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

Supreme Court Chamber

TRANSCRIPT OF APPEAL PROCEEDINGS - KAING GUEK EAV "DUCH"

PUBLIC

Case File N° 001/18-07-2007-ECCC/SC

29 March 2011, 0858H
Proceedings

Before the Judges: KONG Srim, Presiding
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SOM Sereyvuth
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List of Speakers:

Language used unless specified otherwise in the transcript

Speaker	Language
MR. CAYLEY	English
MS. CHEA LEANG	Khmer
MR. KANG Ritheary	Khmer
MR. KAR Savuth	Khmer
JUDGE MILART	English
JUDGE NOGUCHI	English
THE PRESIDENT (KONG Srim, Presiding)	Khmer
JUDGE SIN Rith	Khmer

P R O C E E D I N G S

(Judges enter courtroom)

MR. PRESIDENT:

Please be seated.

The Court is now in session. The Greffiers, can you please report to us whether the parties to the proceeding are present.

THE GREFFIER:

Mr. President, all parties are present except lawyers for the civil parties. Mr. Karim Khan is absent. Mrs. Moch Sovannary is also absent, along with Kim Mengkhy.

MR. PRESIDENT:

Before we proceed with the second session, we would like to inform parties to the proceedings that your oral submission should be in a slower pace to make sure that the interpreters could catch up well with them. I would like now to hand the floor to the co-rapporteur Judge to report on the crimes against humanity.

[9.01.45]

JUDGE MILART:

Thank you, Mr. President.

The second ground of the Co-Prosecutors' appeal is that the trial Judgment erred in law by subsuming specific crimes against humanity under the crime of persecution on political grounds. The Co-Prosecutors submit that the accused should have been convicted cumulatively for all acts constituting the crimes against humanity for which he was found responsible.

Let us recall that the trial Judgment found the Accused individually criminally responsible for the following offences as crimes against humanity: murder, extermination, enslavement, imprisonment, torture, and this including one instance of rape, and persecution on political grounds, and other inhumane acts. The Trial Chamber convicted the accused of persecution on political grounds, and held that other crimes against humanity are subsumed under this conviction.

In short, as the matter will be expertly argued before us, we recall that the Co-Prosecutors submit that the Trial Chamber erred by subsuming under persecution on political grounds the other crimes against humanity for which the accused was found responsible. The prosecutors argue that each crime against humanity for which the accused was found responsible has a materially distinct element not found in the others. The Trial Chamber's failure to convict the accused of all of the crimes against humanity for which he was found responsible undermines the twin aims of cumulative convictions, as it does not fully reflect the accused's individual criminal responsibility or the actual extent of his involvement in the commission of the crimes. [9.03.47]

They further submit that any rationale for not allowing cumulative convictions discussed in the international jurisprudence does not apply in this case, specifically, in the prosecutors' view, the accused is not eligible for parole and the

likelihood that the accused will leave Cambodia for another jurisdiction, much less be convicted in another jurisdiction, is effectively non-existent.

Further, the Trial Chamber failed to fully consider the societal interests protected by each enumerated crime, and that a more complete description of the accused's criminal conduct was needed for the sake of posterity and the Court's historical record.

The Co-Prosecutors further submit that the Trial Chamber erred in law by subsuming the crime against humanity of rape under the crime against humanity of torture and by characterizing the single instance of rape as a component of torture. The Co-Prosecutors will request that the Supreme Court Chamber convict the accused of the discrete crime against humanity of rape.

[9.05.00]

No written responses were filed to the Co-Prosecutors' appeal.

For the purpose of this appeal hearing, the Supreme Court recalls that the addressing of multiple convictions, and in particular the application of the test for multiple convictions offered by the prosecution is based on comparisons between concurring criminal definitions. Therefore, the disposing of the appeal has, as a necessary predicate condition, that the Chamber examine the appropriateness of the criminal definitions employed for this test.

[9.05.40]

Examining those definitions is necessary to ascertain the jurisdiction of this Court, and ultimately for deciding if the Chamber were to enter any of the convictions sought by the appeal. Accordingly, the Chamber provided for the parties for an opportunity to comment on the relevant legal notions of crimes against humanity, persecution, rape and enslavement.

Thank you, Mr. President.

[9.06.10]

JUDGE SIN RITH:

The third ground of the Co-Prosecutors' appeal is that the Trial Chamber erred in law by incorrectly defining enslavement, and, as a consequence, the Trial Chamber failed to convict the accused for the enslavement of all the detainees of S-21.

Regarding the allegation of enslavement in Case 001, the Trial Chamber noted that the amended Closing Order, under the heading of "Enslavement", stated the following: "Certain detainees at S21 and Prey Sar were forced to work. Strict control and constructive ownership was exercised over all aspects of their lives by limiting their movement and physical environment, taking measures to prevent and deter their escape, and subjecting them to cruel treatment and abuse. As a result of these acts, detainees were stripped of their free will."

The Trial Chamber held that the crimes against humanity of enslavement is characterised by the perpetrator's exercise of any or all of the powers attaching to the right of ownership over a

person. The Trial Chamber listed forced labour as one of the indicia of enslavement, and it also stated that forced or involuntary labour may constitute enslavement.

[9.08.00]

The Trial Chamber found that S-21 staff deliberately exercised total power and control over the S-24 detainees and over a small number of detainees assigned to work within the S-21 complex. These detainees had no right to refuse to undertake the work assigned to them, and did not consent to their conditions of detention. The Trial Chamber therefore found that their forced or involuntary labour, coupled with their detention, amounted to enslavement.

The Co-Prosecutors submit that the Trial Chamber erred in law by requiring forced or involuntary labour as a necessary element of enslavement, rather than as an indicium of enslavement. The Co-Prosecutors submit that, as a consequence of incorrectly defining enslavement, the Trial Chamber failed to convict the accused for the enslavement of a broader group of detainees, namely, all the detainees at S-21 irrespective of whether they were subjected to forced or involuntary labour.

According to the Co-Prosecutors, the trial Judgment already contains adequate findings that powers attaching to the right of ownership were exercised at S-21 which fulfill the definitional requirements for enslavement as a crime against humanity. Moreover, those acts were committed intentionally, and with the

purpose of exercising ownership over the detainees. The Co-Prosecutors request that the Supreme Court Chamber accordingly convict the accused for the crime against humanity of enslavement in respect of all the detainees at S-21 irrespective of whether they were subjected to forced or involuntary labour.

[9.10.15]

No written responses were filed to the Co-Prosecutors' Appeal Brief. Thank you, Mr. President.

MR. PRESIDENT:

We will invite the Co-Prosecutor to make oral submission in response to the appeal brief.

MR. CAYLEY:

May it please the Court. Thank you Mr. President. Good morning, Your Honours; good morning counsel. In the space of 45 minutes I am going to attempt to address the issues that have been raised. They are substantial issues, and I am going to have to abbreviate in order to get through all of the issues which were discussed by the rapporteurs.

The first issue that I will deal with is the issue of cumulative charging for crimes against humanity. By this question that is being put to the Co-Prosecutors, I am not simply going to simply repeat paragraphs 134 to 191 of our submission but I will ask you consider them when you are determining this issue.

What I aim to do is to provide you with the current legal basis for cumulative charging and then to very briefly to discuss with

you any affect on sentencing. Our argument put quite simply is this, the Trial Chambers interpretation of the law in its judgements in respects of cumulative convictions was wrong. The misapplication of that law can be found at paragraph 565 of the trial Judgement. The Trial Chamber, in essence, decided to ignore the majority judgment in the 2004 Yugoslav tribunal Appeals Judgement of Kordic and that is 71 in our Table of Authorities within our appeal.

While this Chamber and indeed the Trial Chamber is, and was not bound by international jurisprudence, the majority judgment in that case is, in my submission Your Honours, where the guidance lies on this issue.

For the sake of consistency and indeed legality, it is my submission that the Trial Chamber should have followed the majority judgments in that case. This Court whilst a domestic court has many features of an international court. It will hear very few cases, and the likelihood is that legal scholars of the courts dealing with these very serious offenses will look to this institution now and in the future to find guidance on the interpretation on both substantive and procedural issues in respect of international criminal law.

It is my submission that there is an obligation, respectfully, that we create a consistent body of law. Before examining the Kordic case, let me very simply state what the concept of cumulative convictions means: It means as Judge Milart said

"convicting and individual of more than one criminal offense upon the basis of the same conduct".

[9.14.06]

Why are individuals convicted of different charges for the same conduct, while for the two legal policy factors that Judge Milart mentioned that multiple convictions protect and recognize different interests and more importantly -- most importantly here, particularly for this Court, that there is a proper, historical record of convictions to fully describe what the respondent did.

These two matters are indeed law, and we site them in our brief and you will find them sited in international case law. I won't go through all that case law but you will find these principles discussed at paragraph 347 of the Appeals Judgment of the Musema case. That's authority number 90 in our table of authorities, also in the Akayesu case, that's number 84 in our table of authorities and that's at paragraph 468.

Just as a side note, let me put this in perspective for you. The Yugoslav War Crimes Tribunal will have charged 160 individuals by the time it finishes its work. So that courts record is fulsome in providing a proper, accurate, historical record of what actually took place and for what crimes people were charged and then either convicted or acquitted.

The many human interests that ruptured in that war in Yugoslavia have been recognized in the charges laid at the feet of the

accused.

Let me put this in perspective in this case. The trial Judgement has found that this man who presided over mass executions of adults and children through indescribably brutal methods, beaten and stabbed to death, blood drawn from living bodies, a prison population enslaved. Conditions of detention hitherto un-repeated since the Second World War, words barely serve their suffering and misery. Fellow human beings robbed of due process, tortured, beaten, the murder and extermination of no fewer that 12, 272 living souls and as we stand today there will be a single conviction of this case for the crime against humanity of persecution.

This does not recognize all the interests that were ruptured by this man's acts nor does it serve posterity, truth or reconciliation as a proper record of what happened, what does it say to the future generations of this country about what this man did and mostly to his own people? I would ask you respectfully, to have these factors at the forefront of your mind when you are deteremining this issue. Now let me move to the legal test. The legal test is laid down in a decision commonly called the Celebici decision also known as the Prosecutor et Mucic; it's a Yugoslav tribunal decision. It's numbered 83 in our table of authorities.

[09.18]

Multiple criminal convictions entered under different statutory

provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other. I think an example that I give to the court will make this test clearer but you will find the test laid down paragraph 412 of that Judgement.

It is fair to say in the ensuing years of the Yugoslav tribunal differing views were taken about this particular test, but we can say, what my submission is certainly in the limited time available to me is, that the current law is set out in a 2004 decision of the ICTY which I have already mentioned and that is the case of Kordic. What the appeals chamber said was this: "what is required is an examination as a matter of law is the elements of each offence in the statute that pertain to that conduct for which the accused is being convicted". It must be considered whether each offence charged has a materially distinct element not contained in the other, that is, whether each offence has an element that requires proof of a fact not required by the other offence, and that Your Honours you will find at paragraph 1040 of the Kordic Judgements.

So, for example at paragraph 1041 of that appeals Judgement, addressing the crimes against humanity of persecution and murder, the Judges stated that persecution has these two elements, 1) requirement of proof that an act or a mission discriminates in

fact and 2) proof of the act or mission was committed with specific intent to discriminate. Those are the two elements of persecution. The judges then addressed the crime against humanity of murder. Murder contains an element not contained in persecution, it is proof that the accused caused the death of one or more persons, regardless of whether the act or emission causing the death discriminates in fact or is specifically intended as discrimination which is not required by persecutions. So the judges in that case were looking on the face of it, on the elements required for the offences and finding that these two offences contained materially distinct elements; and this test is being applied as recently as last year in the Popovic decision. Also a decision of the Yugoslav War Crimes Tribunal and that you will find at paragraph number 78 of our list of authorities. The one crime that which that judgement indicates, or the two crimes, the crimes that cannot be found together in that judgement are extermination and murder because murder does not contain an element that is materially distinct from extermination. So murder under the current law would have to be cumulated it would have to be subsumed into the crime of extermination and that you will find in the Popovic judgment but certainly the Trial Chamber applied that law in Popovic. [09.22.16] Sentencing. I have been asked, or the Co-Prosecutors have been asked to consider the effect on sentencing. The Celibici case

which I have already mentioned is quite helpful in terms of sentencing. It gives a summary of practise against many jurisdictions and obviously examines both civil law and common law systems and essentially comes very briefly to the conclusion that a sentence for cumulative convictions can be global, so a single sentence for a number of different offences; it can be concurrent, so a series of penalties running one after the other or it can be consecutive in the sense that you can have multiple convictions and multiple sentences that run along side each other. As you know the Trial Chamber in this case, essentially imposed the global sentence for all the convictions, for the conviction of the crime against humanity and for the grave breaches.

One issue which is my submission will not be a factor that has a great influence on the outcome but I will mention it here; the crime against humanity of persecution requires a discriminatory intent. The other crimes against humanity that we list that were, for which the accused was found responsible but not ultimately convicted did not require discriminatory intent and it has been found and indeed the Trial Chamber found this too, that where that discriminatory intent for persecution exists it is an aggravating factor in respect of those other crimes against humanity that do not require this special form of intent.

[09.24.35]

I have also been very briefly to address the effect of cumulative

convictions on the eligibility for early for early release and it is our position that since this accused is not eligible for early release it will not in any way affect him; the Co-Prosecutors have always maintained that he is not eligible for early release. We maintain that now, it's solely for this court to enforce the respondent's sentence. Within the ad-hoc tribunals, individuals were sent to serve their sentence in other jurisdictions where judges pointed out at the Yugoslav War Crimes Tribunal that those multiple convictions within that particular jurisdiction could have a detrimental affect on the accused but since he will serve his sentence here that is not of concern to us.

Equally, two judges within the ICTY pointed out that the application of habitual offenders laws could also be of a valid concern, where if an individual is convicted of multiple offenses and then serves a sentence in a jurisdiction which has a special penalty known as the habitual offenders penalty for multiple convictions than of course that would be to his detriment, but again this law, these comments specifically apply to the Rwanda and Yugoslav Tribunals where individuals were being sent to different jurisdictions in order to serve their sentence.

[09.26.24]

I am now, Your Honours, going to move on to the issue of rape as a discrete crime against humanity, we've been asked to explore whether rape was an autonomous crime against humanity under international law during the temporal jurisdiction of the Court.

The grounds of our appeal are contained in paragraphs 196 to 208. I would point out before I commence my submissions that the Trial Chamber did find that rape comprises a separate and recognized defence within ECCC law and international criminal law and by making these submissions I am in no way disputing that finding which is at paragraph 366 of the Trial Judgment.

The Trial Chamber, as I've said, determined that one incident of rape should be categorized as a crime against humanity of torture. We submit that the Trial Chamber erred in law by failing to convict the respondent of rape. We note that the elements of the offense of rape as a discrete crime against humanity are the same as when rape is subsumed into torture save for the addition of legal requirements of torture. The test -- what I am saying here Your Honours is that the test is more stringent for rape when it is subsumed into torture than it would be for rape to be found as a discrete crime in itself. In the present case, were the element as are made for torture as well there would be no detriment to the rights of the accused if he were to be convicted of rape as well and this would more accurately reflect the nature of the criminal conduct.

We recognize that in a recent decision of the Pre-Trial Chamber, in the second case that will be heard by this Court, that there was an examination of whether or not rape was a discrete crime against humanity. The Pre-Trial Chamber in that case found that rape could not be prosecuted in this Court in its own right but

that it could be prosecuted under the category as a crime against humanity of inhuman acts. We take issue with that characterization and that application of the principle of legality.

Our argument simply put is that the principle of legality does not require that a crime has been prescribed in the exact and precise terms in which it is later prosecuted as long as it was reasonably foreseeable and accessible to the accused that certain acts or emissions would entail international criminal liability. Thus, so long as it is established that the conduct of rape could constitute a crime against humanity during 1975 to 1999(sic), its irrelevant whether the conduct would have been charged under the name of rape as crime against humanity on the one hand or rape as an inhumane act as another.

As stated, in Hadzi-Vidanovic at the Yugoslav tribunal, the principle of legality is satisfied if the underlying criminal conduct as such is punishable regardless of how the concrete charges in a specific law would have been formulated.

So the question in my respectful submission that you should ask yourselves, is whether conduct amounting to rape was punishable as a crime against humanity, such that it was accessible and foreseeable that the accused could be prosecuted for crimes against humanity based on that conduct during the temporal jurisdiction of this Court.

[09.30.59]

It is our position that the accused could have reasonably foreseen that acts of rape could constitute a crime against humanity as of 1975. Why do I say that? In the Kunarac decision of the Yugoslav war crimes tribunal that's authority 73 in our list of authorities; rape was described as one of the worst sufferings a human being can inflict upon another and the court had found that it had been long prohibited in customary international law. The Pre-Trial Chamber of this court further recognized itself that rape has long been prohibited as a war crime in international humanitarian law and that is the decision on appeal by Nuon Chea and Ieng Thirith of the Closing Order and you will find that at paragraph 151 of the Pre-Trial Chamber's Judgment.

We submit that, the prohibition of rape as an autonomous crime against humanity gradually crystallised out of the prohibition of rape in authorities which actually date back to the 19th Century. I do not have time to go through each one of these in detail but very briefly these authorities are those in fact that were cited by the Pre-Trial Chamber, it includes Article 44 of the Lieber Code which was a code of practice, a code that was put in place for the conduct of war during the American civil war, and the federal authorities expressly prohibited rape being committed by their own armed forces. The regulations annexed to the 1907 Hague conventions, the Geneva Conventions of 1949, the additional Protocol of 1977 and the additional Protocol also of 1977; all of

these instruments prohibit sexual violence and rape.
Other sources that further evidence the gradual prohibition of rape in customary international law is the 1919 commission of responsibility of the Authors of War and the enforcement of penalties this was a report that was produced by the victories' powers by the end of the First World War. The recommendations were to bring in particular the Emperor of Germany and German officers to trial for crimes committed during the First World War. Rape was listed fifth amongst the 32 charges enumerated by that commission. Now it is fair to say that no trials actually took place as a result of that commission's report there were trials that were conducted by the German authorities but there was a lack of political will to have international trials, nevertheless that is what the great powers agreed was the law. [09.34.11]
Later, in 1945 after the end of the Second World War, rape was expressly classified as a crime against humanity under Article 2(c) of the Control Council Law number 10. The law that was promulgated to try the major bulk of war criminals in Germany after the war, the international military tribunal tried the main senior members of the Nazi regime, Control Council Law number 10 was set up in order to try the vast majority of individuals who were susceptible to prosecution for war crimes and crimes against humanity. Now again, whilst those provisions of Control Council Law number 10 contained rape as a crime against humanity no

accused was tried for the crime of rape.
That said, scholars have indeed pointed out that evidence was in fact heard during the main trial, the international military tribunal for rape and whilst it wasn't classified as an inhuman act because within the charter of the Nuremburg Court of the International Military Tribunal, rape was regarded as an inhumane act. Nevertheless evidence of rape was heard in that case and indeed moreover the International Military Tribunal for the Far East also included inhumane acts and evidence also was heard in that case of rape.
Now, moving forward in time, and we must move forward rapidly and I must move forward rapidly because I am running out of time. Both the Yugoslav war crimes tribunal and the Rwanda tribunal provided for the prosecution of rape as an autonomous crime against humanity although these instruments, the statutes that established these courts enumerated these crimes in the early 1900's there had been no development of the law in respect of rape between the end of second world war and the beginning of the 1990's.
The first international criminal prosecution for rape as a crime against humanity was in the Akayesu case, the trial chamber in Akayesu decided in their 1998 judgment that rape was an autonomous crime against humanity. In doing so, pioneering and courageous judges of that trial chamber recognized the horrors of sexual violence and the lasting silent human destruction both to

individuals and to our societies, subsequently the findings of the Rwanda tribunal with respect to the status of rape as a crime against humanity were confirmed by the Yugoslav war crimes tribunal in addressing the horrors of the Kunarac case and the special court for Sierra Leone in the Semanza case. The Co-Prosecutors submit that is appropriate for this court to follow the settled body of international criminal jurisprudence on this issue.

Although neither the Yugoslav tribunal, the Rwanda tribunal, or the Special Court for Sierra Leone identified the precise point in which rape crystallized as a crime against humanity in customary international law it is my submission that it must have occurred in the wake of the second world war, at the latest because as I've said there were no significant conventional or jurisprudential developments related to the crimes against humanity of rape between 1945 and 1993.

The Trial Chamber of this Court has established that reliance on decisions of tribunals post 1979 does contravene the principal of legality. So looking forward to decisions that were made later to interpret the law that came from behind is something that the Trial Chamber has said is lawful and I would ask you respectfully to do the same, because that guidance provides interpretation as to the evolving status of certain offenses and forms of responsibility in international law.

[9.38.36]

Similarly the Yugoslav tribunal in Hadzi-Vidanovic noted, that the principal of legality, jurisprudence in the European Court of Human Rights allows for the gradual clarification of the rules of criminal liability through judicial interpretation and reflects the understanding that it's not necessary that elements of an offense are defined but rather that general description of the prohibited conduct be provided. Now in my submission this makes absolute sense, to allow a process of gradual explanation of international norms through judicial interpretation considering the nature of the international legal system, where norms have not been codified in the manner the defences would be codified in a domestic system.

International law, Your Honours, as you know, is not a product of domestic statute. There is no world authority yet that's empowered to enact statutes of universal application, it's elucidated often through judicial decisions to find otherwise, to apply strict domestic principles would have strangled international law at birth. For this Court to find that rape was not part of customary international law would in my submission also undermine the consistent findings of international criminal tribunals which allow for rape to be prosecuted as an autonomous crime against humanity the determination of the international tribunals in respective rate rests upon the same authorities that are available to you Your Honours, as I've said there were no significant developments between '79 and '93. In some, Your

Honours there is no reason to depart from the criminalisation of rape as a crime against humanity in the law in this Court in particular, very briefly both prongs that the principle of legality stand at are satisfied.

With respect to foreseeability, the Pre-Trial Chamber found that a charged person must be able to appreciate that the conduct is criminal generally understood without reference to any specific provision. Applying that standard to the present case the Co-Prosecutors submit that prohibition of rape in international customary law was sufficiently developed in 1975 such that the accused could have seen that acts of rape constituted a crime against humanity.

[9.41.18]

The fact that the crime previously may have been charged in a less specific fashion is irrelevant for the legality analysis since the underlying conduct is exactly the same. The second prong of the test is the legality test -- the second prong of the legality test, I'm sorry -- is the accessibility requirement and the Pre-Trial Chambers recognize that with respect to the accessibility prong, reliance can be placed on a law which is based on custom. Here, the information necessary to come to the conclusion that rape was punishable as a crime against humanity in customary international law was public and accessible, just because it wasn't in the a domestic statute does not mean to stay that the accused can argue that he didn't have access to that

law, it was established in international customary law by the time of this offense.

An analogy can be made to the practice of the Yugoslav and Rwandan tribunals where perpetrators of rape in the context of widespread and systematic horrific attacks in the former Yugoslavia were found to have sufficient notice that their conduct amounted to a crime against humanity, that that sexual violence, that those rapes was a crime against humanity and they knew it. Lastly international criminal jurisprudence establishes that immorality or the appalling character of an act must play a role in warranting a criminalisation of that act insofar as it can refute any claim that an accused did not know that the crime, that the conduct he was performing was criminal, and that you will find in the Milutinovi? decision at paragraph 42, that's an appeal chamber decision of the Yugoslav war crimes tribunal. And now I will move rapidly to enslavement.

[9.43.29]

The chamber has requested submission from us on the issue on enslavement and in particular regarding the apparent discrepancy the Closing Order's charging of enslavement which appears to charge enslavement with respect to certain detainees rather than all detainees, and the argument in the OCP's appeal that enslavement occurred with respect to all of the detainees in S-21.

In respect of the definition of enslavement I would refer to

paragraph 432 of the Trial Chamber's Judgment. On reflection, I think our position on appeal was perhaps overstated, I think in fact that the Trial Chamber did find that enslavement could take place without forced labour. I think that in just these particular circumstances they found that enslavement was taking place with the element of forced labour, in any event our position on the law is contained in our submissions and I won't repeat that here.

It's always been the position of the Co-Prosecutors that all detainees were enslaved in S-21 and you can find those submissions at paragraph 273 and 274 of our final submission at the end of the first case. That submission clearly identifies the groups forced to work at S-24 and all of the detainees at S-21 as having been enslaved. Now the Closing Order from OCIJ in this case, as I've already stated, says the following: "certain detainees at S-21 and Prey Sar were forced to work. Strict control and constructive ownership was exercised over all aspects of their lives. By limiting their movement and physical environment, taking measure to prevent and deter their escape and subjecting them to cruel treatment and abuse."

As a result of these acts detainees were stripped of their free will. Now I will accept immediately how this Chamber may come to the conclusion that the investigating Judges were limiting, were establishing a subset of individuals who were subjected to enslavement that it didn't involve anybody, but I would make the

following submission. Certainly if you read all of the perambulate paragraphs in the Closing Order prior to paragraph 135, and I won't have time to go through all of them, but certainly if you go through paragraphs 62, 63, 66, and that's in respect to Tuol Sleng, S-21, the Judges address facts that are clearly enslavement, not based on forced labour, prisoners being blindfolded and handcuffed, prisoners being restrained for 24 hours a day.

One prisoner, Chum Mey, explained that he was not allowed to stand up. Rules concerning the lives of prisoner depriving them of their basic human needs unable to speak to each other or to the guards, prisoners shackled when bathed. My submission is that even though paragraph 135 appears to limit the group, if you look at the last sentence it states "as a result of these acts detainees were stropped of their free will". My submission, Your Honours, is that these paragraphs should be read as a narrative in the sense that all the facts that were refereed to before hand are actually incorporated in paragraph 135.

If you read the whole thing as a narrative of what actually happened at S-21 and S-24, and I think that the final sentence of paragraph 135 supports my argument in this respect, in any event Your Honours if you don't accept that argument it is my submission that you do have the authority as the Trial Chamber did to re-characterize this particular charge that's provided for by Rule 110(2) of the rules of procedure of the internal

regulations of that court which says that the judgment shall be limited to the facts set out in the indictment that the chamber referring to this chamber may change the legal characterization of the crime as set out in the indictment as along as no new constitutive elements are introduced.

[9.48.48]

In terms as I've already said, of the element of forced labour, whether or not one takes the position that the Trial Chamber erroneously inserted forced labour into the definition of enslavement, or whether or not they said enslavement could or could not take place with or without forced labour, it is our position that forced labour is not a requirement for enslavement and that this Chamber can enter a conviction for the enslavement of all the detainees who were detained at S-21.

Next, I will move very briefly, in the time I have left, to make the submission on the factual elements on extermination and enslavement on the facts of this case, this of course goes back to what I was saying earlier about cumulative convictions, and what I will do is simply outline the materially distinct elements of the offense of extermination and the offense of enslavement. Extermination requires an act or emission, or a combination of each, resulting in the death of the other. That is not an element of enslavement. Enslavement requires the exercising of powers pertaining to rights of ownership over a human being. That's not an element in extermination. Now, in terms of the

facts of this case, one can distinguish between those facts where conditions of detention led to death, which can be extermination, and then conditions of detention that essentially were enslavement. Again, very briefly, those conditions of detention which led to enslavement you will find in the Closing Order at paragraph 66, paragraph 63, paragraph 62, and paragraph 64. Thus, it is my submission that both the distinction between extermination and enslavement would allow for a condition for both offenses and, moreover, that the facts the Trial Chamber found and indeed were contained in the Closing Order would support those two different conditions. There were those individuals, very few I know, who survived the conditions of detention at S-21. Many people perished, it's true, but there were some individuals who survived and were subjected to conditions of detention that amounted to enslavement.

[9.52.30]

Very, very, briefly Your Honour, because I think I am probably almost out of time -- and I have three minutes left I am told. The issue of persecution as a crime against humanity. We tend to support the findings of the Trial Chamber, there is not a great deal we can add. I could very quickly go through the customary international law, the findings of the Trial Chamber at paragraphs 374 to 396 in respect to crimes against humanity and persecution, but I think it is safe to say that by 1975, bearing in mind all the customary international law that preceded that

point in time, persecutions were well established in international criminal law.

Article 6 of the Charter of the International Military Tribunal found that persecution on political, racial or religious grounds was a crime against humanity. Article 5 of the Charter for the International Military Tribunal for the Far East found that persecution on political or racial grounds was a crime against humanity. The UN General Assembly Resolution 3 states, taking note of the definition of war crimes and crimes against peace and against humanity contained in the charter of the IMT dated 8th of August 1945, and essentially approves of the IMT Charter and the fact that persecution, implicitly, persecution was found to be a crime against humanity in the IMT Charter.

The UN General Assembly Resolution 95 which affirmed the principles of international law recognized by the charter of the Nuremburg tribunal, again, as I keep repeating, had been found to be a crime against humanity. UN General Assembly Resolution 2391 describing crimes against humanity as being amongst the gravest of international law and providing that crimes against humanity whether committed in time of war or peace as they are defined in the charter of the International Military Tribunal in Nuremburg on the 8th of August 1945.

Persecution was also included as crime against humanity in the ILC draft code of offenses against the peace and security of mankind. You find that at Article 210, persecution on political

racial or religious or cultural grounds, also in the 1954 draft Article 211 "Inhuman Acts such as … " etcetera, "persecution committed against any civilian population or social political, racial, religious or cultural grounds." And I failed to mention that persecution was also found was also incorporated in Control Council Law 10 as a crime against humanity, as I mentioned to you earlier -- was the body set up the by Allied powers by the Soviet Union, France, United States and the United Kingdom to try the bulk of the lesser war criminals compared to the International Military Tribunal.

In 1961, in Israel, Adolf Eichmann was convicted of crimes against humanity including persecution of the Jews on national, racial and religious and political grounds, and in 1985 allowed for the issuance of an indictment for persecutions against innocent Jews committed during the Second World War. I think I've run out of my time now but it is my submission that by 1975 that the crime of persecutions is a crime against humanity was well established in international customary law. I am obliged for your attention Mr. President, thank you very much indeed.

[9.57.20]

MR. PRESIDENT:

The defence counsel, you now have the floor.

MR. KANG RITHEARY:

Good morning, Mr. President. Thank you, Your Honours. As counsel representing my client and his interests, and we already

conclude that the ECCC has no personal jurisdiction over him as well reiterated yesterday. That's why we did not submit a written submission in response to the appeal brief by the Co-Prosecutors. This is the main reason we did not submit the response.

Since we are obliged to respond to the prosecutor, and I have just obtained the comment from my client that we should not respond to the prosecutors. However, we, after discussion, he agreed to allow us to give brief response to the prosecutors. And we will be very brief.

[9.58.45]

To respond in relation to the definition of crimes against humanity, although other practices at international tribunals create jurisprudence, but the definition in relation to the crimes against humanity has not been well defined. However, we can refer to Article 188 of the penal code of Cambodia regarding the crimes against humanity. We may refer Your Honours to that particular article please.

These crimes against humanity of course include the enslavement and other deprivation of the rights and the freedom of the people, including torture, rape, sexual slavery, force prostitution and other forms of rape, which have equivalent gravity. And also the attack on political and racial background, the force disappearance and systematic inhumane act, for example like the introduction of the apartheid regime.

Your Honours, I am here in the middle of two countries. In the middle of the country where civil law tradition is well applied. For this reason, the Court shall reject any interpretation in relation to the international jurisprudence based on the common law, and we have found that the elements of crimes against humanity must constitute two main elements, the objective and subjective elements, and that the attack must be systematic. [10.01.15]

For example, the orders shall be rendered from the top, and that the report has to be made from the bottom up. And that the execution, for example, has to be in a big scale, like mass execution. And even with regard to the rape, the rape has to be in the form of systematic and large-scale rape incidents, for example. And for that reason, if such crime is committed in such magnitude, it will be compliant with the Article 188 of the penal code and that of the practice at Nuremberg and Tokyo tribunal. With regard to the rape incidents, as indicated by the Co-Prosecutors that such rape occurred, and there were enough elements to prove it. But we the defence counsel would like to challenge such assertion because the Co-Prosecutors seemed to fail to refer to concrete evidence, and that at S-21 there was only a case of rape, and such rape was not done systematically, which cannot be included as the elements of the crimes under the umbrella of crimes against humanity.

Because a case of rape was well -- action was taken by Duch when

he reported to his superior regarding this rape incident. Son Sen was informed, but his report was ignored by Son Sen himself, and Duch took action, and he changed the male interrogators, replaced them with the female interrogators to stop rape cases. So as I indicated, such rape was not systematic.

[10.03.45]

And if it were committed in a more systematic way, we would not really challenge it. However, at S-21 there was only one case of rape. And I may also refer you to what happened here this day of Cambodia, there were rape cases all across the country, but the government of Cambodia was not really prosecuted for the crimes under its rule, for example. And I also may refer you to the rape cases in Nanking, in Tokyo, and such rape for example was conducted in a very large scale and sexual harassment was also conducted in a more systematic way that they could be included under the crimes against humanity.

In Yugoslavia the soldiers discriminated against women there, for example, the Albanian people who follow Islam religion, and they have suffered a great deal from such abuses. However, the commander of the military in Yugoslavia did not take any immediate action to really stop such incidents from happening, and such abuses were ordered by the government. As I indicated that in such incidents the rapes situation were conducted in a very large scale which is completely different from the incidents at S-21.

[10.05.50]
Enslavement. There is no international recognised definition regarding enslavement, but we can refer to Article 188 of the penal code to find the elements of the enslavement. According to the general education, normally when the crime of enslavement is charged, elements for example like the deprivation of private ownership shall be established as well, not just the forced labour or enslavement itself.
Here, during the Khmer Rouge, people were detained but if I refer you to the incident happened in China for example when people were subjected to hard labour but again these elements could not be concluded as elements of the crimes against humanity or enslavement, and we challenge the notion that conditions at S-24 constituted to the enslavement. During that time, people could roam freely. For example, people were equally treated. Although they were detained, they could really move place when they went to work.
[10.07.40]
And not only the prisoners were under strict control, even the cadres of the Khmer Rouge also were under great control and my client in particular did not really contest, or has never contested such interrogation and execution that happened at S-21 and S-24. Punishment were employed at S-24 in relation to only his subordinate who committed some wrongdoing, and at S-21 people were only interrogated, tortured and executed. Those who entered

S-21 could never get out alive.
So there is no element at S-21 to implicate my client for the charges of crime of enslavement. And we would like to conclude our submission and my client would not wish to make any further submission in relation to the response to the prosecutor concerning rape. And regarding the Co-Prosecutors' submission concerning the cumulative convictions -- cumulative convictions is the discretion of the Judges, according to Article 39. And that the term for sentencing is between five years and life imprisonment. So any sentence term ranging from five years to life imprisonment is proper because even regarding these cumulative convictions, they already covered the sentence term, because the convicted person has been sentenced to the maximum of the sentence term between five years and life imprisonment. [10.10.25]
But in the case of my client, he has been credited for his cooperation, and also his expression of remorse, for example, but I can feel that the prosecutors seem to have applied double standard of law regarding this sentencing, because my client should have been credited for the mitigating factors, and the mitigating factors if my client credited for, then there could have been even reduced sentence term. For example, to 15 years imprisonment, and I would feel that 15 years term would be adequate already for his good gesture.
I would not to elaborate further on this, since it is not our

position to respond to the Co-Prosecutors concerning their appeal brief. And we still maintain that the ECCC has no personal jurisdiction over Duch. And since we are asked by the Supreme Court Chamber to respond then we take the opportunity to do so, but again it is not from our intention to respond to the prosecutor. We would like the Supreme Court Chamber to look at the mitigating factors when rendering the final decision against my client.

[10.12.30]

We would like the President and the Supreme Court Chamber.

MR. PRESIDENT:

Counsel, could you please now be directed to address the matter of mitigating circumstances or factors at a later stage, because we already reserved a session for that. Thank you.

Defence counsel, would you wish to add further on this?

MR. KAR SAVUTH:

Good morning, Mr. President. Good morning, national and international Judges and the Court. Please allow me to elaborate a little bit concerning crimes against humanity. According to Article 129 of the Constitution of Cambodia, due process shall be compliant with the existing law. The ECCC Court is the Chambers in the Courts of Cambodia, and it shall apply national law. For that reason, we may refer you to penal code Article 188 which is about the crimes against humanity and the elements.

For example, the existence of armed conflict, which has been the

element compulsory. Crimes against humanity shall mean any of the following acts when committed as part of a widespread or systematic act directed against any civilian population. According to the international customary law, it shall only be implement in relation with the communication between states, and that they are not related to individual conducts.

[10.15.00]

So individuals shall not be put accountable under international law, which is not really obliged by the constitution, for example, of the tribunal in Nuremberg. Between 1975 and 1979, there was no such provision, and that individuals could not be prosecuted for the crimes committed during this period. If Cambodia can apply customary law, but at the cost of the violation of the rule of the ECCC, then the Chamber shall first look into the elements, and the offences. Each offence of crimes against humanity, what they are and the offences and elements of crimes against humanity cannot be interpreted unless their existence has been established first.

According to the constitution of Nuremberg and the existing national law, the elements of crimes against humanity requires that the existence or nexus armed conflict is established. Between 1975 and 1979 there was no clear indication of such existence.

This means that if we look at the crimes committed between 1975 through 1979, there are no clear elements concerning the elements

of crimes against humanity. Even though there were some offences committed by the CPK, the conclusion was drawn that the crimes committed in the means to purge the internal enemies, and it was not really in part of the armed conflict between Cambodia with Vietnam or Thailand. So according to the ECCC Law concerning the crimes against humanity it can be noted that, if such interpretation is done, so it is a set back of rule of law.

[10.18.05]

The international law prohibits any trial after the crimes happened, in other words, law does not really have the retroactive effect. Thank you, Mr. President and Your Honours.

MR. PRESIDENT:

The Co-Prosecutors now have the floor to reply to the defence counsel response.

MR. CAYLEY:

Very briefly, Your Honours. My learned friends across the well stated that the rape itself, within S-21, would have to be on a widespread or systematic basis. Indeed, there is only one episode of conduct that could amount to rape at S-21, but I would take issue with that interpretation of the law, and I think it's now well-founded within international jurisprudence that it's only the attack itself that needs to be widespread or systematic, not the individual act of rape of the victim.

[10.19.34]

And in fact you can find that within the trial Judgment where

they in fact identify, at paragraphs 300 and 301 of the trial Judgment they explain very clearly that a widespread attack may refer either to the cumulative effect of a series of inhumane acts, or the singular effect of an inhumane act of extraordinary magnitude. And then at paragraph 301: only the attack, not the underlying acts, not the rape, must be widespread or systematic. Thank you, Mr. President.

[10.20.48]

MR. PRESIDENT:

It now the floor for the co-rapporteur Judge to put questions to the prosecutors.

JUDGE MILART:

Thank you, I would have many questions, but since we don't have much time, maybe one of a more general nature. We were being persuaded by the prosecution that notions of crimes for which the prosecution wants the accused to be autonomously convicted were known in international customary law since long. However, I would be curious to know whether the prosecution may present that position as to the concrete definitions of crimes as international crimes, for the specific period of temporal jurisdiction of this Court.

MR. CAYLEY:

I think --

JUDGE MILART:

In particular, the persecution.

MR. CAYLEY:

I think, Your Honour, the fact is we all accept, as I stated in my submissions, that the definitions of these crimes have gradually crystallised. I think that it is not unreasonable for this Court to look forward to the interpretation by the Yugoslav war crimes tribunal and the Rwanda tribunal which clearly those courts use judicial discretion in finding the elements of these offences.

I'm not going to take issue with you at all on the basis that things were gradually developing after the Second World War, but if I was to guide you in terms of seeking precedent, or -- it's not precedent, of course, because it's looking forward -- but to look for guidance on what the elements of these offences are, my submission to you would be that those courts essentially were looking at history, and they made their determinations on the elements of these offences, and I think, in my submission, it would not be unreasonable for you to do the same. But I perfectly accept that matters were crystallising in the period in the wake of the Second World War.

[10.23.45]

MR. PRESIDENT:

I have noted that the Co-Prosecutor was on his feet. You would have the floor now.

MR. CAYLEY:

Sorry, Your Honour, it's a habit from my jurisdiction that I

stand always when I'm addressing judges. I'll sit down; I don't have anything further to say.

MR. PRESIDENT:

The Court will take the adjournment until 11 o'clock. Security officials are now advised to take the accused to the waiting room.

(Judges exit courtroom)

(Court adjourns from 1024H to 1101H)

(Judges enter courtroom)

MR. PRESIDENT:

Now we will open the floor for the section of the appeal on the sentencing issue. I give the floor now to the rapporteur Judge.

JUDGE SIN RITH:

Sentencing. The Trial Chamber considered the appropriate sentence to be 35 years of imprisonment. The Trial Chamber then considered that a reduction in sentence of five years is appropriate given the violation of the accused's rights occasioned by his illegal detention by the Cambodian military court between 10 May 1999 and 30 July 2007. The Co-Prosecutors argued that the Trial Chamber placed insufficient weight on the gravity of crimes and the accused's leading role and willing participation in those crimes, the Trial Chamber place undue weight on mitigating circumstances, and the sentence imposed by the Trial Chamber is arbitrary and manifestly inadequate.

The Co-Prosecutors request that the Supreme Court Chamber revise

the sentence imposed by the Trial Chamber to a sentence of life imprisonment, order that this sentence be reduced to a term of 45 years to provide an appropriate remedy for the accused's unlawful pre-ECCC detention, order that a further reduction be made as appropriate for the very limited mitigating circumstances obtaining in the circumstances of this case, with an absolute maximum reduction of up to five years, and hold that the accused will serve this sentence without the possibility of parole.

[11.04.50]

The defence did not file a written response to the Co-Prosecutors' appeal brief.

The defence argue that the Trial Chamber erred by failing to have due regard to Article 95 of the 2009 criminal code of Cambodia.

The Co-Prosecutors respond that defence arguments that are evidently unfounded, or otherwise fail to meet minimum pleading requirements should be disregarded by the Supreme Court Chamber.

The Co-Prosecutors also contend that the defence's second ground of appeal is not separate from the defence appeal on personal jurisdiction, and should therefore be rejected for the same reasons as the latter.

Thank you.

[11.06.00]

MR. PRESIDENT:

The floor is now open for the Co-Prosecutors to respond to the appeal.

MR. CAYLEY:

Thank you, Mr. President. May it please the Court, the first issue that I will deal with and address in respect of sentencing is the matter that was raised by the Supreme Court Chamber in its Scheduling Order, where we were requested to explore whether and to what extent the 2009 Cambodian criminal code, including Article 668, applies to the determination of the appeals against sentence. That's in paragraph 4 of Your Honours' order.

The underlying issue here, in our submission, is the application of Article 10 and Article 95 of the 2009 penal code of this Court, and just so I can reference all of us into the same place, Article 95 of the Cambodian penal code states that where a life sentence is reduced on the basis of mitigating circumstances the sentence cannot be more than 30 years.

Article 10 of the 2009 penal code provides that a new provision which prescribes a lighter penalty shall be applicable immediately. The second paragraph of Article 668, which I will call the prevalence clause, states that in the event of a conflict between other criminal legislation, and criminal provisions in the provisions of this code, the provisions of this code shall prevail.

[11.08.05]

Now we submit that in this particular Court, Articles 95 and 668 are not applicable to this appeal. And I will explain to you why that is the position, and I may well call upon my learned

colleague, obviously who is an expert in Cambodian legislation -- I'm not, so certainly in the question session she may become involved in this process too. But to be clear, Article 668, which I've called the prevalency clause, which is the clause that says that where other criminal legislation and criminal provisions in force shall be applicable to the offences defined and punished under such legislation and provisions, in the event of conflict between other criminal legislation and criminal provisions, and the provisions of this code, the provisions of book 1 of this code shall prevail.

But the final sentence of Article 668 states that the provision of paragraph 2, the prevalency clause, shall not be applicable to special criminal legislation. The term special criminal legislation refers to this Court.

[11.09.25]

Thus the drafters of the 2009 penal code demonstrated that Article 95 was not to apply to these proceedings. Indeed, one could add that if the drafters of the ECCC Law had wanted the 2009 penal code to apply to sentencing here, they would have actually amended the law. Parliament would have amended the law. But Parliament didn't do that. What Parliament did was to say that that provision did not apply to this Court. So the argument that we are making is that, in essence, Article 95 of the 2009 penal code is not incorporated into the sentencing regime of this Court.

I would add, and this would be later in my submissions, that in any event, Article 95 is actually irrelevant to Your Honours' consideration, because our position, now, is that any mitigating circumstances that exist in this case have frankly reached a vanishing point, and so the provisions of Article 95 in any event would not apply, but I will make those submissions later.

[11.10.56]

We also take the position that Article 95 does not apply to the ECCC because the agreement and the law and the regulations set out a sui generis institution, and indeed even Judge Lavergne, who dissented on sentencing, and stated, in his view, wrongly in my respectful submission that Article 95 applied, determined that this Court was sui generis. He stated that in his dissenting opinion.

"The ECCC agreement and the law are the reflection of extensive negotiations between the government of this country and the United Nations. The agreement and the law set out a sui generis system for sentencing of the accused in this Court. If you look at paragraph 574 of the Judgment in this case you will see that it states that the agreement creates a sui generis sentencing regime. It is therefore doubtful, whether on the basis of Article 33(new), the Chamber could follow a subsequent national legislative provision in preference to the provisions of the agreement. Such an interpretation could mean that the future acts of the national legislature concerning sentence might

frustrate the agreement."
That's at paragraph 574 of the Judgment, reinforcing the view that the sentencing review here is sui generis. The Trial Chamber further found that the international nature of the crimes for which the accused had been convicted, and the uncertainties and complexities evident in the evolution of Cambodian criminal code from the 1956 penal code onwards ruled out direct application of Cambodian sentencing provisions.
[11.13.13]
The drafters of the agreement, on the one hand, and the law on the other hand, made a deliberate decision to depart from ordinary Cambodian penal law on sentencing. They wanted to create a specific regime for this Court. Examples of that can be found, for example, the agreement at Article 10, departing from Cambodian penal law in stating that the maximum penalty at the ECCC is life imprisonment. The maximum penalty, as you know, under the '56 penal code, was not life imprisonment.
Also the ECCC Law, Article 3, clarifying that at the ECCC, the sentencing regime for national crimes is stipulated in Articles 38 and 39 of the law, and this again reflects a deliberate departure from the sentencing regime of the 1956 penal code. The absence of reference to national sentencing practices sets the ECCC Law and agreement apart from the statutes of other international tribunals, which directs their chambers to look at national sentencing practices for guidance specifically because

they were exclusively and purely international courts.
[11.14.45]
If you look, for example, at the Yugoslav war crimes statute, Article 24.1, the penalty imposed by the Trial Chamber, and now I'm reading from the statute of the Yugoslav war crimes tribunal: The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia." The same reference exists in the Rwanda tribunal, having reference to the courts of Rwanda in deciding and determining sentence within the international courts.
The omission, Your Honours, of a similar provision in the ECCC Law and the agreement further underscores that the intention of the UN and the Royal Government was to set up a sui generis system. Moreover, if you look at the rules, the regulations of this Court, made by the Judges, it confirms the unique nature of the sentencing regime here. If you look at Internal Rule 98, it states: "If the accused is found guilty, the Chamber shall sentence him or her in accordance with the agreement, the ECCC Law, and these Internal Rules."
[11.16.12]
Applying the framework set out in the agreement, the ECCC Law and the Internal Rules, it's clear that a chamber is empowered to impose a sentence of anywhere between life imprisonment and 5

years, regardless of its assessment of the arguments pertaining to mitigation. In other words, nothing in the ECCC's sui generis framework requires a Chamber to reduce a life imprisonment sentence to 30 years if it finds that there are mitigating factors to justify a reduction in sentence.

The principle of lex mitior has also been raised as a matter of interest for this Chamber. Our position is that that particular principle does not require the application of Article 95 of the 2009 penal code for the determination of sentences in this Court, and this is for the following reasons. The principle of lex mitior is understood to mean that if the law relevant to the accused has been amended, the less severe law should be applied. [11.17.45]

Now, Article 15 of the International Covenant on Civil and Political Rights states, in relevant part, that if subsequent to the commission of the offences, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. That principle does not apply here, and for a very good reason. And that is because, as I have just stated, those relevant provisions of the 2009 penal code do not apply to this Court. Those principles relevant to sentencing do not apply here. This Court is not bound by them, and so the respondent cannot enjoy the benefits of lex metior.

And there is authority for this. The Yugoslav war crimes tribunal addressed this principle in the Dragan Nikoli? case.

The appeals chamber found that the accused person can only benefit from the more lenient sentence if the law that has changed is binding. Since they only have a protected legal position then the sentencing range must be applied to them. [11.19.13]

The appeals chamber further cautioned in that case that allowing the principle of lex metior to be applied to the sentences of the international tribunal on the basis of changes in the laws of the domestic system in Yugoslavia would mean that the states of the former Yugoslavia would have the power to undermine the discretion of the international tribunal. The chamber found that that outcome would be unacceptable, and that it would undermine the primacy of the tribunal's mandate.

It is my submission, for the same reasons, when this Court was established, the agreement, the law and the regulations provided the sentencing regime for this Court. The 2009 provisions on sentencing are not binding on this Court, and the accused thus cannot enjoy the more lenient provisions of that code.

Indeed, other international criminal courts have rejected the applicability of the Rome Statute, which is the governing statute of the International Criminal Court, and contains a similar provision on sentencing to Article 95 imposing a fixed term of imprisonment for no longer than 30 years and the ICTR, the Rwanda tribunal ruled in the case of Nahimana, that that particular rule does not bind the Rwanda tribunal.

[11.21.05]
So our submission is, in this particular instance, that this law does not apply to this Court, that's made clear in rule 668 because this is special criminal legislation, and my learned friend Madam Chea Leang can confirm that, that this is a sui generis court with its own provisions on sentencing, and that the respondent cannot enjoy the benefits of the 2009 penal code.
Mr. President, will we be finishing at 12 o'clock today? For lunch. Will we be finishing for lunch at midday? I will try and finish before the lunch break. I now intend to briefly summarise our submissions on sentencing.
[11.22.15]
We say that the Trial Chamber discernibly erred in the exercise of its sentencing discretion in arriving at a manifestly inadequate sentence, and we say that the Trial Chamber made a number of errors in this respect, and I will go through these errors, there are six of them, seriatum.
The first error is that the Trial Chamber, in finding that there were significant mitigating factors that existed, that justified a reduction in sentence, erred in its determination. They made a mistake. We say that the Trial Chamber in fact misinterpreted its own findings, and I think if you read the paragraphs concerned, that's paragraphs 606 to 611, it will be very clear that they misinterpreted their own findings.
[11.23.25]

They found that there were significant mitigating factors in the conclusion that they made, and yet they rejected, or qualified, each one of the mitigating factors that they considered, save one. Let's look at the first mitigating factor, superior orders and duress. On the facts, the Trial Chamber rejected superior orders and duress as mitigating factors, and you can see that at paragraphs 607 and 608 of the trial Judgment. The Trial Chamber found that the accused knew that the orders he received to kill, torture and arbitrarily detain persons protected under the Geneva Conventions were unlawful, and that's paragraph 552 of the trial Judgment.

The Trial Chamber also found that the accused willingly and actively participated in the implementation of a policy of terror, and his conduct in carrying out his functions at S-21 evidenced a high degree of efficiency and zeal. And that you will find at paragraphs 555 and 557. It should further be noted that the accused's personal belief in the Party, and his commitments to its goals, apparently subsisted even after he left S-21, on 7 January 1979, that's at paragraph 556.

[11.25.10]

It is granted by us that the Trial Chamber did report, giving limited weight to the coercive climate in Democratic Kampuchea, and the accused's position within the CPK. However, the Co-Prosecutors submit that the weight given to this factor by the Trial Chamber can only have been minor in light of the related

findings in respect of superior authority and duress. For example, if you look at paragraphs 557 to 558 and paragraph 608 rejecting duress as a defence, since the accused was a willing and active participation in the implementation of a policy of terror.

Remorse, the next mitigating factor. The Trial Chamber noted that the respondent had made repeated public apologies, but found that the mitigating impact of his remorse was undermined by his failure to offer full and unequivocal admissions of responsibility, and his request for an acquittal at the end of the proceedings. Paragraph 610, Your Honours.

The next mitigating factor, the propensity for rehabilitation. The Trial Chamber noted that international courts have counselled against giving rehabilitation undue weight in mitigation, and ultimately accorded what is called limited consideration to this factor in its determination of sentence. And you will find that at paragraph 611.

Cooperation, the fifth mitigating factor. This factor certainly stands out in comparison with other factors, as it is the only mitigating factor that the Trial Chamber seem to adopt without any major reservation, and you can find that at paragraph 609 of the trial Judgment. However, the Co-Prosecutors submit that the Trial Chamber erred by giving substantial weight to this factor, even after the belated request for acquittal of the accused at the end of the trial.

[11.27.40]
That appeal by the accused, and his challenge to the jurisdiction of this Court, indicates that his cooperation was not given in a voluntary or selfless capacity. International jurisprudence establishes very firmly what must be fulfilled for a successful plea in mitigation based on cooperation with the authorities. One of these is the selflessness of the accused's cooperation, which must be lent without ask for anything in return. And my authority for that is the case of Bla?ki?, it's a Yugoslav war crimes tribunal case, paragraph 774 of that judgment.
As I've said, the further elaboration of the accused's position on appeal confirms the very limited, or non-existence of the mitigating circumstances in this case. In respect of remorse, the accused's continued request for release underscores, in a case like this, involving massive criminality, the fact that the accused, to this day, lacks real sincere remorse for what happened.
Similarly, the accused's assertion that he does not constitute one of those who were most responsible for serious crimes that occurred during the DK period is inconsistent with the notion that he admits responsibility for the grave crimes for which he is charged. He even goes so far, in his own appeal, to assert that he was one of the least responsible for the crimes committed during this period, and you'll find that at paragraph 55 of his appellate brief.

[11.29.50]
The accused's belated challenge to the legal basis for his prosecution, and his request for release, highlights, in my submission, the insincere, selective and opportunistic nature of his cooperation with this Court.
The next error is that the Trial Chamber erred by giving insufficient weight to the gravity of the respondent's crimes. International criminal courts have repeatedly emphasised that the gravity of the offence is the primary concern in sentencing for international crimes. There are a number of cases on this, but in the time I will only quote two, the case of Muhimana, appeals judgment of the Rwanda tribunal at paragraph 233, "the gravity of the offences committed is the primary consideration when imposing a sentence." The prosecutor in Karera, trial Judgment, paragraph 583, "the penalty must first and foremost be commensurate with the gravity of the offence".
It is our submission that the Trial Chamber failed to take account of this fundamental principle when determining that mitigating factors warranted the imposition of a finite, rather than a life term of imprisonment.
[11.31.30]
It is our submission that the gravity of the respondent's crimes can be seen in their magnitude, their scope, and their duration. The Trial Chamber found the respondent was found guilty for multiple crimes against humanity committed over a period of more

than 3 years, which resulted in the killing of over 12,000 people, many of whom were tortured before they died, or were executed.

The scope of this policy, a policy of terror, the accused was instrumental in creating, had a broad geographical scope, extending throughout the country of Cambodia. If you look at the trial transcript you will find, at pages 69-71, where the expert witness Craig Etcheson stated that S-21 was the only security office that was authorised to detain, torture and execute individuals from everywhere in Cambodia.

[11.32.45]

The third error. The Trial Chamber further erred by giving insufficient weight to aggravating circumstances. The aggravating circumstances in this case included the accused's superior position and abuse of power, the cruelty of the crimes committed, the defencelessness of the victims, and lastly the discriminatory intent with which the crimes were committed, and I've already mentioned that issue. And you'll find that at paragraphs 602 to 605 of the trial Judgment.

As the Co-Prosecutors stated earlier, in their submissions on crimes against humanity, the Trial Chamber erred by subsuming the various crimes against humanity under the crime of persecution, and not directly considering discriminatory intent in respect of all of the other convictions, which we say the Trial Chamber should have made with respect to crimes against humanity thus

considering additional aggravating circumstances in respect of those particular crimes.

[11.33.55]

If the Trial Chamber had given proper weight to these aggravating circumstances, the only reasonable conclusion, Your Honours, would have been the imposition of a life sentence.

The fourth error is that even if very limited mitigating factors did exist in this case, and we say those factors reach a vanishing point, frankly, now, the Trial Chamber erred by finding that they justified a reduction in the sentence from life imprisonment. International law establishes very clearly that a court need not reduce a sentence on the basis of mitigating circumstances where the gravity of the crime is especially severe, or where the effect of mitigation is limited or offset by aggravating circumstances.

In the Kajelijeli case appeals judgment, this case found that the trial chamber did not err, did not make a mistake in declining to reduce a life imprisonment sentence on the basis of credible mitigating evidence where that mitigating evidence did not clearly outweigh the gravity of the crimes for which the appellant had been charged and convicted.

[11.35.27]

Another case from the Rwanda tribunal is the Niyitegeka case, at paragraph 267 of the appeals judgment, upholding the imposition of a life sentence, and stating that nothing prevents a trial

chamber from imposing a life sentence in light of the gravity of crimes committed, even if the evidence in the case reveals the existence of mitigating circumstances.

Another decision also from the Rwanda tribunal, Musema, the appeals judgment at paragraph 396, stating that even if a trial chamber finds that mitigating circumstances exist, it is not precluded from imposing a sentence of life imprisonment where the gravity of the offence requires the imposition of the maximum sentence provided for. International courts have imposed this maximum penalty in cases of grave crimes even where the accused has cooperated with the court.

For example, in the case that I've just mentioned, the Musema case, the trial chamber found that the accused had cooperated throughout the proceedings, through admission of facts, including the fact that genocide had occurred in the region at issue, and that these admissions had facilitated the expediency of the trial, but he was still sentenced to life imprisonment because of the nature of the crimes that he had committed.

[11.37.13]

In this case, Your Honours, despite the accused's cooperation, and the existence of other mitigating circumstances, the trial chamber found that the aggravating circumstances outweighed the mitigating circumstances, and consequently imposed a life sentence. Here I'm talking about Musema. And the appeals chamber upheld this finding.

The fifth error is that the Trial Chamber made a mistake, it erred by not considering international sentencing jurisprudence. And I've heard the submissions from my learned friends across the well, they say that international law doesn't apply when it's not very helpful to them, but when it is helpful to them, that international law does apply. For example, they quoted rule 11 of the Yugoslav war crimes tribunal statute to assist their argument, but where it's unhelpful they say it doesn't apply. Well the fact is for these kinds of crimes, this Court, in my respectful submission, is obliged to look to international jurisprudence because it is where the guidance lies. These courts have been considering these offences for 15 years. And in those 15 years, a great deal of jurisprudence has developed which should be relied on in determining matters in this Court, regardless of the fact that this is a Cambodian domestic court with special international features.

[11.38.40]

We've made extensive submissions on the international jurisprudence relating to sentencing in our final trial submission. The Trial Chamber, at least on the face of their Judgment, appeals not to consider those arguments. They appeared not to consider any of the cases that we submitted to the Court that should be considered in coming to a determination of sentence. The Trial Chamber would not have imposed the manifestly inadequate sentence of 35 years in this case if they'd

reviewed the sentencing practices of other international tribunals.

Indeed, the accused's crimes and his level of responsibility clearly place his case, this case, in the category of cases where international courts would have imposed a term of life imprisonment. To highlight this particular fact, we have reviewed all of the cases where a sentence of life imprisonment was imposed. We selected from all of those cases, seven cases. Two from the Yugoslav war crimes tribunal and five from the Rwanda tribunal, and you can see in front of you a chart -- if I could show this please, Mr. President, this is a chart which essentially is a graphical representation of what I'm about to say.

[11.40.20]

MR. PRESIDENT:

Please go ahead.

MR. CAYLEY:

I'm obliged, Mr. President, please go ahead. We selected these seven cases by taking cases where the accused had similar responsibilities to the respondent in this case, and where the number of individuals killed for which the accused was held responsible was ascertainable. In many cases, as you know, that are heard before international courts, it's sometimes to actually determine how many people were killed. So we selected those cases where the courts had found a certain number of individuals

killed.
We found too frequently, especially at the Rwanda tribunal, that individuals were found guilty of genocide or murder of many or a number of individuals. Now, this is perfectly understandable in Rwanda, given the background of the killings, with many taking place at roadblocks, through generalised raids on homes, and places of refuge where the population were constantly shifting and migrating, and also given the relatively short period over which the genocide in Rwanda took place, a little over three months, as opposed to the three years in this case.
The ICTR, the Rwanda tribunal, did not frequently attribute exact numbers killed to these individuals, and thus the Co-Prosecutors did not include those cases in our sample because we believe that that would have been unfair to the respondent and it would have essentially presented an inaccurate picture to Your Honours. I will very briefly go through each one of these cases.
[11.42.00]
You can see at the far left hand corner is the respondent in this case. On the left hand side it shows the number of dead in this case, 12,500, and next to that it shows the duration of the crimes, three and a half years. And now if I go through, very briefly, the case next to it: Gali?. Gali? is a case from the Yugoslav war crimes tribunal. He was sentenced to 20 years at trial and life on appeal. He was a military commander, and he was convicted of crimes against humanity, being murder, inhumane

acts, and war crimes, being infliction of terror upon citizens. That was the war crime for which he was convicted. He was responsible for hundreds killed, thousands wounded, and for terrorising the 300,000 residents of Sarajevo. He gave commands to initiate widespread sniper and shelling attacks on Sarajevo. He was responsible for the imprisonment of hundreds of civilians in inhumane conditions, and the duration of his criminal conduct was 23 months.

If we now look to the next ICTY case that we selected where there was a life imprisonment at trial, there is an appeal pending in this case, so the determination of sentence in this case is not final. But at least, at trial, he was sentenced to life imprisonment. This man was a fairly minor figure. He was a leader of a group of Bosnian Serb paramilitaries. He was convicted of crimes against humanity, persecutions, murder, inhumane acts and extermination, and war crimes of murder and cruel treatment.

He was responsible for the murder of at least 132 Bosnian Muslim men, women and children, and also for the beating of detainees. The murders took place over approximately a one month period, the beatings over a 26 month period.

[11.44.44]

If we now move on to the next case, which is Akayesu, this is a case from ICTR. This individual received a life sentence at trial, which was confirmed on appeal. He was a mayor of the Taba

commune. He was convicted of genocide and direct and public incitement to commit genocide, and crimes against humanity of extermination, murder, torture, rape and inhumane acts. He personally was responsible for the deaths of approximately 2,000 individuals whilst he was mayor, and individually criminally responsible for the murder of approximately 16 civilians killed on his orders and in his presence.

He participated in and encouraged the rape of women, and the duration of his criminal conduct was approximately three months.

The next case, the fourth case is the Karera case, also a Rwanda tribunal case. This is an individual that was sentenced both at trial, and confirmed on appeal, to life imprisonment. His position was that of a prefect within a commune in Rwanda. He was convicted of genocide, crimes against humanity of murder and extermination, and he was found responsible for participation in, and instigation of an attack at a church in which hundreds of Tutsi refugees were killed. The duration of his conduct was two months.

[11.46.47]

Clement Kayishema, there are four bars for him in this representation before you simply because he received, on trial and appeal, four concurrent sentences of life imprisonment respective to his four separate convictions for genocide. He also was a prefect in Rwanda. He was convicted of four counts of genocide. He was found responsible for instigation and

contribution to four separate massacres, and you'll see the numbers represented there.

The first massacre 8,000 were killed, the second 4,000 were killed. Some estimates place it higher, but we've placed the lowest figure, in fairness. The third massacre, 4,000 to 5,000 were killed, the fourth, thousands were killed. The duration of this criminal conduct is as follows. The first three massacres lasted approximately three days, the fourth, where thousands were killed, was an ongoing campaign of violence over three months. [11.48.11]

The next case is the Aloys Ntabakuze case, also an ICTR case. He was sentenced at trial to life imprisonment. To be fair to Your Honours, the appeal is still pending in that case, so there is not a final determination. He was the commander of a para-commando battalion. So a battalion commander. He was convicted of genocide, crimes against humanity of murder, extermination, persecution and other inhumane acts. He was responsible for the death of 2,000 individuals, and the criminal conduct lasted approximately one month.

In the last case, which is the Renzaho case, which is another Rwanda tribunal case, this individual has been sentenced at trial to life imprisonment, again his appeal before the appeals chamber is still pending. He was a prefect in Rwanda, and he was convicted of genocide, crimes against humanity, murder and rape as crimes against humanity, and war crimes of murder and rape.

He was responsible for the death of 140 individuals on at least three separate occasions, during which he was involved with the commencement and the cessation of the killings. So he was physically present at the beginning and the end of the killings, and he was also responsible for the rape of many women. He was aware that rapes were occurring within his prefectorial district, and he made remarks encouraging sexual abuse. And that criminal conduct was over a period of approximately three months.

[11.50.09]

If, with your permission, Mr. President, I could show two other graphics, which essentially are the same as these, but I think make the picture of what I've just painted a lot clearer.

MR. PRESIDENT:

You may go ahead, but please be brief.

MR. CAYLEY:

Thank you, Mr. President. This particular graphic you see represents very clearly the numbers killed in comparison to all of these other cases. You will see here that the respondent's -- the number of killed, the number of dead, for which this individual is responsible far exceeds any of these other cases that I've quoted. And lastly, if I can show the other diagram, the duration of this man's conduct exceeds by far any of these other cases.

The sixth error is that the Trial Chamber erred in failing to recognise that a sentence of 35 years does not meet the two

principle goals of international sentencing. Namely, retribution and deterrence. And when I speak of retribution, Your Honours, I am not speaking of revenge, I am speaking about the expectations of the Cambodian people in respect of this Court.

[11.51.42]

International sentencing practices must ensure that convicted perpetrators see their crimes punished, that victims' interests are vindicated, and that others who may be tempted to commit atrocities are forever dissuaded. International courts have consistently found that their sentencing practices must be directed first and foremost at retribution and deterrence. The rationale underlying these goals is to ensure that, and I quote, "that convicted perpetrators see their crimes punished, and to dissuade forever others who may be tempted to commit atrocities by showing them that the international community will not tolerate serious violations of international humanitarian law and human rights." And you will find that at paragraph 186 of the Musema Judgment.

International courts have consistently noted that undue weight must not be given to other sentencing purposes such as rehabilitation. I believe I've demonstrated to you that a sentence of 35 years is manifestly inadequate in the light of the magnitude, scope and duration of this man's crimes.

[11.53.05]

Finally, Your Honours, my submission, as I said at the beginning,

is that this Chamber should impose a term of life imprisonment, that is of course reduced to take account for the period of illegal detention by the Cambodian military court. But we call for the imposition of a life term, reduced to 45 years simply to take account of that period of illegal detention, but for the purposes of history a life term must be imposed in this case for all of the reasons that I've stated.

It is perfectly proper, in international jurisprudence, to reduce a life time to a finite term of years.

MR. PRESIDENT:

Please be informed that you can proceed until 7 past 12.

MR. CAYLEY:

Thank you, Mr. President. I think I'll be finished before that, but thank you so much.

In the Kajelijeli case, a life term of imprisonment was reduced to 45 years to account for the violation of the accused's rights during his detention. That is at paragraph 324 of that judgment.

In the Barayagwiza case, the chamber held at paragraphs 1106 and 1107 and in the appeals judgment a 1797, that a life term could be reduced to 35 years to account for improper detention. This sentence was in fact further reduced on appeal to 32 years, although an unspecified part of the further reduction was attributed to certain convictions being set aside on appeal.

And I would also note, Your Honours, that the detention violations in those two cases that I've mentioned to you were

much less severe than in this case. In Baragweza it was 38 days, and in the Kajelijeli case it was 211 days.

[11.55.15]

The OCP expressly recognised this fact in our closing submissions at trial. However, on the other hand, these are cases where the international body itself, the court that was determining sentence, had been responsible for these violations, whereas in this instance it's a separate court, it was the Cambodian military court that was responsible for this illegal detention, and not this institution, not this Court.

Your Honours, at the beginning of these proceedings yesterday, Mr. President, you opened them on behalf of the United Nations and the Cambodian people, and those particular comments touched me. I'm from the United Nations, I'm one of the officials working here together with my Cambodian colleagues. But you also opened these proceedings on behalf of the Cambodian people, and it is to the Cambodian people that ultimately we must answer. Their need for justice, their need for retribution, their need for reconciliation. In essence, it's not the Co-Prosecutors that are pleading from the bar, it is the Cambodian people. And it is for them, Your Honours, that you must, in this case, based on the Trial Chamber's finding on the gravity of the crimes for which this man is responsible, and the related aggravating factors, in particular his superior position and his discriminatory intent, we submit that you must impose, in this case, a life term reduced

to no less than 45 years. That is the appropriate penalty in this case.

I thank you, Mr. President, and Your Honours, for listening to my submissions, and I am now complete, and I think we are now coming to the lunch break.

[11.57.45]

MR. PRESIDENT:

The Court is now adjourned for lunch break, and will be resumed at 1.30. Security personnel are now directed to take the accused to the detention facility to bring him back by 1.30.

(Judges exit courtroom)

(Court adjourns from 1158H to 1326H)

(Judges enter courtroom)

MR. PRESIDENT:

The Court is now back in session. I would like now to give the floor to the Judges of the Bench, if they have any questions to be put to the Co-Prosecutors.

JUDGE SIN RITH:

I have a question for the Co-Prosecutors. This morning there was a detailed submission on the sentencing issue, and in that brief, in paragraph 131, it also specifies the issue of sentencing. The question is, do you have any specific law, or any formula that you base upon for you to request for the 45 years imprisonment?

MR. CAYLEY:

Thank you, Judge. The particular figure of 45 years was based on

our original submission before the Trial Chamber. It's guided by those international cases that I mentioned to you in terms of reducing a sentence from life to a term of imprisonment. It's clearly more than was originally determined by the Trial Chamber. I cannot say, you know, it's a figure that we picked out of the sky, but certainly it's a figure where we've been guided by those international cases which I mentioned to you, and which I can repeat.

[13.29.10]

You will recall the cases this morning I mentioned to you of Kajileli and also the case of Baragweza, so we determined that it was an appropriate sentence that the respondent should suffer, bearing in mind that we're calling for a life imprisonment, but there has to be a reduction to recognise the time of illegal imprisonment by the military court.

JUDGE NOGUCHI:

I have around three questions to the Co-Prosecutors. The first question, during the morning session you mentioned several cases before international criminal tribunals in which life imprisonment was imposed. To your knowledge, are there any cases of the comparable gravity and magnitude to this case before us in which the sentence shorter than life imprisonment was selected?

MR. CAYLEY:

Your Honour, what I would suggest in response to that question is that we make a written filing to you, because I have got a lot of

cases in my head, but I would need to examine them. There are certainly cases of comparative gravity where a sentence of less than life imprisonment has been given, there's no doubt about that, but I would like, in order to answer your question properly, to actually brief it in writing to the Court.

JUDGE NOGUCHI:

Thank you. I would then consult with the Chamber if the Chamber wishes to invite further written submissions in this regard.

[13.31.49]

My second question is quite similar to what was just asked by my colleague. In your appeal brief you request this Chamber to select life imprisonment, and then reduce it to 45 years for the remedy of illegal detention. It appears that you implicitly set the maximum number of finite time imprisonment at 50 years. Is that right, and if so, could you clarify on the legal grounds to have done so.

MR. CAYLEY:

I think -- I'm sorry. In response to your question, we determined a figure based on what we thought were the gravity of these particular offences, which was, in fact, 45 years, taking into account the period of illegal detention. I think in many respects this figure that we're talking about is really what I would call a red herring, because in essence what we are seeking is a life term. We are seeking this Court to impose a life term of imprisonment, but we are recognising that the has got to be

some kind of deduction to recognise this period of illegal imprisonment by the military court. We don't dispute that. So if this Chamber were to come up with a different figure, but impose life imprisonment, as long as that were met, and as long as there was an increase on the 35 years, I think we would be satisfied. That is our position.

[13.33.55]

JUDGE NOGUCHI:

Thank you. The third question is: the Trial Chamber Judgment found that the detention of the accused before the Cambodian military court was unlawful for the entire period of 8 years, 2 months and 21 days, and deducted 5 years as a remedy. As you have briefly mentioned in this morning, there is a few jurisprudence in the international level in which remedy was provided for illegal detention by way of reduction of sentence. In all of these cases, it appears that the deducted period, as a remedy, was longer than the period of illegal detention. Do you have any observation to provide to this Chamber in this regard?

MR. CAYLEY:

Could you just repeat the last part of that question, Your Honour? I'm sorry, I missed it. I was actually trying to discover in my papers those particular cases.

JUDGE NOGUCHI:

As you have briefly mentioned in this morning, there is a few jurisprudence in the international level in which remedy was

provided for illegal detention by way of reduction of sentence. In all of these cases, it appears that the deducted period, as a remedy, was longer than the period of illegal detention. Do you have any observation on this issue?

MR. CAYLEY:

(microphone not activated) I would make there is it does not necessarily need to be longer, it's in the discretion of the court, just as long as he actually gets -- there is some kind of recognition of that period of illegal detention. They exercise their discretion in a certain way, I think this Court can do the same. It's up to the discretion of the Court.

MR. PRESIDENT:

Judge Milart, you may proceed.

JUDGE MILART:

Thank you. I don't mean to discuss the range of punishment in practical terms, but it's general legal framework, and we understand that in putting before us the argument of the specialty of the relationship between the penal code and the ECCC Law, the prosecution seems to make a juxtaposition of the ECCC Law against the Cambodian legal system as a whole. I note that put so generally, it may not be quite accurate.

ECCC Law copiously references the penal code of Cambodia, which by the way was the legal basis on which prosecution sought convictions in case 1. Moreover, ECCC Law treats national Cambodian procedure as a plane of reference on procedural

matters. This would indicate that ECCC Law is not a standalone piece of legislation, but has to be seen in the context of the legal system.

[13.37.55]

Now moving on to the technicalities of the specialty business. The prosecution this morning and in their written submissions put a considerable effort in convincing us how the principle of specialty should be employed in examining and meticulously comparing competing criminal provisions. In these cases we dealt with comparing definitions of crimes, but the same rules should apply to comparisons of hypothesis and dispositions of all norms of criminal law.

Then I have a problem understanding why, when talking about punishments, the prosecution refuses to consider particular competing provisions. Namely, when ECCC Law speaks of punishment for crimes against humanity, this being from five years of imprisonment to life imprisonment as part of Article 39(new), the penal code seemingly speaks of punishments for crimes against humanity, which is life -- imprisonment for life, with a mitigating option as per Article 95.

[13.39.13]

And honestly I cannot see the relation of specialty here. I can see that one is earlier, and the other one is later, lex posterior. But where would be the specialty if you refer the lex specialis, lex generalis comparison to specific provision.

And one more regarding the same issue. Moving on to the teleological argument that was made earlier about the purpose of the law, and the contention how this purpose would be frustrated if national law were to be applied by this Court. And I wonder whether the appellant, who speaks for the Cambodian people, where the appellant sees the frustration in applying what the Cambodian people just recently decided to be the appropriate sentence range for crimes against humanity in their penal code? With no exception as to the gravity of the crime, which is grave by definition, or the level of responsibility of persons convicted. [13.40.25]

On the merits of the same question, what would be the unacceptable outcome in applying the sentence range foreseen in the penal code? It foresees life imprisonment, and when it comes to finitum of imprisonment it fixes it exactly on the same level as ICC statute, which elsewhere is argued as representative for international consensus on what the international law could be. So with regard to the purpose of ECCC Law and the argument of how it would be frustrated by the national law, perhaps the prosecution could elaborate about where is the frustration of this purpose in applying what appears to be international standard confirmed by all states that accepted ICC statute. But more importantly, the purely technical legal question about the specialty referred to specific provision as opposed to the legislative pieces as a whole. Thank you.

[13.41.35]

MR. CAYLEY:

Thank you, Judge Milart. I think my colleague will also have some comments about this. In terms of the lex specialis argument, we have submitted to the Court that the ECCC is a unique sui generis system designed specifically, and set up for the prosecution of international and national crimes that were committed in Cambodia during the temporal jurisdiction of the Court from 1975 to 1979. Our position on that rule of lex specialis is simply this. I know, Your Honour, that you understand what it means, but for the purposes of the public if I can just say it is a Latin rule of statutory interpretation meaning that a specific law prevails over a general law where two applicable principles or provisions cannot be read consistently. We submit that the principle of lex specialis is not applicable in this instance.

The principle of lex specialis applies where two principles or provisions are both binding on a court. In such a situation the principle of lex specialis advocates for the application of the more specific provision, but I would just simply maintain the position that we had this morning, and as we explained, that the 2009 penal code is not binding on this Court, and therefore Article 95 or any provision of the 2009 penal code cannot be considered lex specialis.

[13.43.19]

And my colleague will have a few comments after me, Your Honour,

but just in terms of the ICC law, and the international recognition of that provision. That provision, respectfully, has not been implemented in the ad hoc tribunals. I'm not saying whether that's right or it's wrong, but that's what's actually happened. So other international courts have not followed that provision in sentencing, so we would also say that this Court is not necessarily bound by that particular provision.

And I think now my colleague would like to say a few words on the same issue.

MS. CHEA LEANG:

Thank you, Your Honour, for raising the questions in relation to Article 668 of the Cambodian criminal code, and with regard to sentencing the accused. The Trial Chamber found him guilty within the jurisdiction of this Court.

Before I respond to the question or the issue of sentencing and the relevant article in the criminal code, we need to know the purpose of the establishment of the criminal code. Criminal code. The tribunal is not bound by this criminal code. I am one of the members of the legislature who codified this criminal code, and in regards to the crimes against humanity, not only the criminal code in 2009 was stipulated, it also codified in other law.

In this particular criminal code, that is, in book 2 of the criminal code, the law not yet come into effect, only the first part, that is the first book of the code came into effect after its adoption. So when it comes to Article 628, that is the three

paragraphs of 668, its application came into force at a later stage. There are three separate paragraphs of Article 668, although it doesn't enumerate, they are quite distinct in its own form, if you look at paragraph 1 and 2 and 3 respectively.

[13.46.35]

I would like Your Honours attention to paragraph 2 and 3 which are relevant to the issue of sentencing decisions and our request, and whether we are bound by this criminal code or by the ECCC Law. In paragraph 2 it is clearly stated the conflict of other criminal legislation and criminal provisions, and if that is the case then the provisions of book 1 shall prevail. That is from Article 1 to Article 182. And Article 95 is part of book 1 of the criminal code.

On the contrary, in paragraph 3, which reads "the provision of paragraph 2 above shall not be applicable to special criminal legislation." Here the word I quote, "special criminal legislation" unquote. And the question is whether the ECCC Law is a special legislation. The understanding of the Co-Prosecutors based on our review of the ECCC Law, as well as this 2009 criminal code, ECCC Law is a special criminal legislation, because if you look at the structure of this Court, in comparison to local courts, they are distinct.

[13.48.07]

Even here we do not have the court of appeals at the ECCC. And the second distinction is the way the work is conducted. Here

everything is in parallel, there is national and international apparatus. So the decisions, the procedures and the proceedings, they are all distinct from the domestic practice. For that reason, this ECCC Law is a special law, that's why the provision of book 1 is not applicable, due to its specificity.

And we understand that for this reason the ECCC law is a special law and in Article 39(new) of the ECCC Law it clearly states that on the sentencing issue, it is not for the Co-Prosecutors to decide whether the sentencing is appropriate or not. It is the request from us to increase the imprisonment. We put such a request because we are of the view that this ECCC Law is a special law. So once a sentence is pronounced that is in accordance to the ECCC Law that is within five and life imprisonment, that would be appropriate. And our appeal is to seek an increase to the sentence to be more appropriate to the gravity and the magnitude of the crimes he committed.

[13.50.08]

And we are not bound by the 2009 criminal code because book 1, the general provisions of that code, came into force immediately, that is on 30 September 2009, and the rest of the code only came into effect one year after it comes into effect. Thank you, Your Honour.

MR. CAYLEY:

And just finally, Your Honours, Judge Milart was explaining that there are a number of references to Cambodian law within the law

creating this institution. The only points that I would make in response to that, Your Honour, are really the following. There are, in fact, only two references to Cambodian law as such, substantive Cambodian law, in Article 2(new) and Article 3(new), and certainly when you address the issue of sentencing, the sentencing regime, if you look at Article 3(new) it imposes a sentence, a form of sentence which is specific to this law, that is should be limited to a maximum of life imprisonment, and further in accordance with Articles 38 and 39 of the law.

[13.51.45]

And if you look to 38 and 39, specifically Article 39, it creates a sentencing regime of from 5 years to life imprisonment without reference to Cambodian law, so I would simply reiterate my prime submission, that the intention of Parliament when it established this Court was to set up a sui generis sentencing regime for this particular court. Thank you.

JUDGE MILART:

Mr. President seems to have allowed me to go deeper in the issue. I would see -- it's interesting to discuss why the prosecution saw the penal code of '56 applicable, but flatly refuses to apply the penal code of 2009. I have in mind all the time that ECCC is a national court, created by a national piece of legislation, whose placement in the hierarchy of laws of Cambodia is not any higher than the penal codes. I understand that the reference to the penal code of '56 was necessary because there was a question

of nullum crimen and the definitions of crime as provided at the time of the alleged commission of acts.

[13.53.25]

However, this demonstrates that the national system of law is not to be set aside entirely for the operation of this Court. Now I have to already disagree with the Co-Prosecutor Chea Leang in saying that the specialty of this Court is automatically projected on the specialty of the laws that this Court applies. That this Court is special it can be readily seen. Certainly provisions that established this Court, and established specific institutions for the operation of this Court are special provisions against the background of the laws and courts of Cambodia.

This however not necessarily needs to be immediately extrapolated on the law applicable by this Court. Which brings us back to the argument that I don't want to repeat, possible argument about the applicability of the range of punishments. Now, to relate to the mention about Article 688 (sic) it speaks of conflicting laws. It speaks of conflict of provisions. And my question would be where do you see such conflict? If one provision says that the applicable range of punishment is from 5 years until life imprisonment, and the other provision says it's life imprisonment but it could be mitigated to anywhere between 15 and 30, I would say that the second normative contents is included in the first one.

[13.55.33]
So they are not on a colliding course. Just the second one is more concise. And perhaps in a concrete application could leave to the beneficiary effect. Colliding norms are such norms whose application in practice is impossible, or leads to irreconcilable affect. These two norms can be perfectly reconciled, because one is included in the other. Thank you.
MR. PRESIDENT:
Chea Leang, you may proceed.
MS. CHEA LEANG:
I would like to respond briefly to the question put by Judge Milart. In fact, I did not raise that the law which is adopted by the National Assembly cannot be applied. However we need to consider the reason why the criminal code, in particular Article 668, is written. This is to protect the previous or the other criminal special legislation or law, that is the ECCC Law, so that is the purpose of Article 668.
MR. PRESIDENT:
Can you clarify the code of criminal procedure, or the criminal code?
MS. CHEA LEANG:
I mean the Article 668 of the criminal code. What have been raised by the Judge, I shall fully agree. We shall all apply the laws adopted by the National Assembly, with no exception. However, we need to know the purpose of the creation of such, or

whether it is to preserve this special criminal laws or other criminal provisions that were established before this law, or this code, comes into effect. That is my response Your Honour.

[13.58.20]

MR. PRESIDENT:

Co-counsel for the defence is now given the floor to make their oral submission.

MR. KANG RITHEARY:

Good afternoon, Mr. President, and Your Honours. I would like now to make my submission in relation to Article 668. As the President has already reminded, this article is from the penal code of 2009. I would like to read this article again, and this morning I checked the law time and again, because in the question by the Supreme Court Chamber it was more about the criminal code. Article 668, application of other criminal legislation. Other criminal legislation and criminal provisions in force shall be applicable to the offences defined and punished under such legislation and provisions. This means that this provision already been in force, and that this law does not nullify the other criminal legislation. This is the correct interpretation.

[14.00.00]

This first paragraph of Article 668 already indicates very well that this provision does not nullify other, or abrogate the other criminal legislation. In the event of conflict between other criminal legislation and criminal provisions, and the provisions

of this code, the provisions of book 1, general provisions of this code shall prevail.

There are several articles in book 1, for example Articles 1, 2, 3, 4, 5. Article 5 is about the interpretation of the law. Article 5 is correct that it directs ECCC not to interpret the law outside its jurisdiction or interpret the law by means of analogy or with reference to case law. This morning the Co-Prosecutor has referred too excessively to jurisprudence. Judge Noguchi put some questions to the prosecutor concerning the jurisdiction, and that in some cases those jurisprudence are not internationally recognised or universally recognised. For example, in the case of Sierra Leone court, the case is as pending, and it is not different from this ECCC, and the question is whether we can either use the jurisprudence from this court which is pending to be used at other country like Libya, for example, or back in Yugoslavia.

[14.02.25]

It means that we cannot really use the jurisprudence arbitrarily, and that we shall respect the law in force, and also be bound by the civil law tradition. In book 1 there is also Article 9, which is about the abolition of criminal actions. Article 10 states the lighter or heavier penalties, and this particular Court, Duch has already been accredited for his lighter penalty or mitigating circumstances.

According to Article 31 of the agreement between the United

Nations and the Royal Government of Cambodia and the ECCC Law, it states that the agreement itself is more -- the Cambodian law, and there is no provisions conflicting one another. However, penal code of 2009 includes some of the articles of the provisions of the ECCC including Article 3, 4, 5 and 6, concerning the crimes of grave breaches of the Geneva Convention of 1949 and crimes against humanity as well as genocide. [14.04.25]

And the sentence term in penal code 2009 is even heavier, or equal to that of the ECCC provision, so by comparison, penal code of 2009 and the ECCC Law is not different. And we can trace back the purpose of the drafting of the ECCC Law concerning Article 10 and Article 31 that penal code of 2009 prevails, and dominates the provisions before the ECCC. And of course it is different than the assertion by the prosecutor regarding Article 668. The Supreme Court Chamber should also consider Articles 10, 93, 94, 137, which are the ground for Cambodian laws to be used in conjunction with Article 12 and 13 of the ECCC. And Article 14 and 15 of the International Covenant on Civil and Political Rights regarding the fair trial. And that if the law is in favour of the accused, then the accused shall benefit from the law, and with reference by the Co-Prosecutor to the courts of Sierra Leone, Rwanda and other court is not appropriate. I would like now to end my comments concerning Article 668, and would proceed to my submission on sentencing.

[14.06.40]
The Trial Chamber notes that there were significant mitigating factors, and their position is proper. The Co-Prosecutors in their appeal brief, in their response to the defence counsel brief indicated that the Trial Chamber seemed to be too generous to the defence regarding the mitigating factors. But of course there are genuine mitigating factors as follows.
The accused himself talked to Nate Thayer concerning the assertion by Pol Pot who said that S-21 was fabricated by the Vietnamese, but Duch did challenge such assertion by saying that S-21 was genuinely in existence. And he also confessed, and acknowledged the crimes committed at S-21 and that he received orders from Son Sen and Ta Mok. And that Duch committed the crimes at S-21 out of his -- not from his own discretion or will, and that the expert on psychology already indicated that he could be integrated into the society.
[14.08.20]
And, most importantly, Duch could not intervene when a senior cadre were executed at S-21, and he had to obey orders. And Duch also showed that he was a good man, and he tried to really intervene when there was a rape case in the interrogation unit, and he tried to really replace the male interrogators with the female interrogators. And the accused tried to release detainees at S-21 but failed, but remember that he also managed to release some of the detainees, the FULRO group, with the intervention

from Pol Pot and Pang intervention.
And another point of mitigating factor is that Duch cooperated very well with the civil parties, the Co-Prosecutors, the Judges and civil societies, and then crime at S-21 were committed by Son Sen and other senior cadres. Duch himself wanted to isolate himself from the crime and he would like him to be transferred to industry section, but his plea was rejected.
[14.09.55]
The accused was criticised by his superior concerning his attention to grind to a halt the interrogation at S-21, but he was threatened to continue. Later on he was very desperate and hopeless, and he could not do anything but waited until his day would come when he would be executed. And when the Vietnamese troop invaded and approached Phnom Penh, he was still under pressure and he had to escape to Samlaut, under threat.
This proves that Duch has been doing his best to free himself from the involvement of the crimes, but he had no other choice other than implementing the orders. Otherwise he would have been killed. So if you were in his shoes, like in 1975 for example, under Son Sen's order, what would you do? I believe that you would end up being in the same situation. And Duch was the head of regiment, as the head of regiment he had to be abided by orders from his superior, and the orders from CPK was the very strict discipline, and no one could violate such discipline. Violate the discipline is equivalent to death sentence, and it

has already been seen that such strict policy had been well enforced with other senior cadres who end up being executed at S-21. Duch had no choice between obligation and morality. And he had to only impart the information or order to his subordinate and report back to his superiors.

[14.12.10]

The accused had not committed any heinous crime in person towards victims. He was not the person who issued orders and tortured others at S-21. It was Son Sen and Nuon Chea who enjoyed that privilege. The accused had received threats from Ta Mok. Ta Mok was as famous murdered. He was known to have trouble making Duch subject to his orders, since Duch always challenged him and proposed of the release of prisoners at M-13 at Amleang.

We can therefore conclude that the accused was under great duress, that he had to carry out the orders or he would risk his life and those of his family. The accused acted against his well, the accused expressed his remorse and showed signs that he can be changed and integrated into the society. The accused had never benefitted from his activities, not even promotion or benefits, but threats to the life of his family and peace.

The accused shed lights to the other evidence through his testimonies. He did this very meticulously for the purpose of assisting the ECCC and the real history of the DK regime. This helps clear the doubt in the mind of Cambodians and the international community regarding the real events happened during

that time. It also helped stop an improper trial and prevent the recurrence of such a barbaric regime.

[14.16.55]

Regardless of these mitigating factors, the Trial Chamber unfairly ruled on the sentencing against the accused by violating Article 95 of the penal code of Cambodia which states that when the accused is convicted to life imprisonment, while his mitigating factors are established and credited, the allowed sentence term imposed on him shall range from minimum of 15 years and maximum of 30 years. Nonetheless the Trial Chamber has sentenced him to 35 years of imprisonment, exceeding the legal term limit by five years.

In fact, it should have been more than significant already for the Trial Chamber, after considering all these mitigating factors, and pursuant to Article 95, to impose the 15 years minimum sentence term on the accused, as this should have given him justice for his being the double victim of the threats and duress inflicted on him by the CPK and DK regime, and the additionally unwarranted five year term infringing the spirit of the mitigating factors as set forth in Article 95 of the penal code of Cambodia.

Not only will such conviction give rise to hatred and fear felt by other accused person, but it will also hinder them from feeling the need to cooperate with the tribunal in the future trials. Furthermore, it is against the universal principle on

the right to a fair trial. It also shows that the national and international community that the trial is nothing but a venue for vengeance or victors' justice.

[14.15.35]

And as to the mitigating factors, when the accused observes to be accredited to them, the sentence term shall only rank from 15 to 30 years. Nonetheless the Trial Chamber has been pressured by the social factors and the Co-Prosecutors to sentence the accused way beyond the time limit. Such decision is arbitrary. The Co-Prosecutors' submission that the Trial Chamber has failed to convict Duch cumulatively for the crimes is based on the jurisdiction on normal domestic crimes, not the jurisdiction on crimes against humanity as set forth under Article 188 of the penal code of Cambodia.

Crimes against humanity include murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty and violation of fundamental rules of international law, torture, rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation or any other form of sexual violence of comparable gravity. Persecution against any identifiable group, or collectivity on political, racial, national, ethnic, cultural, religious or gender. Enforced disappearance of persons, the crime of appetite, other inhumane acts of similar character, intentionally causing great suffering or serious injury to body

or to mental or physical health.

[14.17.05]

Under this Article 188, regardless of what -- the sentence shall be cumulative, according to the penal code of 2009. But according to the ECCC Law, the sentence term shall only be between five years and 30 years of imprisonment. That's why the Chamber shall consider the mitigating factors that the accused person shall be credited for. It doesn't mean that each crime under crimes humanity is -- you need -- multiplied. Because the maximum sentence term would be life imprisonment. And again, when mitigating factors are found, then the maximum sentence shall never exceed 30 years.

And further than that it would be a big violation to the code.

Thank you very much, Your Honours.

[14.18.33]

MR. PRESIDENT:

Counsel Kar Savuth, would you wish to add further on this?

MR. KAR SAVUTH:

Mr. President, Your Honours, I have nothing more to add.

MR. PRESIDENT:

Judges of the Bench, would you wish to put any questions to the defence counsel? The floor is yours.

JUDGE NOGUCHI:

I have a question to the defence counsel concerning Article 95 of the 2009 penal code. In your oral statement just now you

suggested that the Chamber shall sentence the accused somewhere between 15 and 30 years of imprisonment because of this provision. This provision seems to say that, I read: "If the penalty incurred for an offence is life imprisonment, the judge granting the benefit of mitigating circumstances may impose a sentence of between 15 and 30 years imprisonment."

Usually, the word 'may' is interpreted as giving discretion whether to behave on that basis or not. If so, the Article 95 seems to give the Chamber before the case the discretion whether to consider the mitigating circumstances and impose a sentence of 15 and 30 years. How would you interpret the wording in this particular provision?

[14.21.25]

MR. PRESIDENT:

Counsel, you may proceed.

MR. KANG RITHEARY:

Thank you, Your Honour, for the question. My submission could be interpreted along with Articles 94, 95. The Co-Prosecutor made the submission that first they would propose that life term shall be imposed, but the Supreme Court Chamber already acknowledged that mitigating factors shall be credited for Duch. With these mitigating circumstances, then the sentence term shall range from 15 to 30 years of imprisonment, and it is of course life the question by Judge Noguchi, it is the discretion of the judge to make on determining, or sentencing, when mitigating factors are

involved.
And that's why the defence counsel would propose that the sentence term shall be reduced to 15 years of imprisonment, not exceeding that. Thank you.
[14.23.05]
MR. PRESIDENT:
Judge Milart, you may now proceed.
JUDGE MILART:
I do not recall anything in the Supreme Court Chamber -- what the Supreme Court Chamber has said, from this Bench, that would indicate that we have accepted that there are mitigating circumstances that need to impact on the sentence, but we are certainly aware that the Trial Chamber found those. Just to immediately respond to the counsel.
But I was wondering that neither party does make any suggestion on how we should approach the scenario in case we find this autonomous convictions for underlying acts of persecution. I understand the defence did not argue this issue on substance, but still the question is to be decided. What if we were to endorse the prosecutors' request to enter into specific convictions, and how then the punishment should be calculated. Perhaps given that we have some time, the parties would like to respond to this question.
[14.24.55]
MR. KANG RITHEARY:

Thank you. I would be brief. It is not the position of the defence counsel, as my client already indicated that we shall not challenge anything in relation to sentencing since his confessions we will -- his intention already. However, it would be a good opportunity for us to respond a little bit concerning this, and it is genuine that it is the discretion of the Judges to consider when calculating sentencing.

Now, although there is no clear provision concerning the range of sentence term between 15 and 30, but Articles 93, 94, 95 state very clearly about the mitigating factors, and that if the Trial Chamber has found the accused guilty and imprisoned to 30 years imprisonment, to life in prison, and with the mitigating circumstances that the term shall be between the 15 and 90. We do not know whether such sentence term imposed, the 35 years imposed, has already been calculated against the mitigating factors already.

Because the 35 years of imprisonment is exceeding the maximum 30 years imprisonment by 5 years already. So we are convinced that the Trial Chamber shall only consider the maximum sentence term of 30 years of imprisonment, and that when mitigating circumstances are considered, then the accused shall be credited for that, and that the sentence term shall be 15 years of imprisonment. He has been double victimed already, because of the double standards have been applied by the Co-Prosecutors, because he is the only head of prison among the other more than

195 prisons all across the country whose chiefs have never been prosecuted.

[14.28.00]

And that is why we, the defence counsel, draw Your Honours' attention to, with your professional legal profession and conscience and wisdom, consider appropriate mitigating factors, and not like what applied by the Trial Chamber. Thank you, Your Honours.

MR. PRESIDENT:

I have a question for the defence counsel. Could you please clarify one issue. The Co-Prosecutors raised the issue in relation to Article 668 of the criminal code in relation to the third paragraph, with their assertion that ECCC Law is special legislation, therefore it prevails. It supersedes the 2009 criminal code. And I would like to seek your opinion on this assertion of the special criminal legislation of the ECCC Law.

[14.29.25]

MR. KANG RITHEARY:

Thank you, Mr. President, for your question. Article 668 of the 2009 criminal code, the third paragraph states about the special criminal legislation, which means -- this one is in relation to paragraph 1. If criminal legislation and criminal provisions are contradictory to 2009 criminal code, then they are within the category of the exception. In case of the conflict, as in paragraph 2, then book 1 shall prevail. And in 2009 criminal

code it encompasses certain Articles from ECCC Law, that is Articles 3, 4, 5 and 6, so I don't see any conflict.

Article 668 provides specification in case of the conflict. And Article 12 of the agreement between the UN also clearly states that Cambodian laws shall be applicable in the ECCC fashioning before any other international law shall compliment. And according to Article 12 of the agreement between the UN and the government, and Article 31, which states that the international legal instruments in supplement to the Cambodian law shall apply. [14.31.25]

And those laws mean that those treaties and conventions ratified by Cambodia, and there is no mentioning of any jurisprudence of any other international criminal court, such as ICTY or ICTR.

MR. PRESIDENT:

Also I have another question on the issue of sentencing. In the ECCC Law, in Article 39(new), there is a set range of imprisonment from 5 years to life imprisonment. In 2009 criminal code, in book 6, in the last Article, 671, it says about the abrogation, and the effect of the previous criminal legislations and provisions. This Article 671 does not abrogate the ECCC Law and in addition, in this article, it means this provision, the existing special laws can continue to exist.

This means that the Article 39(new) of the ECCC Law shall continue to prevail, or whether you think Article 95 of the criminal code shall prevail?

MR. KANG RITHEARY:

Article 671 only abrogates those other criminal legislations, for example the UNTAC law, and other special criminal legislations which are contradictory to the 2009 criminal code. However, ECCC Law is not in conflict with the 2009 criminal code. And in case of the conflict then book 1 of the criminal code 2009 shall prevail. That is on the general provisions. And that book 1 of the 2009 criminal code embraces a number of the articles of the ECCC Law, therefore for your considerations you should also consider Article 10 of the 2009 criminal code as you can consider both the ECCC Law with the supplement of the 2009 criminal code in case of a lacunae or it is difficult to make a decision. It's better than to rely on other jurisprudence of other international courts. Thank you, Mr. President.

[14.34.30]

MR. PRESIDENT:

It seems there are no further questions. Then I would like to give the floor to the Co-Prosecutors to respond to the reply made by the defence counsel.

MS. CHEA LEANG:

Thank you, Mr. President. I do not intend to respond to the defence, however my intention is that I would urge Your Honour to pay attention to Article 12 of the agreement, and I would like my colleague instead to respond to the defence team.

Article 12.2 clearly states that the ECCC shall exercise its

jurisdiction, and of course we have our own jurisdiction, and Article 13 and 14 and 15 also mentions other international treaties and covenants. In Article 12 of the agreement, in paragraph 1, that is in relation to the question raised by Judge Milart. In case of a conflict with the national law, then solutions can be sought from guidance at the international level. I think this is a base for Your Honours to consider.

[14.36.30]

And to respond to the defence team, I would like my colleague to do so. Thank you.

MR. CAYLEY:

Thank you, Mr. President. I will be very brief. My learned friend for the defence stated that his client was cooperative. I'm not going to repeat all the arguments that I made this morning, but our position is that he was selective and opportunistic in the manner in which he cooperated with the prosecution, and you'll find that in paragraphs 66 to 70 of our appeals brief. That kind of cooperation does not meet the standard, in our submission, for mitigation.

My learned friend also said that his client felt fearful. Well, actually, if you look at the trial Judgment at paragraph 555, Comrade Duch only felt fearful towards the end of his time at S-21, and the Trial Chamber concluded that up until that time, he had fulfilled his role at S-21 with efficiency and zeal.

[14.38.00]

For all that, my learned friend across the well has said let us be absolutely frank, this is a man that got up every day and went to work over three and a half years and murdered over 12,000 people. That's what this case is about, ultimately.

Judge Klonowiecka-Milart mentioned at the end about the effect of cumulative convictions on sentencing, and Judge, I understand obviously you have expressed a view about the 2009 code, and I'm not going to deal with that, but I'll deal with the international aspect of discretion on sentencing, because it is my submission -- whether the code applies or not, you know our position on that -- you do have a discretion on sentencing which is based in international law.

And that is a fairly wide discretion. I'd refer you back, respectfully, to the Celebici decision at paragraphs 428 to 432. I can't say to you, by looking at those international cases, that there is a science about this, it's more of an art, in the sense that you would have to consider all of the factors that you normally would as a judge, in terms of mitigation, aggravating factors, gravity, and then come to a figure. The Trial Chamber of course imposed a global sentence, although you would have a discretion to impose a concurrent or consecutive sentence, depending of course on how you felt about limitations elsewhere in the law.

[14.39.30]

As far as the issue on cumulative convictions, as I've said

previously, persecution has this element of discriminatory intent which the other crimes against humanity does not have. If you were minded to convict of those other offences, those other crimes against humanity, then the discriminatory intent found for persecutions would become an aggravating factor in respect of the other crimes against humanity and naturally exercising discretion on sentencing, if you were minded to adjust the sentence, you would have to feed those aggravating factors into the rest of the factors that you found.

Thank you, Mr. President.

(Deliberation between Judges)

[14.41.05]

MR. PRESIDENT:

I would invite the defence counsel to respond if you wish to do so.

MR. KANG RITHEARY:

Thank you, Mr. President, we do not wish to respond.

MR. PRESIDENT:

We will adjourn today's hearing now, and we shall resume tomorrow morning at 9 am in relation to the appeals by the civil parties. Security officers, you are instructed to take the accused back to the detention centre and bring him back at 9 am for the appeal hearing.

The Court is now adjourned.

(Judges exit courtroom)

(Court adjourns at 1442H)