essential requirements in Rule 104.1 of the Internal Rules.
6 Certainly, for just one reason, all the grounds of appeal must be
7 rejected by your Chamber but since the Supreme Court Chamber
8 gives us the opportunity to react and to make some oral
9 submissions on these grounds, I would like to point out the
10 following.

11 [14.18.13]

12 Before the ECCC, and my colleague has pointed it out, civil
13 parties are true parties to the proceedings and they participate
14 in the proceedings against persons charged with crimes that come
15 under the material jurisdiction of the ECCC. The privileged
16 manner in which civil parties can participate in the proceedings
17 is to tender evidence. Such evidence could be oral when civil
18 parties appear before the Chamber to testify in the dock, but
19 very often the evidence is written and the issue of written
20 evidence is essential, as far as we are concerned.

21 Given the extremely limited number of civil parties who have had
22 the opportunity to testify before this Chamber or before the
23 Trial Chamber, tendering into evidence written documents, the
24 documents that each of the civil parties provided when they
25 decided to join the proceedings, was for us the only opportunity

1 for us to make participation of civil parties real and effective.

2 [14.19.33]

3 If you would allow me, Mr. President, I would like to explain
4 both in the interests of the Chamber and the public in the
5 gallery, what was the procedure that had to be followed when
6 victims chose to become civil parties in order to enlighten the
7 Chamber and the public on the two subjects at the very heart of
8 these proceedings, the issue of admissibility of evidence and the
9 issue of the probative value of such evidence.

10 Seven victims who decided to participate in the proceedings,
11 filled and submitted at the stage of investigations, a document
12 called a civil party application, and which document includes a
13 detailed account of what that person endured during the
14 Democratic Kampuchea regime.

15 [14.20.26]

16 Some victims filled out those documents alone. Others were
17 assisted by non-governmental organizations, lawyers and the
18 victims support section of the Tribunal. These documents were
19 then used by the Co-Investigating Judges to assess the
20 admissibility of those civil parties' applications, that is, to
21 establish whether there was a nexus between the alleged crimes,
22 the crimes alleged by the victims, and the scope of the
23 investigations. All those documents were part and parcel of the
24 record as of 2007.

25 In order to explain in further detail what is the record, it is

1 important to point out that before the ECCC there is no record
2 for the Prosecution against a record for the Defence, but we have
3 just one record which is compiled during the investigation and it
4 is fed by the work of the Judges and the parties themselves. The
5 Defence, of course, had access to that record from the very
6 beginning of the investigations.

7 The Judges relied on the evidence that was contained solely on
8 the record to substantiate their intime conviction, but it is
9 important to point out that the cardinal principle in the
10 assessment of evidence before the ECCC, that is to say, that a
11 number of modifications have to be done through the Internal
12 Rules and the memoranda of the Chamber as part of Case 002/01.
13 If you allow me to continue, Mr. President, I would like to say a
14 word regarding the arrangements that are made with regard to
15 freedom and the manner in which evidence should be assessed.

16 [14.22.36]

17 The Trial Chamber was committed to enabling the Defence confront
18 the written evidence and to assess the evidence properly as
19 regards to civil parties in particular as of June 2012. The Trial
20 Chamber issued a decision which was food for thought for us, the
21 civil parties, but also for the other parties as regards the fate
22 reserved to civil party applications. And I am referring here to
23 one of the most important decisions of the Trial Chamber,
24 decision E96/7. The right of the Accused to confront the civil
25 party applications was at the very heart of that decision and in

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1 that decision the Chamber pointed out that the civil party
2 applications that we applied to tender into evidence had to be
3 made available in the three official languages of the Tribunal,
4 and that they constituted a representative sample of all the
5 documents that we would like to tender into evidence or that we
6 wanted to tender into evidence and that they would be forbidden
7 if those applications had to do with the acts and conduct of the
8 Accused.

9 [14.24.06]

10 Since a confrontation was not possible, it is important to
11 understand that the Chamber enjoined us on two occasions to limit
12 the civil party applications that we wanted to tender into
13 evidence precisely to enable the Defence to confront those civil
14 parties. We limited the number of civil parties that we -- or
15 civil party applications that we wanted to tender into evidence.
16 And to give you some statistics, Mr. President, out of the 3,867
17 civil party applications we only tendered into evidence, in
18 response to the instructions of the Chamber, only 484 civil party
19 applications. The two defence teams had the latitude to make
20 written objections on that list of 484 civil party applications.
21 I would like to refer the Chamber to document E223/2/8 for Nuon
22 Chea and E208/5 for Khieu Samphan. In both cases, the Defence
23 objections were extremely general. There were in all in Case
24 002/01, 14 days of oral proceedings on written evidence during
25 which the Defence was able to make submissions on the

1 admissibility of civil party applications.

2 [14.26.56]

3 JUDGE KLONOWIECKA-MILART:

4 It is my understanding, but I may have been confused by now, that
5 the appeal alleged or appeals alleged that they -- not that they
6 didn't have access to these documents. As I understand their
7 appeals, they alleged that these documents should have been
8 disqualified from admission because of their lack of reliability.
9 Alternatively, that a low probative value should be attributed to
10 them and that they should not be relied for the material
11 findings.

12 But the access was not a point that I would have noticed. So I
13 stand corrected if you refer to me a point of the appeal where
14 the access to this evidence is disputed. Otherwise, I would
15 suggest that you move on or you ask the President for an
16 extension of time if there is some issues more directly related
17 to appeals.

18 [14.26.54]

19 MS. GUIRAUD:

20 I was not talking so much of the access they had to those
21 documents but of their admissibility and since, Honourable Judge,
22 you are inviting me to talk of the probative value of those
23 documents, let me remind the Chamber of a fundamental decision,
24 that is decision E96/7, by which the Chamber very early on during
25 the proceedings, clearly indicated that civil party applications

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1 would have very limited probative value. And I am quoting here
2 the decision of the Trial Chamber that the civil party
3 applications would be of very limited probative value in view of
4 the circumstances under which they were collected.

5 The Defence had the opportunity to react both with regard to the
6 admissibility and probative value of those documents during its
7 closing arguments and closing statements and the judgment
8 explained in paragraphs 34 to 39 and, in particular paragraph 34,
9 the requirements that it had taken into account to determine the
10 probative value of civil party applications.

11 [14.28.20]

12 The circumstances under which the civil party were collected and
13 the existence of discrepancies between the various versions that
14 were presented, and the absence of confrontation or possibility
15 of a confrontation between the accused and the authors of those
16 applications -- I will stop here because I know that my time is
17 limited and I would like to end by saying -- that it is not up to
18 us, the civil parties, to make an assessment as to the manner in
19 which the Chamber will assess the evidence provided by the civil
20 parties.

21 But it is up to you, the Supreme Court Chamber, to consider this
22 matter and it is important that the appeals briefs presented by
23 the two Accused should convince you, to satisfy you that the test
24 of Rule 104.1 is met. And the assessment of the -- of the
25 evidence should be an error in law that it causes prejudice or

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1 that leads to a prejudiced to the accused or that a factual error
2 should be committed to lead to a miscarriage of justice.

3 I thank you, Mr. President, for allowing us additional time to
4 make the remarks that we have made as part of these appeal
5 hearings. Thank you.

6 [14.29.59]

7 THE PRESIDENT:

8 Now, it is the appropriate time for a short break. The Chamber
9 will take a short break of 20 minutes and the hearing will resume
10 at 15 to 3.00.

11 (Court recesses from 1430H to 1457H)

12 THE PRESIDENT:

13 Please be seated. Now, the floor is given to the OCP.

14 MR. SMITH:

15 Good afternoon, Mr. President, Your Honours, counsel.

16 Your Honours, in the 15 minutes I have to respond, perhaps I can
17 make a few key points in relation to Khieu Samphan's counsel's
18 submissions.

19 I think the first thing I would like to make is that Counsel
20 refers to the Chamber distorting the evidence in their -- or
21 distorting their interpretation of the evidence to evaluate their
22 decision. But, I mean it's clear today, Your Honours, that
23 Counsel, herself, has distorted the evidence before you in
24 relation to what evidence was available to the Chamber and today
25 I certainly won't be discussing the evidence of the proof of the

1 crimes or the evidence of how Khieu Samphan or how Nuon Chea's
2 convictions were justified. That's for tomorrow and the next day.
3 But, as an example, in relation to Khieu Samphan's counsel's
4 statement that there was no live testimony in relation to the
5 transfer or the population movements before 1975, it's just
6 clearly not correct. She would remember the witness Ponchaud, the
7 witness Heder, the witness Nou Mao and the witness Duch. They all
8 give evidence, live evidence they could challenge of the
9 population movements prior to 1975. So it's just not the case
10 that -- they are just some examples that the Chamber has relied
11 on written evidence that hasn't been able to be cross-examined.

12 [14.59.56]

13 There are other examples which my colleagues will raise tomorrow.
14 But perhaps I would like to stay a little broader. But before I
15 do, I would refer, Your Honours, to a decision E1/193.1, and this
16 is in relation to Ieng Sary's -- sorry, Khieu Samphan's complaint
17 that the Trial Chamber shouldn't have used the victim and impact
18 testimony that they gave at the hearings. My friend -- our
19 colleagues have talked about that briefly, but just to show that
20 that's categorically wrong, perhaps I can refer you to that
21 decision which was made on the 20th of May 2013, where the Trial
22 Chamber confirmed in that decision, and I quote, "There has been
23 mutual consent amongst all the parties and the Chamber decides
24 that the parties may request that civil parties on relevant --
25 the parties may question the civil parties on relevant factual

1 issues subject to the time limitations announced."

2 [15.01.10]

3 And then a few days earlier that led to this decision allowing
4 information coming out in the segment in relation to reparations
5 or the victim impacts of this trial, it was put forward by one of
6 the Prosecutors, Keith Raynor, and he made 10 submissions stating
7 that, "The civil parties should be questioned on all issues in
8 the case; that the evidence related to suffering and the
9 occurrence of crimes was inextricably linked, couldn't separate
10 the two; the civil parties to be heard were victims of the forced
11 movements whose evidence would go to the heart of the trial; the
12 Defence had to be provided with the opportunity to challenge the
13 evidence. Both the Prosecution, Defence have been proceeding on
14 the basis that full examination will take place. The duty of the
15 Chamber is to ascertain the truth; and that civil parties
16 providing victim impact statements be treated in the same way as
17 previous civil parties who had testified."

18 [15.02.19]

19 And Counsel for Nuon Chea then responded, "I don't think I would
20 ever be saying this in a court of law, but I think I agree with
21 all 10 submissions by the Prosecution. So we fully concur with
22 the submissions of the Prosecution."

23 Counsel for Khieu Samphan also agreed with that position in Court
24 that led to the decision of the Trial Chamber.

25 So when Khieu Samphan's counsel puts forward that evidence

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1 shouldn't be used arising out of civil party victim impact
2 statements, that should not be possible now when at trial they
3 agreed that it was the appropriate course to take. And of course
4 it's appropriate, Your Honours, because that evidence of the
5 impact of the suffering of some -- a victim from the first forced
6 transfer or the second forced transfer, will be linked to the
7 facts of how that person suffered.

8 But if I can move on, Your Honours, and perhaps one of the most
9 significant points that Khieu Samphan's counsel raised was now
10 this idea that his right to be able to challenge the evidence
11 that was presented against him, particularly testimonies in
12 statements of people that didn't come to testify, has violated
13 his fair trial right and would invalidate the verdict.

14 Your Honours, it's completely false when, Your Honours, look at
15 the case, to assume that this case was made or built on written
16 statements without the opportunity to cross-examine the issues
17 that arose out of those written statements. There was over 92
18 witnesses heard, 25,000 of pages of transcript to put their case.
19 And very significantly, Your Honours, there was 5,800 documents
20 amounting to at least 222,000 pages in three official languages.

21 [15.04.55]

22 So for argument's sake, if we divide that by three, it's 70,000
23 pages of relevant probative material.

24 In that material, in those 5,800 documents approximately, there
25 was 2,800 documents that originated from Democratic Kampuchea or

1 immediately before, documents that were recorded at the time by
2 people either in the Khmer Rouge and the CPK or people observing
3 it.

4 Under 20 percent of the evidence that was before the Trial
5 Chamber is based on written statements that was admitted without
6 cross-examination; under 20 percent. The documents in the case
7 file, and the reason why I raise this, is Counsel is saying that
8 this Trial Chamber didn't have significant -- sorry, the Trial
9 Chamber didn't have significant material before it to base its
10 judgment.

11 [15.06.17]

12 Your Honours, there were 200,000 statements from the Accused
13 themselves that are on that case file and many of those
14 statements go to proving the acts and conduct and policies that
15 occurred. But even more significantly, 80 percent of the 2,300
16 documents were produced by the CPK themselves.

17 Your Honours, these documents present a high body of inculpatory
18 evidence relevant to the Accused's positions, their roles, their
19 authority, the policy, the military structures, the
20 administrative structures through which the crimes were
21 committed. Of those documents the Chamber had before them 495
22 copies of telegrams and reports from the zones, military
23 divisions and DK organizations, 345 public statements from the DK
24 government, 58 minutes of meetings of the CPK leadership
25 committees of which approximately 16 or so Khieu Samphan was

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1 recorded as being present at those meetings.

2 So when the Trial Chamber finds active participation of the CPK,
3 this is coming from contemporaneous documents made at the time.
4 And significantly and powerfully, there were 86 CPK publications
5 relating to the policies of the government that were coming out
6 -- the criminal policies that were coming out unabashed during
7 the period, and that's the "Revolutionary Flag" and youth
8 magazines.

9 [15.08.19]

10 Your Honours, I just wanted to make that point because when you
11 look at this case, the Trial Chamber looked at the case in terms
12 of its totality, in terms of all of the evidence that it had
13 before them. And Your Honours, that is the approach that we
14 submit is the correct approach, the approach that the Trial
15 Chamber should have taken, not as, certainly in Nuon Chea's brief
16 and Khieu Samphan's brief, not as their arguments are put
17 forward, that Your Honours should look at the case or the facts
18 in isolation, not look at the live testimony versus the written
19 corroborative evidence, not look at that written corroborative
20 evidence of witnesses against the "Revolutionary Flags", the
21 telegrams, the Standing Committee reports. They are asking you to
22 look at the facts in isolation.

23 [15.09.26]

24 The Chamber, at paragraph 521, they take the right approach and
25 they say, "Having regard to the totality of the evidence before

1 the Chamber, it then concludes that least several thousand people
2 died in the evacuation of Phnom Penh."

3 And I think time is short, but if I refer, Your Honours, to the
4 judgement of an ICTY case, of Limaj, it's authority number 70,
5 and it's the 27th of September 2007, by the Appeals Chamber at
6 paragraph 153. And this is important. It explains further that
7 not every individual fact, not every individual killing that
8 might be before the Chamber in terms -- in its various forms,
9 either testimony or written evidence or policy evidence, is
10 required to be proved beyond reasonable doubt.

11 But the totality of the facts in relation to the crimes, they
12 state, "The ultimate weight to be attached to each relevant piece
13 of evidence is not to be determined in isolation, even though
14 each relevant piece viewed in isolation may not be sufficient to
15 satisfy the obligation of proof on the Prosecution. It is the
16 cumulative effect of the evidence, i.e. the totality of the
17 evidence which must be weighed to determine whether the
18 Prosecution has proved its case beyond reasonable doubt."

19 [15.11.18]

20 That's the approach that should be taken because, as the saying
21 goes, you will lose the forest for the trees if you look at one
22 point and deem whether -- is that proved beyond reasonable doubt?

23 It's the collection of evidence supporting the killings, the
24 hardship and the forced evacuations supporting how Khieu Samphan
25 committed these crimes and Nuon Chea.

1 And we urge, Your Honours, to look at that contemporaneous
2 material because that is some of the most powerful material that
3 will indicate to you that the Trial Chamber's decision was
4 correct in light of the testimonial evidence and the written
5 statements.

6 [15.12.16]

7 I think -- if I could have two minutes, Your Honours, to
8 conclude, I think I have gone over --but, when we talk about, or
9 when the Trial Chamber admitted these written statements, that
10 was done according to international standards and practice. It
11 was done according to how they would do it at the Yugoslavia
12 Tribunal, the Rwanda Tribunal, the Sierra Leone Tribunal, all of
13 the other ad hoc tribunals and it was done with their knowledge
14 that they would not use that evidence to prove the acts and
15 conduct of the accused because that cannot be done under the
16 prevailing jurisprudence because that wouldn't give the Defence a
17 chance to be able to challenge the evidence against them on their
18 acts and conduct. But that it was done because if it's not done,
19 these trials where there is millions and millions of victims,
20 they would never end.

21 And so it's a balancing game. Not a game but a balancing approach
22 that the Trial Chamber took and used that evidence as
23 corroborative evidence in this case.

24 So in the 600-page judgment, in the 300 or so decisions by the
25 Trial Chamber, we would ask, Your Honours, to see, we would

1 submit, it's a reasoned judgment and it's based on the
2 appropriate level of proof which obviously will be discussed
3 tomorrow. Thank you.

4 [15.14.22]

5 THE PRESIDENT:

6 The next stage will be the questions by the Bench in relation to
7 the first and second thematic sessions on the fairness of the
8 proceedings and the constitutionality of the Internal Rules, as
9 well as the general overall approach to evidence. And I would
10 like to hand the floor to the Bench if you wish to put the
11 questions on these two thematic things.

12 JUDGE KLONOWIECKA-MILART:

13 Q. I would like to ask the Prosecution in relation to the
14 averment of the appeal that there is no -- because it sort of
15 logically follows from what Mr. Prosecutor was presenting before
16 us -- that there is very little, if any, discussion of the
17 reliability of evidence and witness credibility. Would you defend
18 the trial judgment with this respect?

19 [15.15.44]

20 MR. SMITH:

21 Yes, Your Honours. When, Your Honours, look at the judgment in
22 whole, they -- the Judges rely on -- they make it clear at the
23 beginning in the -- when they deal with their trial, they make it
24 very clear that they would treat any written evidence that the
25 Accused hasn't had an opportunity to cross-examine the author

1 with caution. And it should be presumed that applied throughout
2 the judgment.

3 Similarly, they state quite clearly that the Accused are presumed
4 guilty -- presumed innocent until proven guilty. That they state
5 it must -- the guilt must be based on beyond a reasonable doubt.
6 And they also state upon a reasoned assessment of the evidence
7 the Chamber interprets any doubt as to the guilt in the Accused's
8 favour. And further, they also state that in order to convict,
9 all reasonable inferences that may be drawn from the evidence
10 must be consistent with the guilt of the Accused.

11 [15.17.14]

12 So, certainly from a general sense, I think it should be presumed
13 that that application of standard of the high standard that's
14 required dealing with all elements in the trial was done
15 throughout the judgment. But then when you go to the judgement in
16 particular, you will see a number of instances where the Chamber
17 reasons evidence. It reasons where there is inconsistent evidence
18 and it gives reasons for that. It gives reasons when it accepts
19 parts of the evidence over -- or parts of an accomplice's
20 testimony over other parts.

21 And perhaps if I can just refer, Your Honours, to a number of
22 paragraphs because it would be too long to go through them now;
23 34, 139, 80, 387, 494, 495, 496, 667; footnotes 425, 669; they
24 are some examples that the Trial Chamber shows its reasoning
25 process. And as, Your Honours, would be aware it's impossible for

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1 a Trial Chamber to reason every fact that's required to assess
2 the evidence. And if I refer, Your Honours, to -- because the
3 judgment could never be written if every single fact had to be
4 reasoned, there must be a presumption that the Trial Chamber
5 weighed that evidence. And so I will refer, Your Honours, to the
6 --

7 [15.19.25]

8 JUDGE KLONOWIECKA-MILART:

9 We understand that we are on the same ground, not having given
10 reasons to our rejection of evidence and Nuon Chea is unjustly
11 offended but we will detail.

12 I understand that the Prosecution wants this Chamber to presume
13 that the Trial Chamber accepted evidence on which it didn't
14 comment in its entirety. Do you think there is a basis for such
15 a--

16 MR. SMITH:

17 There is, Your Honour. I mean obviously the Chamber has to give
18 sufficient reasoning and factual support for -- to prove the
19 elements of the charges, but to reason why every piece of hearsay
20 perhaps was accepted or not accepted or every single fact was
21 accepted or not accepted, it would be impossible to finish the
22 judgment. I mean, that's clear. And so there has got to be
23 sufficient reason. And we say there is sufficient reason because
24 of the evidence that has been used to support those findings in
25 the judgment.

1 [15.20.31]

2 But I would like to -- I'll finish there, Your Honours -- to
3 refer, Your Honours, to the ICTY case of Prlic. It's at Authority
4 132, Appeals Chamber at paragraph 12, 2010 and it states, "While
5 the Trial Chamber has an obligation to provide reasons for its
6 decisions, it's not required to articulate the reasoning in
7 detail. The fact that the Trial Chamber did not mention a
8 particular fact in its written order does not by itself establish
9 that the Chamber has not taken that circumstance into
10 consideration."

11 And as I said, Your Honours, and I gave some examples where you
12 will see that reasoning or that balancing process happening and
13 where you don't in other places, the law tells us that as long as
14 there is sufficient evidence before them that that process is
15 undergone throughout.

16 [15.21.48]

17 JUDGE MWACHANDE-MUMBA:

18 The Chamber did hear three witnesses on the application for Nuon
19 Chea for additional evidence. The Chamber would like to know from
20 the parties whether that evidence has had any impact on any of
21 the findings of the Trial Chamber in the judgement. The Chamber
22 would like to start with the Defence Counsel for Khieu Samphan.

23 MS. GUISSÉ:

24 Thank you, Your Honour. Well, I was going to precisely react to
25 an element that was presented earlier concerning the meeting

1 about the evacuation. So I am going to speak about the witness
2 you heard, Toit Thoeurn, on 6 July 2015. This brings me back
3 exactly to what I was saying regarding the superficial way the
4 Chamber dealt with the evidence.

5 In the judgment in its totality there is only one single witness
6 who was speaking about the content or about the substance of the
7 meeting on the evacuation. He talks about Nuon Chea, Khieu
8 Samphan and Ros Nhim. On the hearing of 6 July 2015, you heard
9 Toit Sen (sic) who was Ros Nhim's bodyguard and he told you -- it
10 was a little bit after 2 o'clock and 12 minutes in the afternoon
11 -- this is document F1/3.1.

12 [15.23.30]

13 And the question that was put to him was -- the question that was
14 put to him by my colleague, Arthur Vercken in our team, and the
15 questions are being put to him about that famous meeting in 1974,
16 about the evacuation. He is asked:

17 "Do you remember if in 1974 you accompanied Ros Nhim to a meeting
18 that lasted two weeks and that was held about 300 kilometres from
19 B-20? And do you remember that? Does that ring a bell?"

20 And the answer was the following, "No, it was not 1974. I think
21 it was rather in 1975. This happened after the conference."

22 [15.24.20]

23 So, here in appeal we have a witness who accompanied Ros Nhim and
24 who told us that the meeting that was determined by the -- that
25 the Trial Chamber said happened in June 1974 for which it brought

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1 together all of the elements I described to you earlier, we have
2 another appeal witness who tells us that -- or that Ros Nhim did
3 not attend that meeting. So Ros Nhim was a priori one of the
4 members of the JCC as defined by the Chamber. And this is a new
5 element that's also useful to consider that demonstrates that
6 this is all based on one witness whose credibility is disputed in
7 order to place the fact that Khieu Samphan went to a meeting
8 which was also attended by Ros Nhim. That is problematic.

9 And you also have the statements of Sam Sithy. I was speaking
10 about this earlier briefly, Sam Sithy, who, according to the
11 written statement, apparently attended the execution of members
12 of his family and when he arrived and when he testified before
13 the Chamber, he said something else. It was a different story. So
14 what we note here is that what is written in his written
15 statement is not that he apparently attended this execution, but
16 at the hearing he said that an hour later he heard a gunshot.

17 I have to find the exact references but I will give them to you
18 later. Yes, here I have them. So this was at around 3.16 in the
19 afternoon at the hearing of 3 July 2015.

20 [15.26.20]

21 And we understand or we note that he was not an eyewitness of an
22 execution but that he heard gunshots about one hour after his
23 father was taken away, and here there is again an issue of
24 credibility. He says that the people in his family who could
25 corroborate these facts. But finally, when we ask him which

1 members of the family, he no longer remembers them.
2 And you especially have, and this is another element that
3 demonstrates poor practice on the part of the Chamber because
4 that morning when he was questioned, right off the bat when he
5 had to react on the basis of his memories and on the basis of his
6 experience, he provides a certain version. And the defence
7 lawyer, Victor Koppe, gives -- challenges him and gives him his
8 written statement, the written statement that was used by the
9 Trial Chamber and then in the afternoon he has the time to read
10 over his written statement and he tells you a completely
11 different story. He provides you with a whole new version. So
12 this is a demonstration, a clear demonstration, that a witness
13 based on one single, written statement when you rely on this to
14 establish crimes, well, this is a bit flimsy.

15 [15.27.40]

16 Nothing is more convincing than an examination. And here again,
17 the practice of having witnesses read their statements is -- has
18 problematic consequences on the spontaneity of the evidence and
19 on the possibilities of confronting this witness during the
20 hearing.

21 And another point that is important to note regarding the written
22 statements -- and we should be clear about this -- we never said
23 that the Chamber had only based itself on written statements.
24 But if you allow me please, Mr. President, to respond to this
25 question. I would like to remind you that we filed a submission

1 to stay the proceedings to which we attached an addendum. This is
2 document E275/2/1.3.1. And this was the -- /1.3 was the addendum,
3 and you added a .1 as an annex and we had to make the search and
4 request because of the Chamber's request on our position
5 regarding witness statements.

6 And I'd like you to understand that when we're told that we had
7 the possibility of making objections, we have to see under which
8 conditions these objections were made.

9 We should recall that the Trial Chamber's decision on written
10 statements came into play one year after our request, and then
11 the Trial Chamber provided a delay to the prosecutor to revise
12 their list. It had -- it gave them a delay that was -- went
13 beyond the deadline by 40 days and it is 16 days later, that is
14 to say, by maintaining the original deadline for the Prosecution
15 it was 16 days later that the Defence was able to formulate its
16 observations.

17 [15.30.22]

18 So the Defence had to make observations on the basis of a list
19 that was provided 40 days late, and it's obvious that it's not in
20 16 days that we could make observations and comments that were
21 specific on 1399 written statements, and this is an element to
22 keep in mind and that also supports our theory, that is to say,
23 that the Chamber once again proved that it took a partial
24 approach.

25 And the third witness, and I don't remember his name, who spoke

1 about the issue of meetings, which apparently he attended -- this
2 is Sao Van, yes, Sao Van, who then was heard by the Trial Chamber
3 in Case 002/02, and he speaks about a meeting which he apparently
4 attended and in which he heard a certain number of indications
5 from leaders of the CPK stating that the former Lon Nol soldiers
6 should not be killed.

7 [15.31.42]

8 So it's clear that this is an important element to take into
9 consideration, in particular -- and this is what the Nuon Chea
10 defence developed in detail -- but it also corresponds to our
11 position -- that is to say, that we believe that there never --
12 that Khieu Samphan never adhered to any kind of plan which was
13 designed to kill former members of the Khmer Republic and that
14 Tuol Po Chrey happened in an area where there were zone leaders
15 who did not respect the CPK policy and therefore under these
16 conditions the issue of the Joint Criminal Enterprise, the
17 question of the common purpose has to be reviewed, revised and
18 does not correspond to the Trial Chamber's -- the logic of the
19 Trial Chamber's Judgement.

20 [15.32.39]

21 So here we're speaking about a monolithic vision about what the
22 CPK was, a monolithic vision of the Khmer Rouge. We speak about
23 the Khmer Rouge but this is an element that Short also noted;
24 there was no, there was never any unified armed forces. The armed
25 forces were zone armies and the evacuation as -- was organized in

1 different ways according to the different zone armies.
2 And we -- in -- during the proceedings, and the Nuon Chea team
3 noted this in particular, the Nuon Chea team said that we cannot
4 speak about Joint Criminal Enterprise if the members of the Joint
5 Criminal Enterprise or the alleged JCE do not agree upon
6 everything, have different visions, and as in any political
7 movement have internal trends.

8 [15.33.44]

9 So, therefore, we believe that in the case of Tuol Po Chrey, Sao
10 Van's testimony allows us to put everything back into perspective
11 and allows us to understand that what was considered as a general
12 policy by the CPK can, in fact, be understood as poor choices and
13 as straying from the common policy on the part of zone leaders
14 who had nothing to do with the senior leaders of the CPK and with
15 Khieu Samphan.

16 And I'd like to remind you that Khieu Samphan, the Chamber
17 considered Khieu Samphan had no authority with regard to military
18 matters.

19 JUDGE MWACHANDE-MUMBA:

20 Thank you very much. Any submissions by the civil parties before
21 we go to the Prosecution? If there -- if there was any impact
22 from the additional evidence?

23 MS. GUIRAUD:

24 Thank you for giving us the floor, Your Honour. We have no
25 remarks to make on this matter.

1 JUDGE MWACHANDE-MUMBA:

2 The OCP?

3 [15.34.56]

4 MR. KOUMJIAN:

5 Thank, Your Honour, for the question and the opportunity to
6 address it.

7 I don't believe the Defence Counsel has answered your question.

8 Your question was the effect of the testimony on any findings of
9 the Trial Chamber.

10 Our position is clear, there's none. There was nothing that was
11 said by these three witnesses would contradict the findings of
12 the Trial Chamber. In fact, it is our view that the testimony of
13 these witnesses simply added additional evidence showing that the
14 Trial Chamber's findings were correct.

15 And going through them briefly -- and I admit that it's been a
16 while, my memory's not perfect on their testimony -- but Sao Van,
17 for example, testified. Counsel makes the point that he said that
18 at a meeting, he claims that Ta Mok, I believe, said that those
19 below him were not to kill Lon Nol, I believe he said colonels
20 and above. I could be corrected about exactly how he described
21 it.

22 [15.35.59]

23 First of all, Your Honours, it's important to keep in mind what
24 the evidence has been consistently in the case. And that is when
25 it came to the authority to kill, the authority to kill was

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1 delegated -- there's a document on the case file by the Centre to
2 the zone leaders -- and many witnesses have testified, including
3 district secretaries, that it was the zone leaders that had to
4 approve any killing.

5 So Ta Mok simply telling those below him you don't kill without
6 my order is consistent with the evidence. They were -- and,
7 furthermore, So Phim -- Sao Van's testimony demonstrates how Lon
8 Nol officers and soldiers were -- and officials -- were put into
9 a category of suspects and treated differently.

10 You will recall that he testified that he himself felt under
11 pressure, under suspicion, because his brother had been a Lon Nol
12 official. And he even said in his DC-Cam statement, which I
13 believe, Your Honours, admitted into evidence, he talks about
14 going -- his brother being taken to a place of detention and how
15 he went to use his influence to get his brother out of the
16 detention or if they'd allow his wife to be brought to that
17 location and to be with his brother at that place. I believe it
18 was called -- I believe it was Office 204 it was called, in that
19 district where he was detained with others.

20 So Sao Van simply demonstrates further that the Trial Chamber was
21 correct, that there was a policy of targeting former Lon Nol
22 officials and soldiers.

23 [15.38.06]

24 If we go to Sam Sithy, Your Honours, saw his testimony, and we
25 submit his testimony was absolutely consistent. And you also, I'm

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1 sure, appreciate the advantage of those who actually get to
2 witness a person testify because you could see during his
3 testimony, I submit, that the things he was talking about are
4 things he experienced and can never forget.

5 This happened 40 years ago approximately and he was very young at
6 the time, but what he testified to is he did witness an
7 execution, that was the execution of his mother and others were
8 put into the bomb crater. He was with them and survived. He said
9 that he heard the shots about his -- when his father's group was
10 taken away and killed, and his mother tried to comfort him and
11 tell him, oh son, they're just hunting. But he was afraid because
12 he suspected that they'd killed his father at that time, and the
13 rest of the group. And those people, his father and the others,
14 have never been seen again.

15 [15.39.15]

16 So, Sam Sithy's testimony was extremely important because it
17 would contradict anything that Sao Van or other evidence that the
18 defence has tried to put forward about how former Lon Nol
19 officials and officers were treated.

20 Sam Sithy talks about how in this location, which was the same
21 commune where the top Khmer Rouge leadership planned the attack
22 on Phnom Penh, that at that location a large group had assembled,
23 I believe at the pagoda, that the Khmer Rouge used a tactic that
24 the evidence in this Trial and in the Judgement shows was used
25 throughout the country to try to fool these people into

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1 self-identifying themselves. They were told anyone who was a
2 former officer or former official, "We want to give you your old
3 job back, the war's over, come identify yourself and you'll get
4 more rice and will get your old jobs back."

5 And his father did that, and many, many others did that and he
6 said even some tuk-tuk drivers thinking that, "Oh, this is a way
7 to get free rice", they did that. And it was clearly a tactic to
8 have them identify themselves and then be taken for execution.

9 [15.40.40]

10 And that's exactly the same as what Toit Thoeurn testified to,
11 the final witness that, Your Honours, called. He talked about
12 what happened in the Northwest Zone. He was working under Ros
13 Nhim his adopted father. He also talked about the regular
14 communications; that he would carry messages from Ros Nhim to be,
15 I believe, sent by telegraph to the Centre and then carry back
16 messages from the Centre. I think he said that that was going on
17 about twice a day at that period of time.

18 He talked about how he himself was jealous when he heard the
19 announcement that former Lon Nol soldiers are going to be taken
20 to see the king, and he felt jealous because he saw these former
21 Lon Nol soldiers and officers--

22 [15.41.30]

23 JUDGE KLONOWIECKA-MILART:

24 We remember what he said.

25 MR. KOUMJIAN:

1 Okay.

2 JUDGE KLONOWIECKA-MILART:

3 We remember what he said. If we could get to the impact of which

4 --

5 MR. KOUMJIAN:

6 Well, the impact is--

7 JUDGE KLONOWIECKA-MILART:

8 -- particular finding is strengthened or weakened by any

9 particular witness.

10 MR. KOUMJIAN:

11 Thank you. This further corroborates the policy to kill Lon Nol

12 soldiers and how widespread it was.

13 One of the things you have to keep in mind when Toit Thoeurn

14 talked about witnessing soldiers being taken away and then never

15 being seen again, he was not talking about Tuol Po Chrey but

16 another location in that district which, again, shows how

17 widespread it was. He said he was 100 kilometres from Tuol Po

18 Chrey at the time. But this was a nation-wide policy and that's

19 what the Judgement found and that's what this testimony simply

20 confirmed.

21 [15.42.17]

22 I would just add that Counsel, I believe, misrepresented the

23 testimony of Philip Short. I don't have the exact quote to give

24 to you at this very minute, but while Philip Short certainly

25 recognized that the Khmer Rouge army was organized by zones, he

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1 made it very clear that this was not a group of independent
2 militias. They all answered to one central authority which was
3 giving the orders and was being obeyed by the zone forces.

4 Thank you.

5 JUDGE MWACHANDE-MUMBA:

6 Thank you very much.

7 [15.43.04]

8 JUDGE YA NARIN:

9 I have a question and this question is directed to the defence
10 team for the Accused.

11 I understand that Nuon Chea defence team did not make any further
12 submission, but in the submission of the Defence Counsel for Mr.
13 Nuon Chea objected to the approaches used by the Trial Chamber in
14 putting the burden on the accused, particularly in relation to
15 the Crimes Against Humanity.

16 Between 1975 and 1977, there was a -- two major steps of
17 evacuation and many people lost their lives during the two stages
18 of evacuation, and I cannot quote the exact number of people who
19 died during the period. And people were suffering from inhuman
20 acts during those evacuations.

21 The Trial Chamber heard evidence for many months and the Trial
22 Chamber based itself on voluminous evidence to place Nuon Chea
23 and Khieu Samphan under the crimes of murder, forced transfer,
24 and persecution on the political ground, and also other inhuman
25 acts.

1 [15.44.58]

2 So the Trial Chamber has based itself on the 1,000 pages of
3 evidence not just on one page of evidence. And the Trial Chamber
4 has used various types of evidence, including the evidence inside
5 the Court and also from other sources, namely hearsay evidence.
6 So in addition to that, the Trial Chamber has relied on other
7 evidence to place the criminal responsibility on the Accused. As
8 I said, the Trial Chamber has relied on hearsay evidence as well.
9 The Defence Counsel for the Accused has challenged the methods of
10 tendering all those evidence and the Accused has asserted that
11 these methods have violated the fair trial rights of the Accused.
12 So my question has something to do with all the methods which
13 were used, which were applied, to those evidence. So to what
14 extent did the methods of tendering those evidence impact the
15 fair trial rights of the Accused? And please give the response to
16 my question Counsel for the Accused.

17 [15.47.05]

18 MS. GUISSÉ:

19 Thank you, Your Honour, for this question.

20 I believe we can only respond to a part of the question tomorrow
21 when we'll deal with the issue of crimes and responsibility. But
22 in answer to the question regarding the way the Chamber relied on
23 different types of evidence and sources.

24 As I pointed out earlier, the question is not so much what the
25 Chamber relied on but what the Chamber did with the evidence and,

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1 for instance, as regards discrimination and the discriminatory
2 intent and the use of coercion vis-à-vis the New People and the
3 evidence the Chamber relied on to convict Mr. Khieu Samphan, we
4 developed this in paragraph 783 of the Judgement.

5 The Chamber explained that Mr. Khieu Samphan's case, in itself,
6 bore the germ of what happened subsequently in Democratic
7 Kampuchea, and the Chamber held that there was some element of
8 coercion or constraints and that that was something that was
9 evident in the ideology for the period after 1975, as far as Mr.
10 Khieu Samphan was concerned. And the Chamber actually cited the
11 thesis paragraph 784.

12 [15.49.02]

13 The problem is that the thesis doesn't say exactly what the
14 Chamber did and we're told that in the thesis in the case there
15 were notions that affected the New People but the thesis and is
16 in paragraph 784, what does Mr. Khieu Samphan say.

17 He talks about teams of peasants. He says that the constitution
18 of mutual assistance teams for whom we have the ownership --
19 private ownership, that's not exactly the case. And the thesis
20 doesn't talk about the situation of the Khmer peasants and said
21 new thesis -- new lands could be acquired and new capital could
22 be used to develop industry.

23 Here again, we're not talking of the policy of the CPK. Later on,
24 further down, we are of the view that we can and we should rather
25 seek to free our ability to contribute by transforming these

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1 landowners, these middlemen, these (inaudible)^, into a
2 capitalist agriculture or industrial class, agricultural
3 capitalist entrepreneurs.

4 [15.50.36]

5 Here again, we are far from what the Chamber presents as the CPK
6 policy and I cannot accept that we should take this as good use
7 of the evidence. Yes, the thesis of Mr. Khieu Samphan was used,
8 but they are putting words into his mouth, and that is not the
9 problem we have with the Trial Chamber. Of course, there are
10 problems with written statements persons that we were not able to
11 cross-examine. I'm giving you this as a precise case of the
12 dysfunctional evidence. Evidence does exist, but we are not told
13 exactly how it was used.

14 I hear the Co-Prosecutor saying that they are presenting
15 such-and-such an argument in very general terms. Let us place
16 ourselves in this situation. If we were to be told evidence is
17 not sufficient, in that case -- they are speaking in general
18 terms, we are not demonstrating exactly what happened. What we
19 did is what we did in our appeal brief. We'd demonstrated how the
20 Chamber's findings based on the way it used this evidence was a
21 bad use of evidence and a violation of Mr. Khieu Samphan's
22 rights.

23 [15.52.01]

24 Let me respond to what the Co-Prosecutor said regarding the
25 issue. He pointed out that the Chamber did not have the wrong

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1 premises. When they use different pieces of evidence to reach a
2 finding that would lead to a conviction, that wasn't done
3 haphazardly. Such inferences, for instance as regards the thesis,
4 aimed at finding an intent that we used in the definition of
5 crime, persecution, discrimination, they use this and they defend
6 the thesis, in order to come up with a result.

7 When the Chamber uses this inferential method to lead to a result
8 that would in turn lead to the conviction of Mr. Khieu Samphan,
9 it should reason it. It is only when the reasons are given that
10 we can challenge those reasons. The reason is not to ask for the
11 number of footnotes and the number of pieces of evidence used,
12 but how the evidence was used.

13 [15.53.13]

14 Of course, we want to focus on the issue of probative value, the
15 probative value of some pieces of evidence. Beyond probative
16 value, we also have the manner in which it is used and if it is
17 misused we have the right to challenge the faulty use of such
18 evidence and the jurisprudence is there to justify our approach.

19 MR. PRESIDENT:

20 It is now almost 4 p.m., so it is convenient -- it is a
21 convenient time now for the adjournment and it will resume
22 tomorrow at 9 a.m.

23 Security personnel are instructed to bring the Accused back to
24 the detention facility of the ECCC and have them returned
25 tomorrow at 9 a.m.

1 The Court is now adjourned.

2 (Court adjourns at 1554H)

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