



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**  
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TRANSCRIPT OF PROCEEDINGS  
PUBLIC

Case File N° 002-02/19-09-2007-ECCC/TC

11 February 2014  
Adversarial Hearing

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

Accused: NUON Chea  
KHIEU Samphan

Lawyers for the Accused:  
SON Arun  
SUON Visal  
Victor KOPPE  
KONG Sam Onn  
Arthur VERCKEN

Trial Chamber Greffiers/Legal Officers:  
SE Kolvuthy  
DUCH Phary  
Roger PHILLIPS

Lawyers for the Civil Parties:  
PICH Ang  
Beini YE  
CHET Vanly  
LOR Chunthy  
VEN Pov  
TY Srinna  
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For the Office of the Co-Prosecutors:  
Nicholas KOUMJIAN  
William SMITH  
SENG Bunkheang  
Dale LYSAK  
VENG Huot  
Tarik ABDULHAK  
Vincent DE WILDE D'ESTMAEL

For Court Management Section:  
SOUR Sotheavy

**List of Speakers:**

Language used unless specified otherwise in the transcript

<b>Speaker</b>	<b>Language</b>
MR. KONG SAM ONN	Khmer
MR. KOPPE	English
MR. KOUMJIAN	English
JUDGE LAVERGNE	French
THE PRESIDENT (NIL Nonn, Presiding)	Khmer
MR. PICH ANG	Khmer
MR. SENG BUNKHEANG	Khmer
MR. SMITH	English
MR. SON ARUN	Khmer
MR. SUON VISAL	Khmer
MR. VEN POV	Khmer
MR. VERCKEN	French
MS. YE	English

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

2 (Court opens at 0901H)

3 MR. PRESIDENT:

4 Please be seated.

5 As the President and on behalf of all the Judges of the Trial  
6 Chamber, I would like to give a warm welcome to the prosecutors,  
7 the lawyers for the accused, the civil party lawyers and the  
8 Co-Lawyers for the civil parties who are in attendance today.

9 [09.03.02]

10 The purpose of today's adversarial hearing is to discuss some of  
11 the issues which must be resolved prior to the commencement of  
12 the evidentiary hearing in Case 002/02.

13 There are two items on the agenda: first, responses to the Khieu  
14 Samphan defence team submissions on the commencement of Case  
15 002/02; and, second, oral arguments on the scope of the trial in  
16 Case 002/02.

17 Ms. Se Kolvuthy, could you report on the attendance of the  
18 parties at the hearing?

19 THE GREFFIER:

20 Mr. President, for today's hearing all parties to the proceeding  
21 is present, except the accused, Nuon Chea, who is absent.

22 According to his defence team, he has no intention to participate  
23 in today's hearing.

24 Suon Visal, from the Nuon Chea defence, who has been requested to  
25 be recognised by Nuon Chea, is present, and Simonneau-Fort, the

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1 International Lead Co-Lawyer, is absent, but she gave her seat to  
2 Beini Ye.

3 Thank you.

4 [09.05.00]

5 MR. PRESIDENT:

6 Thank you.

7 And before turning to the agenda items for today's hearing, the  
8 Trial Chamber will address a letter from the Nuon Chea defence  
9 team, requesting the Trial Chamber to grant a right of audience  
10 to their legal consultant -- that is, Mr. Suon Visal. The letter  
11 from the Nuon Chea defence will be attached to today's written  
12 record of proceedings.

13 The Chamber is satisfied, on the basis of the letter received by  
14 the Trial Chamber, that Mr. Suon Visal can be recognised by the  
15 Trial Chamber.

16 I now invite Mr. Son Arun to seek recognition of Mr. Suon Visal  
17 before the Trial Chamber.

18 [09.06.05]

19 MR. SON ARUN:

20 Good morning, Mr. President. Good morning, everyone. My name is  
21 Son Arun, defence lawyer for Nuon Chea.

22 In compliance with the proceedings and qualification of Mr. Suon  
23 Visal, who has been appointed to defend Mr. Nuon Chea as part of  
24 my team, I'd like to seek recognition of Mr. Suon Visal before  
25 the Chamber. And that is Mr. Suon Visal, who is standing behind

1 me.

2 MR. SUON VISAL:

3 Good morning, Your Honours. I am the national lawyer and I would  
4 like to seek your recognition before your Chamber. Thank you.

5 [09.07.10]

6 MR. PRESIDENT:

7 Thank you.

8 And Mr. Suon Visal, please stand up.

9 Mr. Suon Visal, you are now recognised by this Trial Chamber as  
10 having a right of audience for the purpose of representing the  
11 accused Nuon Chea in Case 002.

12 You may be seated.

13 After completing this procedure for the recognition of Nuon  
14 Chea's defence, I now turn to the first item raised in the Trial  
15 Chamber's scheduling memo circulated to the parties in advance of  
16 this hearing on 7th February 2014.

17 [09.07.58]

18 Item 1, responses to Khieu Samphan's defence team submissions on  
19 the commencement of Case 002/02. The first item on the agenda  
20 concerns the time for the commencement of Case 002/02. During the  
21 Trial Management Meeting held on 11 and 12 December 2013, the  
22 Khieu Samphan defence team reiterated its view that Case 002/01  
23 should be finally adjudicated, including the appeals process, if  
24 any, before the evidentiary hearings in Case 002/02 can start.  
25 The Khieu Samphan defence team filed written submissions on this

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1 issue on 5th February 2014, arguing that pursuant to the Trial  
2 Chamber's severance of Case 002, the principles of res judicata  
3 and legal certainty demand that the judgement in Case 002/01 and  
4 related decisions be settled definitely before the proceedings in  
5 Case 002/02 may commence. According to the Khieu Samphan defence  
6 team, the time any such appeals process would take is not a  
7 justification for commencing the evidentiary hearing in Case  
8 002/02 before the final adjudicating of decisions and the  
9 judgement in Case 002/01.

10 [09.10.05]

11 Today, the Chamber will hear oral arguments from the other  
12 parties which focus on responding to the Khieu Samphan defence  
13 team's written submissions -- that is, document E101/5.

14 And the order of responses will be as follows: Co-Prosecutors'  
15 response, 30 minutes; Civil Party Lead Co-Lawyers' response, 30  
16 minutes; Nuon Chea defence team's response, 30 minutes; and Khieu  
17 Samphan defence team's reply to the other parties' responses, 30  
18 minutes.

19 And the Chamber would like now to cede the floor to the  
20 Co-Prosecutors to respond to the written submissions by Khieu  
21 Samphan's defence team. You may proceed.

22 [09.11.17]

23 MR. SENG BUNKHEANG:

24 Thank you, Mr. President. And good morning to Your Honours. Good  
25 morning to all parties who are present here today, and good

1 morning to the general public in the gallery. I would like to  
2 present our response to the Khieu Samphan defence team's  
3 submissions.

4 In the submissions by Khieu Samphan defence team, in particular  
5 in document E301/5/5, it is dependent on the view that Case  
6 002/01 and 002/02 are two separate legal proceedings. The  
7 argument raised by Khieu Samphan's defence is a misunderstanding.  
8 The Defence stated in paragraph 53 by stating that the view of  
9 the judicial notice based on the adjudicated facts does not form  
10 part of the Law of ECCC.

11 And also, in paragraph 54, the Defence also stated that the facts  
12 debated in 002/01 cannot be used as a basis of evidence for  
13 002/02 until all those facts are considered *res judicata* after a  
14 final judgement by the Supreme Court Chamber on these very facts.

15 [09.13.57]

16 Your Honours, your decision clearly shows that the Court does not  
17 have to rely on the view or observation - or the view on -- the  
18 legal view of *res judicata* in order to rely on the evidence put  
19 before you in Case 002/01 during the future proceeding - the  
20 future proceeding in this case.

21 Also in your Clarification issued last Friday - that is, document  
22 E302/5 -- Your Honour clearly states that the true proceedings  
23 are a continuation of the same case, which means really it is  
24 under the same investigation, falls within the same case, and it  
25 is part of the same Closing Order.

1 At the same time, Your Honours also state in paragraph 7 of  
2 document E302/5, that Case 002/02 and Case 002/01 are part of the  
3 same trial. For that reason, there is no need for the Court to  
4 observe the adjudicated facts or the issue of res judicata when a  
5 legal proceeding continues with the same concerned parties. And  
6 that is our view, Your Honour.

7 In addition, evidence that has been put before this Chamber and  
8 Your Honours and that has been accepted in Case 002/01 had been  
9 debated extensively. Such evidence has already been placed before  
10 Your Honours in Case 002/02 – or, rather, is placed before you.

11 [09.16.46]

12 All parties who complied with Internal Rule 87.3 and 87.4 of the  
13 ECCC Internal Rules may request to submit new evidence before  
14 your Chamber. Such process is to ensure the right of all involved  
15 parties in the proceeding.

16 Your Honours, the purpose of allowing to have a judicial notice  
17 or observations on the adjudicated facts, or the principle of res  
18 judicata, is to save resources. However, in its actual  
19 implementation, the Court requires more time to implement those  
20 views -- those judicial notice or principles.

21 The Court of Appeal for the Special Court for Sierra Leone made  
22 such a decision in its Judgement in the case of Charles Taylor,  
23 in paragraph 110 of that Judgement, and I'd like to make the  
24 following quote:

25 "Generally, they recognise that the adjudicated facts are the

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1 views formed by either International Tribunals pursuant to the  
2 rules of those Tribunals in order to enhance the efficiency and  
3 to make those facts consistent. Frequently, those Tribunals  
4 cannot make such a decision. The time that has been used to  
5 review -- to argue on this matter may consume more than the  
6 necessary time to present testimonies or to present evidence in  
7 an adversarial process." End of quote.

8 [09.19.27]

9 Your Honours, in our case, the Trial Chamber cannot save any  
10 resources while the Chamber is idle and not fulfilling those  
11 tasks while the Supreme Court Chamber is drafting its judgement.  
12 And, on the contrary, it is just plainly to delay the necessary  
13 works of this Court. And as a result, it means more expenditure  
14 is needed, the expenditure which derives from the funding from  
15 the Royal Government of Cambodia and from the donor countries.  
16 And if it is agreed to do so, it means that we refuse the victims  
17 the justice of the remaining facts that they have been awaiting  
18 for more than 30 years.

19 And I'd like to conclude my response now and I'd like to cede the  
20 floor to my colleague, Mr. William Smith, to continue making  
21 further responses.

22 Thank you, Mr. President.

23 [09.20.56]

24 MR. SMITH:

25 Good morning, Mr. President. Good morning, Your Honours. Good

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1 morning, Counsel. Good morning, general public. And good morning  
2 to civil parties.

3 Your Honours, I would take the opportunity to expand on a few of  
4 the points that my colleague has made and also address some of  
5 the other points made in the Defence motion.

6 At the outset, Your Honours, we would ask that you deny Khieu  
7 Samphan's application, E3/01, to stay the commencement of the  
8 second trial. His application substantially delays the judicial  
9 process, not only against himself, but Nuon Chea, for no  
10 legitimate reason.

11 Contrary to Khieu Samphan's defence position, postponing the  
12 start of the second trial until after the delivery of the appeal  
13 judgment in the first trial against both Accused by postponing,  
14 it will not make the second trial fairer, or will it make it more  
15 expeditious; it will only substantially delay the process, making  
16 his further accountability for the crimes charged less likely.

17 Your Honour, I'd like to deal with the issue of delay first.

18 If the Defence application of delay is granted, and we take into  
19 account the length of the appeal process from Case File 001, and  
20 we also take into account the significantly greater size of the  
21 Case 002/01 by comparison, it is likely that the appeal process  
22 for this first trial, against both the Accused, would take over  
23 one and a half years to complete, at a minimum.

24 [09.23.00]

25 In the case of the Duch trial, the Judgment was issued on the

1 26th July 2010, as you know, and the Appeal Judgement was issued  
2 18 months later, on 3rd of February 2012. Therefore the start of  
3 the second trial against the two Accused would not be likely to  
4 commence until January 2016 at the earliest, assuming a judgement  
5 in this case by the end of June this year -- assuming that.  
6 In contrast, if the application was refused and the second trial  
7 started in the next few months, it's likely that both the trial  
8 and the appeal of Case 002/01 would allow a savings of about two  
9 years in the overall judicial process for these two Accused, and  
10 that is by allowing the trial and the appeal occur in parallel.

11 [09.24.09]

12 Your Honour, secondly, the Defence position that the second trial  
13 would be expedited if the Trial Chamber applied the principle of  
14 res judicata or the principle of judicial notice of adjudicated  
15 facts from the appeal judgement in the first, as my colleague has  
16 put it, it doesn't reflect the reality of the application of  
17 these processes.

18 My colleague referred to a case from the Appeals Chamber in the  
19 Special Court of Sierra Leone, where they discussed the  
20 efficiency of the use of these adjudicated facts process, stating  
21 that often, in practice, by admitting adjudicated facts, it takes  
22 substantially longer than introducing the documentary and  
23 testimonial evidence and subjecting it to debate and  
24 cross-examination respectively.

25 Particularly now that Your Honours have clarified in your

1 decision of 7th February to admit the evidence of the first trial  
2 into the second, the time saved in calling these witnesses and  
3 admitting these documents, again, is enormous. We have  
4 experienced in Case 002/01 that this time will have saved about  
5 one year in the next trial.

6 [09.25.25]

7 As to the fairness, the Defence have had the opportunity to  
8 debate the documents and cross-examine the witnesses, and so  
9 Khieu Samphan's right to challenge the admitted evidence in the  
10 second trial, subject to recalling witnesses, has been protected.

11 Third, Your Honour, the Defence position that the Trial Chamber  
12 is obligated to apply all factual findings of the Supreme Court  
13 in any appeal of Case 002/01 in the second trial pursuant to the  
14 principle of res judicata, in order to ensure judicial economy  
15 and certainly in the proceedings, is not substantiated in law.

16 Under ECCC and Cambodian Law, the principle is applied in a more  
17 limited way than argued by the Defence. If we look at "Black's  
18 Law Dictionary", res judicata means a thing that has been  
19 adjudicated. I quote:

20 "An issue that has been definitely settled by judicial decision.  
21 An affirmative defence barring the same parties from litigating a  
22 second law suit on the same claim, or any other claim arising  
23 from the same transaction or a series of transactions, and that  
24 could have been - but was not -- raised in the first suit."

25 So, the three essential elements of res judicata are: an earlier

1 decision, a final judgement on the merits, and the involvement of  
2 the same parties.

3 [09.26.29]

4 Under the ECCC Statute and Rules, Your Honours have already held  
5 that the principle of judicial notice of adjudicated facts is not  
6 based in the ECCC Rules or Statute. It only appears once in the  
7 Rules, relating to the powers of the Co-Prosecutors to exercise  
8 public action. Under the Cambodian Procedural Code, the principle  
9 of res judicata only appears six times: in relation to Article 7,  
10 extension of criminal actions; Article 12, res judicata; Article  
11 41, file without processing; and Article 264, extension of  
12 judicial investigations to other persons; and Article 439 and  
13 Article 443.

14 Other than these provisions, Your Honours, the Cambodian Criminal  
15 Procedural Code does not proscribe the applicability, the  
16 conditions, and extent in which the principle of res judicata  
17 could apply to a lower court dealing with facts of the case in  
18 which the same accused has been tried in a higher court for  
19 different but related crimes. The Cambodian Code does not provide  
20 for that situation.

21 [09.28.47]

22 Your Honours, under international practice, it's difficult to  
23 find cases where the principle of res judicata is applied in the  
24 second trial of the same accused for different crimes with  
25 related facts. As to our knowledge, on the -- the severing of one

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1 indictment to two trial phases has not been done before at the  
2 other tribunals other than the ECCC. Consequently, it's only the  
3 closely related principle of taking judicial notice of  
4 adjudicated facts in other trials of different accused that is  
5 extensively discussed at other international tribunals. Albeit  
6 this mechanism applies to different but not the same accused, it  
7 shares the same rationale as that of the application of the  
8 principle of res judicata, the rationale being to ensure judicial  
9 economy and consistency of decisions. Your Honours, as can be  
10 seen by the practice at other international and internationalised  
11 tribunals, judicial notice of adjudicated facts is not  
12 obligatory, but it's a discretionary mechanism that can be used  
13 by a Trial Chamber in various situations. It's a trial management  
14 tool. And so, with regards to the use of these mechanisms such as  
15 judicial notice or adjudicated facts or the principle of res  
16 judicata, here, Your Honours have made it clear that they are not  
17 the only mechanisms available to it in order to speed up the  
18 trial.

19 [09.30.31]

20 Similarly, it's the Co-Prosecutor's view that, based on the state  
21 of the law in this area, particularly in the civil law context,  
22 the use of these principles is discretionary -- and not  
23 mandatory, as the Defence argue. The Co-Prosecutors, in prior  
24 submissions, have specifically not requested the Trial Chamber to  
25 use these mechanisms in expediting the trial, but requested that

1 the evidence of the first trial be imported into the second trial  
2 in lieu of such mechanisms, as was done by your Decision last  
3 Friday, on 7th February, E302/5.

4 So, no prejudice can be claimed by the Accused. They have been  
5 able to challenge the evidence in the first trial and able to  
6 further rebut it in the second.

7 [09.31.29]

8 As to fairness of not proceeding after the appeals judgement of  
9 the first trial, the Defence cannot say it is prejudiced by not  
10 knowing as to how the Supreme Court would deal with issues in the  
11 first trial. All parties are in the same situation. In their  
12 motions, they have failed to give one example of how they will be  
13 unable to prepare the defence prior to receiving the Supreme  
14 Court judgement in Case 002/01. Nor are the Defence prejudiced by  
15 proceeding without the Supreme Court judgement as any final  
16 finding on similar facts subject to new evidence in the second  
17 trial can be expected to be equally applied in the appeal  
18 judgement in Case 002/02. It may well be the case that Supreme  
19 Court Chamber's judgement in the first trial will be available  
20 while the Trial Chamber is writing the judgement in the second  
21 trial, and thereby it would provide an opportunity for the  
22 Defence to challenge the issues and findings with the Trial  
23 Chamber.

24 [09.32.50]

25 Finally and most importantly, the Defence will be able to appeal

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1 all similar and related issues to the Supreme Court, again in  
2 Case 002/02, providing two opportunities to challenge similar  
3 findings. In fact, Your Honours, the process of hearing  
4 back-to-back trials before the appeal in the first trial is more  
5 than fair, as if all the charges were tried at the same time, the  
6 Defence would not know how the Trial Chamber or the Supreme Court  
7 would finally rule on any issue.

8 However with severance, at the least they'll have an insight on  
9 how the Trial Chamber viewed issues and evidence. The res  
10 judicata principle will not be violated, as the Supreme Court  
11 will always have the final adjudication on both trials.

12 As to the Defence request for a stay of proceedings of the second  
13 trial until the appeal judgement in the first, the Defence do not  
14 provide one case or one authority which supports such a stay -- a  
15 stay for about two years. Your Honours, the reason for this is  
16 that, although rare and, in our view, unheard of in the  
17 international system, in domestic systems cases are severed all  
18 the time. Co-accused cases are severed; counts dealing with  
19 separate charges against the same accused are severed or filed  
20 separately. In none of these systems is there a rule that the  
21 second trial must await the appeal judgement from the first. The  
22 reason for this, of course, is that the system would become open  
23 to abuse by parties who are simply delaying -- or seeking to  
24 delay the judicial process.

25 [09.34.46]

1 Your Honours, the purpose behind the principle of taking judicial  
2 notice through adjudicated facts and the principle of res  
3 judicata is for the justice system not to pursue unnecessary and  
4 repetitive litigation to save resources -- and to save resources,  
5 both time and money. In the current circumstances, no resources  
6 would be saved by waiting for the Supreme Court judgement. On the  
7 contrary, the delay would waste substantial resources as the  
8 appeal judgement is unlikely to be issued for approximately two  
9 years or more from today.

10 Your Honour, as a separate submission, and significantly, and  
11 aside from the views of the parties and your considerations as to  
12 the applicability of staying the proceedings for two years, to  
13 apply these principles if appropriate, the Supreme Court has  
14 independently ordered this Trial Chamber to start the trial as  
15 soon as possible on 25th November 2013, when it issued its second  
16 severance decision. The Defence have not provided any authority  
17 as to why the Trial Chamber is not bound by this order or should  
18 depart from what the Supreme Court has ordered it to do. The  
19 Supreme Court has issued a specific and unambiguous order that  
20 should be followed unless there are exceptional circumstances to  
21 refrain from doing so.

22 [09.36.20]

23 The Defence argument justifying the delay of the proceedings  
24 lacks merit and, consequently, does not justify not abiding by  
25 the Supreme Court order.

1 To conclude, Your Honours, we submit it's in everybody's  
2 interests - the Accused, who are in custody, the donors, who  
3 continue to pay more for the Court each month if completion is  
4 delayed, and most of all the civil parties and victims, who have  
5 been waiting for 30 years for justice - for the trial in Case  
6 002/02 to begin as soon as possible. The Khieu Samphan motion to  
7 delay the trial until the appeal judgement in Case 002/01 has no  
8 support in law, and, effectively, would frustrate the very  
9 purpose for which this Court was created: to deal with the most  
10 serious criminal charges known.

11 Your Honour, there are the submissions for the Prosecution. If  
12 you have any questions, we will be happy to answer them.

13 [09.37.44]

14 MR. PRESIDENT:

15 Judges on the Bench, do you have any question for the  
16 Prosecution?

17 If not, I now turn to the Lead Co-Lawyer for the civil parties.

18 You may proceed, Counsel.

19 MR. PICH ANG:

20 Good morning, Mr. President. Good morning, Your Honours. And good  
21 morning to everyone. I will intervene very briefly, and then Mr.  
22 Ven Pov will follow, concerning the appropriate time to commence  
23 evidentiary hearing. And due to my health condition today, I  
24 cannot take the entire time allocated for the Lead Co-Lawyers for  
25 the civil parties.

17

1 Of course, the Office of Lead Co-Lawyers for the civil parties we  
2 have gone through the written submission by the defence counsel  
3 for Khieu Samphan. We do not find any legal basis that is  
4 substantive enough that the Chamber shall grant the submission by  
5 the defence team.

6 [09.39.02]

7 As for the judicial economy, we believe that it does not save any  
8 court time and resources and it will not contribute to expediting  
9 the proceedings. And we are not in the view that the delay of  
10 this proceeding will safeguard the interests of the Accused. And  
11 we are of the view that such a delay will adversely affect the  
12 expeditiousness of the proceedings and we may run the risk of not  
13 having the judgement of Case 002/02.

14 Particularly, it adversely affects the interest of the civil  
15 parties, because they have been waiting for a long time for the  
16 judgement, and they also expect the judgement for the subsequent  
17 cases.

18 And my esteemed colleague, Mr. Ven Pov, will elaborate further  
19 concerning the submission by the civil parties.

20 MR. PRESIDENT:

21 You may proceed, Mr. Ven Pov.

22 [09.40.37]

23 MR. VEN POV:

24 Good morning, Mr. President. Good morning, Your Honours, and good  
25 morning to everyone. Responding to the written submission or

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1 request by the defence team for Mr. Khieu Samphan concerning the  
2 start of the evidentiary hearing of Case 002/02, document  
3 E301/5/5, on behalf of the civil parties, we object this very  
4 submission, the arguments raised by the defence team for Khieu  
5 Samphan requesting the Trial Chamber to decide not to commence  
6 Case 002/02 before the final judgement of Case 002/01. This  
7 argument has no legal basis, and neither was it provided for in  
8 the Internal Rules. It does not provide anywhere that the Trial  
9 Chamber has to wait for the final judgement of Case 002/01 before  
10 the commencement of Case 002/01 (sic). And in addition, Case  
11 002/01 was only part and parcel of the entire Case 002. That is  
12 meant to ensure the efficiency of the Court. So, if we look at  
13 case 002/01 and Case 002/02, they are interrelated -- they are  
14 actually part and parcel of Case 002.

15 [09.42.35]

16 And the Internal Rule does not require that the Trial Chamber  
17 have to wait until the judgement of Case 002/01 becomes final,  
18 and it does not, of course, lead to a stay of the proceeding of  
19 Case 002/02. The defence team brings up the issue of res  
20 judicata, and I believe that res judicata principle does not  
21 apply in this context, and -- because the principle of res  
22 judicata does not prevent the stay of the proceeding of the same  
23 case.

24 I would like to inform the Chamber that the start of evidentiary  
25 hearings will lead to the delay of examination of the evidence,

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1 and it will affect the interest of the civil parties, and it will  
2 eventually lead to delays of the judgement of Case 002/02, and  
3 that runs contrary to the interest of the civil parties and the  
4 expectation of the civil parties that the judgement will be  
5 handed down sooner rather than later, because they have been  
6 waiting for 35 years already.

7 [09.44.13]

8 Mr. President and Your Honours, most of the civil parties are  
9 very old now. Some of them have passed away. For this reason, it  
10 is imperative that this Chamber should commence the evidentiary  
11 hearing of Case 002/02 sooner, so that the civil parties can see  
12 the justice done for them.

13 As for the Accused, we all know that they are at an advanced age  
14 at the moment. So, in order to ensure justice for all parties to  
15 the proceeding, it is important that Case 002/02 start commencing  
16 as early as possible.

17 MR. PRESIDENT:

18 Thank you.

19 The International Lawyer for the civil party, do you have any  
20 intervention or observation to make in addition to your  
21 colleague?

22 MR. PICH ANG:

23 No, Mr. President, none. Thank you.

24 [09.45.32]

25 MR. PRESIDENT:

1 Thank you.

2 Now I hand over the floor to the defence team for Mr. Nuon Chea  
3 to respond to the first item on the agenda.

4 MR. KOPPE:

5 Thank you, Mr. President. Good morning. Good morning, Your  
6 Honours. Good morning, Counsel. We will be very brief on this  
7 point. We only wish to make an observation concerning a holding  
8 in this Chamber's recent memorandum, E302/5, that we believe  
9 bears on this question.

10 The Chamber described severance as "exclusively a trial  
11 management tool", and said that the effect of severance was --  
12 and I quote again: "to separate the charges which would normally  
13 be adjudicated in a single trial into two or more manageable  
14 phases, not to create two separate and distinct trials." End of  
15 quote.

16 [09.46.53]

17 The Chamber, furthermore, asserted that the Supreme Court Chamber  
18 "conceives of Case 002 as a single trial with multiple parts".

19 Mr. President, we disagree with this characterization of  
20 severance and can find no support for it in the Supreme Court  
21 Chamber opinion cited by Trial Chamber.

22 It is clear that Case 002/01 and Case 002/02 are based on the  
23 same Closing Order. There is no question or doubt about that. But  
24 in our view, it is equally apparent that Case 002/01 and Case  
25 002/02 are two different trials. Case 002/01 had all the

1 characteristics of a trial. The Chamber requested parties to  
2 identify the documents they deemed relevant to Case 002/01 and  
3 considered only those documents for admission. And it called only  
4 those witnesses it decided were relevant to Case 002/01, and  
5 permitted questions only within the scope of that trial. It heard  
6 evidence relevant to sentencing and it completed the hearing of  
7 the evidence and initiated deliberations on the verdict.

8 The Chamber acknowledges that appeals against the judgement in  
9 Case 002/01 will be available to all of the parties. We must ask  
10 the question: How can a trial judgement be issued if a trial has  
11 not just ended? How could an appeal against a trial judgement be  
12 filed if no trial has been completed?

13 [09.48.49]

14 Now, having said that, we do appreciate Khieu Samphan's position  
15 and the arguments in support of it. However, ultimately, we do  
16 not support the request to wait for Case 002/02 until the appeals  
17 judgement in Case 002/01, because it is not - it is not what our  
18 client wants. Our client is very anxious to begin the trial in  
19 Case 002/02, and to have an opportunity to tell his story without  
20 artificial constraints on the scope of the evidence. So,  
21 accordingly, we believe that the Case 002/02 trial can and should  
22 begin as soon as possible.

23 MR. SON ARUN:

24 Good morning, Mr. President. Good morning, Your Honours. I would  
25 like to add to my esteemed colleague, Mr. Victor Koppe, on this

1 same issue.

2 I join with my colleague, who has just enlightened your Chamber  
3 on the severance of Case 002. And the defence team for Mr. Nuon  
4 Chea initially did not support the severance. But after all, the  
5 Chamber has already decided, and we have already proceeded along  
6 that line. And it was because of this severance, has delayed the  
7 overall proceeding instead of expediting it.

8 [09.52.34]

9 From the time when the prosecutor submitted introductory  
10 submission outlining the charges in one introductory submission  
11 with one document, and now the Trial Chamber has decided to sever  
12 the case into several segments, and they expect that the  
13 judgement will be handed down once after another. In other words,  
14 we can expect there will be several judgements of the same case.  
15 And I believe that that should not have happened, because I have  
16 observed that no other international court has done so.

17 On a separate issue, I am of the view that from this time  
18 onwards, the Trial Chamber may save the Court's time, as the  
19 Co-Prosecutors have indicated to the Chamber, according to some  
20 of the following reasons.

21 First, the health condition as well as the age of the Accused.  
22 The two Accused, of course, are getting older, and their health  
23 conditions are frail now. So their ability to recall their  
24 experience is not as good as when they were younger, and that  
25 also leads to the hearing that does not have the full

1 participation of the Accused.

2 And following the conclusion of Case 002/01, this is a  
3 continuation of the hearing, according to the introductory  
4 submission by the Co-Prosecutors. Even though there has been a  
5 period of pause between Case 002/01, the Trial Chamber shall  
6 commence Case 002/02 as soon as possible because that is the  
7 continuation of the hearing of the charges brought forward by the  
8 Co-Prosecutor in their introductory submission.

9 [09.54.34]

10 For this reason, my colleague and I do not agree with the defence  
11 team of Mr. Khieu Samphan for the stay of the proceedings of Case  
12 002/02 due to the health condition as well as the advancing age  
13 of the Accused. I believe that their capacity -- retention  
14 capacity and overall capacity -- will diminish at this stage.

15 MR. PRESIDENT:

16 Now I hand over the floor to the defence team for Mr. Khieu  
17 Samphan to reply to the responses by other parties to the  
18 proceeding. You may proceed.

19 MR. VERCKEN:

20 Yes. Thank you, Mr. President. Good morning to the Chamber. Good  
21 morning to all parties, as well as to the public.

22 First of all, I would like to state that I am just discovering  
23 the various arguments here by the different parties--

24 MR. PRESIDENT:

25 Counsel, please hold on. There was an issue with the

1 interpretation booth.

2 Court officer is now instructed to check with the audio  
3 technician and the interpreting booth.

4 (Short pause, technical problem)

5 MR. PRESIDENT:

6 Mr. Vercken, you may now proceed.

7 MR. VERCKEN:

8 Thank you Mr. President.

9 Let me repeat my greetings to the Bench--

10 (Short pause, technical problem)

11 MR. PRESIDENT:

12 Mr. Vercken, you may now resume.

13 [10.01.45]

14 MR. VERCKEN:

15 Thank you, Mr. President.

16 I would like to greet everyone in the Chamber, and in the public  
17 gallery.

18 I realize that I am discovering for the first time the arguments  
19 of the parties. I have not received any written responses to our  
20 submissions regarding my question -- that it will be necessary to  
21 fully adjudicate Case 002/01 and all other appeals, before we  
22 commence the second trial. I am discovering the arguments of the  
23 different parties, which may perhaps explain the rather  
24 disjointed nature of the reply.

25 I would start with a decision regarding the Nuon Chea team. I

1 have understood that Mr. Nuon Chea had expressed the wish to  
2 speak up, to be able to respond, or, in any case, to express  
3 himself before this Chamber. That is perhaps justified in view of  
4 his health status.

5 [10.03.29]

6 But as far as Mr. Khieu Samphan is concerned, let me point out  
7 here that we are not concerned by the medical examination, which  
8 is somewhat abrupt, and which my colleague Son Arun has referred  
9 to. Mr. Khieu Samphan is in good health, he is not dying, he is  
10 here; he is in good health. So, in principle, all these  
11 considerations that have been referred to by Mr. Son Arun to  
12 justify the position of his client only concern his client, and  
13 certainly not Mr. Khieu Samphan. And we have been saying this for  
14 a very long time, and we'll repeat it here again, the more so as  
15 the Supreme Court Chamber, when it considered the position it had  
16 to adopt after setting aside first Severance Order, it did so,  
17 also mindful of the health status of the Accused. And in our  
18 position, in our view, it is completely unfounded as far as Mr.  
19 Khieu Samphan is concerned. Mr. Khieu Samphan is requesting that  
20 we wait for the full adjudication of the case and he wants to  
21 uphold all his rights. For the time being, he is in good health,  
22 and he would like to be tried in accordance with principles of  
23 the law. That is his main request. It is important to recall this  
24 because it also explains a number of differences in the positions  
25 that have been adopted by the different defence teams.

1 [10.06.00]

2 The proceedings today started with the Cambodian Prosecution  
3 lawyer, who immediately wanted to recall that Case 002/01 was not  
4 an isolated trial, that it was not a separate trial, and that  
5 regarding 002/02, or 002/03 -- that we are not talking of the  
6 same trial. And I am perhaps naive in wondering what kind of  
7 severance we are talking of before this Chamber. Is it a  
8 severance which does not actually result in separate trials?

9 Let me remind you of what the Supreme Court held in its decision,  
10 dated between the 25th November 2013, E2/84/2/8 and in paragraph  
11 4, when it reminded everyone of what the Chamber had decided to  
12 do by severing the case -- and I quote:

13 "On the 22nd of September 2011, pursuant to Rule 89-ter of the  
14 Internal Rules, the Trial Chamber issued the severance order by  
15 which it severed the proceedings for the first time in Case 002.  
16 It decided to consider it as part of a separate trial, and only  
17 limited parts of the facts in the Closing Order were included,  
18 and each party -- or each trial, had to result in a finding of  
19 guilt. And in the case of a finding of guilt, there was going to  
20 be a sentence." End of quote.

21 [10.08.53]

22 So, as far as I am concerned, when a Chamber issues a severance  
23 order or issues - or dismisses a case, when a Chamber decides  
24 that a case will end with a decision, either a decision regarding  
25 guilt or innocence, and in the case of finding of guilt, there

1 will be a sentence -- and when the Chamber renders a sentence, we  
2 are talking of a trial that is duly conducted. And the rules of  
3 law regarding the conduct of a trial and the rights of the  
4 Defence, that have to be compelled during such a trial, have to  
5 be respected as part of that trial. This is important.

6 And I note that both the Prosecution and the civil parties have  
7 shown proof of some form of amnesia, since in October 2011, when  
8 the Co-Prosecutors requested the reconsideration of that first  
9 Severance Order, and the extension of the scope of the first  
10 trial, they stated -- and I quote - therefore, what they said;  
11 E124/2, paragraph 4, 5, and the following:

12 "The delay that will be probably occasioned between the opening  
13 of the first case -- the first trial and the second trial,  
14 because of issues relating to adjudicating facts and res  
15 judicata, this would make it legally impossible to expedite  
16 subsequent trials on the basis of charges as established in the  
17 first trial."

18 And I skip part of their statements.

19 [10.11.46]

20 "Neither principle will be available to the Chamber -- that is,  
21 judicial notice and res judicata -- as part of second trial,  
22 insofar as all appeals have not been adjudicated after the first  
23 trial judgement."

24 So, that was in 2011, and the prosecutors were supporting their  
25 arguments regarding extension of the scope of the trial. And what

1 they have stated today is not exactly what they stated then.

2 And the civil parties, in their submissions of the 18th of  
3 October 2011, E124/8, paragraph 27, said the same thing -- and I  
4 quote:

5 "Since the Prosecution - or as the Prosecution has stated, the  
6 civil parties believe it is very difficult to organize a series  
7 of mini-trials that will be based on specific charges."

8 The Chamber rejected the request. We know that the Chamber's  
9 position is different. And the prosecutors reiterated their  
10 position on the 7th of November 2012, E163/5/1/1, paragraph 18,  
11 when they appealed the decision of the Chamber to partially  
12 reject the application -- and I quote:

13 "There is doubt as to the ability of the Chamber to make use of  
14 these mechanisms before an Appeals Chamber decision has been  
15 rendered on the first trial judgement. The issues of law that  
16 could have impact on the second trial, specifically: pardon and  
17 amnesty, modes of criminal participation in international law,  
18 admissibility, and proper use of the evidence." End of quote.

19 [10.14.40]

20 You therefore see that with both quotes it is clear that, for a  
21 very long time, when those submissions appeared to serve what  
22 they considered as their interest, the Prosecution pleaded on  
23 many issues in favour of our application today -- that is, our  
24 request that the appeal process be completed before the second  
25 trial commences. I was expecting the Prosecution to explain in

1 greater detail, why they have changed their position, the more so  
2 as they had raised, at one point an argument that it was in  
3 keeping with a general principle of law that the arguments of the  
4 parties should be admitted if they contradict that they had  
5 raised previously. That was the response of the Co-Prosecutors to  
6 the Supreme Court Chamber in their appeal against the second  
7 Severance Order, paragraphs 6 and 7.

8 [10.16.23]

9 That argument was completely false, in my view. Of course, the  
10 parties can change their position in a trial, unless they were  
11 denied the right of an accused to make an admission. I do not  
12 understand that the Prosecution would support such a position  
13 seriously, but I am surprised that they have not explained to us  
14 today why they have changed their position.

15 What I understand, is that the true crux of the matter, the real  
16 problem we face today, is the assertion by the Trial Chamber,  
17 pursuant to which the first trial would serve as a foundation for  
18 subsequent trials. You made that clear, and repeated it,  
19 including in your recent Decision on Admissibility of Evidence,  
20 305/05. You stated that you consider that Case 002/01 would serve  
21 as a foundation regarding the adjudication of the charges and  
22 facts that are still to be determined. So the question that comes  
23 to mind is as follows: How do you intend to use the first trial  
24 as a foundation, unless you have ascertained exactly what it is  
25 all about? How do you intend to use the first trial as a

1 foundation, whereas the first trial has not culminated in a final  
2 judgement, and can be considered as re judicata? I personally do  
3 not understand and I consider that such a state of affairs would  
4 open the door to all sorts of risks, biases -- risk of confusion,  
5 risk of breaching Mr. Khieu Samphan's rights, which, regardless  
6 of the consequences in terms of time management -- and these  
7 issues, are in dispute -- regardless of financial considerations  
8 -- and the Supreme Court Chamber pointed out that such issues  
9 should not be taken into account.

10 [10.19.50]

11 You decided the severance, and you ruled that the first trial  
12 would serve as a foundation for subsequent trials. We will have  
13 to wait for that foundation to be solidly built before we start  
14 the next trial. That is pure logic.

15 I said a while ago that we were in agreement with the prior  
16 positions of the civil parties and the Prosecution, partially --  
17 partially, because, in our view, there is another ambiguity,  
18 there is another, extremely serious difficulty, which is a  
19 consequence, inter alia, of this creation of the concept of a  
20 first trial that would serve as a foundation for subsequent  
21 trials. And I have already pleaded with regard to this difficulty  
22 before this Chamber on several occasions. It is also related to  
23 the issue of the scope of the trial, and, partially, the scope of  
24 the second trial, but also it is part of the scope of the first  
25 trial, because today we, the Khieu Samphan defence team, still do

1 not know what you, the Judges, have established for the first  
2 trial.

3 [10.21.50]

4 During their closing arguments, during their final submissions,  
5 the Prosecution pleaded the relevance of a system of  
6 international law regarding joint criminal enterprise, the  
7 systemic form. They pleaded the fact that all of Cambodia had  
8 been transformed into a slave camp. Very well, why not? If you  
9 wish. But the first trial, which ended with these final  
10 submissions by the Prosecution, did not focus on all the events  
11 that occurred in Cambodia between 1975 and 1979.

12 Similarly, the Prosecution argued that the crimes that are being  
13 prosecuted as part of the first trial have been committed as part  
14 of a systematic and large-scale attack, and as such, they could  
15 be considered as crimes against humanity, whereas all the events  
16 that occurred between 1975 and 1979 in Cambodia were not  
17 considered during the first trial. And for us, the Defence, it is  
18 an egregious prejudice to our client because at the end of this  
19 first trial, we find ourselves in a situation in which we do not  
20 know the scope of the trial, which is drawing to a close.

21 [10.24.00]

22 If the Prosecution undertook to plead as we did on the scope of  
23 criminal responsibility and the chapeau elements, it is in regard  
24 to us and our client that they undertook to make proposals and  
25 suggestions, which were adopted by the Chamber, and which led to

1 this expression, this term, "foundation" -- the first trial will  
2 be a "foundation". This is a very vague notion that makes the  
3 Prosecution to feel sufficiently at ease, and to violate the  
4 fundamental principles of a criminal trial at will, the  
5 principles that require that there should be a single trial, a  
6 separate trial, in which a limited portion of the facts before  
7 the Chamber are considered and determined, a trial that should  
8 necessarily lead to a finding of guilt or innocence and a  
9 sentence, and which considers only facts that are part of that  
10 first trial.

11 [10.25.39]

12 And, because of this vague notion, which his badly defined, the  
13 notion of an initial trial that would be a foundation, we have a  
14 prosecution that keeps shifting its position -- its positions, as  
15 regards the consequences that the first trial could have on the  
16 second trial. And the Prosecution says, "Let us proceed; let us  
17 proceed to the second trial. Insofar as they are still alive, it  
18 does not matter whether their rights are violated or not; what  
19 matters is to make sure that justice is rendered to the victims,  
20 who have been waiting for justice for a very long time. What  
21 matters is making sure that the funds are judiciously used. Let  
22 us proceed, and it doesn't matter whether we violate all the  
23 principles of the fundamental principles of criminal law."

24 [10.26.45]

25 We refuse such a so-called solution, and we have stated for a

1 very long time and our position is very clear, and logical, and  
2 coherent since the very beginning. We initially accepted your  
3 decision to sever the case, and we did not appeal that decision  
4 because we were of the view that that would perhaps enable the  
5 Chamber to determine some of the facts expeditiously. But we  
6 never – we never accepted that the fundamental rights of our  
7 client be violated. We never accepted that a trial be held on the  
8 basis of subject A in order to be sentence on subject B, because  
9 on that basis, we find ourselves today still in a state of  
10 uncertainty, not only with regard to the scope of the second  
11 trial, but also as to the scope of the first trial. We are also  
12 in a state of total uncertainty, as to the scope of a third  
13 trial, since your Chamber has decided that those issues will not  
14 be resolved today.

15 So we are going round in circles. We are making the same errors;  
16 we are stumbling over the same errors.

17 It is not a perfect solution, but it is the only solution, it is  
18 the only sincere solution. When we said that the first trial  
19 should serve as a foundation for the following one, it is  
20 necessary to wait until the facts that are being tried in the  
21 first trial, are adjudicated in order to be taken into  
22 consideration as such in a second trial.

23 [10.29.40]

24 And in order to finish, I feel like saying that the solution --  
25 or the so-called solution that was built up by the prosecutors

1 and that you have accepted -- that you have just accepted  
2 recently with your decision of 7 February which you issued  
3 recently regarding evidence -- seems to me to be a way -- an  
4 objectionable way -- to avoid the difficulties you are facing.  
5 That is to say that in the end, the prosecutors who are aware of  
6 these difficulties, that they were raising themselves, and that  
7 they were even pleading a few months ago, now propose to you, to  
8 take the totality of the evidence of the first case and to throw  
9 them into the basket of the second case in order to allow you,  
10 who have adjudicated the first trial, to reach the same  
11 conclusions as those that they hope you will be reaching, but  
12 that for the moment everyone ignores. And in so doing, the  
13 Chamber will be in a very comfortable position, as well as the  
14 Prosecution, in avoiding the difficulty of the necessary res  
15 judicata, relying on the evidence of the first case that suddenly  
16 end up in the second case, and therefore we can just continue  
17 peacefully and hope that we will move ahead. Moving ahead, moving  
18 head - this is a pretext that is repeated to justify the  
19 submissions of the Prosecution. These are false pretext. We are  
20 moving backwards, in fact. We are moving backwards. It's clear.  
21 [10.31.40]  
22 Now, we have to organize things. We cannot, of course, counter  
23 the severance which already exists, but you can nonetheless take  
24 decisions that will have less harmful consequences in the future  
25 than the decisions proposed by the civil parties, and by the

1 Prosecution. And this half- solution -- because there's no  
2 perfect solution -- would consist in waiting, and waiting -- in  
3 which will, of course, cover you from this extra criticism for  
4 having put the cart before the oxen. Wait for the res judicata,  
5 since you are telling us that the first case must serve as a  
6 foundation for the following one. Wait, therefore, for these  
7 foundations to be solid, in order to rely on them and this will  
8 also be helpful to the Defence because with a definite decision  
9 regarding the first case, we will finally know what this first  
10 case was made up of, and we will finally understand how the  
11 Prosecution felt that it was in a position to plead for joint  
12 criminal enterprise in the systematic form or for the existence  
13 of a widespread and systematic attack covering the entirety of  
14 Cambodia, following a first case that was only based on -- and I  
15 would like to remind you -- two population movements, and one  
16 single execution site.

17 Thank you.

18 MR. PRESIDENT:

19 Thank you.

20 Judge Jean-Marc Lavergne, you may proceed.

21 [10.34.22]

22 JUDGE LAVERGNE:

23 Yes, thank you, Mr. President.

24 I have a question to put to the Khieu Samphan defence. We have  
25 heard your submission. We have understood that you disagree with

1 the notion of severance, such as it is, being considered by the  
2 Trial Chamber right now, and you relied on the way the Supreme  
3 Court interpreted this notion of severance. However, I would like  
4 to know how you managed to bring together the reference you are  
5 making to the Supreme Court with paragraph 72 of its second  
6 decision regarding severance. And in paragraph 72 of this  
7 decision, E284/4/8, the Supreme Chamber provides the following  
8 indications, and these indications are very clear, and that  
9 encouraged, if I may so, the Trial Chamber to begin as soon as  
10 possible, and following the final statements in Case 002/01, to  
11 start as soon as possible, that is to say, the substantive  
12 hearings of the second trial, and the Supreme Court was extremely  
13 clear on this, it said that we are speaking about reasonable  
14 delay, and therefore that it is necessary, absolutely necessary  
15 for the trial Chamber to use all of the available days for a  
16 final judgement to be issued on the remaining charges. So, I  
17 think that this is something that you should react to.

18 [10.36.38]

19 MR. VERCKEN:

20 Absolutely, and I believe, yes, that in order for you to  
21 understand the way that we understand the decision of the Supreme  
22 Court, I think you should backtrack to -- backtrack a little  
23 further to the Supreme Court's decision, and in particular to  
24 paragraph 68, in paragraph 68, the Supreme Court is somehow  
25 considering contextual issues. It is trying to imagine a

1 solution. We cannot criticise the Supreme Court for that. And it  
2 is in paragraph 68; it is considering why the Chamber, the Trial  
3 Chamber is obstinately refusing to include S-21 in the scope of  
4 the first trial. It was the prosecutors who requested this. And  
5 this is how the Supreme Court answered this question that it was  
6 asking itself. It says: "The Trial Chamber is staying in its  
7 initial position regarding the severance of the charges, without  
8 taking into account the concerns and requests formulated by the  
9 parties in relation to the consequences of a new severance or for  
10 any further trials, and the Supreme Court concludes therefore  
11 that the Trial Chamber is probably not ready to consider any  
12 other charges or factual allegations that remain that are  
13 included in the indictment within the framework of the current  
14 trial." End of quote, [free translation]

15 [10.38.47]

16 The Supreme Court Judges therefore took into consideration  
17 necessarily that their decision was issued whereas the first  
18 trial had already started. This -- we are going back now to  
19 November 2013 -- their decisions were already issued, 23 July  
20 2013, and the summary of the reasons, as well, was presented  
21 then, and the Supreme Court issued a decision in a context that  
22 was a bit special, because the first trial is coming to its  
23 conclusion, and it must rule on these matters of severance. So,  
24 what I believe, Your Honour, is that the Supreme Court is saying  
25 here that it notices, or it notes, that you're not ready, the

1 Chamber is not ready to include S-21, and at the same time, in  
2 paragraph 75, the Supreme Court reminds that the bench must  
3 always act -- and I quote -- [free translation] -- "in the sacrum  
4 of law -- within the sacrum of law". This is an expression used  
5 by the Supreme Court, the sacrum of law, which means that, I do  
6 not believe it is possible today to understand the decision of  
7 the Supreme Courts as an invitation to violate this "sacrum of  
8 the law". This is not what the Supreme Court wanted to say. Never  
9 the Supreme Court wanted to urge you to try B in a trial only  
10 concerning A. This is at least how I see things; it is impossible  
11 for Supreme Court to make a decision.

12 [10.40.57]

13 So, in order to finish with my answer, when the Supreme Court  
14 states in paragraph 72, that you quoted, that the second trial  
15 must start as soon of possible, and in the best condition as  
16 possible, well, yes, of course, the second trial must start as  
17 soon as possible, and under the best conditions, but certainly  
18 not by violating outrageously the sacrum of the law, certainly  
19 not by moving ahead in a first case which seems to us unclear as  
20 far as its scope. We are not sure, the Supreme Court answered  
21 that we should not challenge you in that way, and that we should  
22 wait for your decision in the first trial before pulling on all  
23 the alarm bells that we rang as of the month of August, I think  
24 it is in August when we filed this request to stay the  
25 proceedings.

1 [10.42.22]

2 Yes, of course – yes, of course, we are waiting but we are asking  
3 for you to wait with us. Of course, you are the main players  
4 today, you are those who will be drafting the judgements, but we  
5 do not know how you are going to proceed and what is your concept  
6 of the first foundation trial, and we note that the prosecution  
7 feels perfectly at ease, and does not hesitate to plead concepts  
8 of criminal liability that are completely outside of the scope of  
9 the first trial, or legal concepts, for example, the chapeau  
10 elements, that are completely outside of the scope of the first  
11 trial. So, in our eyes, there is a real problem and I do not  
12 believe that we can interpret the wish of the Supreme Court to  
13 begin the first trial as soon as possible as allowing us to  
14 sidestep the fundamental rules of law

15 MR. PRESIDENT:

16 Thank you.

17 The time is now appropriate for the short break, and the Chamber  
18 wishes to advise the prosecution team that you are not granted  
19 the floor to reply to the observation by the defence counsel for  
20 Khieu Samphan.

21 The Court is now adjourned.

22 (Court recesses from 1044H to 1102H)

23 MR. PRESIDENT:

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

25 For the second item of the agenda -- that is, the determination

1 of the scope of Case 002/02, the second item on the agenda  
2 pertains to the determination of the scope of Case 002/02.

3 On 24 December 2013, the Trial Chamber requested that written  
4 submissions on this issue be filed by 31 January 2014. All  
5 parties filed their submissions on that date.

6 The Co-Prosecutors reiterate their earlier proposal arguing that  
7 Case 002/02 should include the S-21 Security Centre; the  
8 treatment of Vietnamese; the treatment of the Cham; the Tram Kak  
9 cooperatives; and Krang Ta Chan Security Centre, including  
10 treatment of Buddhists and forced marriage; the 1st January Dam  
11 worksite; the Kampong Chhnang Airport construction site; the Au  
12 Kanseng Security Centre; and the Phnom Kraol Security Centre.

13 [11.04.50]

14 The Lead Co-Lawyers concur with the crime sites and events  
15 proposed by the Co-Prosecutors, but also request the inclusion of  
16 the Trapeang Thma Dam worksite, the North Zone Security Centre,  
17 and Koh Khyang Security Centre, forced transfer 3 and related  
18 East Zone purges, as well as charges of forced marriage and  
19 factual allegations related to the treatment of Buddhists on a  
20 nationwide basis.

21 The Nuon Chea defence team submits that, Nuon Chea's principal  
22 interest is to have a full opportunity to adduce exculpatory  
23 evidence in support of his defence and, to that end, proposed the  
24 inclusion of the Trapeang Thma Dam worksite, either the Wat  
25 Kirirum Security Centre or Wat Thlok Security Centre, the alleged

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1 policy of internal purges, and the alleged third phase population  
2 movement as the most important allegations.

3 [11.06.20]

4 Finally, the Khieu Samphan defence team request that Case 002/02  
5 cover all of the allegations in the Closing Order that were not  
6 addressed during Case 002/01.

7 The trial Chamber will now hear oral arguments from each of the  
8 parties. These arguments should focus on responding to the  
9 submissions filed in writing and should not repeat the substance  
10 of the parties' own written submissions. The order of responses  
11 will be as follows: Nuon Chea defence team responses, 45 minutes;  
12 Khieu Samphan's defence team responses, 45 minutes; Civil Party  
13 Lead Co-Lawyer responses, 45 minutes; and Co-Prosecutors  
14 responses, 45 minutes.

15 The Chamber would now like to give the floor to Nuon Chea's  
16 defence team to present their response. You may proceed

17 MR. KOPPE:

18 Thank you, Mr. President, Your Honours.

19 [11.08.04]

20 As we have explained in writing, we have no substantive position  
21 concerning the scope of the next trial. We acknowledge that the  
22 charges prosecuted in a criminal trial are not usually selected  
23 by the defendant. As Nuon Chea's lawyers, our concern is only  
24 that Nuon Chea is able to defend himself against whatever charges  
25 he does face.

1 Our client's primary concern in that regard concerns the  
2 opportunity he will be given at trial to put forward exculpatory  
3 evidence in support of his defence. Nuon Chea himself has  
4 explained on several occasions that he cannot defend himself if  
5 the Chamber focuses on the body of the crocodile and fails to  
6 consider its head and its tail. For Nuon Chea, defending himself  
7 means telling a story that goes far beyond the conditions in  
8 crime sites and formal structures described in the CPK Statute.  
9 Relevant to Nuon Chea's criminal liability is not only what  
10 happened, but why it happened and who was responsible in a  
11 divided and chaotic revolutionary state. Relevant to our client's  
12 liability is not only who the CPK was fighting, but who was  
13 fighting the CPK.

14 [11.09.51]

15 In the trial that we are about to start, it is imperative that  
16 Nuon Chea has the opportunity to establish two critical facts.  
17 One critical fact is that the CPK faced a legitimate, serious and  
18 ongoing security threat over the entire period of Democratic  
19 Kampuchea. The second critical fact, Mr. President, is that the  
20 CPK was not a unified entity, but an association of competing  
21 factions linked by a complex web of alliances and oppositions.  
22 These facts are, of course, related: the security threat came  
23 primarily from foreign actors who supported opposition groups  
24 within the Party in a war against the government. And some of  
25 those opposition groups ultimately triumphed, and the ones who

1 did, now lead the prosecution against Nuon Chea.

2 [11.11.10]

3 Now, Mr. President, none of these facts arise naturally from or  
4 relate to any one crime site. In order to prove these facts, we  
5 will require the flexibility to enter into evidence a wide range  
6 of material across the Case 002 Closing Order and beyond. We  
7 should not be required to establish exactly in which sense every  
8 document, witness, and question pertains to the crime sites at  
9 issue. The Chamber must instead give us leeway to explore and  
10 investigate facts in support of Nuon Chea's defence. This is an  
11 opportunity that was not provided to us during the investigation  
12 or undertaken on our behalf by the Office of the Co-Investigating  
13 Judges.

14 Only if the Chamber decides that it will take a restrictive view  
15 of the evidence admissible in this second trial do we make any  
16 concrete request to include specific crime sites within the scope  
17 of Case 002/02. If the Chamber limits us to matters narrowly  
18 relevant to the crime sites in Case 002/02, as we feel it  
19 generally did in Case 002/01, we must insist that the trial  
20 include the allegations in the Closing Order most closely linked  
21 to Nuon Chea's defence. In general, these include allegations in  
22 respect of crime sites based in the Eastern Zone and the  
23 Northwest Zone.

24 [11.13.12]

25 We note and support the civil parties' request to include

1 Trapeang Thma Dam worksite, the alleged third phase population  
2 movement, and the alleged purge of East Zone cadres within the  
3 scope of the trial. We have no objection to their further  
4 proposal to include forced marriage and the treatment of  
5 Buddhists. As we did in our written submission, Mr. President, we  
6 would also seek the inclusion of either the Wat Thlok or Wat  
7 Kirirum Security Centre, which are both crime sites in the  
8 Northwest Zone.

9 Now, our only other comments about the scope of the trial concern  
10 S-21.

11 In our written submission, we expressed doubts – serious doubts –  
12 that this Chamber could impartially judge allegations concerning  
13 S-21 and, possibly, any part of Case 002/02, after its judgement  
14 in bot Case 001 and Case 002/01. Now, we have spent much of the  
15 last two months reviewing this Chamber's decision in Case 001. In  
16 nearly every paragraph, we find conclusions of fact we intend to  
17 dispute should S-21 form part of the scope of Case 002/02. There  
18 seems to be no realistic possibility we will be able to persuade  
19 this Chamber that the conclusions it formed after 17 months of  
20 proceedings were incorrect.

21 [11.15.00]

22 Although, Mr. President, this is possibly premature, permit me to  
23 offer the Chamber a preliminary glimpse of some of the findings  
24 in the Case 001 judgement we find troubling and intend to dispute  
25 in any trial concerning Nuon Chea's responsibility for S-21.

1 One general subject concerns the number of victims at S-21,  
2 including both the number who were detained and the number who  
3 were executed.

4 As you know, the Chamber relied exclusively, for that purpose, on  
5 the so-called "Revised S-21 Prisoner List", a document compiled  
6 by DC-Cam and subsequently modified by the Co-Prosecutors.

7 The Case 001 Judgement against Duch contains no analysis of this  
8 list of any kind and no effort to examine the underlying  
9 originals, let alone any discussion of the authenticity of those  
10 originals. Yet the only seemingly hard evidence of detainees at  
11 S-21 in the form of photographs and confessions constitute less  
12 than half of the number on the "Revised S-21 Prisoner List" -  
13 around 5,000.

14 [11.16.30]

15 Newly found evidence, Mr. President, from Chinese sources refer  
16 to similar numbers of detainees, and these facts beg the question  
17 whether, contrary to this Chamber's finding beyond a reasonable  
18 doubt in the Duch Judgement, the number of detainees at S-21  
19 might have been around 5,000, and not 12,272.

20 Related is the Chamber's conclusion that every prisoner on the  
21 Revised List, with the exception of one, was executed and that  
22 therefore, on that basis, at least 12,272 people must have been  
23 killed. Interestingly, as you know, the one person the Chamber  
24 decided hadn't been killed was Chum Mey, one of the very few  
25 former detainees to appear before this Chamber in the Duch Trial.

1 And it is only because it seems the Chamber happens to know that  
2 Chum Mey was still alive today - or then - that it was able to  
3 conclude he did not die at S-21. Yet the fact that Chum Mey's  
4 name was on the Co-Prosecutors' list never seem to have prompted  
5 the Chamber to ask itself what would seem to be, in our view, an  
6 obvious question: If Chum Mey's name is on that list, number 1583  
7 of the prisoners, supposedly detained and supposedly killed, but  
8 Chum Mey is alive, how do we know that everyone else on that list  
9 was, indeed, killed?

10 [11.18.05]

11 In fact, Mr. President, we have already identified the number of  
12 detainees on the S-21 Prisoner List who were released. These are  
13 people whom this Chamber has already ruled beyond a reasonable  
14 doubt died at S-21. And this took us almost no effort. We did it  
15 in a matter of hours, on the basis of publicly available  
16 information; we did it before we even started to prepare for  
17 cross-examination, let alone conduct the cross-examination  
18 itself.

19 We also intend to dispute the Chamber's conclusion concerning the  
20 frequency with which torture was employed against detainees at  
21 S-21. The Chamber concluded that interrogation techniques  
22 "routinely" employed violence and that threats were "routinely"  
23 put into practice. We intend to challenge the sufficiency of the  
24 evidence supporting these conclusions.

25 [11.19.01]

1 The Chamber, for instance, also found in the Duch Judgement that  
2 every single instance of detention at S-21 was unlawful, and this  
3 is another finding we intend to contest if S-21 is included as  
4 part of the Case 002/02 trial. We raised once before the  
5 possibility that some of the conduct at S-21 may have been  
6 lawful, might have been justified by military necessity. The  
7 Co-Prosecutors found that suggestion of that possibility - and  
8 I'm quoting them now from their previous severance argument -  
9 they found that "morally repugnant". This is the kind of thing  
10 we, on the Defence, of course, are accustomed to. All we have to  
11 do is suggest that some of the conduct judged might not have been  
12 criminal, just that is considered, apparently, reprehensible.  
13 Now, Mr. President, this is the extent to which the presumption  
14 of guilt has taken hold in these proceedings. In this kind of  
15 context, how can our client accept that the Chamber which has  
16 already found that conduct to be criminal reassess that question  
17 with an impartial mind?

18 [11.20.28]

19 Other findings in the Judgement go beyond S-21. The Case 001  
20 Judgement against Duch concludes for instance, at paragraph 383,  
21 that intellectuals were executed, in general, because of their  
22 background as intellectuals. In paragraphs 99 through 101 of the  
23 Judgement, the Chamber concluded that there was a policy of  
24 smashing enemies. Now, these are, as you know, conclusions we  
25 disputed in Case 002/01, and we will continue to dispute them in

1 the next case, 002/02.

2 Last example, with your permission, Mr. President. Another  
3 holding in the Case 001 Judgement against Duch we may seek to  
4 dispute in the next case concerns the Chamber's findings in  
5 relation to the existence of an international armed conflict. In  
6 our view, there are many questions that are still outstanding  
7 concerning both the nature and period of the armed conflict. Did  
8 an international armed conflict truly exist prior to December  
9 1977, as the Chamber held in the Duch Case? Was there a  
10 sufficient conflict among CPK factions within the Party to maybe  
11 constitute a non-international armed conflict at any point in  
12 Democratic Kampuchea?

13 [11.21.55]

14 In our view, Mr. President, Your Honours, these are questions  
15 which deserve much more reflection and analysis than they  
16 received in the Judgement against Duch.

17 Obviously, Mr. President, the analysis of the substance of the  
18 evidence on S-21 at this stage is very premature, but I'd point  
19 to these few examples to illustrate for the Chamber why we think  
20 the Case 001 Judgement against Duch is so troubling from the  
21 perspective of impartiality.

22 Our client - our client doubts that the Chamber which made these  
23 complex conclusions is able to judge him fairly, not only but  
24 especially with regard to S-21. For that reason, in our view, the  
25 Case 001 Judgement against Duch is reason enough to disqualify

1 this Chamber from adjudicating Nuon Chea's responsibility for  
2 S-21.

3 But even so, the Case 001 Judgement against Duch is only the  
4 beginning. This Chamber will shortly issue a judgement in Case  
5 002/01. We do not know what that judgement will say, but many of  
6 the conclusions urged upon this Chamber in Case 002/01 about the  
7 structure of the CPK, Nuon Chea's role, and the supposed  
8 politics - policies of Democratic Kampuchea - would directly  
9 impact this Chamber's impartiality in Case 002/02.

10 [11.23.40]

11 The Chamber has already concluded that at least 12,273 people  
12 were unlawfully detained, tortured, and killed at S-21, without  
13 any real adversarial assessment of the evidence. Now, this  
14 Chamber enters the Case 002/02 trial having also already decided  
15 that Nuon Chea was responsible for military and security affairs,  
16 that the CPK functioned in an organised and strictly hierarchical  
17 manner, that the CPK had a so-called policy of summarily  
18 executing enemies, our question, Mr. President, is this: Insofar  
19 as S-21 is concerned, what would be left to adjudicate in Case  
20 002/02? What line of defence would be available to Nuon Chea that  
21 this Chamber has not already told him it disbelieves? Maybe it is  
22 a failure of our creativity, but we, on the Nuon Chea defence  
23 team, cannot think of one.

24 [11.24.50]

25 The impartiality problem is also substantial in regards of the

1 rest of the Closing Order. If the Chamber convicts Nuon Chea for  
2 crimes charged in Case 002/01, if it holds that he acted with  
3 criminal intent to harm hundreds of thousands of people, how can  
4 it be seen to approach Nuon Chea's criminal liability in Case  
5 002/02 in impartial manner? Will the Chamber really approach  
6 ambiguities in the evidence without any preconceptions about how  
7 Nuon Chea acted or will it approach them already having decided  
8 that our client is a monster? Will the Chamber judge our client  
9 fairly or will it assume that he is the kind of person who must -  
10 who must - be guilty of the crimes charged?

11 Mr. President, Your Honours, our final comments about S-21 and  
12 about the scope issue more generally concern the  
13 representativeness of the charges within the Closing Order and  
14 the Supreme Court Chamber's most recent decision on severance.  
15 [11.26.03]

16 As you know, we have previously made extensive submissions  
17 concerning the representativeness of the Closing Order. We argued  
18 that, contrary to the submissions of the Co-Prosecutors, S-21 is  
19 not representative of the Closing Order in any respect. Now, we  
20 will not repeat our submissions, which are familiar to the  
21 Chamber. We will only point out that the Supreme Court Chamber's  
22 Decision on severance did not conduct a substantive analysis of  
23 representativeness; it replicated our position concerning the  
24 scope of Case 002/01 and that of the Co-Prosecutors, but it never  
25 embarked on a thorough analysis to determine which charges would

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1 constitute a representative interpretation of the Closing Order.

2 So, Mr. President, to us, the status of the Supreme Court

3 Chamber's Decision in that regard is not clear.

4 Thank you.

5 [11.27.22]

6 MR. PRESIDENT:

7 Thank you.

8 Mr. Son Arun, you may proceed.

9 MR. SON ARUN:

10 Mr. President, I do not have any observation. Thank you.

11 MR. PRESIDENT:

12 Thank you.

13 Now I hand over the floor to the defence team for Mr. Khieu

14 Samphan. You may proceed.

15 MR. KONG SAM ONN:

16 Good morning, Mr. President. Good morning, Your Honours, and good

17 morning to all parties.

18 Responding to the scope of Case 002/02 on behalf of the defence

19 team for Mr. Khieu Samphan, we observe that to date there has not

20 been any agreement among the parties to the proceedings. The

21 disagreement amongst the parties will lead to the delay of the

22 proceedings. Particularly, it will likely amount to various

23 appeals regarding this point.

24 [11.28.50]

25 For example, the severance of Case 002 into several segments is

1 one of the consequences that we have received to date because we  
2 do not know the exact scope of Case 002/01, not until the last  
3 stage of the proceeding, and now again we are dealing with the  
4 uncertainty once again in Case 002/02.

5 If we look objectively at the possibility of the discussion that  
6 the Trial Chamber have convened thus far, we have spent  
7 substantial Court time to deal with this issue. If all the facts  
8 and charges have not been severed from the beginning to date, we  
9 may be somewhere at the stage of the proceedings, but  
10 unfortunately we cannot return to the earlier stage because we  
11 have gone a long way until now. The severance of Case 002/01 from  
12 the entire Case 002 has amounted to the complicated procedures,  
13 and this will affect the interest of the client - of my client,  
14 the Accused, and it has also made the proceedings rather  
15 complicated for the Chamber.

16 [11.30.49]

17 I would like to respond to the observation by the prosecutors, as  
18 well as the Lead Co-Lawyers for the civil parties, concerning the  
19 consequence of the undue delay of the proceedings, as well as the  
20 issue of financial trouble that this Court might encounter due to  
21 the severance of the current case.

22 In general, we are of the view that the issue of funding should  
23 not be the burden of the Prosecution. It is entirely the burden  
24 of those who wanted this Court in the first place. They have to  
25 ensure that this Court can function smoothly. And we are of the

1 strong view that this Court should not be held hostage of the  
2 funding availability of this Court. If this Court does not have  
3 sufficient funding in order to ensure that the justice is found,  
4 this Court may not be able to meet its mandate, and eventually  
5 Mr. Khieu Samphan has to be released. This is the foundation of  
6 justice, because justice is not dependant on the availability of  
7 funds.

8 [11.32.55]

9 I do not want to address on any particular fact or particular  
10 charge that the defence team for Mr. Khieu Samphan is seeking the  
11 Trial Chamber to include in the scope of Case 002/02, for the  
12 following reasons.

13 In order to ensure that it is easy to examine the entire case  
14 file, as well as in the interest of the defence of my client and  
15 to ensure the smooth proceeding, the defence team for Mr. Khieu  
16 Samphan requests the Chamber that all facts and charges are  
17 examined - the charges that have been brought forward by the  
18 prosecutors, the charges that have remained from the - from Case  
19 002/01. We believe that doing so will not add any complication  
20 once we have to discuss on the scope of Case 002, because people  
21 have been wondering as to how broad the Case 002/02 will be and  
22 whether there will be any Case 002/03. If we can include  
23 everything in this segment of trial, we will be able to conclude  
24 the entire case; we will be able to deal with all the remaining  
25 facts and charges left after Case 002/01.

1 [11.34.50]

2 Another important thing that allows this Chamber to examine all  
3 the charges and facts left from Case 002/01 will enable Mr. Khieu  
4 Samphan to exercise his right to his own defence effectively.

5 I would like to bring up the - one of the decisions of the Trial  
6 Chamber, document E302/5, paragraph 5. I would like to read it  
7 out for the Chamber. The trial Chamber wishes to remind the  
8 parties that the severance of the proceedings "is purely the  
9 means of the proceedings for the only purpose to ensure the order  
10 of the charges indicated in the Closing Order and that those  
11 charges are subject for the examination and adjudication."

12 In this particular section of the Decision, it is very clear that  
13 the Chamber points out that it is pure means of proceedings and  
14 the Chamber is of the view that this means of severance serves  
15 that purpose. But to us, it is not the case. There have been a  
16 lot of concerns raised by the parties, and particularly on the  
17 health status of the Accused, as well as the frailty of the  
18 Accused's condition, and these facts have induced this Court to  
19 sever the current case. This is one of the important fundamentals  
20 that I believe that everyone who is present in this Court will  
21 agree.

22 [11.37.30]

23 Now, assuming that the current Accused were at 30 or 40 years of  
24 age, would there be a severance at all? So, I believe that the  
25 severance of the current case was meant to convict the Accused

1 before they die. That is the fact before us. And that particular  
2 intention may not allow Mr. Khieu Samphan to exercise his right  
3 to his defence effectively.

4 That's why on behalf of Mr. Khieu Samphan, we earnestly request  
5 the Chamber to examine the various facts and charges left from  
6 Case 002/01.

7 Thank you, Mr. President.

8 MR. PRESIDENT:

9 Thank you.

10 And, Counsel Vercken, you may proceed.

11 [11.38.55]

12 MR. VERCKEN:

13 Yes. Thank you, Mr. President.

14 Very briefly speaking, I would like to add to what my colleague  
15 just developed a comment, and this comment focuses on the attempt  
16 of the Prosecution to address the issue of representativeness,  
17 the representativeness of the trial. And I imagine that this  
18 temptation will be even greater as the Chamber has told us on 7  
19 February that this is not - we're not speaking about distinct  
20 cases - 002/01 and 002/02; it's still the same case, and  
21 especially owing to the recent decision of the Supreme Court  
22 which, again, concludes, in some kind of contextual analysis -  
23 concludes that, finally speaking, the solution should be - to the  
24 difficulties we are facing, since the Chamber is not immediately  
25 ready - to include S-21 in the first trial might be, possibly, to

1 take everything that the parties are requesting to include in the  
2 first trial in order to define the second trial. This is how the  
3 Supreme Court seems to be proposing to pick in the requests of  
4 the Nuon Chea team, from the civil parties, and from the  
5 Prosecution - everything that is requested to be included in the  
6 first trial in order to define a second trial which, globally  
7 speaking, would provide this characteristic, together with the  
8 first trial, of proper representativeness.

9 [11.41.18]

10 I do not want to proceed in this way. Maybe it's a very clear way  
11 of thinking on the part of the Supreme Court, but I don't want  
12 this to be used to counter our request and that you decide to  
13 decide that you define the second case as having to include  
14 everything that remains.

15 And it is for this reason that I began my submission this morning  
16 with the issue of Khieu Samphan's health. And the Supreme Court  
17 has said to us in its Decision - which is, of course, imperfect,  
18 but no one is perfect - the Chamber - the Trial Chamber - and  
19 this is in paragraph 65 of its Decision. The Supreme Court is  
20 telling us that the Trial Chamber committed an error of law when  
21 it rejected the criteria of reasonable representativeness as not  
22 being applicable to the case at hand.

23 And then comes this rather surprising analysis of the possibility  
24 of restricting the number of charges. I don't exactly understand  
25 what this - what the Supreme Court means here, by "restricting

1 the number of charges".  
2 [11.42.50]  
3 And finally, what's stated is that it is possible to define the  
4 second trial which, taken together with the first trial, will  
5 offer proper representativeness of the case. Of course. Why not?  
6 But at the same time, the Supreme Court is telling us again here:  
7 The criteria for representative only comes into play as of the  
8 moment when we consider that the defendants - or that Khieu  
9 Samphan is too old, or that he's about to die, or that he is ill.  
10 And I repeat again: This is not the case. A little while ago, who  
11 would have banked on the fact that we would still be discussing  
12 the scope of a second trial in the presence not only of Khieu  
13 Samphan, but even of Mr. Nuon Chea? This issue of  
14 representativeness is, of course, useful, but for Mr. Khieu  
15 Samphan - and in the case of Mr. Khieu Samphan, nothing allows us  
16 to say today that he will not be able to survive until the end of  
17 the following trials, no matter the way you will define the  
18 subsequent trials, as maybe the way that we are requesting,  
19 because this seems to be the least worst of the cases - that is  
20 to say, a second case that would encompass the totality of the  
21 charges that remain in the indictment or, as you may define it,  
22 as I interpret it in your recent decisions, you will maybe define  
23 - or issue a new severance, and maybe later on, down the line,  
24 create a third trial. But in any case, nothing allows us to say  
25 that Mr. Khieu Samphan will not be around until the end. And the

1 Supreme Court has studied in depth, in its recent decision, this  
2 question, and it understands that when a severance is decided,  
3 the pros and cons have to be weighed in properly and the  
4 consequences have to be considered for an accused person who is  
5 in good health, for an accused person who probably will not pass  
6 away tomorrow, the consequences of a Severance Order which the  
7 Supreme Court tells us will, in fact, postpone or delay the trial  
8 instead of speeding it up.

9 [11.46.26]

10 So, the most reasonable proposal that we were able to find - and  
11 we regret the decision that Your Chamber took on 7 February on  
12 the general admission of evidence from the first trial into the  
13 second trial, and we would like to remind you that the Supreme  
14 Court, in its recent decision, in paragraph 39, stated, using the  
15 example - and stated that evidence should be used in a second  
16 trial - and I quote paragraph 39: "Regarding the role and the  
17 authority of the Accused, the evidence should be examined in each  
18 trial."

19 This is what seems to be the Supreme Court's position regarding  
20 this matter.

21 So, to be perfectly honest - and even if this will not prevent us  
22 from using all legal means that will allow us to defend properly  
23 Mr. Khieu Samphan - we believe, nonetheless, that the most  
24 expeditious solution, the most efficient solution, the most  
25 logical solution would be to not try to use a criteria of

1 representativeness that seems completely inappropriate here -  
2 there are no elements that allow us to substantiate it or to  
3 consider it as valid - and to try the case based on all of the  
4 remaining charges in the indictment. I even thought that this  
5 could be a solution - or a possible solution could be to drop the  
6 charges - that you do not want us to discuss today. But, of  
7 course, this can be considered in a French court, in which the  
8 prosecution has the responsibility to call witnesses before the  
9 Trial Chamber. But here it is the Chamber that decides on the  
10 evidence that will be tendered. So, the solution of dropping the  
11 charges is not something that I propose because it doesn't seem  
12 to correspond to the rules governing your Chamber. Maybe I am not  
13 entirely clear for all of you, but I'm sure Judge Lavergne  
14 understands.

15 [11.49.35]

16 No matter what, today, the solution -- that is the simplest --  
17 would consist in trying what remains in the indictment and to  
18 stop issuing severances, especially since the following cases  
19 have not yet been defined and when we are trying defendants who  
20 have been detained for more than six years.

21 MR. PRESIDENT:

22 Thank you.

23 The time is now appropriate for lunch adjournment. The Chamber  
24 will adjourn now and resume at 1.30 this afternoon.

25 Security guards are instructed to bring Mr. Khieu Samphan to the

60

1 holding cell downstairs and have him returned to this courtroom  
2 before 1.30.

3 The Court is now adjourned.

4 (Court recesses from 1150H to 1333H)

5 MR. PRESIDENT:

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

7 And the Chamber would like to give the floor now to Civil Party  
8 Lead Co-Lawyers. You may proceed.

9 MS. YE:

10 Thank you, Mr. President. Good afternoon, Your Honours. Good  
11 afternoon to everyone in and around the courtroom. My name is  
12 Beini Ye. I am one of the international civil party lawyers. I am  
13 here today to speak on behalf of Élisabeth Simonneau-Fort, the  
14 International Lead Co-Lawyer, who cannot be present today.  
15 I would like to present the responses of the civil parties on the  
16 scope of Case 002/02.

17 [13.34.30]

18 First, I would like to talk on the submission of Khieu Samphan's  
19 defence counsels on the scope of the subsequence of trial.

20 The defence counsels for Khieu Samphan request that all of the  
21 remaining factual allegations and crime sites of Case 002 should  
22 be included. This is equivalent to refraining from issuing any  
23 further severance decision. The civil parties do not support this  
24 request.

25 In the appeal decision, on the second Severance Order, the

1 Supreme Court calls on the Trial Chamber to balance different  
2 legitimate interests when making the decision on whether or not  
3 to sever the case. This is in paragraph 37 of the Decision. In  
4 doing so, the Trial Chamber's discretion remains broad, as  
5 outlined by the Supreme Court in paragraph 55 -- 51, excuse me,  
6 of the Decision.

7 [13.35.28]

8 Now from the perspective of the civil party's interests, such a  
9 balancing exercise leads to the conclusion that a further  
10 severance of the remainder of Case 002 is necessary. At this  
11 stage of the trial, the civil parties have two major interests:  
12 First, the consolidated group of civil parties has an interest in  
13 the education of all charges in the Closing Order for Case 002,  
14 in order to hold the Accused accountable for the wide range of  
15 crimes and reflect the diverse harm suffered by the civil  
16 parties.

17 Secondly, at the same time, the civil parties seek for judgements  
18 to be issued as soon as possible, because they have the right to  
19 see justice done within their lifespan. As my colleague pointed  
20 out this morning, many civil parties are elderly and their health  
21 is deteriorating. Many have already passed away in the course of  
22 these proceedings. These two interests need to be balanced  
23 against each other, because the adjudication of all remaining  
24 factual allegations in Case 002 will certainly prolong the wait  
25 for a judgement on the remaining charges.

1 [13.36.41]

2 A balance of these two interests can be achieved by severing the  
3 remainder of Case 002 and including a reasonably representative  
4 segment of factual allegations and crime sites in the next  
5 sub-trial. This will allow the Court to adjudicate a significant  
6 portion of the remainder of Case 002, a portion that reflects the  
7 wide range of crime and diverse harm suffered by the civil  
8 parties, and at the same time, issue a judgement on them within  
9 the lifespan of most civil parties.

10 Therefore, the civil parties do not agree with the requests made  
11 by the defence of Khieu Samphan for their rather request to sever  
12 the remainder of Case 002 and include the crime sites and factual  
13 allegations as set out in our submission on the scope of Case  
14 002/02, document number E301/5/3.

15 [13.37.37]

16 I come to the submissions of Nuon Chea's defence counsels.

17 In their written and oral submissions, defence counsels for Nuon  
18 Chea request a more lenient admission of evidence outside the  
19 scope - or outside the Case 002 Closing Order. Defence counsels  
20 also claimed that S-21 is not representative of Case 002.

21 The civil parties would like to make two observations on these  
22 submissions: First, on the issue of admitting evidence beyond the  
23 closing order, we do not deem this argument to be relevant to  
24 determine the scope of the subsequent case. Internal Rule 87  
25 requires a case by case assessment of the relevance of evidence.

1 A blanket ruling admitting -- and I quote: "Any evidence on any  
2 subject within the scope of the Case 002 Closing Order", as  
3 requested by the Defence in their written submission, is  
4 therefore not an option.

5 On the question whether S-21 is representative of Case 002, we  
6 would like simply to point to the Supreme Court's binding order  
7 to include S-21 in the subsequent sub-trial as set out in the  
8 appeal decision on the second Severance Order in paragraph 76.

9 [13.38.55]

10 I have no further observations to make or responses to make on  
11 this point, and I thank you for your attention.

12 MR. PRESIDENT:

13 Thank you.

14 What about the National Lead Co-Lawyer?

15 MR. PICH ANG:

16 Mr. President, I do not have anything else to add to my  
17 colleague's statement. What Beini Ye raised is representative of  
18 the entire team.

19 MR. PRESIDENT:

20 Thank you.

21 We would like now to give the floor to the Co-Prosecutors. You  
22 may proceed.

23 [13.39.48]

24 MR. KOUMJIAN:

25 Thank you, Mr. President. Thank you, Your Honours.

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1 In reading the submissions of the various parties and listening  
2 to the oral submissions today, I believe there is one area where  
3 all agree - and it's important, I believe, to stress that - and  
4 that is in deciding upon the scope of this trial, Case 002/02, or  
5 this phase of the trial. All parties, as I hear them, agree: This  
6 should be the last trial of this case. This is necessary that we  
7 cover all of the important charges remaining in order that the  
8 victims in this case receive justice, that the charges are dealt  
9 with. It's also necessary because, as many have pointed out, the  
10 age of the victims and of the Accused means that these trials  
11 cannot keep going on forever. In addition, it's necessary because  
12 this is an extraordinary chamber, it's a temporary court, and all  
13 expect us to have a strategy to complete our work. And in regards  
14 to Case 002/02, this obviously is now in the hands of Your  
15 Honours to develop that strategy of how we can try the remaining  
16 charges - important remaining charges - in a reasonable period of  
17 time and complete our work within the lifetime, of course, of the  
18 Accused and of the many victims awaiting for justice.

19 [13.41.32]

20 The submission that the Prosecution made back in December - and  
21 we stick with that - is that we can deal in this trial - it is  
22 reasonable to believe that we can deal in this trial with all  
23 charges, all remaining legal charges not covered in Case 002/01.  
24 We can do that, we've argued, by streamlining the case and  
25 reducing the number of crime sites, the number of individual

1 crimes that are dealt with in the trial. As you know, we've even  
2 given a list of proposed witnesses that we believe would cover  
3 the charges; that comes out to less than 100 days, with the  
4 understanding - 100 Court days, with the understanding that, of  
5 course, additional witnesses will be proposed by the other  
6 parties.

7 It's critical to those outside trying to understand how is it  
8 possible to efficiently do this trial in a reasonable period of  
9 time - we've said a year, a year and a half - when the first  
10 trial took a year and a half. The answer to that was very  
11 importantly based on the decision Your Honours gave last Friday,  
12 the Clarification, where you clarified that all of your previous  
13 statements, you reiterated, the trial in Case 002/01 will be the  
14 foundation for the trial in 002/02.

15 [13.43.10]

16 The evidence in any war crimes court of senior leadership, the  
17 evidence that is most time consuming and the most difficult is  
18 always the evidence regarding the linkage of that person to the  
19 policies and the crimes: What was their position? What was their  
20 power? How did they contribute to the enterprise, to the crimes  
21 that occurred? Most of that evidence has already been heard in  
22 Case 002/01; it's already on the record. So, when we say this  
23 will take an additional year, a year and a half, the trial really  
24 began with the trial of Case 002/01. Most of that evidence is  
25 highly relevant to the charges in Case 002/02, and Your Honours

1 will be able to consider that.

2 [13.44.05]

3 Now, the Nuon Chea defence has raised the issue today that, well,  
4 there may not be much left for the Defence to argue because Your  
5 Honours made certain findings about crimes that happened at S-21  
6 in Case - in the first trial before this Court, the trial of  
7 Duch. And in the trial 002/01, we all expect certain findings  
8 about the role and responsibilities and leadership of Nuon Chea,  
9 what his powers were and contributions to criminal plan in  
10 Democratic Kampuchea. The Defence seems to approach this trial as  
11 if it is, frankly, a sporting event where it's Your Honours' role  
12 to make sure that both sides have an equal chance to win the  
13 game. But this is not a game.

14 [13.45.11]

15 The fact that there were findings that crimes occurred, the fact  
16 that there were findings based on law and evidence about the role  
17 of the Accused does not mean in any way that there's a bias on  
18 the part of Your Honours; it does not mean in any way that Nuon  
19 Chea does not have the right to challenge whatever he can  
20 challenge in the subsequent trial. It's not up to Your Honours to  
21 tell the Defence what lines of defence are left. It's up for the  
22 Defence to figure that out. And if, in fact, the case is so  
23 strong that there is no defence, well, that means justice will be  
24 done. Obviously, we have very talented counsel on the Defence,  
25 and I'm absolutely positive that they will come up with arguments

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1 and they will argue the best for their client, and we will face a  
2 very tough battle in Case 002/02.

3 The Defence, in talking about S-21, seems to hold over Your  
4 Honours the possibility that there will be a motion - or the  
5 probability that there will be a motion to recuse Your Honours  
6 from this case, and today they said, "on the basis of findings in  
7 001", the trial against Duch.

8 [13.46.40]

9 My response to that is:

10 First, this is extremely late to be filing a - talking even about  
11 a motion of recusal, when the Duch Judgement was issued years  
12 ago. And there's a responsibility of any party that sees a bias  
13 on the part of a Judge to bring that to the attention of the  
14 Chamber and make such a motion immediately.

15 But more importantly, this is an issue that's already been  
16 adjudicated; such a motion, on exactly the same basis, has  
17 previously been filed. It was filed on behalf of Ieng Thirith. In  
18 that motion filed - I believe it was in the Decision on the  
19 motion by the Judges who were assigned to hear the decision -  
20 they cited numerous cases from international tribunals that hold  
21 that the fact that judges hear cases with related facts does not  
22 disqualify them in hearing the subsequent trial that involves the  
23 same factual scenario. That also has been dealt with in other  
24 tribunals - for example, fairly recently, in the International  
25 Criminal Tribunal for the former Yugoslavia. Not that recently,

1 but on the Karadzic Case that's ongoing, there was a motion filed  
2 back in 2009 in a Decision on the 22nd of July 2009. In paragraph  
3 24, it's mentioned that the tribunal - that is, the ICTY - "has  
4 already, on several occasions, confirmed that its Judges are not  
5 disqualified from hearing a case by having dealt with witnesses  
6 or evidence related to the same facts in other cases".

7 [13.48.51]

8 So, that's the general principle. The specific challenge based  
9 upon Your Honours' participation in the Judgement of Duch has  
10 already been heard, so there's no basis not to include S-21 in  
11 the scope of Case 002/02.

12 It's very understandable why the defence of Nuon Chea would not  
13 want S-21 included, but in our view, it's essential to understand  
14 what was happening in Democratic Kampuchea to include S-21 and,  
15 further, it's mandatory: we have a Supreme Court decision that  
16 has already outlined the minimum charges that will need to be  
17 heard in order to make 002/02 representative.

18 In our view, the case will be representative by dealing with all  
19 charges, even if not all crime sites. And we believe that  
20 satisfies the needs of the victims because of the very special  
21 circumstances of this Court, which makes this case and this Court  
22 different from other cases in other civil law jurisdictions and  
23 ordinary domestic jurisdictions, including in Cambodian courts.  
24 There is a principle - I believe it's called the principle of  
25 legality - we all know that in -- normally, in civil law courts,

1 judges, trial chambers must deal with all of the crimes charged  
2 in a closing order. So, if there are three murders charged in a  
3 closing order, all three have to be dealt with. That apparently,  
4 I understand, is the normal procedure in the domestic courts of  
5 Cambodia. It's not true of all domestic systems.

6 [13.50.50]

7 And I'd like to just mention one matter that was raised in the  
8 Nuon Chea filing, where they talked about the German Procedure  
9 Code. It's Section 154. This was also mentioned in the Supreme  
10 Court Decision on severance. And in Nuon Chea's filing, they said  
11 that this only dealt with insignificant charges.

12 In fact, the commentary for Section 154 - there is a commentary  
13 that's very respected, I understand, in Germany, by Diemer -  
14 D-I-E-M-E-R. And in his commentary on Section 154, it states that  
15 while that section says charges not -- particularly significant  
16 violations of law can be relatively -excuse me. Diemer explains  
17 that when 154 talks about-

18 [13.52.02]

19 It may be necessary for me to read 154 so as not to confuse  
20 everyone. 154(a) of the German Code says:

21 "If individual severable parts of an offence of some or several  
22 violations of law committed as a result of the same offence are  
23 not particularly significant ... in addition to a penalty" -  
24 paragraph 2 - "or measure of reform and prevention which has been  
25 imposed with binding effect upon the accused for another

1 offence..." - that it's then possible for the Prosecution to drop  
2 that charge.

3 Diemer explains that not particularly significant violations of  
4 law can be relatively important violations of law. The crime of  
5 murder under specific aggravating circumstances, according to  
6 Section 211, is not particularly significant when the accused is  
7 sentenced to life imprisonment for attempted murder.

8 So, different systems have different ways of dealing with the  
9 fact that it's inefficient and maybe a poor use of judicial  
10 resources to try cases over and over again when the penalty will  
11 not be increased.

12 [13.53.23]

13 In the current case, we're dealing with a very particular set of  
14 circumstances. We don't have three murders; we're dealing with  
15 thousands, tens of thousands, millions of victims of the various  
16 crimes charged in the Closing Order. It obviously would not be  
17 possible to deal with the individual crimes against each of those  
18 individuals. And this Chamber and this Court has already  
19 recognized that the normal civil law system must be adjusted to  
20 deal with this reality. And it's been adjusted already in  
21 discussing how victims can participate.

22 You will recall that the Pre-Trial Chamber admitted thousands of  
23 victims - whose crimes, as I understand it, were not mentioned in  
24 the Closing Order - on the basis that the crimes that they were  
25 victims of were, in the Closing Order, accused of being

1 nationwide policies. And Your Honours have also adopted the same  
2 procedures.

3 [13.54.37]

4 So, in E145, a decision on severance and reparations, Your  
5 Honours said on page 2, in the second full paragraph:

6 "The Chamber, in its Severance Order, E124, clarified that as,  
7 'under the applicable legal framework, civil parties no longer  
8 participate individually on the basis of their particular harm  
9 suffered', and that, 'limiting the scope of facts to be tried  
10 during the first trial accordingly has no impact on the nature of  
11 civil party participation at trial'."

12 So that is why, in our view, limiting the crime sites to those  
13 sites that are representative of what occurred in Democratic  
14 Kampuchea will ensure that victims of these crimes, that happened  
15 all over the country in whatever sites, whether named in the  
16 Closing Order or not named in the Closing Order, will receive a  
17 measure of justice. Because it's already been ruled in this Court  
18 that they can participate in these proceedings and that there is  
19 no individual reparations. The reparations don't occur on an  
20 individual basis.

21 [13.56.21]

22 Now, one of the factors undoubtedly in your decision on the scope  
23 of this charge -- and defining the scope of the charges to be  
24 discussed in Case 002/02 -- is going to be when we complete, when  
25 can we complete this trial. And it's been highlighted already

1 today that there are two issues that are looming before us that  
2 will affect the timely proceedings in this case. One is, the  
3 Defence has already mentioned again in their filings for Nuon  
4 Chea and here in Court, the probability that there will be  
5 motions to disqualify. We can start dealing, or Your Honours can  
6 start preparing for that. Obviously, that is a motion under the  
7 rules that must be heard by other judges. It should not delay the  
8 proceedings.

9 [13.57.26]

10 Secondly, the appeal is looming. Once the judgement is issued,  
11 which Your Honours have indicated will be in the second quarter  
12 of this year. The appeal is looming. And all parties will be  
13 under deadlines to make written submissions in that appeal. It  
14 doesn't take a mind-reader to anticipate that there's going to be  
15 filings by parties to extend their time to file the appeal  
16 submissions and to object to being full time doing the trial and  
17 doing the appeal.

18 So even after we have the trial judgement, the Court is going to  
19 have to balance the fact that parties are going to be engaged in  
20 the appeal and hopefully the trial of 002/02.

21 Mr. President, in your memorandum rejecting the second Trial  
22 Chamber, you stated that you were still considering and would  
23 consider the possibility of beginning the trial on a limited  
24 basis, in other words, a few days a week, while the judgement  
25 writing is continuing. We would again urge you to do so, because

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1 there is no good time to begin this case. If we wait for the  
2 judgement, then we will face disqualification, then we face the  
3 appeal. The appeal submissions and appeal arguments will  
4 certainly take us at least through the end of this year.

5 [13.59.06]

6 What we've all seen with the international Courts is that there's  
7 momentum. When proceedings begin, they've always been completed.  
8 Any tribunal that has begun a case has been funded and has  
9 completed that case. We think it's important to start that ball  
10 rolling, as difficult of a job it is. It's easier to move an  
11 object in motion than an object that's static. So, again, thank  
12 you Your Honour for listening to us. The Prosecution submits that  
13 the scope of Case 002/02 should cover all legal charges. We've  
14 outlined in our written submissions the locations where those  
15 particular charges can be dealt with. We believe it can be dealt  
16 with within a year, a year and a half of evidence. Thank you.

17 [14.00.04]

18 MR. PRESIDENT:

19 Thank you, Mr. Prosecutor.

20 The hearing of the parties' responses on the scope of Case 002/02  
21 has now concluded.

22 And for the benefit of fostering a greater understanding of the  
23 legal process, the Chamber wishes to briefly inform the public  
24 about the steps taken so far as well as the next steps which must  
25 be completed before the evidentiary hearings in Case 002/02 can

1 commence.

2 On 7 February 2014, the Chamber disposed of the Co-Prosecutor's  
3 request regarding the use of evidence from Case 002/01. In Case  
4 002/02 – the Chamber indicated that proceedings in Case 002/02  
5 are a continuation of those in Case 002/01. The evidence put  
6 before the Chamber in Case 002/01 has undergone extensive  
7 examination by the parties and has been subject to the  
8 requirements of Internal Rule 87.

9 [14.01.54]

10 Based on the foregoing, the Chamber reiterated that the Case 002  
11 case file remains the same for both phases of the trial and the  
12 evidence already put before the Chamber in Case 002/01 shall  
13 serve as a foundation for Case 002/02.

14 As to the recall of witnesses, civil parties and experts who  
15 testified in Case 002/01, the Trial Chamber indicated that it  
16 will consider whether the parties were prevented or did not have  
17 an opportunity to fully examine an individual they intend to  
18 recall in Court because of the limited scope of Case 002/01.

19 The Trial Chamber has now received written and oral submissions  
20 from the parties on what charges should be included in Case  
21 002/02 and will issue a decision on the scope of Case 002/02 as  
22 soon as possible. The Chamber will also make a decision on Khieu  
23 Samphan's request to not commence evidentiary hearings until a  
24 final judgement has been issued in Case 002/01.

25 [14.03.41]

1 Furthermore, the Chamber has received written submissions from  
2 the parties on the status of the health of the Accused and it  
3 will soon decide if there is a need to assess the health  
4 condition of the Accused. Once the Chamber has addressed these  
5 issues, the parties will be invited to file list of the  
6 witnesses, civil parties and experts they intend to call for  
7 questioning during trial as well as the documents they seek  
8 admitted as evidence.

9 Thereafter, as indicated in its work plan for Case 002/02 issued  
10 in December 2013, the Chamber will schedule an initial hearing.

11 This concludes today's adversarial hearing.

12 As the President of the Trial Chamber and on behalf of the Bench,  
13 I thank the parties for their input. And on behalf of the Trial  
14 Chamber, I thank the prosecutors, deputy prosecutors, the defence  
15 lawyers for the Accused, the civil party lawyers and the Lead  
16 Co-Lawyers for civil parties, the officers of the Trial Chamber,  
17 and all officials under the Office of Administration, and the  
18 security staff, as well as the interpreters, who strived their  
19 efforts to make these hearings smooth and professional.

20 And I declare the conclusion of today's hearing.

21 Security guards, you are now instructed to take the accused Khieu  
22 Samphan to the detention facility.

23 The hearing is now adjourned.

24 (Court adjourns at 1405H)

25