



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

TRANSCRIPT OF PROCEEDINGS - "DUCH" TRIAL

PUBLIC

Case File N° 001/18-07-2007-ECCC/TC

18 February 2009, 1016H

Initial Hearing, Day 2

Before the Judges:

NIL Nonn, Presiding
Silvia CARTWRIGHT
YA Sokhan
Jean-Marc LAVERGNE
THOU Mony
YOU Ottara (Reserve)

For the Civil Parties:

HONG Kimsuon
KONG Pisey
TY Srinna
MOCH Sovannary
KIM Mengkhy
Silke STUDZINSKY
Martine JACQUIN
Alain WERNER
Karim KHAN
Annie DELAHAIE
Pierre-Olivier SUR
Brienne McGONIGLE

For the Trial Chamber:

DUCH Phary
SE Kolvuthy
LIM Suy-Hong
Matteo CRIPPA
Natacha WEXELS-RISER

For Court Management Section:

SANN Rada

For the Office of the Co-Prosecutors:

CHEA Leang
Robert PETIT
YET Chakriya
William SMITH
TAN Senarong
Jurgen ASSMANN
PAK Chanlino
SAMBATH Pich

For the Accused Person KAING GUEK EAV

KAR Savuth
François ROUX

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

2 (Court resumes at 1016H in Open Session)

3 (Judges enter the courtroom)

4 MR. PRESIDENT:

5 From now on, the hearing will be conducted in open session, so I
6 would like the AV and the audio unit to connect this audio and
7 visual system back to the public gallery.

8 I now would like to give the floor again to Judge Silvia
9 Cartwright to lead on the discussion. The floor is yours. Thank
10 you.

11 JUDGE CARTWRIGHT:

12 Thank you, President. As the President has indicated, we have
13 now completed the Closed Session. That session was conducted in
14 the absence of the public to preserve the rights and security of
15 witnesses who the Trial Chamber wished to discuss with counsel.
16 I now turn to a preliminary witness list for the trial. The
17 Trial Chamber has taken into consideration the witness lists
18 filed so far and the observations of the parties, and it would
19 like now to inform the parties of its decision concerning the
20 witness list for the trial.

21 In accordance with Rule 80bis(2) of the Rules, where the Chamber
22 considers that the hearing of a proposed witness or expert would
23 not be conducive to the good administration of justice, it shall
24 reject the request that such person be summoned. In determining
25 whether this is the case, the Chamber has evaluated the proposed

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1 hearing of witnesses and experts in the light of Rule 87(2)(a),
2 (b), (c), and (d). It considered whether the proposed testimony
3 would be irrelevant or repetitious, impossible to obtain within a
4 reasonable time, unsuitable to prove the facts it purports to
5 prove, or not permitted under the law.
6 Among other criteria, and in order to avoid unnecessary
7 repetition and lengthy hearings, the Chamber can take into
8 consideration the situation where several witnesses intend to
9 give evidence on the same facts. The Chamber has also considered
10 whether the parties have agreed on facts. Testimony that is
11 related to agreed facts may not be necessary. Finally, the
12 Chamber notes that it needs complete contact details for each
13 witness in order to summon them. It is for the party which
14 requests a witness to be summoned to provide the exact address,
15 or enough information for the Chamber to be able to locate him or
16 her.
17 The Chamber would like to note that the need to hear a witness
18 may change during the course of the proceedings. The Chamber
19 needs more time and information to decide on the acceptance of
20 certain witnesses. It is therefore wise and conducive to the
21 good administration of justice to decide tentatively on a certain
22 number of witnesses now, and to issue a final decision on the
23 remaining witnesses at a later stage. Where appropriate, the
24 witnesses are listed in alphabetical order in English and French.
25 [10.20.28]

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1 The Chamber will announce the tentative calling order of
2 witnesses at a later stage. The first list concerns those the
3 Chamber has decided to accept. That list is as follows: witness
4 KW-29,
5 Nayan Chanda, David Chandler, KW-22, KW-25, KW-06, KW-23, witness
6 D4, witness CP2/5, witness Nic Dunlop, witness CP2/6 or A-05,
7 witness KW-09, witness D5, expert KW-34, witness CP2/4 or A-04,
8 witness KW-13, KW-11, KW-18, KW-21, KW-19, KW-08, KW-12, KW-16,
9 KW-17, witness D6, KW-27, KW-10, KW-15, KW-20, expert Françoise
10 Sironi-Guilbard, witness D1, KW-07, KW-24, witness D2, D3,
11 witness KW-28, witness KW-01, witness CP7 or A-06.
12 The Chamber has decided to postpone its decision whether to hear
13 the following witnesses: witness KW-04, KW-03, CP2/9, Craig
14 Etcheson, Richard Goldstone, Stéphane Hessel, Raoul Marc Jennar,
15 witness CP2/3 or A-03, witness D9, Christopher Lapel, witness
16 CP2/2 or A-02, witness KW-14, witness D8, witness CP2/1 or A-01,
17 witness Marie-Claude Tjibaou, witness CP2/10, CP3/3. In relation
18 to witnesses CP2/3, CP2/2 and CP2/1, counsel will be given the
19 opportunity to comment in writing. We have decided to postpone
20 all witnesses on the list filed by civil party one.
21 During the Closed Session there was argument concerning three
22 witnesses. Witnesses KW-30, 31 and 32. They are witnesses who
23 are sought to be summoned to discuss practices at M13. The Trial
24 Chamber announced its decision in relation to these three
25 witnesses in Closed Session, and now repeats that decision in

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1 public session. The Trial Chamber considers that the practices
2 at, and the development of S21 are pivotal to this trial. The
3 President and the Trial Chamber Judges have decided that the
4 three witnesses on the Co-Prosecutors' list, witnesses KW-30, 31
5 and 32 may well assist them to ascertain the truth concerning the
6 allegations against the accused by giving testimony about the
7 degree of the accused's knowledge of the development of security
8 systems in Democratic Kampuchea and at S21 in particular.

9 [10.26.47]

10 During the Closed Session, the Trial Chamber also mentioned one
11 witness that it considered would be appropriate to be called,
12 that is a witness called by the Trial Chamber itself. It now
13 announces that it will call the witness whose name was referred
14 to in private session, but who has not yet undergone a risk
15 assessment. This witness has been assigned the pseudonym TC1,
16 and will be called by the Chamber.

17 The Chamber will now comment on requests to hear witnesses that
18 it has decided to reject. The counsel notes that according to
19 Rule 80bis (2) of the Rules, where the Chamber considers that the
20 hearing of a proposed witness or expert would not be conducive to
21 the good administration of justice, it shall reject a request
22 that such person be summoned. The Chamber refers to the witness
23 list filed by civil party two, and in particular to witness
24 CP2/8, or A-07. The Chamber notes that it has been provided with
25 no information confirming that she is a relevant witness, namely

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1 it has no information that she was imprisoned at S21. It further
2 notes that in spite of its request, the civil party lawyers have
3 provided no further information concerning the contact details of
4 witness CP2/8, or A-07. The Chamber therefore concludes that the
5 whereabouts of this witness remain unknown. In the absence of
6 any means to locate, contact or summon this witness, the Chamber
7 is not able to call witness CP2/8 or A-07 to testify.

8 The Chamber therefore considers that the evidence which could
9 have been brought by that witness is impossible to obtain within
10 the meaning of Rule 87(2). Consequently, the Chamber rejects the
11 request by civil party two to hear witness CP2/8 of A-07.

12 The Chamber now refers to the witness list filed by civil party
13 group three, and in particular witnesses CP3/1 and CP3/2. In the
14 direction requesting further information in preparation for the
15 Initial Hearing issued by the Trial Chamber on the 5th of
16 February last, the defence was asked to indicate whether it
17 contested any of the facts these two witnesses to propose to
18 testify about. The Chamber acknowledges receipt of the response
19 from the defence filed on the 12th of February 2009, and notes
20 that it does not contest the facts that these witnesses intend to
21 testify about. The Chamber further notes that the estimated
22 length of testimony for each of these witnesses is 10 minutes.

23 [10.31.01]

24 We have received confirmation that the evidence that these
25 witnesses would testify to is uncontested, and therefore the

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1 Chamber concludes that it is unnecessary to summon these two
2 witnesses. Finally, in this part of the Initial Hearing, I want
3 to return to a discussion that was held during the Closed
4 Session. This discussion concerned the witness list for civil
5 party group one, and counsel for that group made specific
6 comments concerning one of the witnesses which drew responses
7 from counsel for the defence and from Mr. Sur.
8 I want to give the opportunity to those counsel to comment again
9 on the matters raised, because the Trial Chamber considers that
10 they are important matters for the public to hear in
11 understanding the scope of these trials. However, I want to
12 impose a time limit on the comments, and hope that each of the
13 three counsel I have mentioned will confine their remarks to five
14 minutes. Mr. Petit has indicated that he wishes to comment, as
15 has Ms. Studzinsky. Hopefully by the time the three previous
16 counsel have commented, they can confine their remarks to a much
17 shorter duration of approximately two minutes each.
18 Mr. Khan, do you wish to open the discussion?

19 MR. KHAN:

20 Your Honour, with your leave, perhaps the more appropriate, with
21 respect, procedure, if you're so minded, would be to follow what
22 happened in Closed Session.

23 JUDGE CARTWRIGHT:

24 Of course, Mr. Khan. I'll do that. Mr. Roux, would you wish to
25 begin? That will mean that you will have to explain a little bit

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1 about the witness concerned without, of course, referring to any
2 names, because although confidentiality is not requested, we have
3 taken the view that until a risk assessment is completed, no
4 names will be mentioned. Thank you, Mr. Roux.

5 MR. ROUX:

6 Thank you, Your Honour. The defence, earlier on, reacted
7 specifically on the issue of witness 3 in the list submitted by
8 the civil parties team of lawyers, group number one. That team
9 was requesting that witness number 3 be summoned to assist the
10 Court in the determination of the appropriate sentence upon which
11 the Court would make a determination vis a vis the accused. Your
12 Honours, we have, on several occasions already, had opportunity
13 to emphasize the fact that in this hybrid tribunal, which is both
14 national and international in nature, we are creating
15 jurisprudence. We are the first international tribunal that
16 accepts as such the presence of civil parties as participants.
17 There are undoubtedly victims that are present nowadays, in the
18 Lubanga case, that are present at the International Criminal
19 Court, but they don't have the same rights and entitlements as
20 here. They can only express their concerns, and they can only do
21 so after being duly authorised to do so. They are not civil
22 parties and this is motivated by a very straightforward reason.
23 This tribunal is the only one where the procedure applied is the
24 civil law procedure, which thus allows for civil parties.
25 In a civil law procedure, civil parties are part and parcel of

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1 the process, they are participants in hearings. As far as I'm
2 concerned, as an international lawyer, I have for years fought
3 for it to be possible for victims to have a voice in
4 international trials, and I am deeply pleased to see that
5 victims, as civil parties, can take part in every respect in
6 hearings, that they have the authority to summon witnesses, that
7 they can take part in debates, that they can ask questions
8 themselves, directly or via their lawyers specifically directing
9 questions to the accused, in particular. All of this either in
10 their direct capacity or via their lawyers, enables them to
11 express the tremendous suffering that they or their relatives and
12 close loved ones have experienced.

13 [10.37.45]

14 The voice of the victims is crucial. We shall be in a position
15 to hear and respect the suffering of the victims. This being
16 said, what exactly is the role of a civil party in a trial of the
17 Roman German tradition. It is very clear for all authors
18 concerned that the civil party and the prosecutor are different.
19 They have different functions and roles. The civil party is
20 present in its capacity that enables it to express its suffering,
21 and to seek redress, to seek reparation. But in terms of the
22 social provision of reparation, the Co-Prosecutors are in charge
23 of this particular function.
24 The Co-Prosecutors will speak on behalf of the public opinion, of
25 society, in order to require a sentence to be applied. This is

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1 never the role of the civil parties. To give this role, or
2 right, to civil parties, that's to say, the right to claim a
3 particular sentence, would amount to a regression in our
4 jurisprudence, because it would bring us right back to the days
5 of direct revenge. All authors tell us that the separation
6 between the functions of civil parties and prosecutors is
7 essential in terms of the civil parties allowing the prosecutor
8 to take on board the depth of their suffering and to translate
9 this in terms of a sentence to be formulated.

10 I think I can leave this point, but I would like to suggest now
11 to the Court to summon an expert, an expert who is possibly the
12 leading world expert on this subject, and I'm referring to
13 Professor Robert Badinter, former French justice minister, the
14 person who has no doubt done the most to introduce new rights for
15 civil parties in criminal cases when he was the justice minister
16 of France. Robert Badinter was also the originator of the
17 abolition of the death penalty in France. He also did very very
18 much to promote the role and voice of victims in criminal
19 proceedings, he was also president of our constitutional council
20 in France. He is a teacher of law in the USA, which means he is
21 also very much conversant with common law.

22 [10.41.09]

23 Nowadays, Mr. Badinter is publicly stating his concern about an
24 undue extension of the role of civil parties. I think today Mr.
25 Badinter would be the best expert to establish for us certain

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1 lines of conduct and ideas for us to ponder as to what exactly we
2 should be doing. On this issue, I think it would be extremely
3 worthwhile for this Court to listen to the point of view of Mr.
4 Badinter. Thank you, Your Honour.

5 JUDGE CARTWRIGHT:

6 Thank you, Mr. Roux. Now, Mr. Sur, do you wish to comment? And
7 remember, I did indicate five minutes, it would be very helpful
8 if you could be succinct. Thank you.

9 MR. SUR:

10 Your Honours, we have a very strong impression today that we are
11 taking part in the writing of international criminal law for the
12 future, insofar as the victims' participation in trials is
13 concerned. Before I indicate that Mr. Roux's view tallies with
14 mine, that we are in perfect agreement, in order to clarify
15 matters, I would like to let the Court know that victims are
16 represented by a group of lawyers which is united, which is a
17 solid whole in bearing the suffering of the clients who have
18 honoured us by asking us to represent them.

19 The word lawyer comes from the Latin *advocare*, so we are speaking
20 for the pain of our clients. This should not, at this point,
21 raise any difficulties. We should not consider that because
22 there is a minor disagreements in *limine litis* at the beginning
23 of trial, we are raising questions as to how we are going to
24 perform our role as civil parties, that is our technical part in
25 these proceedings. Before this Court, we have this role to play

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1 because this is a hybrid court. It is based on international
2 criminal law and Cambodian law, and Cambodian law means that it
3 is based on the Romano-Germanic system, and it is this
4 Romano-Germanic legal system that allows victims to join as civil
5 parties. And this is what we do before the courts in France.
6 [10.45.10]
7 And I should say that article 23(1) which Judge Lavergne referred
8 to is largely similar to the definition of the role of civil
9 parties in France, that is a double role to seek vindication by
10 participating in the prosecution with regard to the elements of
11 the crime, but behind the prosecution, only with regard to the
12 material elements, and therefore we are the active witnesses. We
13 are parties, witnesses who are parties in the proceedings, who
14 have to provide these material elements by giving testimony in an
15 active way under the law, so that the elements of the crime can
16 be determined. That is the first point.
17 With regard to the second point, we seek reparations. We do not
18 seek punishment. Reparations pertain to the party, to the
19 victim, because punishment is part of another system. Your
20 Honours, punishment is defined by four factors. You lock someone
21 up, you punish him so that other people may not do that, and this
22 is part of public order. That is the job of the prosecution.
23 The second function of punishment is to isolate someone, the
24 dangerous person. That is not the function of the victim. That
25 is the function of the prosecutor. The third function is to

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1 amend, because in true punishment, the person can be
2 rehabilitated, and be part of the social fabric. That is also a
3 part of public order. The last function of punishment is the
4 Christian function. It is expiation. That is obviously not
5 within the scope of the victims' role.

6 [10.47.47]

7 Your Honours, what do the victims ask for? What do they expect
8 their lawyers to represent for them? To tell the truth, some
9 will never forgive. They reflect (indistinct) thought in saying
10 that forgiveness is death. Others will forgive, perhaps. Some
11 victims would like the accused to be killed, while others want to
12 be locked up for a while. And others want different kinds of
13 punishment. This cannot be quantified by a counsel for the
14 victims because quantification establishes limits, and I'm
15 concluding now that our role is to work for the civil parties and
16 because through these proceedings we transcend the quantification
17 of a sentence.

18 JUDGE CARTWRIGHT:

19 Thank you very much, Mr. Sur. Do any other civil party lawyers
20 wish to comment, and remember I said about two minutes. Madame
21 Jacquin?

22 MS. JACQUIN:

23 Very briefly, Your Honour. I think we must consider what has
24 been said on both sides with regard to the practice of civil
25 parties before French courts. I would like to say that the civil

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1 parties participate in the future beyond what is done in this
2 Court, because in French courts the civil party is a witness
3 before becoming a civil party. This has not been adopted here to
4 make it easier for these hybrid courts to operate, and to avoid
5 difficulties with regard to the principles.
6 Civil party lawyers express all the difficulties and sufferings
7 felt by the civil parties, but although the civil parties do not
8 require sentencing, they may try to express how the sentencing
9 should be designed. So in restricting the civil party, we should
10 not prevent the civil party from expressing himself or herself
11 with regard to what will come before. We would also like to say
12 that, in this Court, unlike in other courts, there is no
13 financial compensation or damages. There is a request for
14 collective reparation, and I think that the civil parties might
15 have something to say about that later.

16 JUDGE CARTWRIGHT:

17 Thank you very much, Ms. Jacquin. Ms. Studzinsky, you indicated
18 a desire to speak earlier, and you can be succinct too. Thank
19 you.

20 MS. STUDZINSKY:

21 Thank you, Your Honours. I would like to refer first to my long
22 and rich experience in the civil law system, where civil parties
23 can perform broad rights. I also would emphasize that this
24 Court, the ECCC, is unique and of course we might, if there is no
25 matter dealt with in the Rules or the CPC, refer to international

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1 or maybe to national practice, but I think this Court is unique
2 and should find its own way how to deal with rights of civil
3 parties.

4 [10.52.09]

5 To give you, however, a short introduction, how different -- and
6 it is different to the French system. Civil parties are allowed
7 to act in another civil law system. In Germany they are allowed
8 to perform a lot of rights, and in addition to the French system,
9 they are allowed to express their views on the penalty, on the
10 sentence. They are not obliged, but they may do so. Their
11 rights are limited insofar that they are not allowed to appeal a
12 judgment only because they do not agree on the sentence.

13 I would like to outline some arguments here in our unique
14 situation in Cambodia, in a Cambodian court, and looking at what
15 are the rights of the civil parties, that is supporting the
16 prosecution and seeking reparations. Supporting the prosecution
17 includes, of course, contributing to the mitigating and
18 aggravating factors -- that means the civil parties are allowed
19 to introduce such facts which influence directly the sentence at
20 the end. And therefore it is logical if they are allowed to add
21 such facts in different manners, and introduce this into the
22 proceedings, that they of course be allowed to express their view
23 on the sentence.

24 And I do not agree with the defence saying that this means like
25 going back -- it is a revenge. It is not a revenge, it is a full

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1 participation in the proceedings and part of the proceedings as
2 finding the sentence. And as they support, as the rules outline,
3 they are of course allowed to express what they find on this
4 issue. And otherwise, as we find no restrictions in the Criminal
5 Procedure Code of Cambodia restricting civil party rights in this
6 regard, in this respect, so as the law does not mention any
7 restrictions in this respect, of course it is included and part
8 of the rights of full participation.

9 [10.55.47]

10 And therefore, I think, if an expert should be heard I will not
11 object to this proposal by the defence, but of course it should
12 -- an expert who is able to refer to different civil law systems
13 and, as I have shown, the French system is only one of them, and
14 obviously the rights of civil parties and the extent of the
15 rights is different, and so I might be the French educated Mr.
16 Badinter, maybe very familiar with the French system, but not so
17 familiar with other civil law systems, so I suggest to call an
18 expert who can cover all systems to contribute to resolve this
19 question. Thank you very much.

20 JUDGE CARTWRIGHT:

21 Thank you, Ms. Studzinsky. Any other civil party lawyer? Yes,
22 Mr. Hong? Hong Kimsuon? Yes.

23 MR. HONG KIMSUON:

24 Thank you, Your Honour. In my point of view, in the name of the
25 civil party, I am quite familiar with

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1 the roles of the lawyer to represent victims who are civil
2 parties in case 001 and 002. I do not intend to challenge this
3 any longer concerning our support for the witness list whether
4 they are essential or not, but as lawyer Francois Roux already
5 mentioned and as reiterated by Ms. Studzinsky, that these
6 Extraordinary Chambers in the Courts of Cambodia established
7 through the agreement between the United Nations and the Royal
8 Government of Cambodia, and so far there are public documents to
9 prove that the procedures to be applied in this Court is based on
10 the Cambodian criminal procedures.

11 So Article 12 of the Agreement states that the procedures must be
12 compliant with the Cambodian procedural system, so only when
13 there is any uncertainty concerning the interpretation of any n
14 related national laws that the international guidance should be
15 sought. So in these Internal Rules of the -- Rule 23, it is
16 regarded as a principle criminal procedures to be applied in the
17 whole Court. So the term "civil parties" in this case, of
18 course they are -- they derive from the victims, and they have to
19 be represented according to the law.

20 [10.59.46]

21 According to Criminal Procedural Code Article 326 of the civil
22 parties that are represented have the right to address the court,
23 so here the Rule says the presiding Judge shall listen to the
24 statements of civil parties. So as the civil parties we know our
25 roles very clearly, so when we would like to submit any documents

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1 to be included in the case file and that we need support from the
2 President, it is to make sure that we can support the prosecution
3 so that we can bring inculpatory evidence against the accused.

4 So as a civil party lawyer and like our colleagues our obligation
5 here is not to compel the Court to press any -- to sentence the
6 accused person.

7 But we follow Internal Rules, Rule 23, we, the civil parties, are
8 victims, so we are not hear only to observe the hearing, whether
9 the accused is sentenced or not, and that we only seek
10 reparation. And we already know that there would not be any
11 individual reparation, however the Rule states clearly the rights
12 of the civil party and whether these rights are accepted by the
13 Court or not I think it will be left to the Court to make a
14 decision. So I would like the Court also to give opportunities
15 to the civil parties to address the Court by expressing their
16 sufferings and requests. Thank you very much.

17 JUDGE CARTWRIGHT:

18 Thank you, Mr. Hong Kimsuon. Now, the Co-Prosecutors indicated
19 that they wish to address the Court on this matter. They will,
20 of course, be extremely succinct. Thank you. Ms. Chea Leang.

21 MS. CHEA LEANG:

22 Your Honour, thank you. Through the discussions and remarks in
23 this context it is my opinion that the national prosecutor would
24 like to tell about the national laws that has been implemented
25 and is in force so far, but before we talk about the national

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1 procedures and the law, we have to think that this Court is a
2 special hybrid court.

3 [11.02.38]

4 First, as the lawyer Hong Kimsuon said, we have to apply the
5 Cambodian laws. If there is a gap in the Cambodian law then we
6 will apply the international laws. So in general we think that
7 this Court is not a fully national court because the Victims Unit
8 is not an office -- it is not an independent office, and it's not
9 a part of national law. However, the creation of a separate
10 independent office, as stated by the lawyer, is based on the
11 victims.

12 So how do civil party lawyers and the civil parties play this
13 role? I agree that the Trial Chamber needs to consider the Rule
14 23.1. According to our understanding, it is clear that first
15 whether they are allowed or recognised by the Trial Chamber to be
16 the civil parties to participate in the hearing. Secondly,
17 whether what they do is in order to support the prosecution by
18 their position office. So whether what they do is to support the
19 charges made by the prosecution is their roles, hence they have
20 to seek out the witnesses in order to find inculpatory evidences
21 for the accused, to find the guilt of the accused in order to
22 seek for reparation, which is the last intent that they have as
23 stated in Rule 23(b). This is a specific characteristics for the
24 civil parties.

25 So whether their rights to express their opinions in the Courts

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1 during the proceedings, even in the national law it is not
2 prohibited. However, at the end of the trial hearing, usually
3 the Trial Chamber asks the civil party on whether they have any
4 proposal for the Trial Chamber to consider. They are not limited
5 in the expression of the opinions. We all know that first they
6 would like to seek their reparation, however, they might also
7 seek for the sentences to be imposed on the accused. So the
8 Trial Chamber has to consider whether their speech or remarks has
9 any value.

10 [11.05.37]

11 We also have to consider the differences between the roles of the
12 prosecution and the roles of the civil party. We have to think
13 that although the remarks on the sentence of the accused is not
14 the obligation, however this is their rights to express their
15 opinions. And the role of the prosecution, or the Co-Prosecutors
16 in this case, it is our obligation, it is our role, and I agree,
17 because as the
18 Co-Prosecutors we work for the benefit of the victims, for the
19 benefits of the public, so we have to consider the involvement
20 and the limit of the involvement of the accused, and it's us to
21 seek the sentence.

22 And they have the right to express the opinions, and the
23 obligation of the prosecution is different. This is what I want
24 to clarify. What we applied in the Cambodian law. And we have
25 our law clearly stated on the specific point, also you can have a

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1 look at the Rule 26(a) and (b), and I would like to seek the
2 permission to ask the Trial Chamber to seek and to look into this
3 Rule, and if there is any disagreement on this issue, it is clear
4 to refer to this particular rule on any controversial witness or
5 experts to be summoned. And they have to bear in mind that this
6 is not a fully national court, this is a hybrid court.
7 So then the accused can also seek experts who are exculpatory
8 evidence to support their claims. And the prosecution have the
9 right to seek the inculpatory evidence for the prosecution, so it
10 is at the discretion of the Trial Chamber to decide which witness
11 experts to the summoned. Thank you.

12 JUDGE CARTWRIGHT:

13 Thank you very much, Ms. Chea Leang.

14 MR. KHAN:

15 Your Honour, I am most grateful. Sorry, Your Honour. I was
16 getting French translation. Your Honour, the first observation I
17 will make is that this particular submission was precipitated not
18 only upon a public and confidential filing that was put in by
19 civil party group number one, but of course by the submissions by
20 my learned friends for the defence and for the fourth civil
21 party. They have been given two opportunities, in Closed Session
22 and in Public Session to ventilate their views, and there's been
23 similar submissions.

24 [11.08.48]

25 Your Honour, I am most cogniscent, I am most aware of the five

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1 minute parameters, but it does appear that not all of us have
2 been precise in keeping with those limits, and I would ask in
3 advance for Your Honour's indulgence if I stray a little bit
4 beyond those five minutes. Your Honour, I think it's only fair,
5 that as lead counsel of the civil party group one, representing
6 about forty per cent of all civil parties in this case, that it's
7 only right and proper that we be entitled to address relevant
8 submissions before Your Honour.

9 JUDGE CARTWRIGHT:

10 Yes, Mr. Khan, you may have a little extra time, but please try
11 to keep it within a reasonable period, because we don't have the
12 rest of the morning for this matter. Thank you.

13 MR. KHAN:

14 I am most obliged, and I have the point. Your Honour, my learned
15 friend Mr. Sur, for the fourth civil party, stated in Closed
16 Session and again in Public Session, that the civil parties are
17 united. I venture to say that all parties in this Court are
18 united in relation to achieving justice, and I would extend that
19 very freely to my learned friend for the defence, and my friends
20 for the prosecution, but of course it needn't be a matter of
21 great friction or controversy if independent counsel have
22 different views as to how justice can be most effectively and
23 properly achieved. It is the role of the bar to make decisions,
24 and of course it is entrusted to Your Honours, as guardians of
25 justice, to decide how justice will be done in this case.

22

1 So there is, clearly, a disparity in the views expressed between
2 the civil parties and also other protagonists in this Court.
3 There seems to be a clear identity of view, understandable,
4 perhaps, from the civil law tradition and the country that they
5 emanate from, from my learned friend Mr. Sur for the fourth civil
6 parties, and my learned friend Mr. Roux for the defence.
7 However, the starting point must be the law, the object and
8 purpose for which this Court was established. Reference to
9 Cambodian law is correct: it is the foundation, it is the
10 starting point, and without the legislation of Cambodia, of
11 course, this Court would not have existed.
12 [11.11.33]
13 But there are distinctions, there are unique characteristics that
14 make this Court different, and the fact that this is not Paris,
15 this is not France, this is not a clear inquisitorial system is
16 made patently obvious in the rules that guide Your Honours. Rule
17 21 makes it clear, Rule 21A: proceedings shall be fair and
18 adversarial. So Your Honours, it is clearly a mix of systems
19 that have been moulded together to do justice. And as a common
20 law lawyer, I am in the rather ironic position, but a position
21 that I quite enjoy, I must confess, that I am seeking to extend
22 victim participation beyond those lawyers whose country is the
23 birthplace of this concept.
24 Your Honour, as a matter of law, Rule 21(3) is also an important
25 starting point, and it is clear that civil parties may

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1 participate in criminal proceedings. It is my submission that
2 given that civil parties are parties of equal standing to my
3 learned friends for the defence, and my learned friends for the
4 prosecution, the presumption must be that the extent of
5 submissions must be identical and equal to the participation
6 allowed to the prosecutor and the defence unless expressly
7 circumscribed. That is my first point.

8 The fact that this is clearly a legislative requirement in the
9 Rules is perhaps borne out by just one example, Rule 82(5), and
10 that is a rule that limits certain rights of appeal to the
11 prosecution and to the defence. There is no rule at all before
12 Your Honours, and of course my learned friends Mr. Roux and Mr.
13 Sur and others were silent, in my respectful submission, on any
14 law that would contradict my primary submission. There's no rule
15 cited that prohibits civil parties calling evidence of the nature
16 that we intend.

17 [11.14.19]

18 Your Honours, what is the evidence? They are experts, two
19 experts that we propose to speak on the issue of reparations.
20 One international, and one that can speak to the Cambodian
21 particular issues. Two experts on sentencing, again,
22 international and the Cambodia context. And one leading expert,
23 also, on the issue of harm and trauma. This is relevant
24 evidence. But, Your Honours, again, I do not see a need for
25 undue controversy, because all we are doing under 80bis is

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1 proposing. We are proposing these witnesses to Your Honour, and
2 we say that they will provide relevant and coherent and probative
3 evidence that will assist justice being done.
4 Your Honours, if evidence is put forward by any party, Your
5 Honours can disregard it, Your Honours can dismiss it, or Your
6 Honours may accept part of it. So Your Honours, simply by
7 allowing evidence to be called does not cause any injustice to
8 any side whatsoever, in my submission. Your Honours, the Court
9 -- the Chambers of this Court made it clear in the Prosecutor v.
10 Ieng Sary, Directions On Unrepresented Civil Parties Rights To
11 Address The Pre-Trial Chamber In Person, which was a decision of
12 the 29th of August last year, at paragraph 5. Made it clear that
13 a victim's interest in participating in pre-trial proceedings
14 stems from two core rights: the right to the truth, and the
15 right to justice. That was a verbatim quote from the
16 jurisprudence of this Court.
17 The same rationale, in my respectful submission, must continue,
18 to the trial process, to the trial stage before Your Honours.
19 And Your Honours, my learned friend Mr. Roux of course is an
20 experienced lawyer of great repute, and makes extremely eloquent
21 submissions always, and it's an honour to be in the same
22 courtroom with him, and likewise with Mr. Sur. But of course
23 once again we are not in France, and I do not see for the life of
24 me why another French individual, however eminent, like Professor
25 Badinter, should come to this Court, as an expert, and his views

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1 should be accepted, and yet somehow the views of the
2 International Criminal Court should be disregarded. It seems
3 rather perverse, or curious at the very least.
4 [11.17.29]
5 Your Honours, the International Criminal Court and the law and
6 jurisprudence emanating from that organ may not be binding
7 directly upon Your Honours, but at the very least it is
8 indicative of the views of a great many number of states. And
9 the particular rule dealing with victim participation did not
10 emanate from a common law system, it emanated from the great
11 country of my learned friends that now seek to oppose victim
12 participation in the manner that I have adumbrated, that I have
13 set out.
14 Your Honour, Cambodia itself, a sovereign and respectful country,
15 that hosts us here today, is a signatory to that court, and has
16 accepted the principles of that court. Now, on a technical level
17 I fully accept that participation here is that civil parties are
18 civil parties, whereas at the International Criminal Court they
19 only have party-like rights. But Your Honours I would urge you
20 to go beyond the formalities and look at the actual purpose and
21 role of participation. The International Criminal Court, in the
22 case of Prosecutor v. Katanga, Decision on the Set of Procedural
23 Rules Attached to the Procedural Status of Victims at the
24 Pre-Trial Stage of the Case, 13th of May 2008, at paragraphs 38
25 and 39, cast what I submit is an illuminating and cogent piece of

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1 advice on this issue. Indeed, not only advice, but legal
2 guidance.
3 Your Honours, I will quote paragraph 38: "In other words," the
4 ICC said, "the interests of the victims go beyond the
5 determination of what happened, and the indictment of those
6 responsible, and extend to securing a certain degree of
7 punishment for those who are responsible for perpetrating the
8 crimes for which they suffered harm." At paragraph 39, the
9 judgment continued: "These interests, namely the identification,
10 prosecution and punishment of those who have victimised them by
11 preventing their impunity are at the roots of the
12 well-established right to justice for victims of serious
13 violations of human rights which international human rights
14 bodies have differentiated" -- I repeat -- "which international
15 human rights bodies have differentiated from victims' rights to
16 reparations."

17 [11.21.00]

18 Your Honour, a whole host of jurisprudence was cited by the ICC,
19 from the European Convention of Human Rights, including French
20 cases, to the Intra-American Court of Human Rights. Your
21 Honours, Article 33, that governs Your Honours' jurisdiction
22 makes it very clear. And it's relevant to this particular
23 submission and also to a submission put forward yesterday by my
24 learned friend, counsel for civil party number two. It's far too
25 easy, and it would be a sad loss, in my submission, to close

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1 one's eyes to the accumulated knowledge of international
2 jurisprudence from other international courts, and simply say
3 this Court is an island unto itself.
4 That was not the object for this Court's creation, and that was
5 not the object to have international involvement in this
6 proceeding. It makes it very clear, Article 33, that if these
7 existing proceedings do not deal with a particular matter, or if
8 there is uncertainty regarding the interpretation or application,
9 or if there is a question regarding the consistency with
10 international standards, guidance may be sought in the procedural
11 rules established at the international level.
12 Your Honour, no law, in any system, is static. That applies to
13 the civil law, the common law, and international law. I would
14 urge Your Honours, in deciding this matter, to look at the clear
15 thrust of procedures, evidenced in a whole multiplicity of
16 jurisdictions, and as articulated in the International Criminal
17 Court, and as, in my submission, is clear from the object and
18 purpose of this Court's creation, and the rules established.
19 There is no clear prohibition that would prevent us calling
20 witnesses, if Your Honours were so minded, to speak on issues, it
21 would then of course be for Your Honours to accept it or to
22 disregard it.
23 [11.23.17]
24 Your Honours, I cannot leave this subject without addressing my
25 learned friend's, -- Mr. Roux's submission, that to allow the

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1 views of victims to be heard would be regression, not
2 progression. That view, with the greatest of respect, is highly
3 presumptuous. There has been no indication from me, in my
4 filing, or in Court, that vengeance is being sought. He
5 expressly stated that vengeance would be sought. Your Honours,
6 international and national experts would be heard, and Your
7 Honours would decide, but I can say, for the record, that the
8 civil parties we represent in civil party group number one do not
9 want vengeance. They do not want blood. They want justice.
10 And to be prohibited, on an arbitrary manner, from calling
11 evidence that may assist Your Honours, based upon the municipal
12 practices as interpreted in France is completely -- well, I
13 wanted to say something more gentle, but I would say it's
14 completely unmerited, if not absurd.
15 Your Honours, those are my principle submissions in relation to
16 this matter, and I would ask that Your Honours do not simply seek
17 to stifle the voice of the victims. If relevant evidence is
18 relevant, if it will assist Your Honours in deciding the issues
19 of reparation and sentencing, or assessing the harm and trauma
20 suffered from a psychological point of view, I would urge Your
21 Honours to consider it once again with the most anxious scrutiny
22 before summarily dismissing this application. Your Honour,
23 unless I can assist further, and Mr. President, those are my
24 respectful submissions.
25 JUDGE CARTWRIGHT:

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1 Thank you, Mr. Khan. This has been a useful discussion on the
2 topic, but I remind the parties that this is a preliminary
3 discussion, because the parties have not yet had an opportunity
4 to comment in full on the list provided by civil party group one,
5 and further comments will be permitted in writing. However, the
6 Trial Chamber felt it was useful to have this discussion
7 concerning the role of civil parties in public. I need to tell
8 counsel that we will not perhaps be quite so free with giving
9 time for such submissions in the future, but thank you in any
10 event.

11 [11.26.13]

12 Now, Mr. Roux, one final matter please. You did mention in the
13 course of your submissions that you would envisage asking the
14 Chamber to call an additional expert. Should you wish to take
15 that matter any further, you will of course be aware of the time
16 limits if you propose this person as an expert, there are certain
17 time limits that must be observed, and we would just want to draw
18 that matter to your attention. I'm not inviting the application,
19 I'm simply drawing it to your attention.

20 MR. ROUX:

21 I do take your point, Your Honour. This is aligned with what we
22 said yesterday. From the moment when, as things evolve, we
23 discover in lists of witnesses, we discover new proposals, well
24 necessarily we will also be coming up with our own requests for
25 experts. Either we make these requests ourselves or we suggest

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1 that the Chamber summon such people. I would like to recall that
2 Mr. Badinter would not speak as a Frenchman, he is after all an
3 international figure, as a former head of the Constitutional
4 Council of France, he is cogniscent of civil law systems and not
5 only in France. So let us not be reductive in terms of what his
6 expertise is, and today objectively speaking I think we can
7 consider him to be one of the most deepest experts in the world.
8 He was also an active participant in the establishment of the
9 ICC, and in developing human rights rules. I don't think you
10 would find a better qualified person around the world to treat --
11 to discuss the question that we are now occupied with. Thank
12 you, Your Honour.

13 JUDGE CARTWRIGHT:

14 Thank you, Mr. Roux. Mr. President, I believe that that
15 concludes this portion of the Initial Hearing concerning
16 witnesses. Thank you.

17 MR. KHAN:

18 Your Honour, Mr. President, there is one very brief matter that
19 concerns 4.1 of the Agenda, and I will be exceptionally brief.
20 It's our respectful submission that some guidance should be given
21 by the Trial Chamber on two issues: firstly, the number of civil
22 parties that may wish to speak, and secondly when their
23 participation is envisaged. I can say that we hope to file
24 shortly, in the next week or maybe two, an application, or a
25 motion, to the Trial Chamber, stating that out of the perhaps 38

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1 or 39 civil parties that we represent, or hope to represent in
2 accordance with Your Honours' order, we will seek to call at most
3 between seven and ten to invite them to speak with Your Honours'
4 leave.

5 [11.29.30]

6 I would respectfully submit that similar indications perhaps can
7 be sought from other civil parties, because it just may assist
8 all individuals, and particularly Your Honours, in having a view
9 as to the length of this trial, and helping in the case
10 management side of judicial functions. The second issue linked
11 to that is the order of witnesses being called, and it's very
12 clear that under the Rules, Your Honours, under 91, can hear the
13 parties in the orders that you so determine. It's my submission
14 that there are two principle options.

15 The first is that a decision can be made by the party. If that's
16 the case, it's my respectful submission that the prosecution
17 should go first, a civil party witness should go second, then a
18 civil party that may wish to speak, and then finally the defence.

19 The reason I propose this order is that it may be more conducive
20 to Your Honours' exercise of discretion, and understanding the
21 case, because the prosecution primarily should set the parameters
22 of the case, and that would allow the civil parties to support
23 them.

24 Your Honours, if Your Honours were minded to divide the evidence
25 by type or nature of evidence, of course, that's an option for

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1 Your Honours, I would similarly say that, all things being equal,
2 that order may lend itself to a more orderly proceeding. So,
3 Your Honour, that's the second matter, the first is perhaps an
4 order to the civil parties or an invitation to the civil parties
5 that we inform Your Honours as to how many civil parties we
6 envisage we would ask to speak. I am grateful.

7 [11.31.38]

8 JUDGE CARTWRIGHT:

9 Thank you, Mr. Khan. Is there any other matter before we finish
10 this part of the Initial Hearing? Ms. Studzinsky?

11 MS. STUDZINSKY:

12 Thank you, Your Honours. I would like to state that the Chamber,
13 Judge Cartwright, granted to the parties two or five minutes to
14 speak on the issue of rights of civil parties. Then I could
15 observe after this request to extend a little bit this time
16 limit, Mr. Khan took 19 minutes, if I'm right --

17 JUDGE CARTWRIGHT:

18 Ms. Studzinsky, all --

19 MS. STUDZINSKY:

20 -- to address this matter, and --

21 JUDGE CARTWRIGHT:

22 -- all counsel exceeded their time limits. I permitted this on
23 this occasion because it's a matter of great interest for the
24 public, and unless there is some other matter that you wish to
25 address, I don't think it's helpful to go even more over time on

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1 this matter. Is there some particular matter?

2 MS. STUDZINSKY:

3 Yes, I really would get an advice by the Chamber. I think I was
4 in the deadline of in the time limit of five minutes, and I was
5 short and I of course did not exceed in this manner, and I think
6 it is not at all justified by the number of civil parties being
7 represented, but because is it a common issue for all civil
8 parties and not justified because there are individual
9 particularly interests by an civil parties.

10 JUDGE CARTWRIGHT:

11 Can you tell me what you wish the Chamber to do?

12 MS. STUDZINSKY:

13 To remind Counsel if time limits are set, what is reasonable for
14 a point of view, to remind immediately counsel to keep in this
15 time limit and I'm not speaking about one or two minutes, but
16 this was exaggerated from my point of view. Thank you.

17 JUDGE CARTWRIGHT:

18 Thank you very much. Ms Jacquin?

19 [11.34.28]

20 MS. JACQUIN:

21 Your Honours, as civil party lawyers, I would like to have some
22 further clarification with regard to procedural areas in order to
23 avoid difficulties, but particularly with regard to the order in
24 which the civil parties will be taking the floor. So exactly
25 within which time limit you would like us to take the floor, how

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1 far ahead of time you want to know this? We represent thirty per
2 cent of the civil parties in group two, and we consider that for
3 the schedules, seven or eight of our civil parties will take the
4 floor, and I think that some of them have a great deal to say,
5 and some of them may well have been witnesses, because some of
6 them are survivors of S21. That is survivors before the
7 liberation of S21 which means that they were able to escape in
8 sometimes difficult conditions, and I think they will be direct
9 witnesses, and I think that some provision should be made that
10 they be afforded the necessary time to tell their story. Thank
11 you.

12 [11.39.20]

13 JUDGE CARTWRIGHT:

14 Thank you. After a brief deliberation on the Bench, the
15 President and the Trial Chamber would like to remind counsel that
16 we seek further information concerning the parties, either civil
17 parties or witnesses, as to the length of time that they might
18 take. We specifically sought that in relation to witnesses, and
19 we would like that indication also concerning civil parties. And
20 when it comes time to schedule the witnesses and hearing from the
21 civil parties we will then have enough information on which to
22 base our determination. So any further information that can be
23 provided would be extremely useful. So thank you.
24 Now I believe that that now concludes this portion of the Initial
25 Hearing concerning witnesses. Mr. President.

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1 MR. PRESIDENT:

2 Thank you very much, Judge Cartwright, for leading the discussion
3 on this matter. Next, I would like to give the floor to Judge Ya
4 Sokan to lead the discussion on the issues relating to additional
5 material filed with the witness list and motion by the
6 Co-Prosecutors to file new evidence. So Judge Ya Sokan, you have
7 the floor.

8 JUDGE YA SOKAN :

9 Thank you Mr. President. On 11 December 2008, in its Notification
10 of a Trial Management meeting and Order to the parties to file
11 additional materials, the Chamber ordered the parties to file,
12 inter alia, at the same time as their witness lists, a list of
13 exhibits and a list of the new documents they intend to offer in
14 the case, containing a brief description of their nature and
15 contents.

16 According to Rule 80, the civil parties and defence have 15 days
17 from notification of the

18 Co-Prosecutors' List to file their own witness Lists. The
19 deadline for filing such additional material is the same as the
20 deadline to file witness lists under Rule 80 of the Rules.

21 Parties having joined the proceedings after the above-mentioned
22 dates of notification have 15 days from notification of the
23 Co-Prosecutors' witness list to them to file their lists and
24 additional material.

25 According to the material filed by the parties, none of the

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1 parties intend to offer any exhibits, namely tangible objects, as
2 evidence during the trial. The Chamber wishes to acknowledge
3 receipt from the Co-Prosecutors, the defence and civil party
4 groups one, two and three of their lists of new documents filed
5 together with their witness lists.

6 The Chamber also wishes to acknowledge receipt of Document E5/10,
7 the motion of the Co-Prosecutors to submit new evidence pursuant
8 to Internal Rule 39(4) which was first announced at the Trial
9 Management meeting and filed on 28 January 2009. In the motion,
10 the Co-Prosecutors request the Chamber to allow the filing of
11 film footage of S-21 provided by the Government of Vietnam to the
12 Documentation Centre of Cambodia, DC-Cam. The film footage was
13 not previously included in the list of new documents and the list
14 of evidence that the Co-Prosecutors were required to file
15 together with their list of proposed witnesses and experts. The
16 Co-Prosecutors submit that this material was newly discovered and
17 contains evidence relevant to these proceedings.

18 With respect to the lists of new documents, the Chamber notes
19 that these documents will be assessed at the same time as the
20 merits. If any party has any objection to new documents offered
21 by other parties or wish to make any comments on the
22 admissibility of these documents, the Chamber will hear these
23 objections or observations today, and take them into
24 consideration during the discussion on the merits. The Chamber
25 would like to invite the parties to indicate whether they have

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1 any further information or any comments or submissions relating
2 to the various lists of new documents or to the Co-Prosecutors'
3 motion. Do the Co-Prosecutors have any comments to make in these
4 regards?

5 MS. CHEA LANG:

6 Your Honour, thank you. What Your Honour has described is the
7 submission by the Co-Prosecutors officeto the Trial Chamber to
8 accept the new film. I would like to make some clarification as
9 to why there is a delay in the submission of the evidence to the
10 Trial Chamber after the expiry date of the deadline. The Office
11 of the Co-Prosecutors recently received this new information one
12 week after we submitted the witness list and the additional
13 documents to the Trial Chamber, we received the news through the
14 International news and through the Documentation Centre of
15 Cambodia that they received these short films from the Government
16 of Vietnam, therefore the Office of the Co-Prosecutors recently
17 sent our investigators to examine the short films to see how
18 important it is related to our case file 001. After the
19 examination of the film we concluded that it is important
20 relevance to the case file 001, and we requested the
21 Documentation Centre to send us the materials to the Office of
22 the Co-Prosecutors.
23 And what was our intention to submit this evidence to the Trial
24 Chamber? It is important that we see the importance of this new
25 film and that our office has never seen it before and it shoes

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1 the view of the S-21 office. Immediately after the liberation.
2 Two or three days after the liberation, it is therefore shown the
3 headless corpse and the chained corpse in building A, within the
4 compound of the office of S-21. Second, it shows in the film the
5 victimized children at the office of S-21 and this is the
6 evidence that we did not see before we sent to the Trial Chamber
7 before and we do not think it takes a long time to view this
8 film, its only about 10 minutes long and one section is only
9 seven minutes and the other section is only four minutes. And it
10 is crucial to show the facts just happened immediately after the
11 liberation. The dead bodies. The witnesses who saw the sin and
12 also according to Rule 36 as Your Honour has said, the Trial
13 Chamber can also provide extension to the parties who admit
14 additional materials if (illegible) and important. Stated each
15 party has the rights to provide additional evidence and submitted
16 this evidence in writing to the Trial Chamber and we are waiting
17 for the decision of the Trial Chamber at the same time we would
18 also like to enlighten the Trial Chamber that the Vietnamese
19 soldiers that shot the film are still alive and the person is now
20 76 years old, and if the Trial Chamber thinks it is important for
21 the explanation of the film it is possible to provide the address
22 to the Trial Chamber to contact the film maker.
23 Also the victimized children as mentioned by the civil party
24 lawyers. One of the children wishes to be a civil party, but due
25 to the expiration date of the application. I would like the

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1 Chamber to consider also that application. Thank you.

2 [11.50.08]

3 JUDGE YA SOKAN:

4 Does any civil party lawyer have any comments to make in this
5 regard? Does the defence have any comments to make in this
6 regard? You can take the floor.

7 MR. KAR SAVUTH:

8 Your Honours, regarding the filming footage submitted by the
9 Co-Prosecutors in the last minute to the Court, the defence would
10 like to submit that it is not acceptable. The reason that the
11 defence cannot accept this film footage is because the video
12 footages have been provided by the Social Republic of Vietnam,
13 and having viewed the video footages I could see that they are
14 politically motivated. So I could see that in these proceedings,
15 we should not have any interference from the political films to
16 be judged by Judges here. So I would like to also submit that in
17 the films I observed eight main points: First, we notice that the
18 entrance to the S-21 from the East but I could see that in the
19 movie it shows the entrance was from the West not from the East
20 and the location was named S-21 and there was no label, no gate
21 and why they did not preserve the original things? And why the
22 primary school of Toul Sleng was taken in the footage? Because
23 people knew that it was S-21 but why should in the film people
24 only saw the primary school of Tuol Sleng? That's marks point
25 number two. Point number three, I want the Court to also

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1 investigate this matter because there is a guard location where
2 guards are used as the place to guard the prison but there was
3 not any such place so I think the movie of the film was not
4 taken during that 1979, it would have been taken long after that.
5 So I think it is rather a political attempt to introduce the film
6 rather than introduce the truth.
7 In the film there was a basin allegedly used for torturing, but I
8 cannot accept it because I think this type of improvised basin
9 would probably be created after '79 for the purpose of that film
10 only. And point number five, I think the remaining victims are
11 people that survived when Vietnamese troops arrived. I may put it
12 this way - - Duch, you know when he left S-21 when he went away
13 with six people. He left on the 7th of January at 1400 hours. All
14 prisoners were executed, except for four people who could not be
15 buried on time at S-21. And regarding this matter, I would also
16 like to submit that the Japanese TV and the Australian TV crewmen
17 who interviewed in 2007 in July they showed eight combatants who
18 wore military uniforms...

19 [11.55.50]

20 MR. PRESIDENT:

21 Could you please slow down so that the interpreters can
22 follow fully your submission?

23 MR. KAR SAVUTH:

24 Actually, the Japanese TV crew men and the Italian crew men who
25 took footage of these people were not really viewed in the

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1 Vietnamese film that was filed by the Co-Prosecutors, so I think
2 this has been inconsistent information that the defence submits
3 that it cannot be accepted.
4 Point number six, on the 3rd of January 1979, S-21 was ordered by
5 Nuon Chea execute all remaining prisoners so, every prisoner,
6 regardless of a child would have been executed already, so the
7 survivors there were 15 survivors who were among the Duch group.
8 Six people in Duch group and there were other people that I
9 should not reveal their names. We have witness KW-01 as his
10 pseudonym, KW-03, KW-04 [REDACTED].
11 Who survived S-21. So if the Vietnamese took footage, why did
12 they not take the footage of these people who survived S-21 at
13 that time? Because they told me when the Vietnamese troop came to
14 S-21 at the outside they were there, but why were they not
15 captured in the footage? Why only the children were seen in the
16 film? People were told that no children left S-21, they were all
17 executed, so that makes point number six. Point number seven, all
18 victims including children and adult have been starved by S-21
19 and people were so thin and tired, so I would like the court to
20 also review the video to see the appearance of those children. I
21 can see that these children are healthy and they are not children
22 that have not eaten for a long time. It is not children who have
23 not children who have not drank water for a long time, so that's
24 why I submit that it's not acceptable. That makes point number
25 seven.

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1 [11.59.09]

2 Point number eight, before the movie or footage is submitted, I
3 want the Court to also have it checked against the list of
4 prisoners at S-21 because everyone who was arrested and entered
5 into S-21 is kept at S-21, the complete list. So, if these
6 children are the survivors of S-21, their parents name and when
7 they were arrested and sent to S-21, that name should have
8 appeared in the list. The reason I want to make sure the list is
9 well checked because from the 2nd of January to the 7th of
10 January there were no people being sent to S-21 for further
11 imprisonment because they were all executed long before that. I
12 just want to know how or when these children entered S-21 and
13 when we only learned the dates of these children entered the
14 S-21 that we could know whether they were genuinely the survivors
15 of S-21.

16 [12.00.37]

17 So if they came to S-21 before the 2nd of January or I may even
18 say that they came the 1st of January and then hid themselves
19 under a pile of clothes, how could they survive until the day the
20 Vietnamese troop came to take that video film? Because as you
21 have already been familiar, there was nothing left for them to
22 eat and security had been very strict, so when the children did
23 not eat for seven days and seven nights, could they survive? They
24 could not. If they could not survive, why can they appear in the
25 film? That's why we the defence submit, that we really object to

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1 the submission of such a filming.

2 Also, if we interviewed these children, because the person who

3 keeps the list is still alive, Mr. KW-07 who was actually the

4 person who kept the list. And the children were interviewed and

5 they said they could not remember their parents because they were

6 too young, so if you think that if they were too young that they

7 couldn't even remember their parents, how can you call them as

8 witnesses? How can you really presume that their testimony will

9 be genuine or conducive the truth that's why the defence submits

10 again that its not acceptable. From the 2nd January 1979 there

11 was no new person entering S-21.

12 So I can see that these young children would have lived in this

13 area long before that. And I could also question how they could

14 survive, that's why I have a doubt and that's why I think its not

15 really convincing that we should accept that footage. So the

16 defence would like to only request to the Trial Chamber to remove

17 these documents from being discussed. So if they cannot do that

18 and the Trial Chamber accepts the prosecutor's motion, then the

19 defence would like to inform to the Trial Chamber that we, the

20 defence, regard these video footage as having political

21 motivation in nature. As Mr. Francois has already has given

22 interview on the radio that he regarded this video footage that

23 has the connection to political issues, that's why the defence

24 cannot accept it. So we ultimately regard this video footage as

25 the political motivated nature to disguise information of the

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1 truth concerning the event and we reserve our right to raise this
2 issue again in the substantive hearing. Thank you.

3 JUDGE YA SOKHAN:

4 The Chamber will take these comments into consideration and
5 issue a decision in due course.

6 MR. PRESIDENT:

7 Thank you very much Judge Ya Sokhan this concludes the Initial
8 Hearing, I, the President of the Trial Chamber, would like to
9 declare that the Initial Hearing on case file 001 is adjourned
10 and I would like to thank the parties and all participants, The
11 scheduling order for the start of the substantive hearing --

12 MR. ROUX:

13 I do apologize Your Honour, as regards to the defence, we have
14 not finished our session regarding additional documents, or
15 additional material, we still have things to say, we will not
16 take much time but we do have some things to say, as regards,
17 documents annexed to the witness list. Reference was made to the
18 film..

19 [12.06.02]

20 MR. PRESIDENT:

21 Could you please be very brief because for the purpose of the
22 recording we only have seven minutes left for the proceedings so
23 you take the floor.

24 MR. ROUX:

25 Thank you, Your Honour, I shall take less than seven minutes. We

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1 wish to supplement on what has just been said regarding the list
2 of complimentary documents, 52 documents that the prosecutors
3 have deemed useful to add to their witness lists. The defence
4 emphasizes, would like to say quite emphatically that it is
5 shocked after a whole year investigation by the Co-Prosecutors,
6 by the Co-Investigating Judges that the Office of Co-Prosecutors
7 should wish to file even more new pieces now, we find this
8 shocking. I am specifically referring to a great number of
9 confessions as they are called from S-21 that the Office of the
10 Co-Prosecutor would like to introduce. What is the purpose? Is
11 this going to make the procedure slower yet?
12 Over a whole year the Co-Prosecutors have taken part in the
13 investigation and had every opportunity to request such work from
14 the Investigating Judges, why should this emerge at the last
15 minute. And I would specifically like to refer to document 29 in
16 paragraph 13 of the request. A document for which we don't have
17 an original, a document that has already been referred to in the
18 Investigation and that today the Co-Prosecutors would like to
19 bring back into the pool of documents for our discussion. Whereas
20 it has been admitted that the original of this document no longer
21 exists. And the accused denies the existence of such an original,
22 so, I wanted to conclude with these comments and remarks, Your
23 Honours.
24 Recalling once again that we have Rules of Procedure, and
25 Adversarial Procedure Rules, right at the last minute at the very

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1 opening of a Trial we are all of a sudden flooded with another 50
2 documents. We are to see a film whereas my colleague Kar Savuth
3 has just talked about all the counter arguments here. We are told
4 about an NGO with which the Co-Prosecutors has worked a lot. I am
5 referring to DC-Cam that says there might be a list of 177
6 survivors of S-21 and we should now investigate about this new
7 witness is cropping up now and he is now a former child survivor
8 now when is going to stop? It seems that this will never stop,
9 this very morning our colleague Mrs. Studzinsky wishes to have
10 additional information on forced weddings, so are we ever going
11 to be able to make this procedure move forward? At the same time
12 we have the Co-Prosecutors telling the defence "no we don't want
13 to have your witnesses testifying because they are not relevant".

14 [12.10.34]

15 So I would like to say quite unambiguously, the Co-Prosecutors'
16 Office produces mountains of documents we have seen that there
17 are 35 witnesses for 40 days of hearings. The civil party's will,
18 and this is quite normal, be heard and at the same time the right
19 of the accused to have 30 witnesses heard in 4.5 days. This right
20 should be curtailed? Thank you that is all I have to say.

21 MR. PRESIDENT:

22 The floor is yours Mrs. Prosecutor.

23 MS. CHEA LEANG:

24 In order to respond to the defence I think my colleague will take
25 the floor. Regarding the film footage, we the Co-Prosecutors

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1 still submit that we insist the document be included.

2 MR. PRESIDENT:

3 Could you please break for a moment because we need the AV and
4 audio recording system to be ready for recording what will be
5 said in these proceedings. Please sit down, thank you.

6 [12.12.03]

7 (break for change in recording tape)

8 [12.13.40]

9 MR. PRESIDENT:

10 I would like to give the floor to the Co-Prosecutor to finish her
11 submission, since we are running out of time, I would like you to
12 be brief, and of course your submission will be responded by the
13 defence and finally I think if you would like to have any further
14 submissions, we recommend they are made in writing.

15 MS. CHEA LEANG:

16 I think what has been submitted by the defence regarding this
17 additional material I will leave it to my colleague to respond.
18 But I myself would also like to respond to the national lawyer
19 concerning the filming the Co-Prosecutors still insist that the
20 video footage be included in the case file and whether it has any
21 material value for the proceeding I would like the Trial Chamber
22 to call the person who took the video for interview. I would like
23 to give the floor to the International Co-Prosecutor.

24 MR. PETIT:

25 Thank you Mr. President, I will try to be very brief. I think

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1 indeed this deserves a response and hopefully for the final time.
2 I read with a lot of surprise this morning, that my learned
3 friend from the defence was quoted as enjoining this Trial
4 Chamber and I quote "not to waste time with the facts, because
5 they are admitted lets find out what happened". I must admit,
6 that this morning I thought this must be a mis-quote. How can
7 this process be about anything but the facts? The facts, need I
8 not remind everybody, which are the deaths of over 14, 000
9 people. Men, women and children, executed during the stewardship
10 the efficient and committed stewardship of the accused over S-21.
11 Those are the facts of this case.
12 [12.16.01]
13 In establishing the truth, behind those killings, we will of
14 course address the accused state of mind - as it then was, as it
15 is now, his apparent responsibility for these actions, and that
16 effect of that responsibility upon reconciliation. I laud the
17 defence for taking this stance and for that underlining its
18 importance. However, I think we have a fundamental difference.
19 Contrary to what my learned friend yesterday, long asserted with
20 emphasis and his usual eloquence, the substance of this Trial is
21 not about that state of mind, or how one becomes a mass murderer.
22 The substance of this Trial. Indeed its foremost purpose is to
23 bring justice to those 14, 000 plus victims of S-21.
24 The Trial Chambers heavy duty, heavy responsibility is to look at
25 all the relevant evidence that will allow it to seek the truth

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1 behind those crimes. The Co-Prosecutors in turn, have the duty,
2 according to the law to prove the accused guilt beyond a
3 reasonable doubt. As my learned friend knows well and as the
4 Trial Chamber knows well, in this system, any accused can scream
5 "guilty" until he turns blue in the face. It does not bind the
6 Trial Chamber. Guilt still has to be proven beyond a reasonable
7 doubt.

8 A simple assertion that the accused takes responsibility should
9 not brush aside this process. Should not focus it on something
10 that cannot be looked at until the truth is established. It is
11 bearing in mind that the establishing of the truth responsibility
12 that we, the Co-Prosecutors have always sought from the
13 beginning. To bring all relevant evidence to these proceedings,
14 all the facts, so that you may ascertain that truth. We have
15 endeavoured to do so, and we will continue to do so. As you have
16 noticed in our filing we have underlined that duty and in our
17 submission to introduce this video and documentary evidence,
18 and as I said we will continue to seek before the Trial Chamber,
19 the parties and the Cambodian people, all relevant evidence. And
20 I take object to the submission that putting evidence in front of
21 a trial slows the process. And I certainly take object to the
22 defence assertion that this is the purpose sought by the
23 Co-Prosecutors.

24 We are seeking justice and only justice and we believe that
25 justice would be best achieved in part by having first hand

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1 knowledge of what the location of the crimes looked like at the
2 time, which is shown by the seven minute video. Of possibly
3 infant survivors that were rescued from S-21. We could then
4 properly weigh its credibility and we submit that the documents
5 that we've attached to our filing which again I would like to go
6 back to the reality of the filing these documents are actually
7 simply extracts of confession that are the annotations made by
8 the accused, and that show indeed the process behind which and
9 why these people were detained, tortured and then executed.
10 I cannot for the life of me understand how that evidence would
11 not be useful to you, the triers of facts, and how ever
12 inconvenient it might be to read an additional 50 documents it is
13 an absolute must for this Trial Chamber to have all the relevant
14 evidence before to ascertain what is the facts of this case which
15 is justice for the victims of S-21. Thank you.

16 [12.20.28]

17 MR. KAR SAVUTH:

18 Thank you the President. I would like to have a request. When the
19 Co-Prosecutors want to call some of the people who took the
20 video. I would also like to summon these children who allegedly
21 survived that time to also be called for interviews, and I would
22 like a confrontation regarding that aspect. Thank you.

23 MR. PRESIDENT:

24 Would you like to add anything further the defence? Mr.
25 Roux take the floor.

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1 MR. ROUX:

2 Your Honour, I think the problem in terms of procedure here has
3 to do with the way in which the
4 Co-Prosecutors Office seem to try to bypass the work conducted
5 already by the Co-Investigating Judges. It is unusual for a
6 lawyer to defend Co-Investigating or Investigating Judges but I
7 should say here that I wish to pay tribute -- tribute is owed to
8 the two Co-Investigating Judges of this Tribunal. For over a
9 year, and on an adversarial basis, they have sought to establish
10 what are the facts, and both on an exculpatory and on an
11 inculpatory basis. It was up to the Co-Prosecutors' Office --
12 during that investigation phase it was up to them to adduce, for
13 the benefit of the Co-Investigating Judges, any and every
14 material document etcetera that would be necessary for
15 establishing the facts. It is not at the very last minute, and
16 at the hearing itself, that people adduce documents and evidence
17 to establish facts.

18 [12.22.58]

19 These images, this footage, that is 30 years old now, if that
20 video had been given to the
21 Co-Investigating Judges in due time, that footage would have been
22 viewed by the Co-Investigating Judges with due adversarial
23 procedures. The witnesses would have been summoned to meet the
24 Co-Investigating Judges and the proper adversarial procedure
25 would have been followed as well as the confrontation. This is

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1 what I don't accept. What I don't accept is this way of
2 by-passing the work of the Co-Investigating Judges because it is
3 their role, and only theirs, to do the inculpatory and
4 exculpatory investigation.
5 The Co-Investigating Judges are not in charge of investigating on
6 the sentence. For this reason, witnesses for mitigating
7 circumstances are convened to appear during the hearing, and not
8 in the phase of the investigation. So let's make a clear
9 distinction. For the determination of facts on an
10 inculpatory/exculpatory basis, that is one thing. And then there
11 is the public hearing, where the facts, as examined by the
12 investigation, are looked at again in public, without any
13 adducing of new facts.
14 And thereafter, the public hearing aims to hear the civil parties
15 and to hear the determination of the sentence on the basis of the
16 testimony of all witnesses that are to be heard both on an
17 exculpatory and inculpatory basis. The International Covenant on
18 Civil and Political Rights says that all witnesses, inculpatory
19 and exculpatory, are to be heard. Thank you for your attention.
20 MR. PRESIDENT:
21 Thank you, the defence, for your submissions. The Chamber take
22 these comments into consideration and issue a decision in due
23 course. Now, the Initial Hearing hearing comes to an end already
24 so I would like to announce that the Initial Hearing in case 001
25 is concluded and I would like to also tell all of us that the

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1 Scheduling Order for the start of the Substantive Hearing will be
2 issued in due course.

3 I would like the security guards of the detention facility to
4 take the accused back to the detention facility. The hearing is
5 adjourned. Please stand.

6 (Court adjourns at 1227H)

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