



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

អង្គជំនុំជម្រះសាលាដំបូង
 Trial Chamber
 Chambre de première instance

ឯកសារដើម
ORIGINAL/ORIGINAL
 ថ្ងៃ ខែ ឆ្នាំ (Date): 22-Feb-2013, 10:30
Sann Rada
 CMS/CFO:

TRANSCRIPT OF TRIAL PROCEEDINGS

PUBLIC

Case File N° 002/19-09-2007-ECCC/TC

18 February 2013

Trial Day 158

Before the Judges: NIL Nonn, Presiding
 Claudia FENZ
 YA Sokhan
 Jean-Marc LAVERGNE
 YOU Ottara
 THOU Mony (Reserve)
 Silvia CARTWRIGHT (Absent)

The Accused: IENG Sary

Lawyers for the Accused:
 SON Arun
 Victor KOPPE
 ANG Udom
 Michael G. KARNAVAS
 KONG Sam Onn
 Arthur VERCKEN

Trial Chamber Greffiers/Legal Officers:
 Susan LAMB
 DUCH Phary
 Roger PHILLIPS
 DAV Ansan
 Simon MEISENBERG

Lawyers for the Civil Parties:
 PICH Ang
 Élisabeth SIMONNEAU-FORT
 TY Srinna
 VEN Pov
 Christine MARTINEAU
 Lyma NGUYEN
 SIN Soworn
 Beini YE
 KIM Mengkhy
 HONG Kimsuon

For the Office of the Co-Prosecutors:
 CHEA Leang
 Andrew CAYLEY
 Dale LYSAK
 SONG Chorvoin

For Court Management Section:
 UCH Arun
 SOUR Sotheavy

List of Speakers:

Language used unless specified otherwise in the transcript

Speaker	Language
MR. ANG UDOM	Khmer
MR. CAYLEY	English
MS. CHEA LEANG	Khmer
JUDGE FENZ	English
MR. KARNAVAS	English
MR. KOPPE	English
JUDGE LAVERGNE	French
MR. LYSAK	English
THE PRESIDENT (NIL NONN, Presiding)	Khmer
MR. PICH ANG	Khmer
MS. SIMONNEAU-FORT	French
MR. VERCKEN	French

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

2 (Court opens at 0909H)

3 MR. PRESIDENT:

4 Please be seated. The Court is now in session.

5 As the President of the Trial Chamber, and on behalf of the
6 Bench, I would welcome all parties to the proceeding, including
7 the Prosecution, the Lead Co-lawyers for civil parties, the
8 co-defence lawyers for the defence teams, who are present today.

9 [09.11.15]

10 The Chamber holds the hearing today, in order to hear the
11 submissions and observations by parties to the proceeding, as the
12 consequence and effect of the decision on the Co-Prosecutors'
13 appeals against the Severance Order and the scope of Case 002/01,
14 by the Supreme Court Chamber, dated 8 February 2013, document
15 E163/5/1/13. This is in order for the Trial Chamber to get all
16 the opinions so that it can form our decision regarding the scope
17 of the proceeding in Case 002/01, so that we can expedite the
18 proceedings. I would like now to declare the proceeding opened.
19 All parties are also reminded that during today's proceeding and
20 during this week proceeding, commencing from today, and on the
21 subsequent days next week, Judge Cartwright has some personal
22 businesses so that she cannot participate in the proceeding.
23 After I, through consultation with all the sitting Judges of the
24 Trial Chamber, we decided to appoint Judge Fenz, the reserve
25 International Judge, to replace Judge Cartwright during her

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1 absence until such time that Judge Cartwright returns to take her
2 usual position at the Trial Chamber. This is based on the Rule
3 79.4 of the ECCC Internal Rules.

4 [09.13.40]

5 Mr. Duch Phary, could you report the attendance of the parties
6 and individuals to today's proceeding?

7 THE GREFFIER:

8 Mr. President, for today's proceeding, all parties to this case
9 are present, except the accused Ieng Sary, who is present in the
10 holding cell downstairs, due to his health reason.

11 The accused Nuon Chea, is absent due to his health reason, and is
12 being hospitalized at the Khmer-Soviet Friendship Hospital.

13 However, through his counsel, Nuon Chea confirms that he does not
14 object to today's proceeding, as long as he has the opportunity
15 to take consultation with his defence team before responding to
16 the submission by the Prosecution.

17 [09.14.45]

18 Khieu Samphan states that he does not intend to participate in
19 today's proceeding. However, he requires to participate tomorrow.

20 The National Defence Counsel, Ang Udom, for Mr. Ieng Sary, is
21 absent today.

22 MR. PRESIDENT:

23 Thank you, Mr. Duch Phary.

24 Nuon Chea's defence, do you have any matters to raise before this
25 Chamber?

1 MR. KOPPE:

2 Thank you, Mr. President.

3 Good morning, Your Honours. Good morning counsel.

4 Our client has, indeed, agreed not to object to the continuance
5 of this very important hearing, today. However, because today's
6 submissions and arguments are so fundamental to this trial, he
7 has only agreed to waive, if we as his counsel, can properly
8 brief him about today's submissions, and receive, of course,
9 instructions after our consultations.

10 [09.15.53]

11 So before we can give our submissions, not today, tomorrow we
12 would like to give them. So we need to speak to our client first,
13 in order to be able to properly advise your Court. Thank you.

14 MR. PRESIDENT:

15 Thank you for your information.

16 International Counsel for Khieu Samphan, you may proceed.

17 MR. VERCKEN:

18 Thank you very much, Mr. President.

19 Good morning, Your Honours; and good morning to all parties
20 present. To supplement what my learned colleague has just said, I
21 wish to emphasize one point concerning the exchanges that we can
22 have with our client.

23 09.16.43]

24 Up until this morning, and to this very moment that I'm stating
25 this, we are still unaware of the position of the Co-Prosecutors

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1 in response to the questions being put by Your Honourable
2 Chamber, nor are we aware of the position of the civil parties.
3 However, what is of crucial importance is that, we have time to
4 reflect and contemplate with our client before the Co-Prosecutors
5 submit a very clear request concerning the expansion of the scope
6 of this Trial.

7 We would therefore, hope, and I believe that this is a shared
8 desire to be able to consult our clients and discuss this very
9 important issue. This is equally important since, Mr. President,
10 you have asked us to comment on how these proceedings will be
11 scheduled and organized. We believe that it would be much more
12 logical to, rather than solicit the opinions of all parties, as
13 far as Khieu Samphan's defence is concerned, we would prefer to
14 have an overall view and take a circumspect position on all of
15 the positions to be expressed, particularly by the
16 Co-Prosecutors, and then discuss with our clients, these matters,
17 and make very clear before Your Honourable Chamber our stance and
18 position.

19 Those are my comments, Mr. President.

20 [09.18.47]

21 MR. PRESIDENT:

22 Thank you.

23 The Trial Chamber would like to inform the parties and the public
24 that, on Thursday the 7 February 2013, the Chamber informed the
25 parties and the public that we will not hold the hearings between

1 the 11 to the 15 of February 2013 due to the health issue by the
2 accused Nuon Chea, who has been treated at the Khmer Soviet
3 Friendship Hospital; and we are scheduled to hear the witness
4 Elizabeth Becker, this week. And due to the continuing health
5 issue by Nuon Chea, and as he is being treated at the moment at
6 the Khmer Soviet Friendship Hospital, and in conjunction with the
7 decision by the Supreme Court Chamber regarding the
8 Co-Prosecutors' appeal against the - regarding the scope of Case
9 002/01, and taking into account the concerns of the effect of
10 that SCC's decision, we have to re-schedule the hearing of the
11 testimony of the next coming witnesses, or experts.

12 [09.20.26]

13 And the Trial Chamber is facing with the effect of this decision
14 so that we have to deal with this issue, principally first,
15 because it is the most urgent matter that we have to deal with.
16 For that reason, we issued our memo dated 12 February 2013, by
17 instructing all parties to provide their comments regarding the
18 nine points stated in paragraph 3 of that document -- that is,
19 E160/3/1/13/1, so that the Chamber can issue another decision
20 regarding the scope of Case 002/01 with sufficient basis and
21 grounds, which shall be consistent with SCC's decision and their
22 direction, dated -- in that decision, dated 8 February 2013, as
23 well as all the briefs and submissions by parties.
24 In our memorandum of understanding, we intend to hear the
25 comments and submissions made by parties in Case 002, regarding

6

1 the effect of the SCC's decision on the Co-Prosecutors appeal
2 regarding the scope of Case 002/01, and the Severance Order by
3 the Trial Chamber.

4 [09.22.11]

5 And it is planned, in fact, for the 14 and 15 last week. However,
6 due to the inability of certain parties to this case, we decided
7 to hold the hearing today, and if it doesn't conclude, then
8 tomorrow. Upon ceasing of the Case 002 dated 9 September 2007, by
9 the virtue of the Pre-Trial Chamber, who rules regarding the
10 appeal against the Closing Order by the accused Ieng Sary, Ieng
11 Thirith, Nuon Chea, and Khieu Samphan, and after the conclusion
12 of the initial hearing in 2011, and pursuant to Rule 89ter of the
13 Internal Rules, on 22nd September 2011, the Trial Chamber issued
14 a Severance Order in Case 002. So there will be separate hearings
15 by focussing on particular portions of the Indictment.

16 In each segment of the trial, there shall be a judgment and a
17 conviction, if the Accused is found guilty -- that is, document
18 E124.

19 [09.23.50]

20 Also, on the same day, in its Press Release, the Chamber stated
21 that the trial proceedings, at this sheer scope and complexity
22 and due to the advanced age of the Accused in Case 002, which
23 have been the experience in various other international
24 tribunals, could last for at least 10 years, and if there is no
25 Severance Order, the hearing at this magnitude will last that

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1 long. Please refer to that information.

2 For the first segment of the trial in Case 002/01, we determined
3 the scope of the facts including the historical background of the
4 Communist Party of Kampuchea, the communication, the military
5 structure, as well as the facts concerning joint criminal
6 enterprise, and the applied policies on the forced transfer.

7 [09.25.05]

8 These are the crimes charged concerning the forced movement,
9 phase 1 and 2, as well as the role of the Accused. And as for the
10 law, the crimes charged are crimes against humanity, including
11 six points: murder, up to the forced movement phase 1; mass
12 killing, limited to phase 1 and 2; political and all other
13 inhumane acts, which has the impact on the human dignity, as well
14 as the political persecution limited to the forced movement, and
15 other inhumane acts within the limit of the forced movement,
16 phase 1 and 2; and number 60 forced disappearance limited within
17 phase 2 of forced movement; and then the forms of responsibility
18 and the characters of the Accused.

19 Please refer to document E124/7.2, which is an annex to the
20 Severance Order, in Case 002/01.

21 [09.26.48]

22 Upon seizing the notification of the Severance Order decided by
23 the Trial Chamber, on the 3rd of October 2011, the Co-Prosecutors
24 submitted to the Trial Chamber to reconsider the Severance Order,
25 and request for the amendment to the Severance Order, so that the

1 Trial Chamber is requested to include certain crime sites within
2 the scope of Case 002/01.

3 The Co-Prosecutors raised various reasons; namely, that the
4 Severance Order by the Trial Chamber is not in the interest of
5 justice because the crimes selected for the prosecution in Case
6 002/01, as claimed by the Co-Prosecutors -- which is likely to be
7 the only Trial in Case 002 -- does not reflect all the crimes
8 charged in the Indictment.

9 [09.28.00]

10 Please refer to document E124/1, and E124/2.

11 On the 18 October 2011, the Trial Chamber rejected the request
12 for the reconsideration by the Co-Prosecutors, and the reason
13 that we gave is that, we would consider the ability to request
14 for other facts, if considered necessary by the Trial Chamber --
15 document E1 -- E124/7.

16 On the 27 October 2012, the Co-Prosecutor requested for the
17 expansion of the scope in Case 002/01, by inclusion, three crime
18 sites. Out of those nine crime sites; namely, the killing site at
19 District 12, and at Tuol Po Chrey, and the Security Centre at --
20 of S-21, including Choeng Ek killing site, as well as the purges
21 from the new North, from the Centre Zone and from - but it does
22 not include the Prey Sar work site -- that is, S-24.

23 [09.29.28]

24 Upon seizing the submission by the Co-Prosecutors, the Trial
25 Chamber invited all parties to Case 002 to provide their oral

1 arguments in the Trial Management Meeting, on the 27 of August
2 2012; and on the 8 October 2012, the Trial Chamber issued its
3 decision to reject the request for the expansion of the scope in
4 Case 002/01, by the inclusion of the killing sites at District 12
5 and Security Centre S-21, but agreed to include the killing sites
6 at Tuol Po Chrey, as it is of the view that the killings happened
7 immediately after the forced evacuation of people from Phnom
8 Penh, which was part of the forced movement phase 1, and it
9 amended the annex to the Severance Order, document E124/7.3, in
10 which it states the facts as alleged by the inclusion of the
11 killing site of Tuol Po Chrey.

12 [09.30.51]

13 As for the law, it included the killing at Tuol Po Chrey, as
14 well, and the political persecution was also included for the
15 Tuol Po Chrey killing site.

16 On 7 November 2012, the Co-Prosecutors launched their immediate
17 appeal against our decision to the Supreme Court Chamber. And the
18 Supreme Court Chamber subsequently made their decision on 8
19 February 2013 in which it decided to accept the immediate appeal
20 by the Co-Prosecutors' pursuant to the relevant Internal Rules,
21 and it declared the invalidity of the severance of Case 002, and
22 announced the impugned decision.

23 [09.32.01]

24 However, the Supreme Court Chamber gives their direction in parts
25 of its decision, in particular in paragraph 50, which opened the

1 way for the Trial Chamber to reconsider the severance of Case
2 002, pursuant to Rule 89 ter of the Internal Rules. It also
3 directs the Trial Chamber in principal that it should do so
4 appropriately.

5 I would like now to give the floor to all the relevant parties,
6 so that you can make your observations, and give your positions
7 regarding the nine points as we raised in our memorandum, in
8 particular in paragraph three, as well as various other requests
9 concerning these various subject matter.

10 And as we already notified the parties in our notification, that
11 today's proceeding will be of the oral arguments raised by the
12 Co-Prosecutors, and by the Lead Co-lawyers, as raised and
13 indicated in our memorandum.

14 [09.33.35]

15 And all parties are given the opportunity to make their brief
16 response. And then the defence teams will be given the
17 opportunity, as well, to present their understanding and
18 position. And other parties, including the Prosecution, will give
19 the floor for their brief remarks and response.

20 To start with, the floor is now open and given to the
21 Co-Prosecutors to respond to the questions that we put to the
22 Co-Prosecutors, and the Lead Co-lawyers. The question is: The
23 Trial Chamber Severance Order and related decisions reflect the
24 concern that the entirety of the charges in the Case 002 Closing
25 Order, are likely to be able to be tried within the Accused

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1 likely lifespan, or before they become unfit to stand trial. So
2 what are your views on these concerns?

3 (Judges deliberate)

4 [09.35.18]

5 MR. PRESIDENT:

6 I learned that there was no translation just now. I did not know
7 when the translation paused, but Court Officer, can you please
8 check with the interpretation booth.

9 Court Officer, it is not an issue with the translation. Actually,
10 it was confusion. I did not see the interpreters who -- liaison
11 interpreter who was supposed to sit behind the Bench.

12 Now, I hand over the floor to the Prosecution. You may proceed.

13 MR. CAYLEY:

14 Yes, thank you, Mr. President.

15 May I make a suggestion which, I think, will actually expedite
16 this process? Rather than going to one question, and getting the
17 submissions of all of the parties on a single question, and then
18 moving to the next question, might I suggest that we address all
19 of these issues together, because I think they are all
20 interconnected and I genuinely believe that actually we certainly
21 can move through this much more quickly if we address all of
22 these questions, as opposed to going one question after another,
23 which, I think, will take a considerable period of time?

24 (Judges deliberate)

25 [09.41.52]

12

1 MR. PRESIDENT:

2 The Chamber wishes to advise the Prosecutor that the Chamber has
3 outlined nine issues for parties to respond and this was sent to
4 all parties, well in advance, and the Chamber has discussed this
5 matter amongst the Judges of the Bench, and we believe that this
6 outline was meant to ensure that the opinions and views of
7 parties comprehensive and complete. That's why the Chamber is of
8 the opinion that the direction to the parties to respond to these
9 nine issues, will be beneficial for the Chamber to issue a new
10 decision better, and the Chamber views that the upcoming decision
11 to be issued by the Chamber, will not be criticized or plunged
12 into any problem.

13 So for this reason, the Chamber directs that the party respond to
14 the nine questions outlined by the Trial Chamber as per the
15 memorandum of the Trial Chamber, dated the 12th of February 2013.

16 [09.43.37]

17 MR. CAYLEY:

18 Just to clarify, Mr. President, in case there's any uncertainty.
19 Of course, yes, we are going to address the nine points that you
20 have set out in your memorandum, but we believe that it's a much
21 more efficient use of time that we do that together, in one
22 group, and we will use considerably less time than if we're
23 getting up and down to answer each question. And that's certainly
24 what I understand you're saying, is that's what we can do to
25 address all of the nine points, yes, we will do that.

1 MR. PRESIDENT:

2 Thank you.

3 I hand over the floor now to the defence lawyer.

4 You may proceed.

5 [09.44.35]

6 MR. KARNAVAS:

7 Thank you, Mr. President. And good morning, Your Honours, and
8 good morning to everyone in and around the courtroom.

9 Setting aside efficiency, which I do agree is a consideration
10 and, in fact, what is being proposed is efficient. The Prosecutor
11 would go on and address all nine points. Then, because we have
12 our own respective clients, some who are not here, some who may
13 not necessarily be able to follow the proceedings, we need to
14 consult with them. We need to make sure they know what the
15 Prosecution and civil parties' position is, and after that, we
16 can respond. So, based on what the application made, or the
17 submissions made by both the Nuon Chea, and Khieu Samphan Team,
18 and based on our clients' state of health as it is, and if you
19 see today, the doctor said that he's having problems following
20 the proceedings, we think it is highly useful for the Prosecution
21 to address all nine issues, along with the civil parties, allow
22 then the Defence, to consult with the clients, get instructions
23 and then respond.
24 After all, we cannot go forward without receiving instructions
25 from our clients. Thank you.

14

1 [09.47.52]

2 MR. PRESIDENT:

3 Yes, Civil Party Lawyer, you may proceed.

4 MS. SIMONNEAU-FORT:

5 Thank you, Mr. President. Good morning to everybody. We would
6 agree with the Prosecutors, we will answer the nine questions
7 that have been put to us by the Chamber. But we do think that it
8 will be simpler to answer in one go. Firstly, the Prosecution and
9 then for ourselves; that way we respect a kind of consistency,
10 and, of course, the questions are linked so the answer to one
11 leads into the answer to the second. So that is the way we would
12 propose that it be done. Thank you.

13 (Judges deliberate)

14 [09.53.48]

15 MR. PRESIDENT:

16 I hand over to Judge Fenz, in order to clarify this in case there
17 has been any issue with translation.

18 JUDGE FENZ:

19 Yes, apparently, there has been a translation issue. What the
20 President says, and what the Chamber has decided is, that we
21 stick with the original order of questioning and answer, as
22 outlined in the memo. That means, first question, Prosecutor
23 answers, the floor is given to colleague lawyers, we proceed to
24 the next question. Now, shortly to the reasoning, we agree with
25 the Prosecution that all these questions are interlinked, but

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1 this memo is designed along the reasoning in the Supreme Court
2 decision. This is basically what the Supreme Court thinks we need
3 an answer for, to make an informed decision.

4 [09.54.43]

5 We wish to avoid that these issues are finally somehow glossed
6 over with, and some un-clarity as to what choices party wish to
7 make, or wish the Chamber to make remains. For this reason, these
8 very pointed questions, and the need to get an answer to these
9 questions. So, to repeat, we stick with the original order, as it
10 was outlined in the schedule.

11 MS. CHEA LEANG:

12 Good morning, Your Honours, members of the Bench. Good morning
13 parties, good morning members of the public in the public
14 gallery. I thank you, Your Honours, for granting us the floor to
15 address you today, and the invitation of the Chamber concerning
16 the implication of invalidity of the severance of Case 002,
17 following on from the Supreme Court Chamber decision of the 8 of
18 February 2013.

19 [09.57.14]

20 Your Honours have requested to hear our views, and those of other
21 parties on a number of issues. The Chamber – the Prosecutor will
22 recall some of the decision of -- leading to the decision of the
23 Supreme Court Chamber. The decision of the Supreme Court Chamber
24 makes fundamental findings on matters of legal principle, but it
25 is important to emphasize that the consequences of its decision

1 are actually quite simple, and need not cause undue delay to
2 these proceedings.

3 This is why we are particularly grateful that Your Honours acted
4 so quickly to convene these hearings. There might have been some
5 misunderstanding as to the effect of the Supreme Court decision,
6 that's why to begin with, I would like to emphasize a point for
7 the public that the decision of the Supreme Court Chamber does
8 not invalidate the entire proceedings in Case 002.

9 The time that has been spent and the evidence that has been heard
10 so far, has not been wasted.

11 [09.59.00]

12 MR. PRESIDENT:

13 Prosecutor, please pause because I note the defence counsel is on
14 his feet.

15 Counsel Karnavas, you may proceed.

16 MR. KARNAVAS:

17 Thank you, Mr. President. I assume, based on the Court's
18 directions that we were going to go one by one on the questions.
19 Now it appears that the Prosecution is giving either an opening
20 statement, or commenting. I assume that we may have an
21 opportunity, at some point, but we need clarification. Is the
22 Prosecution going to be commenting on the decision, or are they
23 going to be answering the questions? Because the memo is quite
24 clear. You want to hear certain questions. I don't think the
25 Trial Chamber needs, at least at this point, an analysis of the

1 decision.

2 [09.59.42]

3 I mean, either way, it doesn't matter to us, but I thought that
4 was the purpose of saying, "Go down the questions", when you
5 called upon the Prosecution. So, perhaps we can skip the speech,
6 and get to the answers to the questions. Thank you.

7 MS. CHEA LEANG:

8 Mr. President, I'd like to clarify on this point. To start with,
9 I will give some background as to what has led to the appeal and
10 my colleague will respond to the points raised in your
11 memorandum, point by point. So this does not mean that we'll not
12 abide by your instructions, Your Honours, but at least, we should
13 understand the background of that decision.

14 (Judges deliberate)

15 [10.01.10]

16 MR. PRESIDENT:

17 Thank you, the Co-Prosecutor. Could you please make a brief
18 presentation regarding the background as the essence of what we
19 want, is your response and other parties responses to all the
20 nine questions that we put to you as a consequence of the
21 decision by the Supreme Court Chamber, as it will have great
22 impact on the proceedings being carried out by the Trial Chamber
23 in Case 002/01.

24 If there were no impact, we would not conduct this hearing today.

25 MS. CHEA LEANG:

1 Thank you, President, and of course, the background statement
2 that I make is brief, and we will take our time to respond to
3 your questions, point by point.

4 Allow me to continue, Mr. President.

5 The Supreme Court decision requires Your Honours to correct the
6 way in which the severance of Case 002 has taken place.

7 [10.02.30]

8 In fact, it is not a matter of what was done, but how it was
9 done. At this time, these proceedings still rest on the whole
10 Closing Order of 16 September 2010. Following on from this
11 hearing, this Trial Chamber will make another determination on
12 severance on what subject matters should form part of these
13 proceedings. The anticipation is that the hearing of evidence in
14 Case 002/1 will come to a conclusion this year, followed by
15 judicial determination thereafter.

16 I should like to set out the Co-Prosecutor's consistent position
17 on the severance of Case 002, by referring to the manner in which
18 this issue has unfolded over the past 16 months.

19 My fellow International Co-Prosecutor will then address you on
20 the pragmatic requirement of severing the case, once again, and
21 put forward our concrete recommendations in this regard.

22 In essence, Your Honours, the Supreme Court Chamber has directed
23 at paragraph 50 of its decision, that the severance of Case 002,
24 can be based on one of only two possible objectives: One, to
25 effectively manage a complex, multi-accused case by splitting the

1 charges into multiple stages of trials, planned in at once. And
2 two, to accept that the deteriorating health of the co-accused,
3 and the interest in reaching a final verdict in these
4 proceedings, require that a set of representative charges be
5 heard while others, however, regrettably and indefinitely stayed.

6 [10.05.20]

7 This is the pressing decision before Your Honours, having heard
8 the views of the parties, both today and tomorrow.

9 Your Honours, since the Severance Order of 22nd September 2011,
10 the Co-Prosecutors' consistent position has been, and remains,
11 that severance of Case 002 is in the interest of justice. We have
12 never opposed severance of this case. We have simply objected and
13 tried to be heard on the form of the severance. Eleven days after
14 your order of 22nd September 2011, we requested that you
15 respectfully reconsider its terms concerning the sequencing of
16 specific charges, and the choice of crime sites, while fully
17 concurring with the imperative of severance.

18 We asked Your Honours to consider a more representative set of
19 crime sites -- that is, nine sites in addition to phases 1 and 2
20 of the forced movement, and charges encompassing a broader range
21 of crimes against humanity, that more fully reflect the
22 implementation of the five policies of the joint criminal
23 enterprise identified in the Closing Order.

24 [10.07.35]

25 And internal review at this stage, led to the difficult decision

1 to not request the priority consideration of genocide and also
2 war crimes charges in Case 002/01. The Co-Prosecutors considered,
3 at the time, that judicial consideration of these nine additional
4 sites would have satisfied the international standard of
5 representativeness of the totality of the crimes charged, and
6 would have safeguarded the important objectives of the agreement
7 between the United Nations and the Royal Government.

8 Although our request to reconsider the sequencing of specific
9 charges, and the choice of crime sites was denied, Your Honours
10 acknowledged that you would be guided by the Co-Prosecutors'
11 views in expanding the scope of trial, and that is entirely
12 proper.

13 The trial must be fair to the co-accused, but the Co-Prosecutors
14 bear the burden of proving the case against these three elderly
15 defendants.

16 [10.09.05]

17 To adduce evidence, piece by piece, takes detailed planning to
18 avoid redundancy or repetition. To rebut evidence with candour
19 and conviction is no less important to the fairness of these
20 proceedings, but does not impose the same positive burden.

21 In January 2012, as the trial progressed, the Co-Prosecutors
22 requested Your Honours to include just three of the original nine
23 crime sites we had requested. This request was opposed by Ieng
24 Sary, and Khieu Samphan. Our request was considered and left
25 open. Your Honours stated, at the time, that the Chamber "may, on

1 its own motion, decide in due course to expand the scope of trial
2 in Case 002/01, in exercise of its trial management discretion" -
3 end of quote.

4 [10.10.35]

5 A further eight months passed, and on 3rd August 2012, in
6 preparation for a Trial Management Meeting, Your Honours
7 indicated that the Chamber "may be willing to compensate a modest
8 extension" - end of quote - to include executions of evacuees at
9 District 12, and of former Lon Nol Soldiers, and officers at Tuol
10 Po Chrey, and crimes committed at Security Centre S-21, and the
11 related execution site, Choeng Ek, and invited specific
12 submissions on this point.

13 Your Honours found reason to agree with the Co-Prosecutors, thus
14 the addition of these proposed additional sites, maybe in keeping
15 with the chronological and logical sequence of events to be heard
16 in Case 002/01.

17 In advance of the trial management meeting, the Co-Prosecutors
18 notified the Trial Chamber that the inclusion of crime sites as
19 S-21, District 12 and Tuol Po Chrey would significantly assist
20 the Co-Prosecutors to meet their burden of proof by providing
21 strong evidence of the criminal intent behind the forced
22 movements of the population.

23 [10.12.18]

24 We were the only party to submit written positions in advance of
25 this meeting. We did so in the interest of fairness and

1 transparency to ensure adequate notice and time for preparation
2 for all parties. We indicated that witnesses relevant to this
3 site would need to be heard by the Chamber in any event as part
4 of the Co-Prosecutors' proof of the true purpose behind the 17
5 April 1975 evacuation. This position was reiterated two days
6 later -- that is, at the trial management meeting itself.
7 Your Honours seem to have disagreed with these arguments in
8 favour of the inclusion of S-21 and District 12, while finding
9 reason to include killings of Lon Nol soldiers at Tuol Po Chrey.
10 The Chamber disposed of our request of 27 January 2012 by Your
11 Honours' memorandum of 8 October 2012, after a lapse of more than
12 seven months.

13 [10.14.00]

14 Eleven days later, the parties were conclusively advised that no
15 further extensions of the scope of trial in Case 002/01 would be
16 entertained. It was in this context that the Co-Prosecutors
17 considered that recourse to appeal was necessary. Our assessment
18 at that stage reflected in substance the second of the two
19 options put before Your Honours by the decision of the Supreme
20 Court that only one trial was likely to take place in
21 circumstances where the fixed scope of trial would not be
22 reasonably representative of the charges in the Closing Order.
23 Once again, I am grateful to Your Honours for entertaining this
24 brief review of the procedural history regarding the issue of
25 severance in Case 002. We believe it is important for both the

23

1 trial record and for the public to know of the actual
2 circumstances which have led us to this point.

3 I ask that my fellow Co-Prosecutor be permitted to address you on
4 the way forward from here and the request by us regarding the
5 expansion of the crime sites.

6 I am grateful, Mr. President.

7 [10.15.54]

8 MR. PRESIDENT:

9 Thank you.

10 The International Co-Prosecutor, you may proceed.

11 MR. CAYLEY:

12 Thank you, Your Honours.

13 The way that you've structured this is going to mean that certain
14 questions have very, very brief answers because, frankly, the
15 answers are self-evident from the question. So I'm not going to
16 labour points where the answer to the question is absolutely
17 obvious, and that's why I was making the suggestion earlier to
18 try and save some time, but as you wish.

19 The first question: our views on whether or not it's likely that
20 the entirety of the charges in Case 2 -- in the Case 002 Closing
21 Order will be tried within the Accused' likely lifespan or before
22 they become unfit to stand trial, I think you will find -- if you
23 look at the record of these proceedings -- that we have
24 consistently taken the position that it was highly unlikely,
25 intangibly remote, that these three Accused would be tried for

1 all of the charges in Case 002. So we agree with that concern.
2 The reason that we're all here today has actually not anything
3 directly to do with that concern; it's to do with what kind of
4 case these individuals would be tried for. That has been our
5 concern.

6 [10.17.23]

7 We don't disagree with this proposition; we simply disagree with
8 this Trial Chamber about the scope of the case that they are
9 confronting because we believe that this will be the only trial
10 and that within that trial, there should be a reasonably
11 representative sample of charges and crime sites, but the answer
12 to that question -- you don't want me to talk about that now --
13 you want me to talk about that later. So those are the very
14 limited submissions.

15 I think it would help Your Honours, actually, for the purposes of
16 the public to do one thing very briefly, and that's to actually
17 set out, because nobody has said it yet, what the central
18 guidance of the Supreme Court Chamber was, and I can do that in
19 about 45 seconds.

20 The direction that they provided to this Trial Chamber when
21 adopting severance was this, that the Trial Chamber must be clear
22 about whether its adopting severance a) in the interest of
23 judicial manageability of multiple trials, so several trial or,
24 b) because there will only ever be one trial owing to the
25 deteriorating health of the Accused.

1 [10.18.36]

2 Now, whichever one of those two options you adopt and you choose
3 has clear consequences for the Chamber. If you go with Option A
4 of multiple trials, the Supreme Court Chamber has directed you to
5 come up with a plan, to tell everybody, the parties, how we are
6 actually going to do that. And again, I know you don't want me to
7 speak about what the problems are -- you want to talk about that
8 later -- but you have to understand that all of these issues are
9 linked. They're not singular issues. You've got to look at this
10 thing as a whole.

11 Now, secondly, if you go with Option B, which is a single trial
12 owing to the deteriorating health of the Accused -- and this is
13 absolutely fundamental here -- you must ensure that there is a
14 reasonable representative standard within that trial. And, in
15 fact, the Supreme Court Chamber has directed you to look at
16 international standards on this issue, because in other
17 international criminal courts in the ICTY, the ICTR, the guidance
18 is much more substantial on this issue. So representativeness is
19 absolutely critical. It's at the heart of why we are here.

20 So those are my submissions on the answer to the first question.

21 I'll have more to say on all of these issues as we go along.

22 Thank you.

23 [10.20.02]

24 MR. PRESIDENT:

25 Thank you.

1 The floor is now given to the Lead Co-Lawyers for civil parties
2 to respond to the first question. You may proceed.

3 MS. SIMONNEAU-FORT:

4 Mr. President, Your Honours, as Madam Co-Prosecutor has done, I
5 wish to take a few moments prior to responding to the first
6 question to outline some of the issues that the civil parties
7 have identified with respect to the Severance Order. We cannot
8 fully understand a proper response if we are not to fully grasp
9 all of the issues, matters driving our position. It is most
10 regrettable that we were not able to hold proceedings or debate
11 prior to the Severance Order. The time has come now, and I would
12 simply wish to recall a few points, and then we will proceed by
13 answering each of the nine questions as per the request of Your
14 Honourable Chamber.

15 [10.21.06]

16 These nine questions do not constitute the issues -- the problems
17 that the civil parties have identified with respect to the
18 Severance Order. I would call your attention to paragraph 4 of
19 the memo of the 14th of February since we believe that there are
20 other cumulated problems that stem from the Severance Order. I
21 will not address them now as it would be more timely to address
22 them following these proceedings.

23 The decision of the Supreme Court Chamber highlighted a certain
24 number of matters which were all unequivocally addressed in the
25 submission of the civil parties 16 months ago. On the 18th of

1 October 2011, all of these matters were addressed and must be
2 responded to by the Trial Chamber today. Some of them have been
3 encompassed in the nine questions. Other problems will be
4 addressed at a later date, and I would wish to expand upon them.
5 I would also add that in an ideal world, the civil parties would
6 have liked to see all of the facts of this case examined. How
7 could it not be otherwise?

8 [10.22.43]

9 On many an occasion, we have been able to call to your attention
10 the diversity of civil parties, which is not surprising given the
11 magnitude of such a trial concerning mass atrocities and crimes
12 that concerned members of religious orders, intellectuals,
13 soldiers, merchants, workers and peasants, the Vietnamese victims
14 of specific crimes such as forced marriage, for example, as well
15 as Khmer Rouge who were victims of major purges. The
16 victimization is quite varied. How could we not want to see each
17 and every one of these victims have the facts tried, the facts
18 which have caused their harm? How could one not expect that each
19 of their judicial expectations for justice to be done, for the
20 fight against impunity to be fully carried out?

21 [10.23.53]

22 The civil parties obviously want to see exhaustive examination of
23 all of the facts and it is our duty to call to your attention
24 this imperative. However, today, it is not possible to proceed as
25 if the preceding 16 months of trial have not occurred.

1 Over the course of these 16 months, we have received some
2 answers, some of them implied, some of the explicit, some of them
3 absolute. We have also heard from witnesses, experts, as well as
4 civil parties summoned before this Chamber and they were summoned
5 based on a confined trial dealing solely with forced transfer.
6 Certain documents were adduced and tendered, and yet we were
7 facing restrictions because of the health conditions of the
8 Accused and their advanced age. Their health has deteriorated to
9 the extent of having an impact on the proceedings. Since 2012,
10 the trial sittings have been reduced to three days a week. To try
11 the totality of crimes and facts would not only extend the
12 proceedings because of all of the documents to be introduced and
13 all of the witness testimony to be heard, but that could also
14 very well compromise the work that has been done to date.

15 [10.25.47]

16 The Trial Chamber is entirely correct. As stated in paragraph 3
17 of its memorandum under point 6, to emphasize that the expansion
18 of a trial scope would necessitate the recall of certain
19 witnesses in order to re-examine certain documents. This strikes
20 us as entirely impossible given today's circumstances.
21 The decision of the Supreme Court Chamber, while it contains very
22 relevant grounds and while it correctly raises legal issues that
23 the civil parties have already addressed, comes far too late as
24 it simply annuls pure and simply the Severance Order, a request
25 that was not even made by the Co-Prosecutors. By arriving at such

1 a late point in time, this decision, in the view of the civil
2 parties, loses relevance and renders part of the decision too
3 abstract to fulfil the expectations of the civil parties. It is
4 impossible to cover the totality of crimes and facts and, as far
5 as we are concerned, the civil parties believe that we are not
6 dealing in a purely abstract or academic trial, but rather a
7 trial that has been ongoing for the last 16 months, which has
8 very concrete objectives.

9 [10.27.37]

10 We will be providing answers to your questions which you will
11 also hear in conjunction with three additional points. We are
12 guided by this reality, as well as a very obvious pragmatism that
13 stems from the previous 16 months of proceedings, which is driven
14 by what has been said not only by the witnesses, civil parties or
15 witnesses, but also stated very clearly by all parties and Your
16 Honourable Chamber.

17 It is for that reason -- and this brings me to my concluding
18 remarks -- we will not be seizing today's opportunity to re-open
19 a brand new trial to try all of the facts. This does not serve
20 our interests. In fact, it is counter to the interests of justice
21 and certainly counter to the interests of the civil parties. I
22 simply want to impress upon you that the civil parties will
23 certainly embrace an approach that is reasonable, that takes into
24 consideration all that has been achieved in this trial and in the
25 proceedings to date.

30

1 I thank you, Mr. President and Your Honours.

2 [10.29.04]

3 MR. PRESIDENT:

4 Yes, you may proceed, but please respond to the question
5 specifically, because now the Chamber needs to take serious
6 consideration and we need the matter to be addressed as
7 specifically as possible so that we can address the issue
8 objectively. That's why the Chamber has directed the parties to
9 respond to the issues and express their views on the various
10 issues put forward by the Chamber.

11 [10.29.42]

12 MR. PICH ANG:

13 Thank you, Mr. President. Good morning, Your Honours and good
14 morning to members.

15 I would like to respond to each and every question outlined by
16 the Chamber. The first question concerns the -- concerns that the
17 entirety of the charges in Case 002 Closing Order are likely --
18 or unlikely, rather, to be able to be tried within the Accused
19 lifespan or before they become unfit to stand trial, and this is
20 our joint concern. We are very concerned that this is an issue.
21 So I would like to share our concern with the Chamber. We are
22 worried that the Accused might not stand trial until the
23 conclusion of trial, so I also suggest that the Chamber consider
24 the appropriate scope in the first trial.

25 [10.30.55]

1 MR. PRESIDENT:

2 Thank you.

3 The time is now appropriate for adjournment. The Chamber will
4 adjourn now until 10 to 11.00.

5 The Court is now adjourned.

6 (Court recesses from 1030H to 1051H)

7 MR. PRESIDENT:

8 Please be seated. The Court is now back in session. Thank you.

9 The floor is now given to the Co-Prosecutors and the Lead
10 Co-Lawyers to respond to the second question as follows: the
11 Trial Chamber's Severance Order and related decisions were
12 expressly motivated by a concern to preserve its ability to
13 render any timely verdict in Case 002. As a general matter, would
14 you prefer the Chamber to attempt to try a broader array of
15 charges and factual allegations in Case 002 at the risk of no
16 verdict being ultimately obtained, or do you consider it
17 preferable to proceed instead in relation to a more limited array
18 of charges and factual allegations, thereby increasing the
19 likelihood that a verdict can be rendered? That is the question.
20 The floor is now given to the Co-Prosecutors.

21 [10.53.18]

22 MR. CAYLEY:

23 Thank you, Your Honours.

24 Some level of repetition, I'm afraid, because these questions are
25 so interlinked. Certainly opposition has been from the very start

1 of this issue back in 2011 that we would wish for this case to
2 proceed upon the basis of a more limited scope of charges, the
3 reasons referred to in the first question.

4 Our dispute with the Chamber is simply whether or not the
5 particular charges selected in the Severance Order, the crime
6 sites that were selected, are representative of the indictment of
7 the Closing Order as a whole, and we say that those matters that
8 you selected are not representative and indeed, again, to repeat
9 myself, if you go to the Supreme Court Chamber's decision, they
10 agree with us and they say that you have to address that issue in
11 your new Severance Order.

12 [10.54.22]

13 So, yes, we do agree that this case should proceed on a more
14 limited array of charges and factual allegations because we
15 believe that that will increase the likelihood of a verdict, but
16 we say that those matters that you select for the new Severance
17 Order should have this reasonable representativeness quality. And
18 I think you will guess that I am in favour of the second option
19 that the Supreme Court Chamber gave you, which is the option that
20 there will only be one trial and, thus, you must ensure that that
21 trial, again to repeat myself, is reasonably representative of
22 the case as a whole.

23 One final comment and then I've completed what I have to say on
24 this, I noticed -- I heard earlier my colleague, the
25 International Lead Co-Lawyer for the civil parties say that this

1 is all very late, and I understand her frustration. It is very
2 late in the day that this decision comes down, but it is a
3 decision of the Supreme Court Chamber, and whether it's late or
4 not, we, this Court, the parties, have to follow the direction
5 that is given in that decision. And also, I would emphasize to
6 you, even though we follow these questions, it's absolutely
7 imperative that the parties are all properly heard. That's what
8 the Supreme Court Chamber stated. We have to be heard on these
9 issues because it goes to the heart of this case, and these
10 issues have to be resolved very, very quickly. We all know that,
11 but we must all be properly heard.

12 Thank you.

13 [10.56.14]

14 MR. PRESIDENT:

15 Thank you.

16 The floor is now given to the Lead Co-Lawyers for the civil
17 parties. Please make a direct response to the question.

18 MR. PICH ANG:

19 Thank you, Mr. President.

20 To respond to the second question, the Lead Co-Lawyers and the
21 civil parties themselves would not like to have one trial
22 covering all the facts in Case 002. The civil parties would like
23 a trial where a verdict can be issued and occurs in the spirit of
24 the severance of the case. It is a relief for the civil parties
25 to see a shorter trial where a verdict could be possible. And, of

1 course, the trial should be proportionate to the actual situation
2 of the health of the Accused, as well as the financial constraint
3 faced by the Court.

4 My international colleague would like to add to what I just
5 stated.

6 [10.57.43]

7 MR. PRESIDENT:

8 Yes, you may do so.

9 MS. SIMONNEAU-FORT:

10 I don't have a complementary point to make on each question, but
11 here I would like to make a clarification. The Supreme Court
12 decision is not too late because it raises questions that have
13 not yet been dealt with, and as far as we're concerned, it is
14 excellent that these things have come up again before this Court.
15 I was simply saying that it is tardy in the sense that it totally
16 annuls the severance. That's not quite the same.

17 [10.58.19]

18 On the second question that has been put to us by the Chamber, I
19 would simply add a few thoughts because it obviously doesn't lend
20 itself to a yes or no answer. It's not a simple case of
21 alternatives, on the one side, a judgment within a reasonable
22 time limit and, on the other, a wider scope of trial with a risk
23 of no sentence. Obviously, it's not quite like that. You have to
24 find a balance, and the balance has, of course, been adjusted as
25 the discussions have proceeded.

1 Two basic ideas on this subject I will share with the Chamber
2 which are necessary, I think, to make a decision. The first point
3 is that if representativity relates to the choice of facts that
4 you choose to bring up, then such representativity also relates
5 to the way in which such facts are treated in the debate. What I
6 mean by this is as of the point in time when there has been
7 severance and when we are limited to forced transfer 1 and 2,
8 then we are limited to asking questions, submitting documents and
9 intervening by looking for the causes and the effects of the
10 transfers by connecting them with other events with a view to
11 giving meaning to this trial and to make, insofar as it is
12 possible, a representative trial that ends within a reasonable
13 time.

14 [11.00.01]

15 We are therefore not obliged to include all of the facts for the
16 trial to be representative. You simply have to include certain
17 events and facts, and here we fully share the position of the
18 Co-Prosecutors. We were not against severance. We were against
19 severance as it was done.

20 My second point, which I think is important, especially with
21 respect to the civil parties, is that, as we have said before, as
22 far as we're concerned, a trial is not a simple decision. The
23 decision has to be rooted in debate which gives it substance. In
24 a trial such as this one, the completion of which depends on a
25 great many rather random factors, we should not attach much

1 greater importance to the final decision than to the discussions
2 that lead to it. The latter is just as crucial as the final
3 decision, and even if quite obviously our goal, as in any trial,
4 is to reach a final sentence, everything that happens before in
5 the trial proceedings, is something that makes a positive
6 contribution to the search for justice. Now, I wanted to point
7 this out to you because the answer to question number 2 that we
8 are being asked lies in a delicate balance between reasonable
9 time limits and at the same time the representative nature of the
10 trial as a whole. Thank you.

11 MR. PRESIDENT:

12 Thank you.

13 The floor is now once again given to the Co-Prosecutors and the
14 Lead Co-Lawyers--

15 I'd like first to give the floor to Judge Fenz. You may proceed.

16 [11.02.18]

17 JUDGE FENZ:

18 I just wanted to highlight a factor relevant in this balancing
19 exercise. I'm sure it's clear to the parties, so this is
20 basically aimed at the public who should understand what we are
21 doing here.

22 We are talking about the likelihood of a verdict. A verdict needs
23 to be written. The writing of a verdict can only start once
24 evidentiary proceedings are finished. That means there will not
25 be a verdict on the day after the closing speeches. Now, I will

1 not speculate on the time needed for writing this verdict, but
2 perhaps we can get some idea on the time possibly needed when we
3 look at Case 001. This was a case against one accused dealing
4 with basically one crime site. After the closing speeches it took
5 eight months for the Trial Chamber to get the verdict out.
6 Proceedings before the Supreme Court took another roughly one and
7 a half years. So, if we edge this, we arrive at -- if I
8 calculated correctly -- two years and three months to achieve a
9 final verdict after the closing speeches.

10 [11.03.55]

11 Now, this case is a case against three Accused with arguably more
12 evidentiary and legal challenges. The reason I'm mentioning it
13 here is first of all transparency for the public and secondly --
14 but I'm sure this has happened already -- to ensure that the
15 parties take this factor into consideration in further arguments.
16 Thank you.

17 MR. PRESIDENT:

18 Thank you.

19 I'd like to give the floor first to the Co-Prosecutors and then
20 the Lead Co-Lawyers to respond to the third question.

21 And the third question is the following: at the time of the SCC
22 decision, the Trial Chamber was nearing the conclusion of Case
23 002/01. It estimates that relatively few additional courtroom
24 days in the presence of all three Accused were required in order
25 to conclude hearing of evidence in that first trial.

1 [11.05.17]

2 Since the lodging of the Co-Prosecutors' appeal and as foreseen
3 by the medical experts periodically reviewing the fitness of all
4 Accused, the Chamber has experienced increasing delay and
5 difficulty in obtaining the presence of all three Accused at any
6 given time due to their physical frailty. In light of this
7 changed circumstances and difficulties of implementing an
8 alternative course at this late stage, do you still oppose the
9 Trial Chamber's definition of the scope of its first trial as
10 expressed in the Severance Order and related decisions?

11 MR. CAYLEY:

12 Thank you, Your Honour.

13 Just to respond to Judge Fenz. Of course, Your Honour, we are
14 aware of how long judgements take to write, we know that. But
15 actually in a way you have -- I think reinforced the argument as
16 to why this one and only trial should be reasonably
17 representative. I mean what you've said -- and certainly you'll
18 hear our views on this later, you don't want me to talk about it
19 now -- we see it as an extremely problematic proposal to move to
20 a second trial while you're still writing the first judgement.
21 That's always been our position.

22 [11.06.50]

23 So I think in a sense what you've said actually reinforces the
24 position of the prosecutor, that this first case does need to be
25 reasonably representative. And if you're talking about months in

1 terms of writing a judgement, we're talking about weeks in terms
2 of hearing further evidence.

3 So, yes, we accept what you're saying, but we believe it actually
4 supports our position that this trial should be more
5 representative, that we should follow the guidance -- indeed we
6 must follow the guidance that's given by the Supreme Court
7 Chamber.

8 Now, in terms of answering this particular question, again, it's
9 linked to the first two questions. We do not oppose severance,
10 but we do and we always have opposed the scope of the Severance
11 Order.

12 [11.07.35]

13 And the reason for that goes back to what I said in the other two
14 submissions, is that the case as it stands at the moment does not
15 follow the international legal position, which is that the
16 reduced case should as far as possible in the difficult
17 circumstances that exist in this Court - and I'll come to that -
18 it should be reasonably representative of the entire Closing
19 Order.

20 And, again, I know you want me to address this later on but I'll
21 say it now because it's linked. You can of course when you are
22 considering that test, bear in mind the particular circumstances
23 that exist in this case, that the Accused are elderly, that they
24 are frail, indeed in terms of our request, what we are going to
25 ask for, we've taken that into account, you have to balance that.

40

1 And indeed the proposition that we are going to make to you is we
2 believe, in our submission, the best one in the circumstances
3 bearing in mind the particularly problematic circumstances of
4 this trial.

5 [11.08.45]

6 MR. PRESIDENT:

7 Thank you.

8 The floor is now given to the Lead Co-Lawyers for civil parties.

9 You may proceed.

10 MR. PICH ANG:

11 Your Honours, we actually can foresee the risk in the trials
12 before this Chamber, in particular when it comes to the health of
13 the accused Nuon Chea and Ieng Sary, which due to their health
14 has caused quite a delay in the current proceedings. So it is
15 extremely difficult to actually determine a concrete time for the
16 conclusion of the trial. And of course with the sheer scope of
17 complexity, it is also difficult for the civil parties to prepare
18 ourselves in anticipation of the re-scheduling of the hearings in
19 this case.

20 [11.10.14]

21 In regards to the scope of the case as determined by the Chamber,
22 of course the civil parties support that. But we aren't sure at
23 the moment as how much time will the Court need to conclude the
24 hearing in Case 002/01, taking into account the health and the
25 frailty of the Accused. Regardless, we support the scope of the

41

1 trial as determined by the Chamber and we also support the
2 submission by the Co-Prosecutors for the extension of the few
3 crime sites and it is up to the discretion of the Chamber to
4 balance it. Thank you.

5 MR. PRESIDENT:

6 Thank you.

7 Once again, the floor will be given to the Co-Prosecutors and
8 then the Lead Co-Lawyers to respond to the fourth question by the
9 Chamber.

10 The question is the following: If you maintain your request to
11 expand the scope of Case 002/01, is this request limited to the
12 addition of factual allegations related to S-21 and District 12,
13 or do you consider the SCC's direction to ensure reasonable
14 representativity to require a still broader range of factual
15 allegations and charges?

16 [11.12.18]

17 Inclusion of S-21 and District 12 would encompass only a limited
18 geographical area, encapsulate only a minor part of the overall
19 victimisation in Case 002, and compel the Chamber to rehear
20 allegations in relation to the only crime site to have been
21 adjudicated before the ECCC to date.

22 The Trial Chamber limited Case 002/01 principally through forced
23 movement on grounds that this phenomenon affected virtually all
24 individuals living in Cambodia during the Democratic Kampuchea
25 regime. So, please make your comments in relation to the SCC's

1 decision identified requirement of representativity.

2 You may proceed.

3 [11.13.37]

4 MR. CAYLEY:

5 Thank you, Your Honours. I have quite substantial submissions to
6 make to you on this issue because I think it's at the heart of
7 all of this debate, but I would just try and answer some of these
8 questions at the beginning of the question where I don't actually
9 cover them in my submissions.

10 One particular point I want to address is this issue you raised
11 of rehearing allegations in relation to the only crime site to
12 have been adjudicated before the ECCC to date and here let me
13 labour this for the purpose of the public.

14 We're talking about S-21 because Case 001 dealt with S-21 and
15 with Duch. But as far as the proposition that you make that
16 because the evidence relating to that crime site's been heard,
17 somehow precludes it being part of the second case, I disagree
18 with that position if that's what's being suggested.

19 [11.14.50]

20 The Supreme Court Chamber makes it very clear that this Court is
21 a sui generis internationalised court applying international law
22 as well as Cambodian domestic law. And if you look to the
23 guidance of those other courts, of the Yugoslav Tribunal, of the
24 Rwanda Tribunal, you will find that in a number of cases, the
25 same crimes were addressed but in respect of different

1 individuals being tried for the same crimes. An example comes to
2 mind of a case actually that Mr. Karnavas and I were both
3 involved in, which were the events in Srebrenica in July of 1995
4 in Bosnia. There were multiple trials at the Yugoslav Tribunal
5 concerning events in Srebrenica of different accused. And here,
6 in this instance, we are speaking of people who are more superior
7 to the individual who has been tried and convicted, and thus
8 arguably more responsible for what actually took place at S-21.

9 [11.16.06]

10 So I want to essentially park that particular point on one side,
11 because I don't believe it is something that should be relevant
12 for your consideration and I think there are other very
13 compelling reasons why you should include S-21 within this case.
14 Let me now address you on this issue of representativeness. Now,
15 as I've said -- and I'm sorry, I'm trying to avoid repeating
16 myself but unfortunately this does lend itself to a certain
17 degree of repetition -- we seek to have included in this case
18 Tuol Po Chrey and S-21. As far as Tuol Po Chrey is concerned, we
19 agree with the reasons that you set out in paragraph 3 of your
20 memorandum of the 8th of October of 2012 - that's E1635, its
21 connection with the forced transfers, so we agree with that.

22 [11.17.13]

23 Now, moving on to this principle of reasonable representativeness
24 when severing, we submit that in the context of an indictment at
25 the ECCC, this is a principle that should be applied and indeed

1 the Supreme Court Chamber directed you to apply it. Now, Rule
2 89ter of our own Internal Rules for this Court allows for
3 severance when the interest of justice requires it. But that rule
4 does not elaborate on what factors you should actually take into
5 account when you are engaged in the severance process. In such a
6 situation, we submit, in accordance with the agreement and the
7 statutes that you are required to look to international law to
8 guide you. As I've said, the Supreme Court Chamber affirmed that
9 approach. They recognized that the severance process requires
10 that the severed indictment be reasonably representative of the
11 full indictment, particularly whether it's concerned about having
12 more than one case. They held that that approach is directed by
13 common sense of meaningful justice and conforms with comparable
14 international legal standards. And in reference to those
15 international standards, you will find that the Supreme Court
16 Chamber held at paragraph 42 and I believe paragraph 38 of the
17 Supreme Court Chamber decision, that international standards were
18 reflected in Rule 73bis(d) of the ICTY Rules of Procedure and
19 Evidence.

20 [11.19.16]

21 Now, I'm not going to read that Rule out to save time, I'm sure
22 your legal officers can obtain a copy of it for you. But in
23 summary, what that Rule says of the Yugoslav Tribunal, is that
24 severance requires that any reduction of counts or crime sites or
25 incidents must be done in a way that what is left in the

1 indictment -- in the Closing Order in our case -- is reasonably
2 representative of the full indictment. Now that Rule includes
3 certain factors which should be considered by you in order to
4 ensure that the indictment is reasonably representative.

5 Now, there are six factors mentioned in that Rule and there are a
6 further two factors that have arisen because of case law at the
7 Yugoslav Tribunal, an additional two factors which I believe will
8 also assist you and I'll make very brief submissions on them.

9 [11.20.17]

10 Now, the first factors that you have to consider are the actual
11 crimes charged in the indictment: What are the crimes charged in
12 the indictment? Secondly, what is the classification of those
13 crimes? Thirdly, the nature of those crimes. Now, you can see
14 that those three issues are actually very much linked together --
15 I'll try and unpack them -- but they are really I think issues
16 that you need to consider together. Now, the fourth issue relates
17 to the places where the crimes are alleged to have been
18 committed. The fifth issue is the scale of the crimes. The sixth
19 is the victims of the crimes. And then a further two issues,
20 which, as I say, are incorporated into this matrix by reason of
21 case law, and that's the time period over which the crimes took
22 place. And then the last point which I think is a very important
23 one in this case, is the fundamental nature or theme of the case.
24 Let's look at the first point, the crimes that are being charged
25 in the Closing Order. Severance requires that the crimes retained

1 are reasonably representative of the original indictment. Now the
2 crimes in the severed indictment must be of the same severity and
3 variety as those in the Closing Order as a whole.

4 [11.21.51]

5 And, again, I emphasize what I said a moment ago, I believe that
6 you should balance against all of these factors the age and
7 health of the Accused. In applying this test, I think you have to
8 do that. That is why we have come up with the formulation that we
9 are going to offer you because we accept that this is something
10 that you do need to weigh against these factors.

11 Now, the addition of S-21 to the annulled Severance Order to a
12 new Severance Order will significantly increase the
13 representativeness of the indictment in terms of crimes charged.
14 The charges associated with S-21 are murder, extermination,
15 enslavement, imprisonment, torture, political persecution, racial
16 persecution and other inhumane acts through attacks against human
17 dignity. Also recall, Your Honours, that S-21 addresses a number
18 of grave breaches of the Geneva Conventions that we currently
19 don't have in the case as it stood prior to the Appeal's
20 Decision. Wilful killing as a grave breach; torture as a grave
21 breach; inhumane treatment as a grave breach; wilfully causing
22 great suffering as a grave breach; wilfully depriving a prisoner
23 of war to a fair trial, grave breach; unlawful deportation of
24 civilians, grave breach; unlawful confinement of civilians, grave
25 breach.

1 [11.23.29]

2 So, the inclusion of S-21 would lead to the incorporation into
3 this case of four additional charges of crimes against humanity,
4 enslavement, imprisonment, torture and other inhumane acts
5 through attacks on human dignity. And four unique grave breaches
6 of the Geneva Conventions, wilfully causing great suffering,
7 wilfully depriving a prisoner of war to a fair trial, unlawful
8 deportation of civilians and unlawful confinement of a civilian.
9 Now, it's even arguable that actually although wilful killing as
10 a grave breach addresses murder as a crime against humanity, that
11 there are unique elements within the grave breaches provisions
12 which actually do make it a separate crime. I don't want to split
13 hairs over this but certainly you can see that if you incorporate
14 S-21, you incorporate a whole array of additional charges
15 providing a greater scope and a much more reasonable
16 representation of the indictment as a whole.

17 [11.24.47]

18 Let me look very quickly at classification of crimes, the second
19 factor which this test would offer you to consider in coming to a
20 new Severance Order. Severance requires that the classification
21 of the crimes charged are reasonably representative of the
22 original indictment. Now, as you know, in the original Closing
23 Order those crimes belong to classes -- genocide arguably a very,
24 very serious crime against humanity, but nevertheless a separate
25 provision, crimes against humanity, grave breaches of the Geneva

1 Conventions and also national crimes under the Cambodian Code of
2 Criminal Procedure.

3 Now, at the moment, we are addressing a single group of crimes,
4 crimes against humanity. Including S-21 would incorporate grave
5 breaches of the Geneva Conventions. You wouldn't be addressing
6 all of the crimes, all of the different classifications of crimes
7 in the Closing Order, but you would be addressing substantially
8 more than you are now.

9 [11.25.56]

10 Now, the third factor, the nature of the crimes, you must address
11 this too. Severance requires that the nature of the crimes
12 charged are reasonably representative of the original indictment.
13 Again, I know this is linked to the first two factors, but I'm
14 giving you the test as you'll find in the law. Now, the nature of
15 the crimes charged relates to the similarities and differences in
16 the core elements of each crime within a similar class. So for
17 example, within the category of crimes against humanity, murder
18 and extermination would be similar crimes, with similar core
19 elements because they both of course involve unlawful killing.
20 However, murder and extermination would be different to
21 imprisonment that we don't have -- or we didn't have in the
22 annulled old Severance Order. As I've said a moment ago, the
23 grave breaches provisions again contain unique elements, one of
24 which is including proof of international armed conflicts.

25 [11.27.03]

1 So the addition of S-21 to the annulled Severance Order will
2 significantly increase the representativeness of the nature of
3 crimes contained in the Closing Order. We would be adding to the
4 original Severance Order crimes of enslavement, torture including
5 rape, imprisonment and other inhuman acts. Wilful killing, grave
6 breach; torture, grave breach; inhuman treatment, grave breach;
7 wilfully causing great suffering -- I won't repeat myself, I've
8 said this already. But you can see that within these other crimes
9 there are unique elements that are not present in the crimes that
10 are currently being addressed by the Chamber.

11 Fourthly, I need to address you on places where crimes were
12 committed. Severance requires that the places where the crimes
13 were committed are reasonably representative of the original
14 indictment. That means that the crimes in the severed case must
15 be geographically reflective of the crimes in the original
16 indictment. So, for example, where crimes occur in the original
17 indictment across a variety of locations within a country, the
18 severed indictment should try as far as possible to reflect that.
19 Conversely, where crimes occur in one place, it would be
20 appropriate to sever the case to exclude crimes outside that one
21 localized place.

22 [11.28.37]

23 Now, the addition of S-21 to this case would actually
24 significantly increase the representativeness of the places where
25 crimes were committed in the indictment. Now, I know from your

1 memorandum you disagree with that proposition because you say
2 well, S-21 actually was a very limited locust. Now, although S-21
3 was located in one geographical area, it in fact is more
4 reasonably representative of the commission of crimes throughout
5 Cambodia than any other criminal event in the indictment. Why is
6 that? Well, because victims who were tortured and executed within
7 S-21 were brought in from all over Cambodia, from every zone,
8 north, south, east and west. And if you read the allegations in
9 the Closing Order, you will find that it actually supports this
10 proposition. I'm not going to go through all of it but let me
11 just give you a few examples. If you go to paragraph 431 of the
12 Closing Order it states: "The CP cadres and members of the RAK
13 who were arrested came from all zones and autonomous sectors of
14 Cambodia."

15 [11.30.01]

16 Next, paragraph 434: "For the arrest and transfer of CPK cadres
17 and RAK members from autonomous regions or zones, two methods
18 were used. In some cases, S-21 personnel would go to the zones
19 and make arrest or collect prisoners arrested by the zone units
20 and then return to Phnom Penh. In other cases, CPK cadres and RAK
21 members were summoned to Phnom Penh by Office 870 and in
22 particular by Nuon Chea, officially for a meeting and they just
23 disappeared never to be seen again."

24 Paragraph 437 of the Closing Order: "The arrest of Vietnamese
25 civilians and soldiers generally took place in the main conflict

1 zone."

2 So you can see that in fact contrary to what you say in your
3 memorandum suggesting that it's very, very limited in
4 geographical scope, in fact S-21 is wide in geographical scope
5 and it satisfies that particular part of the test.

6 [11.31.07]

7 The fifth factor that you've got to consider -- which I've
8 mentioned already -- is the scale of crimes. Any severance
9 requires that the scale of crimes charged are reasonably
10 representative of the original Closing Order. This means that
11 crimes in the severed indictment need to reflect the full extent
12 of the original -- of the crimes in the original indictment or
13 Closing Order.

14 Now, it's our submission that the addition of S-21 in the new
15 Severance Order will significantly increase the
16 representativeness of the scale of crimes contained in the
17 indictment.

18 What is this case about? This is case is principally about the
19 untimely death or murder of between 1.7 and 2.2 million people
20 who perished between 1975 and 1979. S-21 better represents the
21 magnitude and severity of the crimes in this case, probably more
22 than any other crime within the Closing Order. Just a couple of
23 factors for you to consider here, if you look at the Closing
24 Order, paragraph 422:

25 "S-21 was the most important security centre in Democratic

1 Kampuchea. It was considered to be an organ of the Communist
2 Party of Kampuchea. Its management reported to the highest
3 echelons of the Party, it conducted activities on a national
4 scale and senior level cadres and important prisoners were held
5 there."

6 [11.33.01]

7 We know from the first case that at least 12,272 people perished
8 in S-21 - a very, very significant number of people and
9 reflective of the mass killings that went on in this country.
10 The sixth issue that you need to consider are the victims of
11 crimes. This particular factor requires that any new case, any
12 severed case, is reasonably representative of the original
13 indictment in terms of victims, grouping of victims, particular
14 ethnic groups.

15 Now, if you look at the original Closing Order, the entire
16 population of Cambodia is considered as victims of the crimes
17 charged. Now in relation to the policy of implementing and
18 defending the CPK Socialist Revolution through the re-education
19 of bad elements and the killing of enemies both inside and
20 outside the Party ranks by whatever means necessary, the victims
21 were from two groups: internal enemies and external enemies.

22 [11.34.29]

23 Now, external enemies included first of all the Cham, secondly
24 the Vietnamese, the Buddhists, former officials of the Khmer
25 Republic including civil servants and former military personnel

1 and their families. Internal Party enemies included members of
2 the CPK and the RAK. Now, if you look at the annulled Severance
3 Order, the victims groups with regard to the first population
4 related exclusively to external Party enemies, so city dwellers,
5 New People and former civil servants. Similarly, if you look at
6 the second population movement, the groups transferred were
7 largely external to the Party and the RAK. These groups included
8 again former city dwellers, former civil servants, Cham, Khmer
9 Krom and Chinese. Now, with regard to Tuol Po Chrey, the victim
10 groups were external Party enemies such as former Khmer Republic
11 officials and soldiers as well as people with bad biographies and
12 viewed to be undisciplined in the cooperatives.

13 [11.35.44]

14 In contrast, if you look at S-21, the majority of the victims
15 were internal Party members of the CPK leadership. This internal
16 enemy group I think can be broken down into sub-groups, the most
17 significant of which are members of the Revolutionary Army of
18 Kampuchea with the next most significant being members of the CPK
19 cadres. In both of these groups, the positions of these victims
20 range from the very highest to the lowest within the CPK. More
21 specifically, they were cadres from the ministries for which
22 these Accused were principally responsible. For example, 209
23 victims were from Office 870 and S-71. And at least 113 were from
24 the Ministry of Foreign Affairs and 482 from the Ministry of
25 Commerce. These victims came from across the entire country and

1 the influx in type of prisons directly related to the purges
2 conducted around the country. Other groups which were not CPK
3 cadre or RAK military were former soldiers and officials of the
4 Khmer Republic, former members of the National United Front of
5 Kampuchea, members of the educated classes, teachers, professors,
6 students, doctors, lawyers and engineers.

7 [11.37.11]

8 Of the non-Cambodian victim groups at S-21, the Vietnamese were
9 in the largest of the sub-groups, with also people from Thailand,
10 Laos, India, and Western countries: United States, Australia and
11 United Kingdom. So it's absolutely apparent that if you include
12 S-21, you increase the victim groups that will be represented,
13 the people that will find justice. They've gone but justice can
14 still be done for a wider group of victims.

15 Let me talk about the last two factors that you need to consider,
16 first of all the time period of the crimes. Now, although this is
17 a factor that's not explicitly recognized under ICTY Rule
18 73bis(d), case law at the tribunals has emerged that severance
19 should ensure that the time period of the crimes charged are
20 reasonably representative of the original indictment. For
21 example, the severed indictment should be reasonably
22 representative of the months or years over which the crimes took
23 place. And second, a severed case should try and reflect as far
24 as possible any key phases in the commission of those crimes.

25 [11.38.42]

1 And the case which supports that proposition is the Prosecutor
2 and Stanisic and Simatovic - S-t-a-n-i-s-i-c; Simatovic,
3 S-i-m-a-t-o-v-i-c - Case IT 0369 PT, decision pursuant to
4 73bis(d) of the Rules of Procedure and Evidence. And I'll give
5 the dates of that decision, it is -- the date of that decision
6 for the purpose of reference is the 4th of February 2008,
7 paragraph 23 is the relevant part of that judgement.

8 Now, the addition of S-21 to this case will significantly
9 increase the representativeness of the time period. In contrast
10 to the forced transfer, which as the Trial Chamber has pointed
11 out, occurred right at the beginning of the chronology of this
12 terrible story, it's very, very limited -- it's a limited period
13 of time. Now, S-21 became operational in October of 1975 and
14 remained in operation until the 7th of January 1979. So you would
15 in effect be covering the entire time period of the Closing Order
16 by incorporating S-21 into the case.

17 [11.40.27]

18 Now the last issue to consider -- again, this was also introduced
19 by case law from the ad-hoc tribunals. Again, it's not a fact
20 that's explicitly recognized within 73bis(d), but Chambers have
21 incorporated this particular factor in the matrix that they use
22 to decide on how a case should be severed. And they say that
23 severance should reasonably represent the fundamental nature or
24 theme of the case. Now, you can find the law on this in the
25 Stanisic and Simatovic decision, which I mentioned, at paragraphs

1 8 and 9, essentially supporting this part of the test.

2 The addition, Your Honours, of S-21 really reflects the heart of
3 this case. If you look at the common purpose of the joint
4 criminal enterprise, it states "that the common purpose was to
5 implement rapid socialist revolution in Cambodia through a great
6 leap forward and defend the party against internal and external
7 enemies by whatever means necessary".

8 [11.41.53]

9 Now, that "common purpose" is said to have come into effect on
10 the 17th of April of 1975 and continued until the 6th of January
11 of 1979.

12 Now, as things stood in the now annulled Severance Order, we were
13 addressing principally the forced movement of the population,
14 only one of five criminal policies identified as being part of
15 the joint criminal enterprise in the Closing Order at paragraph
16 157. By including S-21, you are not only covering the entire
17 period of the joint criminal enterprise, but you will also be
18 addressing three of the five criminal policies expressed in the
19 joint criminal enterprise within the Closing Order.

20 In conclusion on this issue of representativeness, this case, the
21 heart of this case, although there were multiple types of crimes
22 that were committed during this period of time -- but the heart
23 of this case is about arrests, torture and murder at security
24 centres.

25 The Accused have been charged in respect of 11 security centres.

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1 S-21 is one of those security centres directly connected to the
2 Standing Committee -- directly connected to the Standing
3 Committee, an important factor bearing in mind the Accused that
4 we are dealing with.

5 So, in conclusion, Your Honours -- and let me just check that
6 I've actually answered all of your questions -- I would emphasize
7 that, contrary to what you say here, in fact, the inclusion of
8 S-21 -- we're not now asking for District 12 because we have gone
9 through this balancing act of looking at the health and fitness
10 of the Accused and we're not now pursuing that any longer.

11 [11.43.57]

12 But we do believe that S-21, in fact, represents a very large
13 proportion of the types of victims who suffered in this country
14 and we do believe that it encompasses, for the reasons I won't
15 repeat, a significant geographical area because victims came from
16 all over Cambodia. And I think I've covered in some depth this
17 concept of representativity, which the Supreme Court Chamber
18 directed your minds to address when you make your next decision.
19 So thank you, Your Honours. I don't have any further comments.

20 [11.44.46]

21 MR. PRESIDENT:

22 Thank you.

23 Next I hand over to the Lead Co-Lawyers for the civil party to
24 respond to this question.

25 MR. PICH ANG:

1 Thank you, Mr. President. Actually, I do not have much thing to
2 add. We simply concur with the International Co-Prosecutor
3 concerning the schedule that is quite comprehensive, and I think
4 that the points should be well taken.

5 As a matter of fact, the civil parties -- lawyers representing
6 the civil parties who have endured a lot of atrocities, including
7 the Cambodian national Cham -- Muslin Chams and Vietnamese
8 minorities in Cambodia, suffer from the atrocities and crimes
9 committed during the period of three years, eight months and 20
10 days. And on behalf of the civil parties, we do want the Trial
11 Chamber to adjudicate on those crimes allegedly committed during
12 the period.

13 However, taking into account the actual circumstance, we also
14 understand that if the scope and magnitude of the case is not
15 manageable within an appropriate period of time, we would ask the
16 Chamber to consider appropriate scale-down of the scope.

17 [11.46.22]

18 And as for the proposed inclusion of crime site in S-21, I think
19 that it is very appropriate. And of course, if we look at the
20 prisoners who were detained and tortured at S-21, some of our
21 living civil parties and witnesses are also -- were also
22 imprisoned in S-21 and they are now also the civil parties to the
23 proceedings. And they are demanding that their -- the justice be
24 brought to them. So I believe that the scope of S-21 is
25 appropriate to be included.

1 MR. PRESIDENT:

2 The time is now appropriate for lunch adjournment. The Chamber
3 will adjourn now until 1.30 this afternoon.

4 The Court is now adjourned.

5 (Court recesses from 1147H to 1343H)

6 MR. PRESIDENT:

7 You may be seated. The Court is now back in session.

8 I notice the national counsel for Ieng Sary is on his feet. You
9 may proceed.

10 MR. ANG UDOM:

11 Thank you, Mr. President. Good afternoon, Mr. President, Your
12 Honours and everyone in and around the courtroom.

13 Due to my client's health issues and based on today's treating
14 doctor's report, and as I, myself, met my client, he indicates
15 that he cannot follow the proceeding fully due to his fatigue and
16 exhaustion. He requests to waive his direct presence in today's
17 proceeding even from the holding cell downstairs, and that
18 request is for this afternoon session and for the whole day
19 tomorrow as well.

20 This does not mean that the proceeding today or tomorrow is not
21 of any significance to him, but it is due to his health concern
22 and that he tries to save his energy for the other proceedings in
23 this case.

24 I'm grateful, Your Honour, and I'd like to request that he
25 returns to the facility. Thank you.

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1 [13.45.57]

2 MR. PRESIDENT:

3 Upon hearing the request by Ieng Sary through his defence counsel
4 to waive his direct presence in today's proceeding as well as
5 tomorrow's due to his health and that he intends to save his
6 energy so that he's able to participate in other proceedings, the
7 Chamber would like to remind that in our previous notification
8 regarding the hearing as a consequence of the impact of the SCC's
9 decision for today and tomorrow, that information was relayed to
10 all the parties through the senior officer's email that it is up
11 to the Accused themselves to participate in this kind of
12 proceeding as this is the right of the Accused and they may
13 decide either to participate or not in today's and tomorrow's
14 proceeding.

15 For that reason, Mr. Ieng Sary is granted permission to return to
16 the ECCC detention facility.

17 Security guards, you are instructed to take Ieng Sary back to the
18 detention facility.

19 (The accused Ieng Sary exists the courtroom)

20 [13.48.14]

21 We would like to inform the parties that after we heard the
22 comments and observations by various parties this morning, we
23 examined the fifth point in our memorandum and that we decide now
24 to exclude the fifth point from the list so that there is no need
25 for all parties to respond to the fifth point that is under

1 paragraph 3 of the memorandum.

2 However, in its place, we would like to seek comments from
3 parties for the rescheduling of the witnesses on the character of
4 the accused Khieu Samphan, as it was initially scheduled to be
5 heard this week starting from Wednesday, the 20th of February.

6 However, due to the current issues before us and that there is a
7 need for the Chamber to issue a new decision on the scope of Case
8 002/01, the schedule needs to be deferred.

9 I would like now to give the floor to Khieu Samphan's defence for
10 them to make comments regarding the character witnesses. You may
11 proceed.

12 [13.50.36]

13 MR. VERCKEN:

14 Thank you very much indeed, Mr. President. I will be very brief,
15 since we have just submitted a request with respect to some
16 difficulties that arise following the possible summons of TCW-665
17 and TCW-673.

18 Pardon me. I'll go a bit slower.

19 MR. PRESIDENT:

20 Please speak slower and please make sure you identify the
21 pseudonym for the witnesses clearly.

22 MR. VERCKEN:

23 Yes, I beg your pardon. I will speak a little bit more slowly.

24 Our team has just submitted a written request with respect to
25 some of the difficulties that we have identified in association

1 with the immediate testimony of TCW-665 and TCW-673. As you,
2 yourself, Mr. President, have just recalled, the first difficulty
3 lies in the fact that the subject of today's hearings and in
4 anticipation of your decision following the order of the Supreme
5 Court Chamber, we are still unaware of the exact scope of the
6 current trial. And in light of this difficulty, had it been dealt
7 with in isolation, it wouldn't be so problematic.

8 [13.52.34]

9 These do not concern exclusively character witnesses and we have
10 notified to the Chamber a very long time ago that these two
11 witnesses can also speak to the facts of the case and not just to
12 our client's character. And since their testimony may address
13 some factual allegations as well as facts regarding his
14 character, we believe that the Trial Chamber would be well
15 advised to deal with both aspects of their testimony -- that is,
16 to hear what they have to say with respect to the facts and our
17 client's character. And it is only when the Trial Chamber will
18 have rendered a decision with respect to the scope of this trial,
19 it appears to us, as entirely logical since it would be somewhat
20 nonsensical to have these witnesses appear and state what an
21 esteemed character Mr. Khieu Samphan is when they do not have an
22 idea of the actual facts being adjudicated before this Chamber in
23 this particular trial.

24 This is why we would respectfully submit that the possible
25 testimony -- testimonies of these two witnesses be postponed and

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1 that they also may be permitted to speak to the factual
2 allegations of this case. Thank you very much.

3 [13.54.35]

4 MR. PRESIDENT:

5 Thank you, Counsel.

6 The Co-Prosecutors, do you have any comments regarding the
7 response by the defence team regarding this matter?

8 MR. LYSAK:

9 Thank you, Mr. President. Good afternoon. We do have a response.
10 We received a copy of this motion in French late on Friday
11 afternoon, but have reviewed it.

12 It is our position that there is really no reason for the Trial
13 Chamber to defer character witnesses or people who are, at a
14 minimum, primarily character witnesses pending the Court's
15 decision on the scope of crimes that will be tried in Case 002.

16 [13.55.32]

17 Frankly, we do not see how the issues that these witnesses would
18 testify to would in any way be affected by the Trial Chamber's
19 decision. The Court has made clear before that the parties need
20 to be prepared to deal with all Case 002 issues.

21 As we sit here right now, and the same was true before this
22 decision, Khieu Samphan faces charges from the entire scope of
23 the Case 002 indictment. That was true before; that remains true
24 now.

25 The factual matters that have been introduced regarding the

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1 Accused and their role during this trial, as the Court knows,
2 were intended to provide a foundation for the entire Case 002
3 indictment, not just the part relating to forced movement. We
4 were trying a -- establishing facts regarding how the Democratic
5 Kampuchea regime worked, what the various entities were and what
6 the role of each Accused was to establish a foundation -- this
7 was the word the Court used -- that would support trial of all
8 the charges.

9 [13.56.58]

10 Given these considerations, we have a hard time seeing how Khieu
11 Samphan's character in any way changes based on whether S-21 is
12 or is not added into this trial.

13 And I recognize counsel is now saying that they -- these
14 witnesses may also testify to some facts, and that is fine. Part
15 of the motion that was filed expressed a concern that we may
16 object if they attempted to introduce evidence other than
17 character evidence or introduce evidence as to other parts of
18 Case 002. I can give you the assurance that we would not make any
19 such objections.

20 I do not think that the scope of crimes that are included in this
21 trial will have any effect -- any significant effect on witness
22 -- testimony from witnesses who are primarily speaking to the
23 character of the Accused, so it would be our proposition that the
24 Trial Chamber go forward with these witnesses if, and I stress
25 if, based on subsequent decisions of this Court, there were new

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1 issues raised which the Defence then realized that any of these
2 witnesses have information, they can always make a motion to this
3 Court based on that. But I think that is highly unlikely.

4 [13.58.27]

5 These are people who will speak to general facts about Khieu
6 Samphan. They are unlikely to be people who will -- who will
7 speak to specific crime sites in Case 002.

8 So for that reason, we would ask the Court to continue and to go
9 forward with the character witnesses as scheduled.

10 MR. VERCKEN:

11 Mr. President, a very brief comment in response to the
12 Co-Prosecutor's observations.

13 I would just like to know what is his source of information
14 because these two proposed witnesses have never been heard by the
15 Co-Investigating Judges. So where, exactly, is he drawing his
16 information from?

17 It would be even more absurd to hear what these people have to
18 say on the facts when we have yet to define the scope of this
19 trial.

20 [13.59.35]

21 MR. PRESIDENT:

22 Judge Lavergne, you may take the floor. Thank you.

23 JUDGE LAVERGNE:

24 Thank you, Mr. President.

25 This afternoon, we will have a first clarification with respect

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1 to the scope of testimony that we had intended to hear this week.
2 These witnesses had been labelled as character witnesses, and
3 yet, from what I gather, I think everyone would agree that these
4 witnesses may also have questions put to them concerning the
5 facts contained in the Closing Order and relative to all three
6 Accused.

7 One of these witnesses, as I will remind you, was very close to
8 one of the accused persons and is very likely to bring forward
9 useful information to relevant questions regarding the two other
10 Accused. This is of great significance, as this week it is likely
11 to be difficult to ensure the in-court participation of Mr. Nuon
12 Chea. And I believe that the defence for Nuon Chea would be able
13 to comment on that.

14 [14.01.24]

15 Mr. Co-Prosecutor, the Chamber has understood what you have just
16 said. We understand that you do not object to questions regarding
17 facts to be put to these witnesses so long as they are relevant,
18 but could you please clarify your problem with respect to
19 characterizing these witnesses as character witnesses? These
20 witnesses can also be -- can also provide information on facts
21 and this may change the context not only for the defence of Mr.
22 Khieu Samphan, but also for the defence teams of the other
23 accused persons.

24 MR. LYSAK:

25 Thank you, Judge Lavergne.

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1 We characterize them as character witnesses because that's how
2 they were identified as the defence. In their submissions --
3 excuse me -- that is the case.

4 I will remind the Court that all parties listed witnesses --
5 proposed witnesses for the entire Case 002 trial prior to
6 severance back in 2011. And at that same time, the Khieu Samphan
7 defence, as all parties, filed summaries of the facts that they
8 expected these witnesses to testify to on the entire Case 002
9 indictment.

10 [14.02.57]

11 So when counsel asks my question as to where I got the
12 information as to what these witnesses would testify on, I got it
13 from you, from the filing you did. And that filing does not give
14 any reason to suggest that these witnesses would testify on facts
15 that would cause a problem related to the scope of Case 002.

16 Now, it's the Trial Chamber's discretion to decide this, and it
17 may wish to hear from the other defence as well, but my
18 information is based on the description of the witnesses in the
19 Khieu Samphan defence filing and there is nothing in there to
20 suggest that we would have a problem going forward at this time.

21 [14.03.52]

22 MR. PRESIDENT:

23 Thank you.

24 How about the Lead Co-Lawyers for the civil parties?

25 MR. PICH ANG:

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1 Thank you, Mr. President, Your Honours. We are of the opinion
2 that the hearing of witnesses should follow the schedule
3 indicated by the Chamber even though there has been a proposed
4 additional list of witnesses concerning S-21, so I believe that
5 even there might be additional witnesses, it should not affect
6 the decision and indication of the Trial Chamber. And I believe
7 that if we stick with this indication, we will be moving forward
8 more expeditiously.

9 We have experienced certain delay already, so far. That's why I
10 believe that we should not change any further. Otherwise, it will
11 lead to undue delay of this proceeding, and I am afraid that the
12 Court hearing will continue to delay. And we have to take into
13 consideration the advancing age of the Accused and the current
14 status of health of the Accused. That's why I think that we
15 should not defer at -- the hearing of these two potential
16 witnesses. Thank you.

17 MR. PRESIDENT:

18 Thank you.

19 How about the defence team -- the other two defence teams,
20 starting from the defence team for Mr. Nuon Chea? Do you have any
21 comment on this?

22 [14.05.44]

23 MR. KOPPE:

24 Thank you, Mr. President. At this stage, we don't really have any
25 comment. We are in the process of preparing a witness list in

1 respect of character witnesses. I think if I'm correct, our
2 deadline is coming Friday, so Friday we will file submissions
3 which character witnesses might testify on grounds of what facts,
4 etc.

5 So Friday, we will adhere to our deadline indicating to the Trial
6 Chamber which character witnesses we intend to call upon.

7 MR. PRESIDENT:

8 Thank you.

9 How about the defence team for Mr. Ieng Sary? Do you have any
10 observation on this issue?

11 MR. ANG UDOM:

12 Good morning -- good afternoon, Mr. President and Your Honours.
13 We do not have any observation on this point.

14 MR. PRESIDENT:

15 Thank you.

16 I hand over to Judge Lavergne. You may proceed, Judge.

17 [14.07.08]

18 JUDGE LAVERGNE:

19 Thank you, Mr. President.

20 Just so that this be entirely clear for the Nuon Chea defence, is
21 it understood that the so-called character witnesses who may also
22 be heard on the facts can also ask questions -- be asked
23 questions about the role of Mr. Nuon Chea? And since apparently
24 Mr. Nuon Chea cannot be present this week, we would like to know
25 if the Defence is intending to give its agreement for him to

1 waive his right to attend the hearings.

2 Moreover, questions can be asked about the role of the Accused
3 and about all of the facts contained in the Closing Order.

4 MR. KOPPE:

5 Mr. President, I think our position at this point is that we have
6 to discuss with our client whether -- what is his position in
7 respect of your questions. You've taken us by surprise in respect
8 of this -- this topic, so we have to get back to you tomorrow
9 morning on this.

10 (Short pause)

11 [14.08.45]

12 MR. PRESIDENT:

13 Counsel, you may proceed.

14 MR. KARNAVAS:

15 Good afternoon, Mr. President. Good afternoon, Your Honours, and
16 good afternoon to everyone in and around the courtroom.

17 As I understand the practice and the jurisprudence before this
18 Court and other courts, once a witness takes the stand,

19 essentially all is fair game that is relevant, and so as I

20 understand it, were one to bring in a character witness, nothing

21 prevents the Judges, especially, from asking any questions that

22 may be relevant to any issue within the Closing Order. That's my

23 understanding.

24 And more or less, that would go to the other parties as well such

25 as the Prosecution or the civil parties.

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1 That's my understanding of the law, and perhaps if I'm mistaken,
2 this is the time, perhaps, to be clarified on the point, to be
3 corrected, so that anybody who does wish to provide character
4 witnesses would know exactly the perils that confront them. Thank
5 you.

6 [14.09.55]

7 MR. PRESIDENT:

8 Mr. Co-Prosecutor, you may proceed.

9 MR. LYSAK:

10 To be short, we - excuse me. We agree - we agree with what Mr.
11 Karnavas has just said. Witnesses who are brought into this
12 Court, even if they're brought in identified as character
13 witnesses, certainly can be asked questions on any relevant issue
14 related to the case. So, while they - I think parties make their
15 decisions, including decisions, I assume, about whether to waive
16 presence or not based on the expected information that we will
17 hear from the witnesses as is either set out in an interview or
18 in a description from the parties as to the facts on which the
19 witness will testify, while that is the basis on which we make
20 decisions about whether to call witnesses, whether to provide
21 waivers, certainly it is true that witnesses can be questioned
22 about any issue, even if they are called as character witnesses.

23 (Short pause)

24 [14.11.18]

25 JUDGE FENZ:

1 Just a clarification. I think we all agree that all relevant
2 questions can be asked. Now the question which -- what is a
3 relevant question; is obviously dependent on the scope, on the
4 determination of the scope.

5 Currently, the whole case is open. Supreme Court has not only
6 dealt with the request for the couple of additional extensions by
7 the prosecutor, it has said we are back to square one, we decide
8 completely free after hearing everybody what will be heard.

9 Now, if we agree that this is the effect of the Supreme Court
10 decision, how can we go ahead with witnesses without knowing the
11 scope or before the Chamber has made a decision on the scope of
12 the proceedings? And to clarify that, I think this Chamber has
13 done its best to avoid delays, but there are decisions like the
14 Supreme Court decisions that necessarily need to -- lead to a
15 delay if they are properly implemented.

16 If somebody has a suggestion how to avoid this, we certainly
17 welcome it.

18 [14.12.32]

19 MR. LYSAK:

20 I think the answer to your question is, as we have done with a
21 number of other witnesses in this case who have testified on the
22 entire -- where the entire scope of Case 002 is open, we've done
23 that with witnesses who were senior in age and, therefore, the
24 Court has allowed questioning on the entire scope of Case 002.
25 We've done that with expert witnesses where the Trial Chamber has

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1 -- who are coming from abroad -- where the Trial Chamber has
2 issued an order saying they can be questioned on the entire
3 scope.

4 And so it seems to me, the way we would proceed is that the
5 witness is allowed to testify on anything within the scope of
6 Case 002.

7 [14.13.23]

8 Now, if this was a -- if this was a witness who we expected would
9 have days of testimony on issues that probably may ultimately be
10 severed, there may be a reason to say we should wait, but I think
11 because it is a character witness, because it is a witness who's
12 likely to testify to conduct of Khieu Samphan which covers --
13 which is -- all of which is relevant when you look at the scope
14 of the Closing Order, it's unlikely that these witnesses would
15 testify about specific crimes.

16 So I would agree with you if there was a concern that we had a
17 witness who was going to spend half a day testifying about
18 genocide against the Cham, then maybe we would re-evaluate, but I
19 think with character witnesses, we can fairly safely proceed,
20 authorise questioning on the entire scope of Case 002 as we have
21 done in the past and still finish these witnesses with reasonable
22 diligence.

23 MR. PRESIDENT:

24 Counsel, please proceed.

25 [14.14.34]

1 MR. KARNAVAS:

2 Your Honour, let me just disabuse counsel for the Prosecution
3 that we can just proceed as nothing -- nothing is relevant. The
4 Prosecution has one approach, the Defence has another. The
5 tactical and the strategic decisions that are made by the Defence
6 on whether to propose a witness or not depend on the scope.

7 Now we're back to square one. Therefore, once the scope is known,
8 a defence lawyer can decide whether they want to put a witness on
9 because they are subject to everything.

10 Calling a witness a character witness is just a label. That's the
11 point that Your Honour made. And the Prosecution concedes that.

12 And so if the scope is narrow, perhaps the decision will be made
13 to put the witness on knowing that the testimony is limited to
14 the scope. Now the testimony is unlimited to everything, so
15 simply because a witness is called character witness, nothing
16 prevents the Trial Chamber or the Prosecution or the civil
17 parties from asking questions that are relevant to the entire
18 scope of Case 002.

19 [14.16.03]

20 So for that reason, it behoves the Trial Chamber to not hear any
21 witnesses until we deal with this issue. And we are here in this
22 situation because the Prosecution appealed and the Supreme Court
23 made its decision. And now we have to deal with this issue first
24 before we can go forward.

25 MR. PRESIDENT:

1 Thank you.

2 Yes, Counsel, you may proceed.

3 [14.16.38]

4 MR. VERCKEN:

5 Just to briefly add one point to what has just already been said
6 by the Chamber and by my learned colleague, it's not because
7 today the prosecutors are asking, according to them, for only the
8 addition of S-21 that your Chamber is obliged to decide that said
9 request does correspond to the kind of representativeness that
10 the Supreme Court requested vis-à-vis the Closing Order. As the
11 Bench said, for the moment, everything is back to square one and
12 your Chamber can decide on practically everything. It can be as
13 wide or as narrow as it wishes. The prosecutor's request does not
14 bind the Chamber because the severance decision has been entirely
15 cancelled.

16 MR. PRESIDENT:

17 Thank you. Thank you for the observations made by all parties
18 concerning the hearing of character witnesses of Mr. Khieu
19 Samphan.

20 [14.18.02]

21 There has been a request for the delay in the scheduling order of
22 hearing schedule to be held next, and it is therefore important
23 that the Chamber gets the opinion from the relevant parties. And
24 we have to take all the viewpoints of parties into consideration
25 in light of the decision of the Supreme Court Chamber concerning

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1 the Co-Prosecutor appeal of the Trial Chamber's decision
2 concerning the scope of Case 002/01. The Chamber will have to
3 decide on the scheduling of the hearing as soon as possible so
4 that the Chamber can arrange all the necessary logistic and other
5 supporting service ready because we need the victim and witness
6 support section to take the witness to provide testimony on this
7 hearing. And at the same time, we have to advise party
8 accordingly on the exact schedule.

9 [14.19.25]

10 Now the Chamber continue to discuss other matters and the Chamber
11 has put this first for the parties to opine on this issue.

12 The -- the -- in relation to an extension of the scope of Case
13 002/01 still sought, the Chamber wishes to know whether you wish
14 to indicate as to how many documents witnesses, expert or civil
15 parties, including recall of individuals already heard, would be
16 required in the support of or in rebuttal of this request. So
17 when would be the earliest date upon which you could be prepared
18 to tender or, if required, present these additional documents in
19 Court?

20 So I would like to now hand over the floor to the Prosecution
21 before any other parties to these proceedings.

22 MR. LYSAK:

23 Thank you, Mr. President. I will respond to the questions that
24 are raised in issue number 6 of your memorandum.

25 [14.20.52]

1 First, let me address -- and what I will outline for the Chamber
2 is the additional documents, witnesses that will -- would be
3 required under our proposal if S-21 was added or included as part
4 of the current trial.

5 First, let me address the issue of documents. And I would start
6 by noting that the majority of the documents from S-21 are listed
7 in two of our annexes: Annex 9 is a list of S-21 prisoner
8 interrogation and execution lists, Annex 10 is a list of S-21
9 confessions. These are documents that were proposed by the
10 prosecutors for Case 002. And, I would start by noting that most
11 of these documents have already been admitted by the Trial
12 Chamber.

13 [14.21.55]

14 With regard to Annex 9, we identified a total of 337 prisoner
15 lists, interrogation logs and execution logs from S-21. At 297 of
16 the 337, have already been assigned E3 numbers and admitted by
17 the Chamber, which would leave only approximately 40 further of
18 those documents to be put before the Chamber.

19 But with respect to Annex 10, there are already 308 S21
20 confessions that have been admitted by the Trial Chamber, and
21 given E3 numbers and, therefore, there are approximately 150 such
22 documents left to be put before the Chamber.

23 So, the total number of documents that originated from S-21,
24 would be approximately 200, and I would note that these are the
25 exact same types of documents that have already been considered

1 by the Chamber, argued by the parties at the hearings, and
2 admitted by the Trial Chamber. So while there is some additional
3 documents that the Trial Chamber would now be put before you,
4 they are the same types of documents that have already been
5 considered.

6 In addition to those, I would note a couple of other areas,
7 without getting into the whole history; the Chamber is aware that
8 there are submissions coming up from us on witness statements and
9 complaints that we would be tendering into evidence.

10 [14.23.48]

11 If S-21 is added, there would be another group of such witness
12 statements, but it would be not a significant number compared to
13 the total. But there would be an additional group of witness
14 statements that might relate to S-21, and I would say that there
15 are probably a few other documents such as some photographs, and
16 a few other miscellaneous records that we would also put before
17 the Chamber.

18 This is something that we could do with relative speed, so if the
19 Chamber were to issue an order to add S-21 to the case, you can
20 provide a fairly short time deadline to us; 10 days to 14 days
21 after your order, to identify any additional documents to be put
22 before the Chamber.

23 [14.24.48]

24 The order also asked us about document presentations, which is
25 slightly separate. The practice has been after witnesses have

1 testified on the segment of the trial to present documents -- to
2 do a presentation of relevant documents; that is certainly
3 something, again, that we would prepared to do whenever the
4 Chamber wishes to schedule it. We would suggest that that is best
5 done after any witness testimony and we will follow the Trial
6 Chambers' orders in that regard, but we will certainly be ready
7 when, and if, the Trial Chamber commences hearings on S-21 to do
8 a presentation on documents, if the Trial Chamber wishes to hear
9 from us on that.

10 [14.25.42]

11 The second issue is -- asks us about the number of witnesses that
12 we would propose to be heard. This is an issue that we have - has
13 been discussed back and forth somewhat between the Chamber and
14 the parties already, and I would start by noting that aback this
15 issue was first issue was first raised by the Trial Chamber back
16 at our August 2012 Trial Management Meeting, and at that time,
17 the Trial Chamber issued a memorandum, which is document E218.1.
18 It is a 3 August, 2012 memorandum regarding the Co-Prosecutor's
19 proposed extension of scope of trial. And in that memorandum, the
20 Trial Chamber indicated - quote -- and I'm quoting from paragraph
21 11 of that memorandum -- quote: "The Trial Chamber is mindful to
22 grant this proposed extension," this is referring to S21 at
23 Choeng Ek, "but in view of Kaing Guek Eav's testimony to date, in
24 addition to the totality of crime-base evidence already before
25 the Chamber in relation to these topics, and admissible in

1 consequence of decision E96/7, the Chamber is unconvinced of the
2 need to hear further witnesses or civil parties to address crimes
3 committed at S-21 and Choeng Ek."

4 [14.27.35]

5 There were subsequently a presentation in response by our office
6 to this in which we indicated while we agreed that there had been
7 much evidence already heard regarding S-21, we were nonetheless
8 of the view that it was important to hear a small number of
9 witnesses. And our position on that remains the same. We would
10 submit that some evidence from witnesses needs to be publicly
11 heard in Court, from people who can describe the operations of
12 the S-21 prison, and that is to ensure both that in the public
13 hearings, the prosecutors have an opportunity to meet the burden
14 of proof, and that the Defence has an opportunity to contest the
15 evidence relating to this crime site.

16 [14.28.32]

17 And so, while we certainly agree that there has already been much
18 evidence heard relating to S-21, we have proposed a small number
19 of additional witnesses. And I would note here, the Trial Chamber
20 makes reference to its decision E96/7, as a reason why there is
21 no need to hear extensive testimony from witnesses on this issue.
22 This is the decision that the Trial Chamber issued regarding the
23 admissibility of statements of witnesses who do not appear in
24 Court to testify. And I would simply remind the Court, that while
25 the general gist of the Court's ruling, was that statements that

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1 do not relate to the acts and conduct of the Accused maybe
2 admissible even if the witnesses do not appear, the Chamber also
3 ruled that one of the factors to be considered in determining the
4 admission of such statements is whether they are - quote-- "of a
5 cumulative nature, in that other witnesses will give, or have
6 given oral testimony of similar facts" -- end of quote, and this
7 is a quote from paragraph 24 of that decision.

8 [14.30.00]

9 So it is our position that in order to ensure that this
10 cumulative requirement or concept is satisfied, the Court should
11 hear from a representative sample of witnesses relating to S-21.
12 And that is why that we have proposed, in addition to Duch,
13 himself, providing additional testimony, four other witnesses
14 whom we believe would cover the various issues relating to S-21.
15 That would include one surviving detainee, TCCP-21; one of the
16 interrogators at the prison, TCW-540; the cadre who was
17 responsible for documenting prisoners, TCW-698; and the cadre who
18 was responsible for taking prisoners to the Choeng Ek execution
19 site, TCW-232.

20 [14.31.09]

21 So, our proposal would be that, in addition to rehearing, or
22 hearing - recalling Duch, that the Trial Chamber hear from these
23 four witnesses.

24 I would note here that during that same trial management
25 conference last year, the Defence were asked whether they had

1 witnesses they wished to call relating to S-21, and I would
2 remind the Court that the -- both the Ieng Sary defence, and the
3 Khieu Samphan defence, had no witnesses to propose relating to
4 S-21. The Nuon Chea defence did propose a large number of
5 witnesses, 31 in total. However, I would note that four of the 31
6 are the same witnesses that I just outlined that we are
7 proposing. Of the other 27, many of them, when the Trial Chamber
8 examines the proposal, I believe it will find that many or most
9 of these do not need to be called. The Nuon Chea list includes,
10 for example, the two psychologists who examined Duch, in Case
11 001; it includes some people who were determined by the Court in
12 Case 001, to have no connection to S-21. And it includes
13 virtually every name that the Defence could come up with, of
14 people who were associated with S-21. And perhaps, Counsel should
15 be invited to review that list as to whether they really do need
16 the Trial Chamber to rule on all these witnesses, but it is our
17 submission that when the Trial Chamber does the same thing that
18 it has done with other witness proposals, it will find that a
19 very few of these witnesses need to actually be called.

20 [14.33.21]

21 The two more issues before matters on this, as I've already
22 indicated, one of the reasons that we contend that S-21 can be
23 tried relatively quickly, is because there has already been a lot
24 of evidence heard by this Court. I note, of course, as we all
25 recall, that Duch, himself, testified for 12 days in this

1 courtroom. We've heard from testimony from Nuon Chea's messenger,
2 who delivered documents between Nuon Chea, and Duch. We've heard
3 from witnesses from the Ministry of Foreign Affairs, who have
4 testified to Ieng Sary's receipt and knowledge of S-21
5 confessions and his role in the arrest of people, cadres arrested
6 from there.

7 We've heard from a number of witnesses from the zones, sectors
8 and districts, who have testified to cadres being called to Phnom
9 Penh, and disappearing and who have confirmed the identity of
10 those people on S-21 prisoner lists, and we've heard from David
11 Chandler, whose given testimony about the role of S-21 and the
12 role of the Accused in relation to S-21. So, the Chamber has not
13 only already admitted many documents relating to S-21; it's heard
14 extensive testimony and, therefore, we believe this crime site
15 can be tried quite expeditiously.

16 [14.35.14]

17 The last point I wish to make, is to give our time estimates for
18 these witnesses, and I would simply note here that, the
19 experience that we have seen in this Court, so far, is that crime
20 based witnesses have been able to testify relatively quickly.

21 We have almost already completed the list of witnesses related to
22 the two forced movements that the Trial Chamber had selected to
23 hear, and I would note that there have been a total of 18
24 witnesses and civil parties who have testified regarding the
25 first and second forced movement. Their testimony was heard in a

1 total of only 16 court days. So, as we have submitted before, we
2 believe that the Trial Chamber can be – can schedule these
3 witnesses in a relatively short time. For example, with the two
4 Tuol Po Chrey witnesses, that have yet to be heard, it has been
5 proposed that each of them testify for one day and we believe
6 that is sufficient.

7 [14.36.33]

8 That would mean that the Tuol Po Chrey crime site, the witness
9 testimony would be completed in two days. For the S-21 witnesses,
10 we propose a little longer, because they are admittedly a little
11 more complex, but still we have proposed a total of 11 days for
12 the hearing of those four witnesses, as well as, recalling Duch.
13 So, our submission is that the submission of additional documents
14 can be done quite quickly, that most of the documents relating to
15 S-21 have already been admitted, and that the necessary witnesses
16 can be heard in a fairly expeditious manner, and I hope that is
17 responsive to the questions from number 6.

18 [14.37.42]

19 MR. PRESIDENT:

20 Defence Counsel, you may proceed.

21 MR. KARNAVAS:

22 Just one point of clarification, perhaps the Prosecutors can tell
23 us about this.

24 We know that they have five witnesses, Duch plus four. They've
25 indicated documents from Annex 9 and 10. Are they saying now that

1 they do not intend to propose any transcripts of testimony from
2 001? In other words, witnesses that they're going to try to back
3 door into the case by trying to submit their transcript. And I
4 would like to have a definitive answer. Thank you.

5 MR. LYSAK:

6 I'm happy to answer that question, Mr. President.

7 We will be submitting addressing this issue as part of the
8 witness statement issue. I would note that under the Court's
9 ruling, Duch, himself has already testified. By far, the most
10 significant testimony from Case 001 that would be of interest
11 here would be Duch's testimony, but also the 50-some witness
12 statements OCIJ interviews that he gave.

13 When you take away those witnesses - when you take away Duch's
14 testimony, and you take away the key witnesses that we have
15 proposed, that would not leave very much from the Case 001 trial.
16 Nonetheless, all of this will be addressed by us as part of our
17 witness statement submission. So if there are any witnesses who
18 will not testify in Court, whose statements we would offer, those
19 would be covered in the submission that we will be making
20 regarding witness statements.

21 [14.39.3 9]

22 And so witness statements would include, just so I'm clear,
23 Counsel, Annex 12, 13, and I believe 11 is the Annex of trial
24 transcripts, but if we are going to propose any such witness
25 statements, it will be done at that time.

1 MR. KARNAVAS:

2 One more point of clarification. Therefore, when we're told that
3 now it would take about three to four weeks' additional time, it
4 presupposes that the Trial Chamber will rule in its favour over
5 admitting transcripts of testimony in lieu of viva voce
6 testimony.

7 [14.40.20]

8 In other words, because there's a likelihood that the Defence
9 will be asking that some of these witnesses come and give
10 evidence. It's not a foregone conclusion that the Trial Chamber
11 will automatically admit transcripts of testimony as opposed to
12 calling the witnesses; especially if it goes to the acts and
13 conduct of the Accused. So, in any event, I'm grateful to the
14 answer that we got. I do think that when the Trial Chamber is
15 asking for witness' statements or transcripts of testimony of
16 witnesses is part -- part and parcel of that; and so perhaps if
17 the civil party is going to address that, we want to hear
18 concretely. Because only then, you will have the true nature of
19 what the actual time may be, added to already, we have projected
20 for this case to last. Thank you.

21 MR. PRESIDENT:

22 The Co-Prosecutor, you may proceed.

23 MR. LYSAK:

24 Thank you, Mr. President. Very briefly, I want to make sure I'm
25 very clear on this. We will not be proposing testimony relating

1 to the acts and conducts of the Accused from witnesses who will
2 not testify here. That is not the purpose of the upcoming filing
3 from us, and the Defence response. That will be a filing that
4 will identify witness statements that does not relate to acts and
5 conduct of the Accused that the Co-Prosecutors are putting
6 forward. By no means -- the Trial Chamber has already ruled on
7 this and given us a ruling on what types of witness statements
8 may be admitted, and so we are not going to be asking the Trial
9 Chamber to reconsider that ruling. Our submission will solely
10 relate to matters not including the acts and conduct of the
11 Accused.

12 [14.42.26]

13 MR. PRESIDENT:

14 Judge Fenz, you may take the floor, please.

15 JUDGE FENZ:

16 Just a clarification, basically, following this discussion of --
17 you mentioned Chandler as possible evidence. But do I understand
18 you correctly you don't plan to recall him in this part of the
19 trial?

20 MR. LYSAK:

21 That's correct, Judge Fenz. When Professor Chandler testified,
22 the testimony was allowed on the entire scope of Case 002, so
23 he's already provided the necessary testimony that we believe is
24 required relating to S-21. And for that reason, no, we do not --
25 we will not make any request to recall Professor Chandler.

1 MR. PRESIDENT:

2 Thank you.

3 The floor is now given to the Lead Co-Lawyers for civil parties.

4 You may proceed.

5 [14.32.34]

6 MR. PICH ANG:

7 Thank you, Mr. President.

8 If the facts at S-21 is included in this segment of trial, the
9 Trial Chamber cannot provide a definite response as to the number
10 of documents, the witnesses, experts or civil parties to the
11 Chamber. However, all the recognized civil parties related to
12 S-21 are in the number of 128 and we need about 14 days after the
13 new decision is made by the Trial Chamber to make a list for your
14 submission upon discussing with all the civil party lawyers
15 regarding the number of the civil parties' witnesses or experts
16 that we would propose.

17 [14.44.55]

18 As for the hearing days for the civil parties, we may only need
19 between three to five Court days for the civil parties if there
20 is a case that the Trial Chamber decides to include the facts at
21 S-21.

22 MR. PRESIDENT:

23 Thank you.

24 The floor is now given to Nuon Chea's defence. You may proceed.

25 MR. KOPPE:

1 Mr. President, as indicated earlier this morning, we would like
2 to give our submissions and any observations after consultation
3 with our client. Many things have been said today, many
4 fundamental things have been said today. We need to properly
5 discuss these submissions and observations from the Prosecution
6 and the civil parties with our client. And as a matter of fact, I
7 do not anticipate us to be able to even give those submissions
8 tomorrow.

9 [14.46.02]

10 We have indicated earlier via email that we need the Tuesday to
11 discuss with our client in order to be able to incorporate his
12 instructions into our submissions. I think also, considering the
13 fundamental nature of today's discussion, that we are granted the
14 possibility to give our submissions on Wednesday.

15 MR. PRESIDENT:

16 Thank you, Counsel.

17 The floor is now given to Ieng Sary's defence if you would like
18 to make comments regarding this topic.

19 MR. KARNAVAS:

20 Thank you, Mr. President, and good afternoon again, Your Honours.

21 We're in the same boat or the same situation as the Nuon Chea
22 team is. Mr. Ieng Sary today was not able to follow the
23 proceedings even though he was downstairs. And we did not
24 entirely know where the Prosecution was going. We had an inkling
25 what position they may take. We had mapped out two or three

1 different options that were available to the Prosecution.

2 [14.47.16]

3 Be that as it may, we did meet with Mr. Ieng Sary before, but we
4 haven't been able to meet with him and discuss with him what we
5 heard today from the Prosecution. I'm not sure that he was able
6 to follow any of the proceedings this morning, so we would need
7 time tomorrow to meet with him and we can go right after the Nuon
8 Chea team.

9 We will be highly focused. We don't anticipate taking too much
10 time, so we should be able to go through all of it within, I
11 would say, 45 minutes. Thank you.

12 MR. PRESIDENT:

13 Thank you, Defence Counsel.

14 The floor is now given to Khieu Samphan's defence.

15 [14.48.06]

16 MR. VERCKEN:

17 Mr. President, indeed, as I indicated this morning, even though I
18 did not set out a specific timeframe, I think it is entirely
19 logical for all defence teams to be able to consult their
20 respective clients in order to discuss the substance of today's
21 hearings and to formulate a very clear position that will be very
22 briefly presented before Your Honourable Chamber. And I believe
23 that we would be able to do so on Wednesday morning, which
24 appears to us as the ideal moment to do so. Thank you.

25 MR. PRESIDENT:

1 Thank you all for your comments. The time is now appropriate for
2 a short break. We take a 20-minute break and return at 10 past
3 3.00.

4 The Court is now adjourned.

5 (Court recesses from 1449H to 1513H)

6 MR. PRESIDENT:

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

8 Now the Chamber is calling upon parties to respond to the
9 question put forth by the Chamber. And the defence team has made
10 their position clear that they reserve the right not to respond
11 to the question now up until they have consulted with their
12 respective clients. As such tomorrow hearing may not proceed
13 because the Chamber would like to leave some time for the defence
14 teams to discuss and consult with their clients.

15 Now, I would to proceed to point number 7 and I would like to put
16 the question to the Prosecution and the civil party lawyers. The
17 Trial Chamber indicated its intention to proceed to a hearing of
18 evidence in Case 002/02 as soon as possible after the conclusion
19 of Case 002/01. As all factual allegations in relation to each
20 potential sub trial in Case 002 from part of one consolidated
21 indictment, might the Trial Chamber proceed with the hearing of
22 the evidence in Case 002/02 after the conclusion of the hearing
23 of evidence in Case 002/01 following a judicial recess sufficient
24 to allow preparation by the parties for the next trial segment in
25 parallel with the drafting of the Case 002/01 partial verdict?

1 [15.15.27]

2 I would like to now hand over the floor to the Prosecution.

3 MR. CAYLEY:

4 Thank you, Your Honours.

5 I think, actually, Judge Fenz partly answered this question this
6 morning when she was emphasizing to all of us how long it took to
7 draft the judgement in the first case. I think Your Honour
8 mentioned a figure of eight months. And I think now to be
9 speaking of writing a judgement, starting another trial, time
10 really running against us; I think we would find ourselves in a
11 position where it would be very difficult to get a judgement in
12 this case done and run a second trial at the same time. And get
13 that judgement within a reasonable period of time. So I share
14 Judge Fenz's concerns with respect to this proposition.

15 [15.16.20]

16 As you know, our position is to adopt option 2 of what the
17 Supreme Court Chamber decided that it would be one trial with
18 reasonable representativeness of the charges in the Closing
19 Order. And I've already given you my submissions on that. This
20 particular proposition in 37 is looking to the first option that
21 the Supreme Court Chamber offered. And I'll simply repeat the
22 submissions that we've already made on this since October of 2011
23 in the August Trial Management session.
24 We feel that there are pragmatic technical legal reasons why it
25 would be extremely difficult to move to a second trial without a

1 verdict or even a determined appeal in the first trial. You will
2 recall that you made a press release on the 22nd of September of
3 2011, and in that press release you stated that the first trial
4 would provide a basis to consider the role and responsibility of
5 the Accused and to provide a foundation for the remaining charges
6 in later trials.

7 [15.17.49]

8 Now, if you look at the Severance Order itself on 22nd of
9 September of 2011 -- that's E124, you didn't address in that
10 Severance Order how findings in this first case would be
11 transmitted into this next portion or part of the case - a second
12 trial. All that was stated -- and you'll find this in the
13 operative part of that decision -- was that, further information
14 regarding subsequent cases to be tried in the case -- in the
15 course of Case 002 will be provided to the parties and the public
16 in due course. And, you know, I don't need to say it that that
17 information has never been provided by the Trial Chamber and that
18 the Supreme Court Chamber in its most recent decision of the 8th
19 of February of 2013 recognised that fact, that there is no plan
20 of how we're going to proceed into this second phase trial.
21 Now, as I say, we've raised with you the concerns that we have of
22 the legal difficulties in relying on findings made in this first
23 trial in any subsequent trial. Now, the possible mechanisms
24 available to a court to rely on findings made in a prior case and
25 to rely on those findings in a subsequent case are the doctrines

1 of res judicata and judicial notice of adjudicated facts.

2 [15.19.31]

3 Now, we've stated to you, repeatedly, that neither mechanism may
4 be available to you before any appeal has been settled in respect
5 to the first case. That's our real concerns. And you yourselves
6 have actually stated that there is no legal basis at the ECCC for
7 you to take notice of judicially adjudicated facts. And that's a
8 decision on an application by Ieng Sary regarding judicial notice
9 of adjudicated facts; decision of the 4th of April of 2011, at
10 page 3.

11 Now, you may want to revisit that decision but we would still
12 submit to you that the likelihood of moving straight to a second
13 trial without an appeal determination of issues in this first
14 case is unlikely and, at the very least, extremely problematic.
15 So, on this point, we say, bearing in mind the age and the health
16 of the Accused, and these legal technical challenges that
17 proceeding straight to a second trial after this trial, we'd ask
18 you to do as the Supreme Court Chamber has directed and opt for
19 one smaller trial of some portion of the Closing Order giving due
20 consideration to these arguments that I made this morning on
21 reasonable representativeness. Thank you.

22 [15.21.03]

23 MR. PRESIDENT:

24 Thank you.

25 Now, the Lead Co-Lawyers for the civil party, you have the floor.

1 MS. SIMONNEAU-FORT:

2 Briefly, Mr. President, on this question, we entirely agree with
3 the prosecutor and believe that it would be highly problematic to
4 start a second trial without having a verdict for the first. And
5 perhaps a decision on appeal, if appeal, there is, for the simple
6 reason that the first trial, apart from forced transfer,
7 envisages elements that would serve in subsequent trials.
8 Therefore, it seems impossible to do anything except wait for the
9 verdict and the decisions.

10 [15.21.55]

11 I take note of the suggestion by the Supreme Court to create
12 another panel of judges -- if I understood the proposal
13 correctly, I'm not certain I did. I think that would pose a good
14 number of juridical problems as well. Also, problems connected
15 with the Internal Rules because at the moment they do not provide
16 for any kind of second panel of judges. It would also cause
17 effectiveness problems because if your Chamber knows the case
18 file well, I think it would nevertheless take a long time for a
19 new panel to acquaint itself with it.

20 So, unfortunate that may seem; I think we have to await the end
21 of this first trial portion before we even consider another.

22 Thank you.

23 MR. PRESIDENT:

24 Thank you very much.

25 The Chamber will take all the points you have raised into

1 consideration.

2 Now, I note counsel Karnavas is on his feet. You may proceed.

3 [15.23.00]

4 MR. KARNAVAS:

5 Thank you, Mr. President. It would help us for our submissions if
6 we would have a point of clarification from the OCP and from the
7 civil parties.

8 As I understand their position, what they're saying is, it is
9 within the legal right of the Trial Chamber to dismiss any
10 portion it wishes of the Closing Order. Because if we're only
11 going to have one mini-trial or one trial that's a sort of a
12 smorgasbord of the Closing Order, effectively the rest of the
13 Closing Order is not going to be tried, is being dismissed.

14 So the Prosecution has already indicated its position, but is
15 part of their position that Your Honours have the authority to
16 dismiss and not try any other part because that's effectively
17 what they're suggesting? And that would help us in our
18 submissions.

19 [15.24.10]

20 MR. PRESIDENT:

21 Thank you.

22 Mr. Prosecutor, you may proceed.

23 MR. CAYLEY:

24 No, we're not saying that at all, and we're saying what we have
25 consistently said, is that part of the case would be severed.

1 There is always a prospect that perhaps, remotely, it may be that
2 one Accused may still be fit after this first case has been
3 determined, but bearing in mind all the factors that we see today
4 that is why we are recommending to you that you proceed with a
5 single trial.

6 [15.24.46]

7 We are not recommending that the rest of the case be dismissed at
8 this point. There may come a point when that is the case, but
9 that certainly -- that situation does not exist today. The case
10 would simply be severed as it was done previously but on a
11 different basis.

12 MS. SIMONNEAU-FORT:

13 Likewise, for us, we never said that either. We endorse the views
14 of the Prosecution on this subject. The Chamber simply has to
15 adapt itself to what happens in the future. We just have to take
16 note of that fact, regretful though it may be.

17 I also wanted to be clear whether the Defence is making its
18 comments at a later stage or if it's making them now and at a
19 later stage. That would help me in the distribution of our time
20 planning.

21 [15.25.46]

22 MR. PRESIDENT:

23 Thank you.

24 The Chamber has made it clear in its -- in the subject of today's
25 hearing. The purpose of today's hearing was made clear this

1 morning all - or from an outset, starting this morning;
2 particularly the effort the Chamber is trying to address -- that
3 is, to enable the Trial Chamber to ensure the efficiency of Case
4 002. This is the matter that the Chamber made it abundantly clear
5 to the party.

6 So we would like to hear the view of the Chamber - of the parties
7 so that the Chamber have the basis to issue a reasoned decision,
8 and we hope that that would not lead to any problems any more in
9 the future in relation to this issue.

10 Now I hand over to Judge Fenz.

11 JUDGE FENZ:

12 Just to avoid further confusion, I am re-reading the relevant
13 part of the Supreme Court decision which says if the gist of the
14 severance is judicial manageability, there is a necessity for a
15 tangible plan for the adjudication of the entirety of the charges
16 in the indictment.

17 [15.27.15]

18 Now, it might very well be that the issue of judicial
19 manageability comes into the decision of the Trial Chamber, not
20 necessarily as the only but as one determining factor.

21 Do I understand the Prosecution and the civil parties correctly
22 that what they are saying at the moment is the following:

23 They consider it to be a tangible enough plan for the future if
24 the Trial Chamber aims to have a verdict in a
25 still-to-be-determined scope and makes any further plans as what

1 is to happen with the remainder of the indictment at a later
2 stage.

3 That's basically what we said in the original order when we said
4 further determinations about the fate of remaining points of the
5 indictment will be made in due course.

6 Now, I take it that this was not specific enough for the Supreme
7 Court. May I ask clarification because this is a point raised
8 repeatedly by the Supreme Court, meaning the lack of a tangible
9 plan?

10 [15.28.41]

11 MR. CAYLEY:

12 I think -- and I've - and I've already made these submissions to
13 the Court, Judge Fenz, but I'll repeat myself. I think the Court
14 - the Supreme Court Chamber is giving you two options: it's
15 essentially stating that if you believe that the only real,
16 realistic prospect is to go forward with a single trial, then
17 that single trial must have some kind of representativeness of
18 the whole case. And that's the position that we would ask you to
19 adopt. Those are our submissions.

20 I think the judicial manageability issue relates to this original
21 proposition that you had for a series of trials, and if you go
22 with that option the Supreme Court Chamber is saying you've got
23 to come up with a plan, which is what you originally said.

24 But, again, I would emphasize our position is that you go with
25 the second option of the single trial reasonably representative

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1 of the entire indictment.

2 [15.30.00]

3 MR. PRESIDENT:

4 Thank you.

5 There are two points remaining: the first one is for all the
6 parties, starting from the Co-Prosecutors and the Lead
7 Co-Lawyers.

8 The question is the following: The Trial Chamber indicated that
9 in the Severance Order that all remaining allegations in Case 002
10 were not discontinued in consequence of it but would form the
11 subject of future proceedings should circumstances permit. What
12 prejudice has resulted to the parties from the lack of a concrete
13 timetable for these later trials given that its implementation
14 depends wholly on unknown contingencies such as the continued
15 fitness to stand trial of all Accused, the availability of donor
16 funds to support future trials, and the hypothesis that any
17 subsequent trials may instead be heard by a different Trial
18 Chamber.

19 [15.31.17]

20 MR. CAYLEY:

21 Thank you, Your Honours. I can be very brief on this.

22 We appreciate as much as everybody else in this Trial Chamber the
23 unpredictable factors which have existed in this case and which
24 have made it very difficult for you as a Chamber and the parties
25 to manage this case.

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1 But I want to be very clear about the prejudice because the
2 Supreme Court Chamber expresses, at least in respect of the
3 Co-Prosecutors, exactly what that prejudice was. And they put
4 that at paragraph 44 -- you'll find it in the decision -- and I
5 will read it for the purposes of the record -- quote:

6 "In violating their right to a reasoned opinion and their right
7 to be heard and limiting the scope of Case 002/001 in a way that
8 unduly disregards reasonable representativeness of the
9 indictment, the Trial Chamber thereby caused prejudice to the
10 Co-Prosecutors."

11 [15.32.30]

12 Now, the right to be heard is being addressed by the Chamber now
13 and we look forward to a fully reasoned decision, but the essence
14 of the prejudice as far as the Co-Prosecutors are concerned in
15 terms of what we seek from this Chamber is representativeness.
16 And we feel, we submit to you, we emphasize that unless you make
17 efforts absolutely balancing all of the problematic factors of
18 this case as we've tried to do in making these submissions to you
19 today to ensure that this case addresses the absolute heart of
20 the criminality that we're dealing with, then we will remain
21 prejudiced.

22 The formation of the second chamber, that was actually in this
23 question. I don't have anything to add to what my colleague said.
24 I think it's a problematic proposition for a whole number of
25 reasons, not just legal. I think probably financial as well,

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1 frankly, with the financial situation that the Court is in. I
2 also anticipate that even if it could come about, it would take a
3 considerable period of time for it to be established, for judges
4 to be recruited or moved or whatever way it would work.

5 So I think as much as the Supreme Court Chamber was trying to
6 come up with creative solutions, it's probably one that's not
7 going to work here. Thank you.

8 [15.34.06]

9 MR. PRESIDENT:

10 Thank you.

11 The floor now is given to the Lead Co-Lawyers if you have any
12 observation to make regarding this matter.

13 MS. SIMONNEAU-FORT:

14 Thank you, Mr. President. As far as the civil parties are
15 concerned, our position differs slightly and it is due to the
16 nature of the civil parties and what the prejudice to the civil
17 parties would be if we were not to fix a proper timetable, which
18 was the question addressed to you in our submission from October
19 2011. We very much would like to see a concrete timetable.

20 As I stated earlier, the civil parties have chosen to be civil
21 parties with very pointed expectations -- the truth,
22 explanations, so on and so forth -- and only the ongoing
23 proceedings as they move forward can actually proffer the truth.

24 [15.35.18]

25 The civil parties are entirely entitled to have an idea of the

1 nature of future trials, although they understand that it is
2 quite plausible that those future trials may not occur or are
3 driven by random factors, be they financial reasons, reasons
4 which are not controlled by the Trial Chamber. Nevertheless, the
5 civil parties are owed a certain degree of certainty from the
6 Trial Chamber so that any decision not be tantamount to a
7 miscarriage of justice.

8 The civil parties believe that the Trial Chamber seeks to hold
9 consistent trials in order to cover the entirety of this case and
10 Closing Order. All parties have the responsibility to include
11 this first trial which concerns forced transfer within a broader
12 trial, a broader case, and the civil parties must have the
13 impression that the forced transfer does not constitute one
14 single and isolated trial from the rest of the case. It is very
15 important for the civil parties to have the situation that they
16 have succumbed to be acknowledged by the Trial Chamber and
17 possibly addressed in future trials based on concrete timetables.

18 [15.37.15]

19 We believe that it is in our best interests, not only for the
20 civil parties but for all parties, to understand what the
21 timetable would be so that we can prepare overall strategy and
22 this is exactly why we are requesting, once again, the Trial
23 Chamber to provide a timetable of future trials even in
24 consideration of random factors, uncontrollable factors, that may
25 have an impact on those eventual trials.

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1 I believe that this will bring us to a conclusion and that the
2 eighth question is addressed to all defence teams. If the defence
3 teams do not respond to the eighth question, I would recall that
4 the civil parties wish to raise three matters directly related to
5 the Severance Order.

6 I would, therefore, respectfully seek leave from the Trial
7 Chamber to specify as to whether or not we can address those
8 three issues now or if the Trial Chamber wishes the civil parties
9 to address those matters tomorrow or during the morning session
10 on Wednesday. These three issues are of crucial importance for us
11 and I would very much welcome the opportunity to lay them before
12 you. Thank you.

13 (Judges deliberate)

14 [15.40.10]

15 MR. PRESIDENT:

16 The International Lead Co-Lawyer for civil parties, can you
17 provide brief accounts of all the three points that you would
18 like to raise and the reasons behind your request? Please make it
19 brief before the Chamber decide on whether giving you the floor.

20 MS. SIMONNEAU-FORT:

21 Thank you, President. These three points had been raised in our
22 submission, requesting reconsideration of the Severance Order
23 submitted in October 2011 and those three points were also raised
24 a second time afresh in paragraph 44 of the Supreme Court
25 Chamber's decision in one of its footnotes, which is quite

1 lengthy.

2 The three matters I'm referring to are, firstly, whether or not
3 the Severance Order could apply to the characterization of
4 crimes, and we wish to make a few comments on that matter. And
5 the two other points are rather specific to the civil parties,
6 the first being the nature of the impact of a Severance Order on
7 the participation of civil parties. And the third point is to
8 determine the impact of the Severance Order on the distribution
9 of reparations and the awards of reparations.

10 These are very important issues for us. We believe that the Trial
11 Chamber has provided implicit answers; however, we do seek
12 clarifications in the most unequivocal terms possible. I would
13 require approximately 30 minutes to expand upon these points.

14 Thank you.

15 (Judges deliberate)

16 [15.42.23]

17 MR. PRESIDENT:

18 Yes, you may proceed.

19 MS. SIMONNEAU-FORT:

20 Thank you very much. The first point concerns as to whether or
21 not the Severance Order has an effect on the characterization of
22 crimes when we have submitted our briefing, the civil parties
23 stated -- and that it was impossible from a judicial point of
24 view, and today we sustain the same position for the following
25 reasons.

1 The judicial characterization of crimes is a matter on which the
2 Trial Chamber can only make a proper judgement once the facts
3 have been adjudicated upon and once the merits of the case have
4 been studied and once the Trial Chamber has decided whether or
5 not there should be a characterisation of the crimes and what it
6 is in right to qualify even with the Severance Order and a
7 restricted number of factual allegations. It is entirely
8 reasonable to assume that the Trial Chamber could, at the outcome
9 of these proceedings, provide a characterization of crimes of
10 genocide or persecution based on religious grounds.

11 [15.44.06]

12 Nevertheless, in its Severance Order in paragraphs 5 to 7, the
13 Trial Chamber expressly excluded those two legal
14 characterisations. This is unfounded. We believe that it is
15 important for the Severance Order to remain focussed on the
16 facts. It may apply to persons and facts; however, it cannot
17 apply to the judicial characterisation of crimes.

18 We, therefore, respectfully request the Trial Chamber to exclude
19 the characterisation of crimes as they apply to genocide and
20 other crimes. That is my first point.

21 The second matter, as evoked earlier, deals with the effect of
22 the Severance Order on civil parties. This is a highly important
23 point which is rooted in the Severance Order. In our October 2011
24 submission under paragraph 7, we had raised this very crucial
25 matter and stated the effect at the issuance of the Severance

1 Order. The Supreme Court Chamber had reviewed this matter afresh.

2 [15.45.37]

3 As civil party lawyers, we seek certainty that the Internal Rules
4 upon which the Trial Chamber is issuing its decisions would
5 correspond directly to the questions that we have raised. We
6 believe that the consolidated group of civil parties in their
7 participation as an entirety forecloses the possibility of an
8 individual impact.

9 In February and September 2010, the Internal Rules were amended.
10 Henceforth, Rule 23, paragraph 3 is absolutely clear. Civil
11 parties participate individually at the preliminary stage during
12 the trial stages and all successive stages. The civil parties
13 form a consolidated group whose interests are represented by the
14 Co-Lead Lawyers.

15 [15.47.06]

16 Following confirmation of those amended rules, there is
17 individual participation of the civil parties during the judicial
18 investigation and then the civil parties are part and parcel of
19 the consolidated group represented by the Co-Lead Lawyers.

20 Individual participation is, therefore, annulled. There is no
21 longer the notion of individual interest even though it is our
22 duty, of course, to take all of those individual interests in
23 consideration in defence of the interests of the consolidated
24 group.

25 A civil party who may have been admitted during the judicial

1 investigation is owed the right to take part in the consolidated
2 group of civil parties and by virtue of his status within the
3 consolidated group, he remains/she remains a full-fledged civil
4 party which cannot be contested. No exclusion is possible. To do
5 so, the entire consolidated group would have to be annulled or
6 denied, and the notion of individual participation followed by
7 individual analysis would have to be reinstated.

8 It is the view of the civil parties that it is in breach of the
9 rights of the civil parties to place restrictions on their
10 participation as a consolidated group which would include
11 emphasizing individual point of view without affording them the
12 full-fledged rights as a consolidated group.

13 [15.49.09]

14 Among these rights, there are; notably, in the case of a
15 Severance Order -- the right to not be excluded individually so
16 long as it has been demonstrated that they were victims of the
17 facts being tried during the first trial or the successive
18 trials.

19 The Trial Chamber clearly set out in its Severance Order under
20 paragraph 8 that pursuant to the ECCC legal framework, civil
21 parties no longer participate in the proceedings as individual
22 members to acknowledge the personal harm that they may have
23 suffered, but they form a consolidated group whose interests are
24 defended by the civil parties and the Lead Co-Lawyers during the
25 proceedings. And, therefore, the Severance Order which restricts

1 the scope during the first trial does not have any impact on the
2 nature of the participation of the civil parties at this
3 particular juncture.

4 [15.50.26]

5 We understand what the Trial Chamber has stated very implicitly
6 but which is rather clear for us, no civil party may be excluded
7 in these proceedings regardless of the nature of the Severance
8 Order. We also believe that the Trial Chamber has addressed this
9 matter in an indirect manner during the hearing of the first two
10 civil parties, Mr. Romam Yun and Mr. Klan Fit, as well as during
11 the testimony of Mr. Em Oeun.

12 All three civil parties have been cross-examined. They held the
13 status of civil parties and yet none of the three were actual
14 victims of forced transfer.

15 We believe that the notion of a consolidated group of civil
16 parties is a very particular judicial concept and notion that saw
17 the light of day here at the ECCC. The notion of collective
18 participation is unique and without precedent in the world. It
19 does not exist in a Romano-Germanic legal system and there is no
20 international jurisprudence with respect to this issue. Civil
21 party participation may be somewhat of a repulsive idea for some,
22 but it is an incontestable legal notion that applies here. All
23 parties have the responsibility to assume this notion and,
24 therefore, no civil party may be excluded from the first trial
25 nor from any future trials with or without severance.

1 [15.52.20]

2 Regardless of the definitions ahead, there are over 3,500 civil
3 parties who are affected and victims who are affected. Together
4 they form one consolidated group. The Trial Chamber stated this
5 in implicit terms in its Severance Order and, once again, this is
6 a leading and clear legal notion.

7 We feel that today the Trial Chamber must confirm this fact in
8 the clearest and most unequivocal terms, with the objective to
9 confirm this with the civil parties because there are some civil
10 parties who understand that or who have the feeling of being
11 excluded when the facts of which they suffered harm or which do
12 not concern them directly are not tried.

13 We require a clear and categorical position from the Chamber as
14 there are NGOs which are conducting outreach programs with civil
15 parties and we also have reparations projects underway. We feel
16 that a very clear response from the Trial Chamber will also
17 enlighten the public as well as observers who still have
18 questions and doubts over this.

19 [15.53.59]

20 Once again, we state that no civil party may be individually
21 excluded because of a Severance Order or no individual civil
22 party may be excluded as a consequence of a new Severance Order.
23 This is fundamental.

24 And, lastly, the third issue as to whether or not the Severance
25 Order will have an impact on the awarding of reparations. Once

1 again, the Internal Rules as well as decisions of the Trial
2 Chamber have provided very founded and justified reasons. The
3 Severance Order does not have an effect on the selective awarding
4 of reparations. The Internal Rules, in its modified version from
5 February 2010, in Rule 23quinquies.1(a), that reparations must
6 address the harm suffered by the civil party.

7 This is not a matter of a multitude of harms, it is a matter of
8 the harm suffered by the consolidated group of civil parties. The
9 harm is considered collective. This is entirely logical. So long
10 as the civil parties form a consolidated group they are entitled
11 to a collective reparation awarded to the entire group.

12 [15.55.50]

13 Once again, based on the Internal Rules, the Trial Chamber in
14 paragraph 8 of its Severance Order very clearly envisaged this
15 matter since it stated that civil parties do not participate
16 individually as a consequence of the harm that they may have
17 suffered. The Chamber adds that the Severance Order does not have
18 any effect on the manner in which the Lead Co-Lawyers may seek
19 reparations on behalf of this consolidated group of civil
20 parties.

21 In full respect of their rights, if they are asked to no longer
22 participate in these proceedings and to no longer be awarded
23 reparations, these same civil parties cannot be excluded from a
24 collective request based on the Severance Order which is defined
25 by its scope and the facts associated. This would be a

1 discriminatory application of the law and in the interests of
2 consistency, reparations would be rewarded collectively.

3 [15.57.25]

4 On the other hand, certain civil parties would be individually
5 excluded on the grounds that they were not victims of certain
6 facts and denying individual participation. This is entirely
7 counter to the rights that govern their participation.

8 Before concluding on this topic and to avert any possible
9 confusion, I would also add that the Trial Chamber additionally
10 asked for reparations requests that would address the crimes
11 dealt with during this trial. This is not in contradiction to
12 what I have just laid out before you. Reparations must be
13 directly associated with the facts being judged and the crimes
14 that have been tried. It may be a day of commemoration that is
15 associated with forced transfer if forced transfer is the only
16 topic to be dealt with during the first trial. This is a minimum,
17 but it does not exclude other matters. All civil parties must
18 benefit from eventual reparations.

19 We, therefore, are requesting the Trial Chamber to confirm this
20 notion and to confirm this statement - that is, to impress upon
21 the civil parties once again that no civil party will be
22 individually excluded in the issuance of a new Severance Order.
23 We are seeking founded certainty based on legal grounds. We are
24 seeking a very clear response from the Trial Chamber, a response
25 that will then be conveyed to the civil parties, to

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1 non-governmental organizations, and to the greater public as well
2 as observers who are following this.

3 [15.59.46]

4 That brings me to my conclusion, Mr. President. I would simply
5 add that by putting these points before you during today's
6 hearings, we are entirely aware of the significance of these
7 points and the weight of what we are stating before the Chamber.
8 It is clear for us that we cannot continue to operate under a
9 cloud of uncertainty, uncertainty that may linger because of the
10 Trial Chamber but which is (unintelligible) for us.
11 We, therefore, very much hope that the Trial Chamber will provide
12 founded grounds in response to what we have raised. Thank you
13 very much.

14 MR. PRESIDENT:

15 Thank you.

16 (Judges deliberate)

17 [16.01.14]

18 The time is now appropriate for today's adjournment.

19 The Chamber has heard a request made by the three defence teams
20 regarding their possible responses to the questions put to the
21 parties by the Trial Chamber as well as the observations and
22 proposals made by the Co-Prosecutors and the Lead Co-Lawyers,
23 that they would be in a better position to respond on Wednesday
24 morning as they have yet to consult with their clients' request
25 for appropriate time for such consultation and instruction from

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1 their client before they respond to the questions of the Trial
2 Chamber as well as all the matters raised by the Co-Prosecutors
3 and the Lead Co-Lawyers.

4 The requests made by the three defence teams are appropriate. For
5 that reason, the Chamber will adjourn today's proceeding and will
6 resume on Wednesday 20 February 2013 starting from 9 a.m. This
7 information is for all the relevant staff and personnel and for
8 the general public as well.

9 As for – the scheduling of hearing the character witnesses of
10 Khieu Samphan that we planned to conduct on 20 and 21 this week
11 will be deferred to appropriate time in the future.

12 For that reason, WESU is now instructed to not inviting these two
13 witnesses to the Chamber – that is, TCW-673 and TCW-665 –
14 awaiting further instruction and scheduling by the Trial Chamber.

15 [16.03.29]

16 Security guards, you are instructed not to bring Khieu Samphan to
17 the courtroom tomorrow, but instead bring Khieu Samphan to the
18 courtroom on 20 February 2013 -- that is, Wednesday, prior to 9
19 a.m.

20 The Court is now adjourned.

21 (Court adjourns at 1603H)

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