



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber

Chambre de première instance

TRANSCRIPT OF PROCEEDINGS - "DUCH" TRIAL

PUBLIC

Case File N° 001/18-07-2007-ECCC/TC

17 February 2009, 0858H

Initial Hearing, Day 1

Before the Judges:

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

For the Civil Parties:

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

For the Trial Chamber:

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

For the Office of the Co-Prosecutors:

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

For Court Management Section:

SANN Rada

For the Accused Person KAING GUEK EAV

KAR Savuth
François ROUX

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

2 (Judges enter the courtroom)

3 MR. PRESIDENT:

4 Today, In the name of the Cambodian people, and the United
5 Nations, and pursuant to the Law on the Establishment of
6 Extraordinary Chambers in the Courts of Cambodia for the
7 Prosecution of Crimes Committed during the Period of Democratic
8 Kampuchea, the Trial Chamber of the Extraordinary Chambers in the
9 Courts of Cambodia, promulgated by Royal Kram 1004/006 dated 27
10 October 2004, today declares open the Initial Hearing on Case
11 File 001, relating to the accused man Kaing Guek Eav alias Duch
12 aged 66 who has been charged with crimes against humanity, grave
13 breaches of the Geneva Conventions of 12 August 1949, and
14 violation of the 1956 Cambodian Penal Code. The bench is composed
15 of judges: I myself, Nil Nonn - the President, Mrs. Silvia
16 Cartwright, Judge Ya Sokhan, Judge Jean-Marc Lavergne, Judge Thou
17 Mony, and reserve Judges: Judges You Ottara, and Mrs. Claudia
18 Fenz.

19 This first hearing represents the realization of significant
20 efforts to establish a fair and independent tribunal to try those
21 in senior leadership positions and those allegedly most
22 responsible for violations of Cambodian criminal law as well as
23 international crimes committed in Cambodia between 17 April 1975
24 to 6 January 1979

25 [8.59.43]

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1 This is also the first internationalized trial to give effect to
2 a wide-ranging regime of victim participation. It presents a
3 unique opportunity to enable victims to take a full part in the
4 trial. The Court will discharge this duty whilst paying full
5 regard to the demands of a fair and expeditious trial. This trial
6 starts with the current Initial Hearing and will be followed at a
7 date yet to be fixed, by a hearing on the substance.
8 During this Initial Hearing the Chamber will consider
9 applications for admission of Civil Parties and protective
10 measures sought by them. It will also consider any preliminary
11 legal and procedural issues including a motion filed by the
12 Co-Prosecutors, the list of new documents and exhibits proposed
13 by the parties and the list of witnesses and experts to be heard
14 at the trial.
15 Neither the accused person, nor any witnesses, experts, or civil
16 parties will speak at the Initial Hearing on any matters of
17 substance. Following the Initial Hearing the President, in
18 consultation with the Trial Chamber, will fix the date of the
19 Substantive Hearing. During the Substantive Hearing the Trial
20 Chamber will consider the evidence contained in the case file.
21 The accused person, witnesses, experts and the civil parties may
22 testify or make statements orally during this part of the trial.
23 The greffiers, have you already examined the identity of the
24 parties as prescribed in the Internal Rule already?
25 MR. CRIPPA:

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1 Yes, Your Honour, we have checked and it would be attached to
2 the records of the proceedings.

3 [09.03.29]

4 MR. PRESIDENT:

5 The list of the parties who are present are not present will be
6 attached to the transcript. For this hearing, I have mandated the
7 judges of the Trial Chamber to be in charge of different parts of
8 the Initial Hearing. Before beginning proceedings, according to
9 Rule 23(7)(e)(1) of the Internal Rules, the Trial Chamber would
10 like to invite each National Lawyer for the Civil Parties to
11 proceed to request recognition of each of the foreign lawyers.
12 Please Ms. Ty Srinna, make your request for recognition of your
13 foreign colleagues.

14 MS. TY SRINNA:

15 Your Honours, the Trial Chamber Judges, I am Ty Srinna, a
16 national lawyer and I would like to request for the recognition
17 of my foreign colleagues, Mr. Karim Khan, Alain Werner, and Ms.
18 Brianne and they are co-lawyers for the civil parties in group
19 one. Thank you very much.

20 MR. PRESIDENT:

21 Next, I would like to invite Mr. Hong Komsoun to make your
22 request to make your request for recognition of your foreign
23 colleagues, for Group four.

24 [9.06.23]

25 MR. HONG KIMSOUN:

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1 Your Honours, the Trial Chamber judges, I am Hong Kimsoun. I am
2 the national lawyer for the civil parties, in case file 001. In
3 our group there is Mr. Kong Pisey, I myself , Mr. Yong Paneth and
4 Ms. Silke Studzinsky the international lawyer so we have four
5 people all together in our group so please recognize us. Thank
6 you.

7 MR. PRESIDENT:

8 Two of the lawyers had already sought recognition from the
9 Chamber in the Trial Management Meeting so we can confirm that
10 their recognition has already been granted in the previous
11 proceeding and now we can confirm such a position, so in group
12 number four, some of the lawyers take part of both, some in group
13 two and group four, somehow you have not yet introduced the
14 International lawyers.

15 MR. HONG KIMSOUN:

16 Thank you, Your Honours I would like to inform to the Chamber
17 again that we have another lawyer, Mr. Pierre-Olivier Sur. We are
18 sure that we would like to request your recognition also. Next we
19 would also like to invite the national lawyer Ms. Moch Sovannary,
20 to make a request for recognition of your foreign colleagues.

21 MR. PRESIDENT:

22 I would like to invite the national lawyers in group
23 three.

24 KIM MENGKHY:

25 Your Honours. Thank you very much. My sincere respects to the

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1 Bench and parties in this proceeding. I am Kim Mengkhy on behalf
2 of group three, I am the national lawyer and I would like to say
3 my colleague Ms. Moch Sovannary also takes part in the group and
4 we have four international lawyers including Mrs. Martine
5 Jacquin, Mrs. Delahaie, and the two international lawyers who are
6 not available today. Including Mrs. Rap and Mr. Cannon. We have
7 28 civil parties in our group but here we have only four lawyers
8 and 15 civil parties attending such a hearing.

9 [9.09.54]

10 MR. PRESIDENT:

11 The Trial Chamber would like to invite Mr. Oliver, Mr. Alain
12 Werner, Mr. (sic) Brianne McGonigle, Mr. Karim Khan and Ms.
13 Annie Delahaie to rise. You are now recognized by this Trial
14 Chamber as civil party lawyers for the purpose of the trial
15 proceedings before this Chamber; pursuant to this recognition you
16 enjoy the same rights and privileges as a national lawyer. Please
17 be seated.

18 To continue the proceedings of our Trial Chamber, the trial
19 proceeding will raise the issue of the preliminary objections and
20 the relevant legal issues. That is the first issue of the agenda
21 that needs to be discussed and presented to the hearing. The
22 preliminary objections. The Chamber would like to commence this
23 Initial Hearing by allowing the parties to address any
24 preliminary objections. The Chamber would like to commence this
25 Initial Hearing by allowing the parties to raise any preliminary

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1 objections. According to the provisions of Internal Rule 89, at
2 the Initial Hearing a party can raise any preliminary objection
3 concerning a) the jurisdiction of the Chamber; b) any issue which
4 requires the termination of the prosecution; and c) the nullity
5 of procedural acts made after the indictment is filed. Failure to
6 raise any preliminary objections at the Initial Hearing shall
7 render them inadmissible.

8 After a preliminary objection has been raised by a Party, the
9 Chamber will afford the other Parties the opportunity to respond
10 to the application. As appropriate, the Chamber will dispose of
11 any preliminary objection either during the Initial Hearing,
12 immediately following the Initial Hearing or at the same time as
13 the Judgment on the merits of the case. When the Chamber decides
14 to dispose of a preliminary objection at the same time as the
15 Judgment on the merits, the proceedings will then continue.

16 [9.12.45]

17 During the Trial Management Meeting, on 16 January 2009, the
18 defence indicated its intention to raise a preliminary objection
19 during the then forthcoming Initial Hearing.

20 Subsequently, by written Direction issued on 22 January 2009,
21 this Chamber directed each existing party of the proceedings, if
22 they intend to raise any preliminary objection, to file with the
23 Court an outline of arguments of such objection by 28 January
24 2009. With the same Direction, the Chamber also directed any
25 civil party applicants, if they intend to raise any preliminary

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1 objection, also to file the outline of arguments by 10 February
2 2009.

3 Accordingly, on 28 January 2009, the defence team for the accused
4 person filed its outline of arguments for a preliminary objection
5 with regards to the applicability of statutory limitations to
6 national crimes. No other outline of arguments were received from
7 the remaining parties to the proceedings within the prescribed
8 deadline.

9 In essence, the defence contends that statutory limitations have
10 entered into effect with regards to the charge of violations of
11 the Cambodian Criminal Code of 1956, contained in the Closing
12 Order and Indictment against the accused. The defence, in
13 particular, requests that the Chamber allow it to join the
14 arguments on the merits of the preliminary objection together
15 with the discussion on the substance of the case. The Chamber
16 agrees with the request by the defence in consideration of the
17 particular nature of the preliminary objection. Accordingly, the
18 only issue for determination is the admissibility of the
19 preliminary objection that the defence intends to raise. The
20 Chamber considers that the preliminary objection is admissible.
21 This is about the preliminary objection that the Trial Chamber
22 received on the set date on the acceptance of the preliminary
23 objection which has been filed by the defence of the accused.
24 The preliminary objection on the statute of limitations. While
25 waiting for the response from the Trial chamber there have been

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1 no other submission or response to that preliminary objection.

2 Now the Trial Chamber would like to ask any relevant parties if

3 any party wish to make any suggestion or arguments to the

4 contrary to the objection raised by the defence of the accused.

5 Please the Co-Prosecutors the floor is yours.

6 [9.16.42]

7 MS. CHEA LEANG:

8 Your Honour, on behalf of the prosecution, I received the

9 preliminary objection of the co-lawyers for the accused. Other

10 Co-Prosecutors have not responded or written a submission, at

11 this time the prosecution does not object to the arguments of the

12 preliminary objection.

13 MR. PRESIDENT:

14 Are there any disagreements on the preliminary objection requests

15 by the defence team for the accused? After having heard the

16 speech by the Co-Prosecutor on the admissibility of the

17 preliminary objection raised by the defence, the Trial Chamber

18 would like to declare the said Objection admissible. The Chamber

19 will decide on the preliminary objection at the same time as the

20 judgment on the merits. The Chamber will issue in due course

21 further directions to the parties in connection with this matter.

22 These directions will include directions to the Parties on the

23 manner in which arguments are made. This is in response to the

24 preliminary objections that have been raised. Next item on the

25 agenda, it's the relevant legal issues, by Order dated 11

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1 December 2008, the Chamber requested the Parties to file an
2 indication of the legal issues, if any, they intend to raise at
3 the Initial Hearing.

4 In their submissions accompanying the filing of their proposed
5 Witnesses and Experts List dated 19 December 2008, the
6 Co-Prosecutors stated that, at that stage, they were not in a
7 position to indicate any legal issues they intend to raise at the
8 Initial Hearing but, following the Trial Management Meeting, they
9 would be able to notify the Chamber of any outstanding issues
10 they intend to raise.

11 Further to this, the Chamber will now like to inquire with the
12 Co-Prosecutors, as well as with the other parties, whether they
13 have any outstanding legal issues that they intend to raise.

14 First the Trial Chamber would inquire with the Co-Prosecutors
15 whether they have any other legal issues to raise at this stage?
16 Please the international Co-Prosecutor.

17 [9.19.59]

18 MR. PETIT:

19 Good morning, Mr. President, Honourable Judges, counsel, civil
20 parties, ladies and gentlemen. I would like to accept this
21 opportunity to advise the Trial Chamber that although at this
22 hearing we do not intend to debate or to raise any legal issue,
23 we would like to take this opportunity to advise the Trial
24 Chamber and the parties that at Trial, during the proceedings,
25 the Co-Prosecutors intend to invite the Trial Chamber to consider

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1 the applicability of the concept of joint criminal enterprise to
2 the proceedings against the accused. As I said, I don't think
3 this is the proper forum to debate the issue, but we want to
4 advise in advance the Trial Chamber that we deem this concept to
5 be applicable to the proceedings before this Chamber and indeed
6 before this Court, that this concept represents and is supported
7 by the facts as they are laid out in the case file, that more
8 specifically the so called category 1 and 2 of the joint criminal
9 enterprise will allow the Trial Chamber to consider the full
10 breadth of the culpable liability of the accused. We further
11 submit that the Trial Chamber is indeed by the factual basis
12 within the case file, but is however, free to interpret the law
13 to apply it and to legally characterize any legal fact therein.
14 This impudence and indeed this duty, means that the Trial
15 Chamber is not bound by any decision of the pre-Trial Chamber on
16 this issue. We will further argue, respectfully, that the
17 pre-Trial Chamber erred in its evaluation of the applicability of
18 this concept to this file and these proceedings and as I said we
19 will invite the Trial Chamber and assist it in considering the
20 applicability of this concept to the proceedings. Thank you.

21 MR. PRESIDENT:

22 Thank you the Co-Prosecutor for raising this legal issue. Next I
23 would like to invite the co-lawyers of the accused if you have
24 any legal issues to raise at this stage. The floor is yours.

25 [9.23.32]

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1 MR. ROUX:

2 Thank you Mr. President, your Honours, The prosecutors and the
3 counsel for the civil parties. The defence wishes to inform the
4 chamber of what it will raise during the substantive proceedings.
5 With regard to legal issues pertaining to the length of the
6 provisional detention, of the accused. The defence recalls that
7 Mr. Kaing Geuk Eav will have been in provisional detention for a
8 total duration of 9 years, 9 months and 7 days up until today.
9 This means more than 8 years in the detention centre of the Phnom
10 Penh military tribunal. The defence wishes to emphasize further
11 that this situation is unacceptable. This matter was raised
12 previously before the Pre-Trial Chamber and I wish to recall
13 that, as requested by the pre-Trial Chamber and a number of
14 non-governmental organizations were invited to submit amicus
15 curiae briefs and most of these non-governmental organization
16 mentioned the principal of *dura lex, sed lex* the law is hard but
17 it is the law.

18 A person cannot be kept in detention for more than three years as
19 these organizations record. Duch should have been released. The
20 Pre-Trial Chamber did not adopt the views of these organizations
21 for of the defence however it indicated that the matter should be
22 raised again before the Trial Chamber and the defence respectful
23 submits today that during the substantive proceedings this matter
24 will be raised again. Thank you.

25 MR. PRESIDENT:

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1 Thank you the lawyer for the accused, for any issues concerning
2 detention of the accused, I would like to invite the civil party
3 lawyers to raise any legal issues they may have at this stage.

4 The floor is yours.

5 [9.27.27]

6 MR. KHAN:

7 Mr. President, Your Honours, good morning. Your Honours, there is
8 no discreet legal issues that will be raised on behalf of civil
9 party one that I represent. However we will in due course, of
10 course respond to the motion that my learned friend the
11 prosecutor intimated that he will file regarding join criminal
12 enterprise. Its not clear to me at this stage the rule under that
13 application will be made and we will respond on behalf of the
14 civil parties that we represent on the merits, However, one
15 guiding principle must be borne in mind in my respectful
16 submission, that when balancing whether or not a new form of
17 participation should be inserting into this trial which will be
18 decided of course on the merits, it is critical for the civil
19 parties that I represent, that any decision will not necessitate
20 any delay in these proceedings, Your Honours of course will be
21 mindful of international human rights standards, enshrined in
22 multiple regional instruments, and the right of the defence to
23 have proper notice, Your Honours, I just wanted to raise this
24 issue as far as our position at this stage.
25 In relation to the matter of my learned friend of the defence and

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1 the intimation that a application for provisional release will be
2 filed in due course. Once again, we will respond with the Courts
3 leave on the merits. But as a matter of law it is my respectful
4 submission that the starting point must be the time that the
5 accused has spent in custody in relation to the proceedings under
6 Your Honours' jurisdiction. The previous period when the charges
7 that he faces now were not raised against the accused, are, as a
8 matter of law out with consideration of reasonable time, Your
9 Honour, I wont go into the plethora, the very great weight of
10 international human rights law from Strasbourg to the
11 Inter-American human court of human rights on that issue, but
12 once again with the Courts leave, respond on the merits in due
13 course. Mr. President those are my only observations at this
14 point with Your Honours leave.

15 MR. PRESIDENT:

16 Thank you the lawyer. I would like to invite the civil party
17 lawyers if you have any other legal issues at this stage of the
18 proceedings. Please the floor is yours.

19 MS.JAQUIN:

20 Thank you Mr. President, on behalf of group three I would like to
21 align with what my colleague has said, we would like to reserve
22 the right to respond to the very submissions by the
23 Co-Prosecutors and by the defence and in particular in connection
24 with the issue of joint criminal enterprise. Thank you.

25 [9.31.04]

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1 MR. PRESIDENT:

2 Thank you Madame Lawyer. Next I would like to advise the civil
3 party lawyers in other groups if you have any other relevant
4 legal issues to raise at this stage the floor is yours.

5 MS. STUDZINSKY:

6 Good morning, Your Honours, from our group there are no relevant
7 legal issues at this stage and we will comment after any relevant
8 submission by the other parties and respond then. Thank you very
9 much.

10 MR. PRESIDENT:

11 Thank you.

12 MR. SUR:

13 President, Your Honours concerning the issue of provisional
14 detention, I would like to say just the following. I am not aware
15 of any jurisprudence from Strasbourg that calls for the release
16 of anyone in relation with unduly long provisional detention
17 prior to a trial. Thank you, Your Honours.

18 MR. PRESIDENT:

19 Thank you the lawyer for your remarks. Next I would like to
20 invite the civil party lawyers who intend to raise any relevant
21 legal issues. If you have any legal issues to be raised at this
22 stage? If there are no other issues to be raised I would like to
23 make some remarks on the legal issues that have been raised so
24 far, also the issues raised by the Co-Prosecutors and the defence
25 team.

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1 [9.33.26]

2 The next item on our agenda is the Agreements on facts. By means
3 of correspondence previously addressed to the parties, the
4 Chamber indicated that it welcomes submissions from the Parties
5 on uncontested facts or an indication of evidence that supports
6 these facts. The Chamber wishes to reiterate that any such
7 agreement will have no binding effect on the Chamber with regards
8 to the trial and in particular to the evaluation of the evidence
9 before it. Any such agreement will have the sole purpose to allow
10 the Trial Chamber to organize and prepare to appraise the facts
11 and the evidence relating to the case.

12 Indeed, the Chamber wishes to stress the possible relevance and
13 impact of any agreement of fact reached by the parties on the
14 Chamber's decision with regards to the list of proposed witnesses
15 and experts as well as on the list of new documents.

16 The Chamber recalls that, during the Trial Management Meeting,
17 various references were made, particularly by the Co-Prosecutors,
18 to an ongoing dialogue with the defence which included the
19 possibility for these Parties to reach a common agreement on
20 certain issues of fact. By the Direction issued on 5 February
21 2009, the Chamber directed the Co-Prosecutors and the defence to
22 file, by 12 February 2009, any information on agreements on facts
23 that they may have reached. Further to this Direction, both the
24 Co-Prosecutors and the defence filed separate responses
25 indicating that, although the Co-Prosecutor has, on 30 January

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1 2009, proposed for agreement to the Defence a list of 351 facts,
2 to date no agreement has been reached on those facts.
3 However, the defence has indicated that it is in the process of
4 reviewing the facts proposed for agreement by the Co-Prosecutors
5 and will respond as soon as possible and in any event before the
6 Substantive Hearing. The Chamber takes note of these filings and
7 of the submissions by the Co-Prosecutors and the defence.
8 The Chamber would now like to invite all Parties to provide an
9 update of whether they have managed to reach any relevant
10 agreement or whether they intend to do so in the foreseeable
11 future. This is the issues on the agreement of facts which are
12 relevant to all the concerned parties, as stated earlier; do the
13 Co-Prosecutors have any comments on the Agreement of facts?
14 [9.37.21]
15 MR. PETIT:
16 Thank you, simply to indeed confirm that we have sought this
17 agreement from the defence as you have seen from the attachment
18 that we have provided the copies of the facts are essentially
19 are extracted from the closing order we are of course very much
20 mindful that any such agreement is of binding effect to this
21 Chamber but as was rightfully put by the President will help
22 direct the proceedings, we understand that our learned friend is
23 considering and has been considering these facts, and it is
24 indeed 351 paragraphs, and that this evaluation is ongoing and
25 perhaps we can ascertain today how fast this is going.

17

1 MR. PRESIDENT:

2 Do the co-lawyers of the accused have any comments or suggestions
3 in response to the agreements on facts?

4 MR. ROUX:

5 Thank you, Your Honour, pursuant to the information provided to
6 us by the Chamber we would like to confirm that this work is
7 ongoing; it is an extremely fastidious kind of job as can well
8 imagine and we wish to finalize this work as stated prior to the
9 continuation of the trial - that's to say to the substantive
10 hearing. We are confident that we should be able to make good
11 progress in the next few weeks together with our colleagues from
12 the Co-Prosecutors Office.

13 We are following the same approach which is to come up with a
14 proposal for the Chamber, and it is the Chamber of course that
15 will reach the relevant decision but it is our business to
16 provide with any points of agreements on facts. Thank you
17 President.

18 And I would like to say by the way, that before I leave this
19 subject I think the defence would like to take the floor again at
20 some later stage on the same item. Thank you.

21 MR. PRESIDENT:

22 Please next I would like to advise the civil party lawyers if you
23 have any comments on this in response the agreements on facts.

24 Please the floor is yours.

25 [9.40.25]

18

1 MR. KHAN:

2 Mr. President, Your Honours on behalf of civil party group one,
3 we have nothing to add. I think this issue is primarily is one in
4 my respectful submission that would concern the prosecution and
5 the defence and I have nothing to add to that position at this
6 moment in time.

7 MR. PRESIDENT:

8 Thank you. If there are no other comments to be made on this
9 issue the Chamber would like to inform the media that the live
10 feed will be stopped now and we will have a 20 minute break to
11 allow all the recording equipment to be removed. The court will
12 re-adourn at 10 am, please all the participants and the public
13 return to your seats by 10 am. Now we shall have a rest.

14 (Court recesses from 0941h to 1004h)

15 MR. PRESIDENT:

16 Next we shall resume our session. Before resuming the session, I
17 would like to ask the greffiers whether all the recording devices
18 for the live feed have already been removed.

19 MR. DUCH PHARY:

20 All the equipment has been removed.

21 MR. PRESIDENT:

22 Next, in the name of the President of the Trial Chamber, I would
23 like to give the floor to Judge Thou Mony to continue, and to
24 lead the discussion on the next agenda item on preliminary
25 remarks concerning protective measures. The floor is yours.

19

1 JUDGE THOU MONY:

2 Thank you very much, the President. Next, I'm going to lead the
3 discussion on the preliminary remarks concerning protective
4 measures. The provisions of Internal Rule 29 required the
5 Chamber to ensure, inter alia, the protection of victims who
6 participate in the proceedings, whether as complainants or civil
7 parties, and witnesses. In so doing, the Chamber may consult
8 with the Victims Unit or the Witnesses and Experts Support Unit.
9 It may order, either by its own motion or at the request of the
10 Parties, appropriate protective measures where these victims,
11 witnesses or experts' appearance before the Court is liable to
12 place their life or health or that of their family members or
13 close relatives in serious danger.

14 [10.06.37]

15 These provisions are further supported by the general provisions
16 of Article 33 New of the ECCC Law, according to which the Trial
17 Chamber shall ensure that trials are fair and expeditious and are
18 conducted in accordance with existing procedures in force, with
19 full respect for the rights of the accused and for the protection
20 of victims and witnesses.

21 Currently, the Chamber is in the process of consulting with the
22 Witness and Expert Support Unit to assess the need for any
23 protective measures for civil parties and for witnesses and
24 experts proposed by the parties. WESU has advised the Chamber
25 that most international experts and witnesses require no

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1 protective measures. These experts and witnesses will therefore
2 be referred to by their names, and their identities will no
3 longer be confidential from the time their name is disclosed by
4 the Chamber.

5 WESU has recommended that all factual witnesses living in
6 Cambodia be referred to by their pseudonym pending a final
7 determination by WESU on their risk assessment, and in any event
8 until testimony. Accordingly, the Chamber directs the parties to
9 the proceedings not to reveal the names or identifying
10 information of these witnesses and experts until any further
11 order of the Chamber.

12 For the limited purposes of this stage of the Initial Hearing, as
13 an interim measure, the Chamber will refer to all civil parties
14 or civil party applicants by referring to the document reference
15 number of their original civil party applications as placed in
16 the case file. Accordingly, the Chamber hereby requests the
17 Parties of the proceedings not to divulge the names and the
18 identifying information of all civil parties and civil party
19 applicants until further order of the Chamber.

20 [10.09.25]

21 MR. PRESIDENT:

22 Thank you, Judge Thou Mony. Next, I would like to ask Judge
23 Jean-Marc Lavergne to lead the discussion on the next agenda item
24 concerning the admissibility of civil party applications. The
25 floor is yours.

21

1 JUDGE LAVERGNE:

2 I thank you, Mr. President. Now the Chamber will discuss and
3 consider applications to be joined as civil parties in this case
4 pursuant to Internal Rules 23 and 83. In this respect the
5 Chamber recalls the provisions of Rule 23(1), which indicate that
6 the purpose of a civil party action before the ECCC is, on the
7 one hand, to participate in criminal proceedings by supporting
8 the prosecution of a crime within the jurisdiction of ECCC, and
9 on the other hand to allow victims to seek collective and moral
10 reparations.

11 First of all, the Chamber will review the background and history
12 of civil party applications received by the Court since the
13 commencement of the investigation phase. It will introduce the
14 criteria for the evaluation of the admissibility of a civil party
15 application and, finally, it will consider all the applications
16 received. In addition, the Chamber will also address the issue
17 of the applicability of protective measures for civil party
18 applicants already joined as well as for further applicants, as
19 well as civil parties proper.

20 [10.11.42]

21 So first of all, regarding the background. I should recall that
22 during the investigation phase, the Office of the
23 Co-Investigating Judges received a total of 28 applications to be
24 joined as civil parties in the case concerning the accused. Each
25 of these applications, together with any additional supporting

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1 materials and attachments as well as, where applicable, the
2 relevant powers of attorney for civil party lawyers, has been
3 placed in chronological order in a specific folder of the case
4 file, namely folder D25, documents 1 to 28.
5 Subsequently, the Greffiers of the Office of the Co-Investigating
6 Judges have indicated that each of these 28 civil party
7 applicants was, subject to any later decision of the
8 Co-Investigating Judges, considered to be a Civil Party in the
9 judicial investigation relating to Case 001.
10 Finally, in the Closing Order indicting the accused person, the
11 Co-Investigating Judges indicated that during the investigation
12 phase a total of 28 individuals joined the case file as civil
13 parties, and all of these are now represented by civil party
14 lawyers. The Chamber is in receipt of a motion concerning Civil
15 Party D25/24, and this motion will be discussed later on ,
16 together with the review of the civil party applications. This
17 is a deceased civil party.
18 Following the time when this Chamber was seized of the case file,
19 a total of 66 additional applications to be joined as civil
20 parties were received within the deadline of 2 February.
21 Accordingly, these were placed in the case file under the
22 specific folder E2. As announced during the Trial Management
23 Meeting, where warranted, the Chamber already proceeded to issue,
24 by letters of the Greffiers on behalf of the Chamber, interim
25 recognitions as civil parties in a total of 45 of the 66

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1 applicants referred to above. Consequently, a total of 21 civil
2 party applications have not been issued interim recognition.
3 Now regarding the applicability of protective measures. It was
4 previously state that protection of civil parties has been the
5 subject of various decisions issued during the investigation
6 phase by Co-Investigating Judges. In the most recent of these
7 decisions on 8 August 2008 and in document number D98, in
8 dismissing specific requests for certain measures of protection
9 advanced by seven civil parties, the Co-Investigating Judges
10 indicated, inter alia, that this Trial Chamber, rather than the
11 Co-Investigating Judges, had sole authority to determine
12 necessary limitations to the general principle of publicity
13 during the conduct of the trial proceedings.
14 By written direction on 22nd January 2009, the Chamber directed
15 any existing civil parties at the time, namely the 28 civil
16 parties joined during the investigation phase, who intended to
17 apply for protective measures at the trial stage of the
18 proceedings to do so by written submission no later than 28
19 January 2009. No such submission was received by the Chamber
20 within the prescribed deadline.
21 At this stage the Chamber would thus like to inquire with the
22 civil party lawyers for the 28 civil parties concerned, that's to
23 say those joined and recognised as civil parties during the
24 investigation phase -- I would like to ask whether the lawyers
25 for those 28 civil parties -- I would like them to confirm that

24

1 no protective measures are sought during the trial phase.

2 I shall first of all give the floor to the lawyers of the civil
3 parties, asking them whether they have any comments in this
4 regard. Madame Jacquin.

5 MS. JACQUIN:

6 Mr. President, we have no comments, and we would like to confirm
7 that for the civil parties that we represent in this group, there
8 has been no protective measures required.

9 JUDGE LAVERGNE:

10 Mr. Khan, you have the floor.

11 MR. KHAN:

12 Your Honour, I am most grateful. The question, of course,
13 related to the initial 28 applications. Your Honours, on the
14 10th of February 2009, on behalf of civil party group number one,
15 we filed a motion before the Trial Chamber seeking a
16 clarification on the existing protective measures for the civil
17 parties. Your Honour, that issue has not been determined, as far
18 as I am aware, but in that motion we set out our primary
19 position, that absent a formal waiver, or until such time as a
20 decision was made setting aside an order of Co-Investigating
21 Judges, the protective measures that had been ordered must, as a
22 matter of law, continue to apply.

23 [10.17.48]

24 Your Honours, I can address you in more detail on that issue, but
25 the issue was fully briefed in our filing on the 10th of February

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1 2009. If it assists, I can go into more detail, but that is the
2 principle decision, in my respectful decision, that we advance on
3 behalf of the clients that we represent.

4 JUDGE LAVERGNE:

5 Mr. Khan, thank you. I was going to talk about this request for
6 clarification from your side, but since for the time being we're
7 only looking at the 28 civil parties who have joined in the
8 investigation phase, and we're talking about possible submissions
9 regarding these cases, by the 28th of January at the latest, and
10 your filing came later on in time, so I was going to refer to
11 that but a little later on. So you will have an opportunity to
12 raise this again very shortly.

13 MR. KHAN:

14 I am grateful, Your Honour. In that case I will hold my fire.

15 MS. STUDZINSKY:

16 Your Honours, on behalf of our group, there might be an
17 additional request for protective measures, because we have
18 learned recently that the practice how civil parties enter the
19 Court premises were amended and we have learned this two days
20 ago, and they have to enter now the premises by the public entry,
21 and as soon as I am aware about all circumstances that happened
22 this morning we reserve our right to request for our clients
23 additional protective measures in this regard to how they could
24 enter safely the Court when they want to attend hearings. Thank
25 you. Furthermore, there are no other comments from our group.

26

1 Thank you.

2 JUDGE LAVERGNE:

3 So at this point you are not making any particular request, you
4 are simply expressing a reservation at this point. Mr. Sur, you
5 have the floor.

6 [10.20.30]

7 MR. SUR:

8 For group four, Mr. President, we have no particular request or
9 motion. We are in the hands of the Court.

10 JUDGE LAVERGNE:

11 Do the Co-Prosecutors have any comments or remarks on these
12 issues?

13 MR. PETIT:

14 Not at this point.

15 JUDGE LAVERGNE:

16 Does the defence have any point to make? None. We can thus
17 continue.

18 By means of the same Direction dated 22 January 2009, the Chamber
19 also directed any new civil party applicants who intended to
20 apply for protective measures, but did not do so in these
21 applications, they were thus instructed to do so by no later than
22 10th February 2009. Only one specific application for such
23 protective measures was received by the Chamber within the
24 deadline, and this is what Mr. Khan was referring to, on behalf
25 of civil party group one. The lawyers of this group one submit

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1 that protective measures previously granted by the
2 Co-Investigating Judges to existing civil parties at that point
3 should be maintained. Furthermore, they requested that those
4 protective measures be extended to all civil parties, including
5 those who would have joined the case after the Indictment against
6 the accused person became final.

7 [10.22.10]

8 Out of the 66 civil party applications referred to above, the
9 Chamber notes that for 59 applicants there was no specific
10 request for a protective measures. Only seven applicants have
11 specifically requested a variety of protective measures either
12 vis a vis the public or vis a vis other parties in the
13 proceedings. Accordingly, their respective civil party
14 applications have been placed in the strictly confidential part
15 of the case file and their content has not been disclosed to the
16 parties of the proceedings. This course of action is justified
17 by the fact that, generally, ex-parte or strictly confidential
18 filing of applications is warranted when conducted in the best
19 interest of justice and when disclosure of such information to
20 other parties in the proceedings would either prejudice the
21 applicant or other persons related to the application, for
22 instance, in cases where protective measures are sought.
23 So with specific regards to the seven applicants, the Chamber
24 would like to indicate that it is in consultation with WESU to
25 obtain a full risk assessment of the specific measures sought and

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1 in due course it will issue any decision as appropriate.
2 Equally, on the issue of whether the applications will remain as
3 strictly confidential or whether they may be disclosed to the
4 parties, the Chamber finds that in the particular circumstances
5 of the civil party applications, and pending the risk assessment
6 by WESU, disclosure of identifying information contained in these
7 applications to the other parties might be prejudicial to the
8 applicants in that it may lead to a disclosure of their identity
9 or their present whereabouts pending an application for
10 protective measures.

11 [10.24.22]

12 As regards now the remaining 59 civil party applicants, the
13 Chamber would also like to inquire with the civil party lawyers
14 to confirm whether no protective measures are sought during the
15 trial phase, or whether there are particular motions or requests.
16 I shall once again give the floor to the lawyers for the civil
17 parties. Do they have any comments regarding these remaining 59
18 civil party applicants -- applications that were filed after the
19 investigation.

20 MR. KHAN:

21 Your Honour, I am unable to assist on the details at this time,
22 but for the record perhaps I should clarify that the reason that
23 the group I represent, civil parties group one, did not file an
24 application or a motion on the 21st of January was because of the
25 position that we took that the protective measures previously

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1 ordered were continuing, but Your Honour, in relation to the
2 group that does not have protective measures, I am not in a
3 position at this time to make submissions as to whether or not
4 protective measures are being sought on a case by case basis. I
5 do apologise. But I think it needn't delay matters at all.

6 JUDGE LAVERGNE:

7 Thank you. Do the other lawyers for the civil parties have any
8 comments?

9 MS. JACQUIN:

10 Yes. For group three we have a specific motion, a specific
11 request for protection. I shall not mention the name of the
12 person concerned, a person who is already the subject of
13 protective measures, this person arrived separately this morning
14 and is not now seated amongst the public, so this request of ours
15 was, I think, duly taken care of, and I wanted to reflect this
16 back to the Chamber.

17 JUDGE LAVERGNE:

18 If you cannot mention names of persons, you are in a position to
19 give the pseudonym from within the list.

20 MS. JACQUIN:

21 All right, Mr. President. I am referring to 09VU0070, on page
22 7.

23 JUDGE LAVERGNE:

24 09 --

25 MS. JACQUIN:

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1 09VU0070, and in the case file we are dealing with number 02/89.

2 E2/89.

3 JUDGE LAVERGNE:

4 So if I'm not mistaken, this is a request which comes with a
5 motion for strict confidential status. So this is a different
6 kind of civil party. Are there any other comments, requests for
7 the floor. Do the Co-Prosecutors have anything to say in
8 particular? Does the defence have anything to say? I see no
9 requests for the floor.

10 [10.28.36]

11 MS. STUDZINSKY:

12 Your Honour I would like to only add for the group of our clients
13 who are among the second group after the Closing Order, or
14 considered after the Closing Order, that there are at this stage
15 no further requests but of course we reserve our rights to
16 request for further protective measures in the case of any
17 amendment of change of circumstances, and this is the only
18 comment I would like to add. But at the moment there are no
19 actual requests. Thank you very much.

20 MR. KHAN:

21 Your Honour, perhaps I can just clarify, so there is no
22 ambiguity. We made reference before to the motion filed on the
23 10th of February 2009 by civil party group one. In my
24 submission, the default position must be that there is still a
25 necessity for protective measures, but in addition to that it is

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1 my very clear submission that as a matter of law, these 59 still
2 should benefit from the protective measures that were put in
3 place and that were granted to them by the Co-Investigating
4 Judges at an earlier stage.

5 [10.30.12]

6 Your Honours, it's very clear from the practice direction,
7 article 4.1, and I quote: "Protective measures, once ordered,
8 shall continue" -- mandatory -- "shall continue to apply mutatis
9 mutandis throughout the entire proceedings in the case concerned,
10 and in relation to any other proceedings before the Court, and
11 shall continue until they are cancelled or varied pursuant to the
12 provisions of this practice direction."

13 And Your Honour, article 4.4 of the same practice direction
14 provides, and once again, with Your Honour's leave, I quote: "In
15 order to vary a protective order, the procedure of article 2 of
16 this practice direction shall be applied. The Co-Investigating
17 Judges or seized Trial Chamber shall seek to obtain, wherever
18 possible, the consent of the person in respect of whom the
19 application to cancel or vary the protective measures has been
20 made."

21 So it is patently clear, in my respectful decision, from the
22 practice direction that Your Honours have put in place and that
23 applies to this very issue, that those protective measures that
24 were ordered at any stage should continue unless they are
25 expressly set aside. And Your Honours, when considering whether

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1 or not to expressly set them aside, of course Your Honours, as
2 has been intimated, will seek soundings and feedback from the
3 individual concerned whether or not protective measures are still
4 sought, so to put it very shortly, it is my submission that
5 protective measures firstly continue to apply, secondly they have
6 not been varied or set aside, and before Your Honours would
7 remove that protection from the individuals concerned, their
8 views must be sought in the normal matter.

9 And so, Your Honour, I hope that clears up our position on this
10 issue. And unless I can assist further on this particular point,
11 that's all I have to say at this juncture, with Your Honours'
12 leave. I am grateful.

13 JUDGE LAVERGNE:

14 (No interpretation)

15 [10.33.55]

16 The Chamber has noted the observations of the parties with regard
17 to the issue of protective measures to be applied at the trial
18 stage, and the Chamber will issue a decision in due course as
19 appropriate, taking into account the individual situation of
20 these various civil parties after the Initial Hearing. We shall
21 now move on to the criteria for the admissibility of civil party
22 applications.

23 The provisions of Internal Rule 23(2) of the Internal Rules
24 enable a civil party who is a victim of a crime which comes under
25 the jurisdiction of the ECCC to seek redress for the damage

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1 suffered. However, In order to declare a civil party application
2 admissible, the victim's claim must be for an injury which is
3 physical, material or psychological and the direct consequence of
4 the offence, personal, and have actually come into being.
5 Accordingly, when reviewing the civil party applications received
6 in this case the Chamber must satisfy itself, from the
7 information provided, that is it possible to consider whether the
8 applicant has indeed suffered damage, and whether this damage is
9 the direct consequence of an offence under the jurisdiction of
10 the Chamber.

11 Ancillary to this evaluation is, in particular, the requirement
12 for sufficient proof of the identity of each of the civil party
13 applicants. While the Chamber is cognizant, for instance, that
14 the issue of an identity card may not always be a requirement in
15 Cambodia, and that some of the applicants live in provincial
16 towns with limited access to means of official certification of
17 their identities, some proof of identity is nevertheless a
18 necessary precondition for the admission of a civil party
19 application.

20 [10.36.20]

21 Accordingly, the Chamber must be in a position to ascertain the
22 identify of a person as a civil party applicant and thereby
23 evaluate his or her application. The means of identifying each
24 civil party applicant, and the degree of proof required, will be
25 assessed by the Chamber on a case-by-case basis based on the

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1 materials before it.

2 We shall now review the various civil party applications. And in
3 order to do so, the Chamber will first refer to those which were
4 filed during the investigation phase. The Chamber will then
5 refer to the civil party applications received from the time it
6 was seized of the case file and in particular to those applicants
7 who have already received an interim recognition as civil party.
8 Finally, the Chamber will refer to those applications which have
9 not received an interim recognition.

10 First with regard to civil parties joined during the
11 investigation phase. According to the last sentence of Internal
12 Rule 23(4), a victim who has filed a civil party application
13 during the investigation is not required to renew his or her
14 application before the Trial Chamber. Accordingly, the 28
15 individuals who have filed civil party applications and were
16 subsequently joined as civil parties in the case therefore remain
17 as civil parties in the case against the accused person.

18 Before we move on to the rest of the proceedings, the Chamber
19 would like to acknowledge receipt of the request dated 23rd
20 January 2009, document number E2/5/1, by civil party lawyer Ty
21 Srinna with regards to Civil Party D25/24. As indicated during
22 the Trial Management Meeting, this civil party has passed away
23 and her civil party lawyer is now requesting that her husband be
24 allowed to succeed her in the civil party action. At this
25 juncture, the Chamber would like to give the other parties an

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1 opportunity, if they intend to do so, to comment on the said
2 request.

3 Would lawyer Ty Srinna wish to add something to her request? No?

4 Do any other parties have any submissions or observations to
5 make?

6 MR. KHAN:

7 Your Honour, if I may speak on behalf of my co-counsel in
8 relation to this particular issue. It is our submission and our
9 request that the civil party listed at D25/24 be allowed to
10 continue to participate in these proceedings through the presence
11 of her husband. Unfortunately, as Your Honour intimated, the
12 civil party unfortunately passed away. This of course is one of
13 the very lamentable consequences of the delay in proceedings
14 between the alleged commission of the offences and the
15 commencement of this trial.

16 [10.39.58]

17 But Your Honour, it is our submission that whilst it is said that
18 justice delayed is justice denied, it need not be denied in
19 relation to the civil party accepted under D25/24. There is no
20 relevant rule, to the best of my knowledge, under the Internal
21 Rules that would prevent Your Honours allowing a husband to
22 continue to represent the interests of a wife that had been
23 previously acknowledged in proceedings. Your Honour, it is my
24 understanding that under article 254 of the Civil Procedure Code
25 that such eventualities are clearly contemplated, and clearly

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1 envisaged, and part of the whole ethos of civil party
2 representation, as Your Honour, of course, particularly coming
3 from such a system, would be fully aware, is to allow redress and
4 closure and allow proper effective participation. And so the
5 first submission would be that the margin of discretion should be
6 in favour of including participation rather than excluding
7 participation.

8 Your Honour, perhaps with Your Honour's leave, Ms. Ty Srinna, can
9 read out the Khmer version of article 254, which perhaps more
10 succinctly and coherently sets out the relevant provisions which
11 may be of assistance to Your Honours in deciding this particular
12 issue. Your Honours, with your leave, perhaps Srinna Ty can read
13 out article 254 in Khmer.

14 MS. TY SRINNA:

15 I would like to add, on top of the matter that my client passed
16 away, and regarding this matter there is a reference which can
17 help as guidance for the Chamber to consider. Article -- the
18 civil code translated by Doctor So Sovan (ph?) who translated
19 from French into Khmer and the law was created in 1965 and had
20 been applied until the 17th of April 1975, the day when the Khmer
21 Rouge took control and from the republican regime.

22 [10.43.25]

23 And there is an article that clearly indicates the succession of
24 the civil party action, so if a civil party passed away, the
25 Co-Investigating Judges must find all means, for example, to get

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1 the information of the passed away person, including the death
2 certificate and also the information confirmed by other
3 neighbours to prove that the person can succeed, or be inherited
4 any estate. And that the Co-Investigating Judges shall continue
5 this civil party action to let the successor succeed from the
6 deceased civil party.

7 Although in the case the action will be removed by the greffier,
8 however, the action still remains in force. I would like to
9 clarify that this article suggests that my client has already
10 submitted the death certificate, and I already submitted it to
11 the Judge, and regarding the book of residence that approves the
12 relationship between the spouses, and that her husband is
13 entitled to succeed from her. And I think regarding this point,
14 I think, Your Honours, I have already submitted those documents
15 to the Chamber already, so I would like Your Honours to review
16 these documents and consider it about allowing my next client to
17 succeed from the passed away client.

18 MR. KHAN:

19 Your Honour, I am most grateful for that, and perhaps continuing
20 the theme of a tag team, my learned friend Mr. Sur can address
21 Your Honours in relation to the French practice, which can also
22 be used as a comparator in the exercise of Your Honours'
23 discretion.

24 MR. SUR:

25 Thank you. Since these proceedings are based on the civil law, I

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1 think we should recall the rules of law that are applicable in
2 this case, and what we should apply. So what we see here is a
3 victim of S21, and her sister who joined the civil party
4 applications, and it is a sister of this victim who has just
5 died. Now, the question is how should the husband participate in
6 the proceedings? Is it as a successor, as the ex-wife or wife,
7 or is it as in his own capacity as having suffered harm or
8 injury? I think the second alternative should apply, that is to
9 say, that this person should have a direct link, a direct and
10 certain link with the harm or injury as such, and as husband of
11 this lady who was the sister of an S21 victim.

12 [10.47.54]

13 This is my view, Your Honours, of how matters apply in civil
14 law.

15 JUDGE LAVERGNE:

16 I think we should clarify matters here, because the application
17 that was filed was filed on behalf of the husband of the civil
18 party, and it is clearly requested that this husband is not taken
19 on on his own behalf but as a successor of the deceased civil
20 party. Is there an application for civil party on behalf of the
21 husband for personal harm, or does this harm pertain only to the
22 wife?

23 MR. SUR:

24 In my view, I think that the civil party lawyers are united on
25 this point. In my view, from a civil viewpoint, this person can

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1 be a successor to the rights of the deceased, and so this person
2 must join as a civil party alleging harm suffered.

3 MR. KHAN:

4 Your Honour, this is a novel, and issue of law, in my respectful
5 submission, as of course many issues are in this jurisdiction.
6 Your Honour, I would invite Your Honours to look at the various
7 options that have been presented. My primary submission, with
8 the greatest of respect, departs somewhat from the submission put
9 forward by my learned friend, that the husband himself can be
10 classified as suffering harm so as to be in these proceedings.
11 The primary submission is that his wife had locus standii, and
12 because of her unfortunate passing away, and I can't give
13 evidence of course, but I will say at this juncture, in
14 furtherance of her wish, he wishes to participate and be
15 recognised as a civil party, to protect the interests of his
16 loved one who is not able to participate and take part in an
17 issue which had a direct link to her.

18 [10.50.40]

19 If Your Honours were not with me on that primary submission, I
20 would then invite Your Honours to consider the submission put
21 forward by my friend Mr. Sur, that the husband himself has
22 suffered harm. But in all candour I must say at this juncture,
23 in relation to information in my possession, I am not able to say
24 on instructions that he has suffered harm of such nature that
25 would allow him to participate in these proceedings. Which is

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1 why my principle submission is he should be allowed to intervene
2 as the successor of his wife, who is not able to be with us in
3 this courtroom or the gallery in order to participate in relation
4 to these proceedings that she waited her whole life for without
5 being able to see this day.

6 JUDGE LAVERGNE:

7 Are there any further comments on the part of the civil parties?

8 The Co-Prosecutors? The defence? No observations.

9 The Chamber has taken note of the comments and observations of
10 the parties, and will render its decision on this matter in due
11 course, but before the substantive hearing. Now moving on to
12 the case of the 45 civil parties who were recognised temporarily.
13 These include the five strictly confidential requests.

14 To start with, the Chamber would like to know whether the parties
15 have any observations to make both with regard to the interim
16 recognitions issued by the Chamber and on the admissibility at
17 this stage of those applications notified to them. Following
18 this, the Chamber will specifically address civil party
19 applications E2/36 and E2/51.

20 [10.53.17]

21 So first with regard to the admissibility of civil party
22 applications except the last two mentioned, do the parties have
23 any observations to make with regard to the admissibility or
24 interim recognition. The civil parties? No observations. The
25 Prosecutor? None. The defence?

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1 MR. ROUX:

2 Yes, Your Honour. Generally speaking the defence does not wish
3 to challenge the civil party applications, however the defence
4 would like to point out to the Chamber that for a number of civil
5 parties, it has received documents only in English, and that
6 accordingly it is not in a position to make a submission as long
7 as it does not have translations into French. Furthermore, in
8 the last few days we were receiving documents that we had not
9 been able to peruse. It appears to me that for some cases,
10 questions might arise with regard to the link that they may have
11 with S21.

12 So what the defence can say at this juncture that as long as we
13 do not have all the documents in French we cannot make any
14 submissions, and therefore we reserve the right until the
15 substantive proceedings to raise issues that may arise if it
16 appears that a civil party was not an actual victim of S21. And
17 of course, for every person that a civil party was indeed a
18 victim in S21, of course there will be no challenge by the
19 defence.

20 JUDGE LAVERGNE:

21 If I may, just to clarify matters, are you making your
22 reservations on the soundness of the applications or their
23 admissibility?

24 MR. ROUX:

25 If people consider that a civil party died in S21 and this is not

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1 the case, then it goes to the admissibility in fact of the
2 application, or the civil party on behalf of which an application
3 is being made.

4 JUDGE LAVERGNE:

5 I think it is perfectly clear to all the parties that we are not
6 going to go to the merits of the applications, we are just trying
7 to look at the apparent existence of harm. It is perfectly clear
8 that during the substantive proceedings we shall examine each of
9 the applications to be perfectly certain that the alleged harm
10 did in fact occur. So your reservations pertain instead to the
11 fact that you expressed some doubts with regard to the actuality
12 of the harm, but we are not talking about admissibility.

13 [10.56.47]

14 Do you have any reflections on that?

15 MR. ROUX:

16 With regard to prima facie admissibility there is no problems. I
17 am just expressing our reservations with regard to what may arise
18 during the substantive hearing.

19 JUDGE LAVERGNE:

20 The Chamber will now examine the following civil party
21 applications, starting with E2/36, represented by lawyers Kim
22 Mengkhy and Martine Jacquin, and E2/51 represented by lawyers Ty
23 Srinna, Karim Khan and Alain Werner. These have received interim
24 recognition by the Chamber. Due to the limited scope of the
25 ensuing questions, the Chamber deems it feasible to proceed with

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1 discussion about these particular applications, while asking the
2 civil party lawyers to exercise their utmost care to avoid the
3 disclosure of the applicants' identity.

4 From a brief view of the record, none of the two civil party
5 applicants has presented proof of their identify with their
6 applications. Bearing in mind the earlier indication concerning
7 the need to provide some proof of identify, the Chamber has
8 carefully reviewed each of these applications, their supporting
9 materials and attachments. At this stage, the Chamber would like
10 to inquire of the civil parties representing these applicants
11 whether they have any submissions to make in this regard.

12 [10.58.34]

13 First, Ms. Jacquin.

14 MS. JACQUIN:

15 My colleague Annie Delahaie will make our submissions on this.

16 MS. DELAHAIE:

17 Yes, Your Honour. I would like to provide some clarifications
18 with regard to this application. This is E2/36. This concerns a
19 person living in Ratanakiri province who has no identifying
20 documents as may be considered in our country, and who is ill
21 now, moreover. So the person cannot be reached easily because he
22 or she lives in a remote area. But this person had taken care to
23 obtain a document from the Victims Unit which is stamped the 5th
24 of February 2009, and it indicates that this person's name is
25 what is indicated, and that the person lives at the address

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1 indicated in the civil party application.

2 So to date we have this document which was filed and stamped, and
3 we may well provide the Chamber with any further supporting
4 materials that may come into our possession.

5 JUDGE LAVERGNE:

6 I think that you are not being heard.

7 MS. DELAHAIE:

8 Am I audible now? Can the Chamber hear me now?

9 MR. PRESIDENT:

10 Could you please repeat? I just did not hear the Khmer
11 translation. So we can proceed now.

12 MS. DELAHAIE:

13 Yes, certainly, certainly Mr. President. I was stating that for
14 this particular case, the person E2/36 -- we did not have any
15 identity document as is deemed normal in other countries, and
16 furthermore this person lives in a remote place in the province
17 of Ratanakiri, and we are also informed that this person is now
18 sick. The Victims Unit has given us this information.

19 [11.01.10]

20 But in spite of these circumstances, we do in the file have an
21 element of clarification that was submitted on the 5th of
22 February 2009, it was filed with the Victims Unit. This document
23 does specify that the name of the person is indeed the name as
24 it appears in the civil party application. This also certifies
25 its address. Let's say that it is a statement, and the statement

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1 was filed by this person, a person who is now located in a remote
2 area and cannot easily be contacted.

3 For the time being, that is the only justification of identity
4 that we can offer for this person. However, there may be the
5 possibility for us to get hold of additional identification
6 material once this person will be in better health. Thank you.

7 JUDGE LAVERGNE:

8 Thank you. Are there any other comments from the other lawyers?
9 I see none. Lawyers Ty Srinna, Karim Khan and Werner, would you
10 have any specific points in relation to what I have just
11 mentioned? That's to say, the civil party application for E2/51.

12 MR. KHAN:

13 I am obliged, Your Honour. Yes, I do. It does seem to be
14 correct that a copy of the identification card of this individual
15 was not appended to the documents that were submitted to the
16 Victims Unit, however it is correct to say that the
17 identification number of the putative civil party was included in
18 those documentations. Your Honours, it will not impact on
19 protective measures at all if I am to say that the individual
20 concerned is a lady, 84 years of age, and the location in which
21 she resides is -- I am told, I haven't been there as yet -- I am
22 told it's six hours away from where we are today.

23 Your Honours, we will obtain a copy of the identification card,
24 an individual will go up there as soon as possible to obtain the
25 same, but at this moment in time Your Honours are in possession,

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1 in the case file, and the Victims Unit definitely, of the
2 identification number, the number of the identification card of
3 E2/51. But Your Honour, we will file, as soon as we possibly
4 can, a photostat of the said identification card. Perhaps that
5 assists.

6 JUDGE LAVERGNE:

7 Are there any other comments from the other parties?

8 Co-Prosecutors, anything? Defence, anything? Nothing.

9 [11.06.10]

10 Having heard the different comments of the parties, the Chamber
11 makes the following determination: Prior to issuing interim
12 recognition, the Chamber has carefully received each of the
13 relevant civil party applications and it has applied a prima
14 facie standard of proof. This is not an examination on substance
15 or on merit. Regarding the existence of criteria for the
16 evaluation of a civil party applications, at this juncture the
17 Chamber confirms the status of those that have already received
18 interim recognition as civil parties in the case against the
19 accused except for cases E2/36 and E2/51. For these two civil
20 parties our decision will be handed down later on in view of the
21 documents that we are informed of and that we hope to receive
22 very soon indeed.

23 Now, the Chamber will look at other civil party applications, in
24 particular the remaining 21 civil party applications for which no
25 interim recognition was issued by the Chamber. These include one

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1 remaining application filed as strictly confidential. The
2 Chamber would like to indicate that, specifically for the latest
3 applications filed directly prior to the deadline for the filing
4 of civil party applications, there was very limited time
5 available between the receipt of applications and their
6 processing for the filing in the case file. Consequently it was
7 impossible to conduct an immediate review for the possible
8 issuance of interim recognition.

9 Consequently, as an interim measure, the Chamber would first to
10 inquire from the other parties whether they have any specific
11 comments regarding the admissibility of those applications as
12 notified to them. Following this, the Chamber will specifically
13 address applications E2/69, E2/74 and E2/87. In these cases we
14 also have identification issues.

15 [11.08.50]

16 So first of all, regarding admissibility of civil party
17 applicants generically speaking. Are there any comments for
18 those applications for civil parties that do not have interim
19 recognition, are there any comments or remarks regarding these
20 applicants?

21 I see no request for the floor. Prosecutors? Mr. Roux, yes.

22 MR. ROUX:

23 Your Honour, I have no objection regarding prima facie interim
24 recognition, but subject to what the debate will determine on
25 substance.

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1 JUDGE LAVERGNE:

2 Now, as regards the application for E2/69, 74 and 87. The
3 application is represented by lawyers Ty Srinna, Karim Khan and
4 Alain Werner. Here we are in a position to discuss these, whilst
5 at the same time asking the lawyers to exercise utmost care to
6 avoid making known the identity of the applicants. From a brief
7 review of the record, none of these three civil party applicants
8 has presented proof of identity within the applications, and
9 bearing in mind the earlier information concerning the need to
10 provide proof of identity, the Chamber has carefully reviewed
11 each one of these applications and supporting materials and
12 attachments. At this stage, the Chamber would like to inquire of
13 the civil party lawyers representing these applicants whether
14 they have any submissions or comments on these applications. Mr.
15 Khan, you have the floor on E2/69, E2/74, E2/87.

16 MR. KHAN:

17 Your Honour, once again I am much obliged. In relation to E2/69,
18 I can inform the Chamber that we are in possession now of a
19 number of an election card issued to this particular would-be
20 civil party. Your Honour, we would hope to get that to the Bench
21 shortly. It is my submission that whilst this is not an
22 identification card or a passport, but a number on an election
23 card, it will, when you are in receipt of it, be sufficient to
24 establish identification.

25 [11.11.53]

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1 Your Honour, in due course and when determining this matter, I
2 would ask Your Honours to take into consideration the decision in
3 Lubanga before the International Criminal Court, which is the
4 decision on victim participation. Trial Chamber One, 18th of
5 January 2008, and paragraphs 87 and 89, and Your Honour in that
6 decision a hierarchy, as it were, or a list of possible forms of
7 identification were detailed by your sister tribunal in The
8 Hague. And the Trial Chamber in that instance made it clear, and
9 I quote: "Non-official identification documents, such as a
10 voting card, would suffice." So, Your Honours, we hope to get
11 that particular document in relation to case file document number
12 E2/69 to Your Honours as quickly as possible.

13 In relation to E2/74, I am pleased to inform Your Honours that a
14 copy of the national identity card has just come into the
15 possession of the legal team, and we intend to file that before
16 the Court very shortly, I hope by the end of today, if not,
17 tomorrow. Similarly, I am pleased to be able to tell Your
18 Honours that in relation to case file document number E2/87, I
19 received this morning a scanned copy of this individual's
20 passport.

21 As Your Honours are aware, this particular individual resides
22 overseas, but we have a scanned copy of that passport, and once
23 again, with Your Honours' leave, we would intend to file by the
24 end of today, or if not tomorrow, the relevant documents
25 regarding identification together with E2/69. Your Honours, I

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1 hope that assists in this matter.

2 JUDGE LAVERGNE:

3 Thank you. Are there any comments from the parties, from the

4 Co-Prosecutors, from the defence? I see no comments.

5 [11.15.00]

6 Having carefully reviewed each one of the latest applications,

7 and having applied a prima facie standard of proof for the

8 existence of criteria for the evaluation of the civil party

9 application, and having heard the comments from the other

10 parties, the Chamber declares that apart for applicants E2/69,

11 74, 87, all other remaining civil party applicants who do not

12 have interim recognitions are admitted as civil parties in the

13 case against the accused.

14 The Chamber will later on review the applications of applicants

15 E2/69, 74, 87 in light of the documents that have been promised

16 to us this morning and we shall issue a determination with

17 respect to these applicants in due course and definitely prior to

18 the substantive hearing.

19 MR. KHAN:

20 Mr. President, I am most grateful. The reason I rise to

21 interject is that, in my respectful submission, this may be an

22 appropriate time to raise an additional issue which may be

23 germane to the topic that we have just been discussing. Your

24 Honour, yesterday we filed, on behalf of civil party group one,

25 an application to the President of the Trial Chamber to extend

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1 the deadline for the filing of civil party applications. Your
2 Honours, perhaps you have not seen that document as yet, so
3 perhaps I can be permitted, with your leave, to very briefly
4 detail what it was about.

5 Yesterday we received a power of attorney from Mr. Norng
6 Chanphal. Your Honour, he waives his protective measures. He's
7 an individual who is a child survivor of S21, and regarding whom
8 there is a lot of press coverage recently, so that is the reason
9 I took the liberty of raising his name quite openly. He has very
10 clearly waived any requirement for protective measures. Now,
11 Your Honours, the application that is before the President is to
12 extend the time limits so that the documents and the application
13 that is before His Honour the President can be considered.

14 [11.18.26]

15 It is my respectful and very strong submission that the
16 application has merit. This individual is one of only a handful,
17 very regrettably, only a handful of child survivors of S21. The
18 individual only approached the intermediary very recently. We
19 had the power of attorney on the 16th of February, but in fact it
20 was only two days after the deadline issued by Your Honours on
21 the 19th of January 2009 that he came to this Court, to the
22 Victims Unit, and sought to be admitted as a civil party. As
23 Your Honours are of course fully aware, the deadline that was
24 initially imposed expired on the 2nd of February. This
25 individual was only two days late, on the 4th of February.

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1 Your Honours, there is of course a multitude of reasons why
2 individuals may not become fully aware of the proceedings in this
3 Court, or their right to participate as civil parties, but in the
4 circumstances of this particular case, given the very rare
5 example of the issues to which this civil party can speak, and
6 the fact that they would be, in my respectful submission, little
7 or no prejudice to the defence were his application to be
8 considered by the Trial Chamber. I would strongly urge firstly
9 His Honour, the President, to give the most anxious scrutiny to
10 the application we filed yesterday.

11 And secondly, if we was gracious enough to grant the application,
12 I would ask that the Trial Chamber similarly give very careful
13 consideration to the merits of joining this individual, Mr. Norng
14 Chanphal, as a civil party participant in these proceedings. It
15 is only fair and just, in my respectful submission, that Your
16 Honours can hear the views, the eyewitness account, of a child
17 that fortuitously survived S21. And in the balancing of your
18 discretion, I would ask that there is no prejudice to the defence
19 that I can discern, unless my learned friend Mr. Roux says
20 otherwise. The application was only two days, anyway, out of
21 late, and I would ask that the application be considered.

22 [11.21.15]

23 But Your Honours, the reason I raise it now is of course it may
24 be germane in due course to case management issues of the trial.
25 So Your Honours, with your leave, I did think it appropriate to

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1 bring this to Your Honours' attention at this point.

2 MR. PRESIDENT:

3 Thank you the lawyer for the new information regarding the
4 victim, who is to be the civil party applicant which has been
5 submitted after the expiry of the deadline for the civil party
6 applications which had been notified in public. Let me move on,
7 and I would like to give the floor to Judge Lavergne for his
8 presentation regarding the issue or the discussion of this topic.

9 JUDGE LAVERGNE:

10 President, I think it might be a good idea at this point to hear
11 the opinions of the other parties regarding the request that was
12 just put forward by Mr. Khan. And Mr. Khan, perhaps you might
13 also give us a little bit more of a detailed description of the
14 merits, or the circumstances of this client. Was this client
15 apprised of specific circumstances that would have prevented him,
16 for very clear reasons -- reasons that would have prevented him
17 from filing his application within the deadline?

18 MR. KHAN:

19 Your Honours, I will try to assist. Of course it was implicit in
20 the Trial Chamber decision of the 19th of January 2009 in setting
21 a deadline of the 2nd of February 2009, that there was a need to
22 draw a line, after which further applications would not be
23 considered, but in tandem with that order, it is very clear that
24 the various organs of this Court, and various efforts of outreach
25 were conducted, so that this deadline could be communicated to

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1 the people in Cambodia, and also other possible civil parties
2 that may be residing outside the borders of this country.
3 My instructions are that Mr. Norng Chanphal simply was not aware
4 of the deadline, and when he became aware of the deadline he went
5 and approached the relevant intermediary, and without any delay
6 whatsoever between his contacting the intermediary, the necessary
7 forms were filled in and he approached the Victims Unit on the
8 4th of February. Your Honour, it is very clear, and this initial
9 issue is a matter under the Rules clearly for the President, but
10 under Rule 23(4) of the internal regulations, and I quote: "The
11 President may, by special decision, extend or shorten the
12 abovementioned deadline." Of course, that is the deadline for
13 receipt of civil party applications.

14 [11.25.00]

15 Your Honours, I don't need to read out or rehearse the arguments
16 that are before His Honour the President and which were filed
17 yesterday. But Your Honour, that's the extent of my
18 instructions. I received the power of attorney yesterday, and
19 once again, without any delay, we filed the application to the
20 Court. It wasn't clear to me, Your Honour, and forgive me, if
21 Your Honour wishes to hear, or any member of the Trial Chamber
22 wishes to hear any narrative as to the circumstances that this
23 witness -- Your Honour, I apologise, there was some problem with
24 my microphone.
25 Your Honour, I don't know if you wish to hear any facts, but as

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1 far as when this information came to the knowledge of the --

2 JUDGE LAVERGNE:

3 No.

4 MR. KHAN:

5 -- client, I am simply told he wasn't aware of the deadline.

6 When he was informed of the operative part of Your Honours

7 decision of the 19th of January, when he realised that

8 proceedings were underway, he went to a relevant intermediary,

9 who without any delay, and I must say with great swiftness,

10 approached the Victims Unit with the relevant documents, but

11 unfortunately, because of Your Honours' order, the Victims Unit

12 declined to accept the civil party application, and that of

13 course is the substance and reason why we filed the application

14 we did yesterday before the President, because it is very clearly

15 within the President's gift, and the President's discretion to

16 extend the deadlines.

17 [11.26.50]

18 And so the way we phrased it is that the deadline should be

19 extended until such time as the application is determined. And

20 so once it is determined, appended to the motion we filed

21 yesterday, is a completed Victim Information sheet, and we would

22 ask that if the President extended time limits to consider Mr.

23 Norng Chanphal, then all the documents would be before the

24 Chamber as a whole, and the matter could be dealt with, in my

25 respectful submission, without a great deal of delay whatsoever.

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1 And Your Honour I don't know if there's any other question
2 arising out of that before my learned friends perhaps wish to
3 intervene. Does that answer Your Honour's question?

4 JUDGE LAVERGNE:

5 I think we have understood the thrust of what your request is
6 about. Ms. Studzinsky, would you wish to take the floor on this?

7 MS. STUDZINSKY:

8 Yes. Thank you. Thank you, Your Honours. I would like to add
9 an additional argument, and support that this victim, and
10 applicant now, will be granted civil party status. Sorry?

11 JUDGE LAVERGNE:

12 So that we're very clear, are you also representing that victim?

13 MS. STUDZINSKY:

14 No, I do not, but I have understood -- maybe I'm wrong -- but
15 that you invited other parties to give any comment. Am I wrong?

16 JUDGE LAVERGNE:

17 Very briefly. Very briefly.

18 MS. STUDZINSKY:

19 Ok. Thank you, Your Honour. I only want to mention that
20 according to the preamble of the Rules, these Rules only have the
21 purpose which is to consolidate applicable Cambodian procedure
22 for proceedings before the ECCC. And that if you look into the
23 Cambodian procedure code, their civil parties or victims may
24 apply until the last final statement of the Prosecution. And
25 therefore to give you another argument, in which light this

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1 application and the restrictions by the deadline, now ten days,
2 issued by the Chamber before the Initial Hearing should be seen,
3 and so in this light, and the purpose of the Rules, I would
4 support to grant this applicant the civil party status. Thank
5 you.

6 [11.30.11]

7 JUDGE LAVERGNE:

8 Any other parties wish to make submissions? The Prosecution?

9 MR. PETIT:

10 Thank you, very briefly. It is clear or at least to the extent
11 that information has been published or provided this morning by
12 my learned colleagues, to the extent that such information is
13 accurate it is clear that the testimony of this individual on all
14 points would assist the Chamber and the parties to establish the
15 truth. It appears that this witness is indeed in a position to
16 give special testimony which may not be available in the record
17 of the case for the time being, and which, from what I
18 understanding from the available information, is additionally
19 relevant and validates some evidence that the prosecution has
20 requested that the Chamber include in the record of the case.
21 This includes video footage that was submitted to the Chamber.
22 If I understand the information correctly, the witness might be
23 in a position to provide a context, or confirm information. Now,
24 to what extent is it possible or appropriate for this testimony,
25 which I might describe as key, to what extent should it be part

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1 of the case record? That would be for others to decide, but
2 pursuant to article 39(4), the Chamber could consider that the
3 time limit in this respect, in this particular case, might be
4 extended.

5 Or perhaps, as a witness. This person could be called by one of
6 the parties, because I think that it must be emphasised that this
7 testimony, from what we know, would shed light on the case, and
8 might be useful for the Chamber in determining the truth. I
9 agree with my learned colleagues that the admissibility of this
10 individual as a civil party or as a witness is not in any way
11 prejudicial to the defence's interests. Thank you.

12 JUDGE LAVERGNE:

13 Does the defence wish to take the floor?

14 MR. ROUX:

15 Mr. President, Your Honours, this is a delicate matter. You are
16 aware that the accused has acknowledged his responsibility in
17 S21. This was said, this has been published on the Tribunal's
18 website, it is common knowledge. However, for some weeks now,
19 there has been a lot of hype, there has been an increase of new
20 testimony, new documents, which are provided through press organs
21 even before they are brought to the Tribunal, and the defence
22 says enough to this.

23 If we are here, it is because we are in the context of judicial
24 proceedings, and I would like everyone to follow the judicial
25 process. There is a principle of law which provides the sworn

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1 enemies of arbitrariness of proceedings, and that this is the
2 twin sister of the truth. We support, my learned friend Kar
3 Savuth and I, are defending a man, and although this man
4 acknowledges his responsibility he is entitled to a fair trial.
5 A fair trial is first and foremost one that respects procedural
6 provisions. It is first and foremost a trial that takes place in
7 a courtroom and not in press conferences.
8 [11.36.45]
9 How does this last witness make himself or herself known?
10 Through video footage that the Co-Prosecutors thought that they
11 could file or submit at the last moment to be included in the
12 record of the case, through a non-government organisation with
13 which the Office of Co-Prosecutors has been working for more than
14 two years, and they wait until the very last moment to produce
15 this document, because they perceive in this document young
16 children who allegedly -- and I use the conditional advisedly --
17 who would have been in S21. At the very last minute, they go to
18 find these children, and as if it were by chance, two days before
19 the commencement of trial, the person who claims to be one of the
20 children in this film calls a press conference and says "here I
21 am, it is I, and I wish to be in the trial." What are we doing?
22 I think everybody should keep a cool head. The work of justice
23 that we are doing here is hard work, but it is essential, and we
24 can only do our work if we respect the rule of law. So
25 obviously, on a matter of principle I can understand that you are

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1 requested to be flexible with the time limit. I can understand,
2 we can understand, but if you extend the time limits for this
3 civil party, how many more will ask for the same thing in the
4 days to come? And how are you going to respect the rights of the
5 accused? One of the fundamental rights of any accused before any
6 court, both domestic and international, is respect for the
7 principle of adversarial proceedings.
8 What would happen if you agreed at any point that new parties
9 should be included in the proceedings, that we should have new
10 witnesses, that new documents may be entered into the record. I
11 repeat that we respect the victims. We also owe respect to the
12 accused, and we also must the rule of law. We on this side would
13 like to reiterate our respect for non-governmental organisations
14 which for years have done remarkable work. However, I call on
15 these organisations which claim to defend human rights to also
16 apply human rights to the accused. Thank you.

17 MR. KHAN:

18 Your Honour, Mr. President, with your leave, I am compelled to
19 respond to the impassioned submissions of my learned friend, and
20 however eloquently and impassioned they may be, I respectfully
21 concur that this issue calls for what he very properly described
22 as "cool heads". It is beyond my wit to see what prejudice is
23 being said to be occasioned to the defence by the application
24 that is before the President, and in due course I hope will be
25 before the Trial Chamber.

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1 [11.41.50]

2 I wish to make it very clear that notwithstanding the goodwill of
3 the intervention of my good friend, my learned friend the
4 Prosecutor, this individual has been unequivocal that he does not
5 wish to appear as a witness, but he wishes to appear as a civil
6 party. And of course, there are reasons for that. But Your
7 Honours, this witness is not talking, and will not speak about a
8 new issue that surprises my learned friends for the defence.
9 There is simply no evidence, or any allegation of improper notice
10 being given to the defence.

11 My learned friend says repeatedly that he accepts and he welcomes
12 and he applauds the assistance of various NGOs. He also says
13 repeatedly today, and in previous filings, that the accused
14 accepts his responsibility. Well Your Honours, I do ask you to
15 look behind these goodwilled protestations, and decide what
16 prejudice is caused by my application being granted. It's not
17 said that there was a different camp. It's not said that
18 different crimes were being committed. The only benefit is that
19 Your Honours will see the prosecution's case through the eyes of
20 a child at that period of time. And as my learned friend the
21 Prosecutor very properly put it, that would assist Your Honours
22 in determining actually what occurred at S21, and also, in due
23 course, if that juncture is reached, the effect it had on the
24 civil party, and it's also relevant to the issues of sentence and
25 reparation.

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1 So there's no issue whatsoever that's been properly detailed by
2 my learned friend's impassioned and articulate speech that can be
3 said to occasion prejudice. My learned friend says very clearly
4 that press coverage has been given of my client. Well, Your
5 Honour, I received a power of attorney only yesterday, and I have
6 not been able to advise my client before any press coverage took
7 place. But Your Honours, one of the benefits of having
8 professional judges rather than a jury, and perhaps common law
9 lawyers in many systems may be used to, is that you are
10 professional judges, and this proceeding, of course, is not being
11 judged in the press.

12 [11.44.40]

13 It is being judged by professional judges who will evaluate the
14 evidence, not of media reports or newspaper articles, but of
15 evidence that you hear in Court, and again, Your Honours, in my
16 respectful submission, that is a matter germane to your
17 determination of this issue. My learned friend says that it
18 would be arbitrary -- at least that was the interpretation that I
19 got -- that it would be arbitrary to admit this putative civil
20 party. The opposite is the case, in my emphatic submission. It
21 would be arbitrary to deny a civil party to be admitted simply
22 because he happened upon this Court two days late.

23 Particularly so when Your Honours would have the benefit of
24 hearing testimony relevant to the evidence that's already been
25 disclosed to the defence, and that's before Your Honours, from a

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1 unique perspective. So the floodgates argument, if that is what
2 it is, the floodgates argument of Your Honours being deluged in
3 an incessant waterfall of further applications seems to be a
4 doomsday scenario for which there is no basis in logic or fact.
5 As my learned friend the Prosecutor has said, this is a rare
6 example of a child survivor, and it would assist Your Honours to
7 hear what this individual states.
8 It is my respectful submission, Mr. President, that in
9 determining the application we filed yesterday, it would be to
10 fetter your discretion to arbitrarily deny admission of relevant
11 evidence that is relevant to the responsibility of the accused,
12 but much more importantly, even, is relevant to allowing Your
13 Honours to hear the voices of those that actually were
14 incarcerated at S21, who survived it, and to allow Your Honours
15 to, even for a moment, to be given a glimpse into the gates of
16 S21.
17 [11.47.04]
18 This witness is a rare example, a child that has survived, that
19 can speak to these issues, and with the greatest respect for my
20 learned friend's impassioned and articulate and eloquent speech,
21 his submissions are rather devoid of merit. And Your Honours I
22 would ask that the application be granted, but of course the
23 application is before the President, and I would ask that it be
24 determined in the usual manner.
25 MR. PETIT:

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1 If I may address the Court and correct some implications that
2 have been made by my learned friend, that seem to imply that the
3 Office of Co-Prosecutor, which is an independent officer before
4 this Court, with very specific mandate and responsibility, is
5 somehow wholly or partly responsive to third parties and their
6 own agendas, be it civil society members or others. We have a
7 duty, stated by the Rules, to bring to this Court all the
8 relevant evidence that we deemed will be helpful for this Court
9 to reach the truth. As we are duty bound to bring before this
10 Court any, if it exists, exculpatory evidence that would assist
11 this Court.

12 I agree that a line must be drawn, and indeed you have drawn that
13 line. However, I subscribe to my learned friend's comments that
14 the scenario of this Court being incapable of functioning is, as
15 my learned friend mentioned, not very convincing, as this Court
16 will no doubt exercise its judicial powers judiciously. As my
17 learned friend from the defence knows from my filing with regards
18 to the video documents, we only became aware of these documents
19 on the 26th of December. Hence, we were logically and in fact
20 unable to produce these documents, or to suggest that they be
21 introduced into the case file beforehand. I'm sure we will go
22 back to this debate later in the agenda.

23 [11.49.26]

24 As to this person, on February 4th, that individual went to the
25 Victims Unit and filed his request to become a civil party. At

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1 no point until the 13th of February were we given that
2 application by the civil party -- or by the Witness Support Unit.
3 We were therefore unaware of this man's existence, much less his
4 willingness to participate. When we did become aware, through
5 media reports, on the same day we requested from the Victims Unit
6 that they communicate to us the file which we received on the
7 same afternoon, on the 13th. Obviously, by taking the time to
8 evaluate properly this application, we resolved the position that
9 I've expounded before you this morning to support, in a way that
10 the Trial Chamber will see fit, the inclusion of that person's
11 testimony, or story, into the narrative of this trial.
12 This narrative which not only seek to establish the guilt or the
13 innocence of the accused, but also must take into account the
14 history telling part of courts such as this one. Its
15 responsibility to tell the Cambodian people, 30 years after the
16 events, what indeed occurred in this country. That is a duty
17 that this Court must take into account when it does bring forth,
18 or allows the party to bring forth evidence. And I again
19 reiterate that I cannot see, despite, as my learned friend put
20 it, the eloquent speech of my learned friend, I cannot understand
21 what prejudice for an accused who does, indeed, apparently,
22 acknowledge his responsibility, what possible prejudice that
23 testimony would be to that position. Thank you.

24 MR. ROUX:

25 The defence would like to take the floor last, if the Chamber so

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1 wishes.

2 MR. PRESIDENT:

3 Please, the co-lawyer for the accused.

4 MR. ROUX:

5 Thank you for allowing the defence to have the last word. I
6 think I have spoken enough. I would just like to mention that
7 when my learned friend for the civil parties says that this
8 witness will be relevant for the sentencing, this gives me the
9 opportunity to recall that the civil parties do not have a role
10 to play in the proceedings pertaining to the sentence. For the
11 rest, I maintain my respectful submissions to the Chamber, and
12 the defence is in the hands of the Chamber, while adding that at
13 the present time, the Defence notes that the civil parties have
14 the person's file, the Office of the Co-Prosecutors have the
15 file, and the defence is yet to receive the file. If that is not
16 violating the rights of the accused, then I do not know what
17 we're talking about here.

18 MR. PRESIDENT:

19 After hearing the observations and the requests by the lawyers,
20 the civil party lawyer for the submission of the expiry date of
21 the civil party application, according to the Internal Rules, it
22 was two days late, and after listening to the remarks concerning
23 the facts which led to the delay, and under the relevant
24 situation by the civil party and the victims, and the children of
25 the S21, and also after hearing the supporting statements of

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1 other civil party lawyers, as well as the prosecution, and after
2 hearing the observation of the co-lawyer of the accused, and
3 because this issue is related to the legal issue that needs to be
4 taken into consideration in details, the Trial Chamber will
5 postpone the decision on this issue, and will decide in due
6 course, after the Initial Hearing.

7 And I would like to thank Judge Lavergne on the lead of the
8 discussion on this issue. Now it's the lunch break, and the
9 Trial Chamber would like to adjourn for the lunch break, so all
10 the participants and the public can have your lunch. At 1.30 pm,
11 at 1330, please the participants and the public return to your
12 respective seats -- before 1.30 for the trial to resume.

13 The security please take the accused to the rest room, and bring
14 the accused back to the Trial Chamber in the afternoon before the
15 1330. Thank you.

16 (Court recesses from 1157H to 1330H)

17 MR. PRESIDENT:

18 During this afternoon session, the Trial Chamber would like to
19 resume the Initial Hearing, and we already declared this morning
20 as the President of the Trial Chamber I maintain my right to
21 allocate tasks to our Judges to handle some certain item of
22 agenda. So I would like to now give the floor to Judge
23 Cartwright who will lead the discussion on the next agenda item.

24 JUDGE CARTWRIGHT:

25 Thank you, Mr. President.

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1 MR. KHAN:

2 Mr. President, Your Honours, I think perhaps it wasn't observed,
3 but while the President was speaking there was no translation.

4 MR. PRESIDENT:

5 Now, the Trial Chamber declares the continuity of our session,
6 and as I already indicated this morning, as the President of the
7 Trial Chamber, I reserved my right to allocate duties to our
8 Judges to handle some certain part of the items. So I would like
9 to give the floor to Judge Silvia Cartwright to lead the
10 discussion on the next item of agenda concerning the issues
11 relating to the witness lists. So Judge Silvia Cartwright, you
12 have the floor now.

13 [13.32.22]

14 JUDGE CARTWRIGHT:

15 Thank you, Mr. President. As you have indicated, this section
16 deals with issues relating to witness lists. The Chamber wishes
17 to acknowledge receipt from the Co-Prosecutors, the defence, and
18 civil party groups 1, 2 and 3, of the lists of witnesses and
19 experts they intend to have summoned at trial in accordance with
20 Rule 80 of the Rules, and additional materials as ordered by the
21 Chamber on the 11th of December 2008. According to Rule 80, the
22 civil parties and defence have 15 days from notification of the
23 Co-Prosecutors' list to file their own witness lists. The Khmer
24 and English versions of the Co-Prosecutors' witness list and
25 additional material was notified to the existing parties on the

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1 5th of January 2009. The French version of that list was
2 notified to the existing parties on the 14th of January 2009.
3 All witness lists were filed within the prescribed deadlines.
4 Parties having joined the proceedings after those dates have 15
5 days from notification of the Co-Prosecutors' list to them to
6 file their lists.
7 Pursuant to Rule 80bis of the Rules, the Chamber will consider
8 these Lists during this hearing. On the 5th of February 2009,
9 the Chamber issued a Direction requesting additional information
10 from the parties and the Co-Investigating Judges. The Chamber has
11 received the following information. On the 11th of February
12 2009, the co-lawyer for civil party group 2 filed a response with
13 respect to Witness No.8 of the witness list of that group,
14 together with an article in English referring to that witness and
15 describing her alleged detention at S21.
16 [13.34.35]
17 On the 12th of February 2009, the Co-Investigating Judges
18 indicated that they intend to interview a certain number of
19 persons appearing in the witness lists filed by the parties.
20 They further indicated that they will do everything possible to
21 ensure that the scheduling of such interviews will not interfere
22 with the Trial Chamber's scheduling directions. On the same
23 date, the defence indicated that it did not contest the facts
24 that proposed witnesses number 1 and number 2 of witness list of
25 civil party group 3 intend to testify about.

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1 Witness lists received after the Initial Hearing will be
2 considered upon receipt. The other parties will be given an
3 opportunity to comment on these lists in writing. The parties
4 will be informed of the Chamber's decision with respect to those
5 lists by written decision. In the interests of good
6 administration of justice, the Chamber wishes to know if, among
7 the civil parties who are still entitled to exercise their right
8 to file a witness list, any of them does not currently intend to
9 file such a list, and if that is the case, if they expressly
10 waive this right. The Chamber would greatly appreciate that
11 information either this afternoon or later in writing.

12 I turn now to the Co-Prosecutors' witness list. The
13 Co-Prosecutors filed their proposed list on the 19th of December
14 2008, in Khmer and English. In addition, the Co-Prosecutors
15 filed summaries of the facts to which each proposed witness and
16 expert is expected to testify, and the list of new documents they
17 intend to offer in the case. On the 24th of December 2008, the
18 Chamber requested additional information with respect to the
19 scope of the request for protective measures. On the same day,
20 the Co-Prosecutors responded that their witness list could be
21 notified to the parties, and that they did not ask the Witness
22 Expert and Support Unit to conduct a risk assessment for
23 witnesses Craig Etcheson, David Chandler, Nayan Chanda, Nic
24 Dunlop and Françoise Sironi-Guilbard.

25 [13.37.20]

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1 During the Trial Management Meeting, the Chamber noted spelling
2 discrepancies in the names of proposed witnesses KW-03, KW-11,
3 KW-12, KW-14, KW-19, KW-22, KW-28 and KW-30 and requested the
4 Co-Prosecutors to clarify this issue. The Chamber also asked the
5 Co-Prosecutors to review personal information relating to
6 proposed witnesses and experts Craig Etcheson, David Chandler,
7 KW-25, Nayan Chanda, Nic Dunlop, KW-34 and Françoise
8 Sironi-Guilbard. The Chamber wishes to acknowledge receipt from
9 the Prosecution of clarifications to their witness list, filed on
10 the 19th of January 2009. The Co-Prosecutors indicated that
11 those witnesses had already been heard during the investigative
12 phase, and provided the ERN numbers for documents relating to
13 them. They also provided additional personal information on the
14 above-mentioned witnesses where that was available.

15 As noted during the Trial Management Meeting, the list filed by
16 the Co-Prosecutors contains 35 proposed witnesses and experts
17 they wish to summon at trial. Two of those witnesses, KW-03 and
18 KW-04, are currently civil parties in the proceedings. According
19 to the Co-Prosecutors, they were included in the list in case
20 they decided to abandon their civil party status. Once the civil
21 parties have made their decision concerning civil party status,
22 early notification of any decision to renounce that status would
23 be appreciated. The Chamber notes that any civil party whose
24 testimony can be conducive to the ascertainment of the truth may
25 nonetheless be summoned to appear in court. At the time they

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1 appear in the court to testify, their status as a civil party
2 will be taken into account. If they do not renounce their civil
3 party status, the prohibition on taking the witness oath under
4 Rule 23(6) will apply.

5 All proposed witnesses are identified by their names as well as
6 by pseudonyms. As indicated during the Trial Management Meeting,
7 the Co-Prosecutors estimate that a minimum of approximately 40
8 trial days will be needed for the testimony of the witnesses and
9 experts on their list. The Chamber would now like to give the
10 parties the opportunity to make observations on the
11 Co-Prosecutors' witness list. The Co-Prosecutors will of course
12 have an opportunity to reply after such observations have been
13 made.

14 [14.40.34]

15 Do civil party lawyers have any comments to make on the
16 Co-Prosecutors' witness list? Mr. Khan?

17 MR. KHAN:

18 Your Honour, no. I am grateful.

19 JUDGE CARTWRIGHT:

20 Ms. Studzinsky?

21 MS. STUDZINSKY:

22 Yes, thank you, Your Honours. I would like to give our opinion
23 on the civil parties KW-04 and KW-03 on the Prosecutors' witness
24 list, and we would like to inform the Chamber that these civil
25 parties do not intend to withdraw their civil party status, and

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1 so far we have no other comment and do not object concerning the
2 other witnesses and experts on the Prosecutors' witness list.

3 Thank you.

4 JUDGE CARTWRIGHT:

5 Thank you for that indication, Ms. Studzinsky. Are there any
6 other civil party lawyers wish to make any observations? Thank
7 you. Does the defence have any comments that it wishes to make
8 regarding the Co-Prosecutors' witness list?

9 MR. ROUX:

10 Thank you, Your Honour. I have a few points regarding this list.
11 We take note of the fact that in this list the Office of the
12 Co-Prosecutors is in fact considering the testimony of three
13 persons concerning the M13 detention facility. The defence would
14 like to recall that M13 is not part of the facts falling under
15 the jurisdiction of this Chamber, and there is a very specific
16 reason for this. M13 was no longer in existence by 1975, this
17 latter date being the time for which this Chamber has
18 jurisdiction.

19 [13.43.55]

20 This being said, the Chamber will take note of the fact that
21 these witnesses are called upon in relation to counts that
22 obviously have nothing to do with M13, and for rather
23 self-evident reasons, since Duch is being prosecuted for crimes
24 in S21. We, the defence team, do not understand why the Office
25 of Co-Prosecutors insists on calling upon witnesses to talk about

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1 M13. This is what we find in the outlines of arguments. In
2 particular for KW-32 it is stated that this person's testimony
3 will be on the role of the accused in relation to M13, on the
4 circumstances of the establishment of M13, and on the length of
5 the existence and the mode of functioning of M13. This is not
6 part of our remit. It is totally outside the scope of what this
7 Chamber deals with, and it is, more basically, completely outside
8 the *ratione temporis* jurisdiction of this Chamber. Consequently,
9 the defence would respectfully wish to request that these three
10 witnesses be removed from the list as per their summaries.
11 Furthermore, the defence would also like to state that it feels
12 uncomfortable regarding summaries as they have been worded, or
13 submitted, rather generally speaking. Overall, I would tend to
14 find all of this to be some copy and paste work rather than
15 material that gives information concerning reasons for which such
16 and such a witness would be summoned to appear. May I take just
17 one example, but this type of scenario appears for several
18 witnesses. There is a kind of catchphrase here, which is "the
19 testimony of this person will be on the armed conflict, the role
20 of the accused in relation to S21, the circumstances of the
21 establishment of S21, and the length of existence and mode of
22 operation of S21." As you can see, M13 has here been replaced by
23 S21. But this doesn't enlighten us any further as to the actual
24 gist of the testimony, this overall phraseology is much too
25 generic.

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1 And lastly, concerning the expert whose name you mentioned, Mrs
2 Sironi, the name is not confidential, I would like to recall that
3 the two psychiatrist experts have, on several occasions, been in
4 a position to examine our client at the detention centre. The
5 defence is, of course, in favour of both these experts appearing
6 before this Chamber, however, we would like to submit an oral
7 motion now.

8 [13.48.25]

9 The defence requests that the Chamber kindly ask these experts,
10 prior to appearing before the Chamber, to go and pay another
11 visit during the time that will be required for such a visit to
12 the accused in the detention centre in order to update the
13 earlier conclusions of their report, that report being now over
14 one year old. Your Honour, these were our comments and our
15 request. Thank you.

16 JUDGE CARTWRIGHT:

17 I have a few questions, please. I need to have complete clarity
18 concerning the witnesses to which you are referring. Could you
19 state the pseudonyms for the three witnesses that you referred to
20 in relation to M13, please?

21 MR. ROUX:

22 My apologise, Your Honour. The pseudonyms are KW-30, KW-31 and
23 KW-32.

24 JUDGE CARTWRIGHT:

25 Now, in relation to the witnesses concerning whom you consider

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1 that inadequate summaries have been provided. Can you give me
2 those pseudonyms please?

3 MR. ROUX:

4 I'm referring to all the summaries, Your Honour. All the
5 summaries seem to me not up to the standards of what had been
6 agreed amongst us at earlier meetings.

7 JUDGE CARTWRIGHT:

8 May I infer that the second expert to whom you referred, along
9 with Françoise Sironi-Guilbard is KW-34?

10 MR. ROUX:

11 Yes, yes, this is correct, Your Honour. This is correct.

12 JUDGE CARTWRIGHT:

13 Thank you very much. Now, the Co-Prosecutors are invited to
14 respond to those comments.

15 [13.51.23]

16 MR. PETIT:

17 Thank you, Madam Judge. I will start by the end. I admittedly,
18 and as everybody knows here I'm not as familiar with civil law
19 practices as is my learned friend and others here. I understand
20 that he is making a request to the Trial Chamber that one of our
21 witnesses be ordered or requested to do a certain act. Be that
22 as it may, acceptably or not, in these types of proceedings, I
23 have no objection to this process. I think it might be
24 interesting to have, indeed, an update, and it would enlighten
25 the Trial Chamber.

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1 As to the somewhat cursory criticism of our summaries of
2 witnesses, these summaries were made specifically short because
3 of the request by the Trial Chamber to have only one or two lines
4 per witnesses indicating the relevance of their testimony. I
5 find it odd that the defence would then hold our compliance with
6 the Trial Chamber's request against us. To describe sometimes
7 pages and hours of proces verbal interviews in one or two lines,
8 and the relevance of that testimony, to some of the most complex
9 criminal infractions and complex factual situations -- to do so
10 in a few lines requires, indeed, to exercise a very summary
11 description, and because all the elements of the crimes are the
12 same, of course it bears that there would be repetition as to the
13 relevance of these testimonies.

14 [13.53.40]

15 I submit, therefore, that those summaries were in compliance to
16 the best of our abilities to indicate to the Trial Chamber and to
17 the parties how each of these witnesses would be relevant. We
18 have tried, for example, when guards were involved, to specify
19 what part of their duties, let's say, or experience as guard, was
20 different from the others. As the Trial Chamber may recall, we
21 had summaries that were prepared of one or two or three pages for
22 each of these witnesses, that went into great extent about what
23 we thought were the relevancy of each of these witnesses.
24 Following the Trial Chamber's instructions, we reduced these
25 pages of summary to one or two lines. I would offer, right now,

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1 to the Trial Chamber, and to any parties, to forward these
2 extensive summaries of each of these witnesses so that the
3 parties can be perhaps better informed, and the Trial Chamber
4 make a more informed decision. However, again, as I said, we
5 complied to the best of our abilities with the Trial Chamber's
6 instructions in this, and I submit that that criticism does not
7 have a valid foundation.

8 As to the witnesses that refer to M13, can I first note that one
9 of those witnesses -- I apologise to take the Court's time in
10 trying to find the proper pseudonym -- KW-08, is admittedly an
11 old time colleague and co-perpetrator of the accused who did
12 initiate his career at M13 and then follow it onwards to S21, and
13 provides indeed, obviously potentially tainted, but very
14 compelling evidence that would be relevant to the proceedings. I
15 think that witness's usefulness to the Trial Chamber should be
16 obvious.

17 As to the other two witnesses who are indeed called, or would be
18 called, by the Co-Prosecution to address the events of M13 --
19 let's be clear, everybody knows what our jurisdiction is,
20 legally, personally and temporally. Everybody knows as well,
21 especially those involved in international criminal trials
22 beforehand, that these trials do not operate, nor do they tell
23 the story in a vacuum. Crimes are committed within a country.
24 Are we going to tell us that we cannot talk about Cambodia
25 because it's irrelevant to the jurisdiction because it existed

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1 prior to 1975? No.

2 [13.57.08]

3 I note, interestingly, that the defence wishes to call several of
4 the accused's old friends and neighbours, I believe, to establish
5 certain facts. Is this irrelevant? Is this not helpful? We do
6 not intend to contest the defence request to call these witnesses
7 that will testify to events quite extemporiously. They are
8 useful to the proceedings. The witnesses who worked for the
9 accused at M13, and at least for one of whom eventually became a
10 detainee at M13, will testify to relevant facts for this Court.
11 Part, if not the major part of the defence rests on the character
12 of the accused, or at least so do the witnesses that will testify
13 to.

14 Furthermore, during the course of the investigation, the accused
15 has made several assertions concerning his commitment, his
16 actions at S21, his state of mind while committing the crimes.
17 You will have to weigh that state of mind to properly assess the
18 criminal conduct of the accused. That state of mind, however,
19 did not in and of itself spontaneously generate in March 1977
20 when the accused took over S21. It dates back to his long term
21 commitment to the aims of the Communist Party of Kampuchea in its
22 persecution of perceived enemies, his support for those policies,
23 his lifetime dedication, up to 1979, and actually even later
24 then, up to the nineties.
25 My learned friend knows full well that witnesses who testify to

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1 the state of mind of an accused during the commission of the
2 crimes need not have their knowledge based only within the
3 jurisdiction, the time jurisdiction of the Court. The Court
4 needs all the facts to assess properly not only the commission of
5 the crime but the intent behind the commissions of those crimes,
6 and intent is understood best when the whole picture of the
7 criminal conduct and that of the accused is put before the Judges
8 of facts.

9 [13.59.39]

10 That is why we submit that those two witnesses, those who would
11 testify should they be heard, and whose testimony will be tested
12 during the investigation, those testimonies will be relevant for
13 what is now the case before you. And will it please the Court,
14 my colleague would like to address the Court.

15 JUDGE CARTWRIGHT:

16 Ms. Chea Leang.

17 MS. CHEA LEANG:

18 Thank you, Your Honour. My colleague already indicated in the
19 special case, and that the Co-Prosecutors would like to call
20 KW-30, 31 and 32 witness, and we know that these three witnesses
21 have been summoned because there has been a related jurisdiction
22 to the M13 but before it started at S21 the victims were guarded
23 together at an office called PJ near the Psar Thmei market, so
24 the temporal jurisdiction continued from M13 to S21, and the
25 prosecution thinks that the temporal jurisdiction continued.

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1 And those witnesses know about the facts related to S21 -- for
2 example, the organised infrastructure of the S21, the detention
3 and the torture or the killing at M13, so those witnesses think
4 there's a link between the situation at M13 to S21. That's why
5 the prosecution intends to suggest and propose the Judges to
6 consider these issues and to hear the testimony of these
7 witnesses during the substantive hearing. Thank you.

8 JUDGE CARTWRIGHT:

9 Yes. Thank you very much. You wish to respond? Very well, Mr.
10 Roux.

11 MR. ROUX:

12 Thank you, Your Honour. Perhaps, first, to dispel any
13 misapprehension on the part of my learned colleagues. My
14 learned colleague Mr. Petit referred to KW-08. He is not one of
15 the three people that we asked to be struck off the list. I did
16 not refer to KW-08. Furthermore, in the summary of the
17 Co-Prosecutors of the testimony of KW-08, reference is made
18 solely to the events at S21, so I said nothing about KW-08. I
19 only refer to KW-30, KW-31 and KW-32.

20 [14.03.32]

21 Obviously, with regard to this issue of M13, we consider this to
22 be an important point. The Chamber will not be unaware that if
23 the Office of Co-Prosecutors heard about M13, it may have --
24 mistakenly of course -- omitted to call one of the major
25 witnesses of M13, whom we all know. But that must be an

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1 oversight on their part. So you cannot have a trial at different
2 speeds. The defence has said previously that it did not intend
3 to answer questions to be put by the Co-Prosecutors pertaining to
4 events at M13, and if the rule of law is to be recalled here, on
5 no account can the accused be charged before this Court for
6 events that occurred in M13.

7 But I hear my learned friends on the other side saying that they
8 do wish to go back to these events. It is not possible from a
9 legal standpoint, and I repeat, it would not be fair. Thank you.

10 JUDGE CARTWRIGHT:

11 Yes. Thank you, Mr. Roux. I will now turn to the witness lists
12 filed by the civil parties. As indicated during the Trial
13 Management Meeting, and referred to today, there are four such
14 groups. Civil party one is represented by Ty Srinna, Karim Khan,
15 Alain Werner and Briane McGonigle. The Chamber received the
16 witness list from this group yesterday, the 16th of February, and
17 has not had time yet to review it. It contains five proposed
18 witnesses. The deadline for the filing of witness lists for this
19 group expires on the 4th of March 2009.

20 I would like to inquire of counsel for group one of the civil
21 parties if they intend to waive their right to present any
22 further witnesses, a list of any further witnesses?

23 MR. KHAN:

24 Your Honour, I can say "yes" with one caveat. It will be the
25 intention to seek to call Norng Chanphal should our earlier

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1 application be granted. With that caveat, there would be no
2 additional request to supplement the proposed witness list.

3 [14.07.03]

4 JUDGE CARTWRIGHT:

5 Thank you for that indication. The witness list for civil party
6 group two, which is represented by Hong Kimsuon, Young Panith,
7 Kong Pisey and Silke Studzinsky, their list was filed on the 19th
8 of January 2009 in Khmer and English. In addition, this group
9 filed summaries of the facts to which each proposed witness and
10 expert is expected to testify, and the list of new documents they
11 intend to offer in the case.

12 The list filed by this group of civil parties contains ten
13 proposed witnesses and experts they wish the Chamber to summon at
14 trial. All the witnesses are identified by their name and a
15 number. Seven of these have been assigned a pseudonym. The
16 Chamber, for the purposes of this hearing, will use the pseudonym
17 Witness CP2 with an assigned witness number for all witnesses on
18 this list until the risk assessment of these proposed witnesses
19 has been completed. Where pseudonyms have been assigned by the
20 party, the Chamber will, for clarification, add this pseudonym
21 between brackets.

22 One of the proposed witnesses in this list is an alternative
23 witness in case witness CP2-8 or A-07 cannot be located. The
24 lawyers for group two estimate that a minimum of approximately
25 8.5 or 6.75 trial days will be required for the testimony of the

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1 witnesses and experts on their list, depending on whether witness
2 A-07 can be located or not. In its direction requesting
3 additional information and preparation for the Initial Hearing
4 dated the 5th of February, the Chamber asked the civil party
5 lawyers to provide additional information concerning witness
6 CP2-8 or A-07 on their list. In particular, to provide any
7 evidence that she was detained at S21.

8 [14.09.33]

9 On the 11th of February, the civil party lawyers filed an article
10 written by witness CP2-9 in 1991 mentioning this witness CP2-8 of
11 A-07, and describing her detention at S21 as well as the torture
12 that she was subjected to. No additional information was
13 received. The Chamber would now like to give the parties an
14 opportunity to comment on the witness list of civil party group
15 two. Civil party group two will have the opportunity to reply
16 after all observations have been made. First, the
17 Co-Prosecutors, do you have any comments?

18 MR. PETIT:

19 We would. We would have comments to make on -- and if I
20 understood your directive -- witnesses A-03, A-02 and A-01 of the
21 civil parties' list. These comments have -- I would request
22 guidance from this Trial Chamber. The comments that I have
23 regarding, particularly A-01 and A-02 might force the debate to
24 go either in camera hearing. Or might, indeed, refrain or
25 prevent me from making the most useful argument before this Trial

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1 Chamber.

2 With your permission, if that is agreeable, I would like to
3 reserve our right to file in writing our consideration regarding
4 these three witnesses, by forthwith -- if not tomorrow certainly
5 by the day after tomorrow, and giving, therefore, the parties an
6 opportunity to answer and then the Trial Chamber to properly
7 assess our misgivings, which are, I submit, serious and well
8 founded, about, again, A-01, A-02 and A-03. As to the rest of
9 the witnesses, we do not have any comments.

10 JUDGE CARTWRIGHT:

11 Yes. Thank you, Mr. Petit. We will be going into private
12 session later to consider some aspects of witness lists, and that
13 may be an opportunity then, or alternatively we can indicate that
14 you can file those comments in writing. However, I was focusing
15 primarily on the CP2-8 or A-07 and CP2-9, who was the witness to
16 be called in substitution. You have no comments relating to
17 them?

18 MR. PETIT:

19 Thank you. No, we do not certainly have any objection, that is.
20 [14.12.33]

21 JUDGE CARTWRIGHT:

22 Yes. Thank you. Do any of the other civil parties have any
23 comments to make. Mr. Khan?

24 MR. KHAN:

25 Your Honour, I am most grateful. Perhaps, with your indulgence,

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1 I would ask to go back for a moment to the motion that we filed
2 yesterday. We dealt with the list filed rather quickly. I do
3 make, for the record, an application to vary this motion to the
4 extent that it should be considered not only under Rule 80bis but
5 also, simultaneously, under Rule 31 of the Internal Rules. Your
6 Honour, the reason I say that is that it is very clear from Rule
7 31 that any party may invite Your Honours to call any expert that
8 may assist you to properly and fairly determine this matter.
9 And that application, of course, is open to the defence, to the
10 civil parties, and the prosecutor. Some consequences could flow
11 from whether the application is granted under Rule 80bis or Rule
12 31. This is because, Your Honours, from the plain reading of
13 Rule 31, it is clearly mandated at paragraph 11 that should Your
14 Honours accept a proposal to call an expert the Court will foot
15 the bill, the Court will pay for the expert to attend.
16 The difficulty or candour that we face when we present to Your
17 Honour, is whilst my legal team is acting completely pro bono,
18 with the caveat of one member that is assisted by the British
19 Embassy, the experts we've contacted will not be able to work pro
20 bono. Some are internationals. Your Honours, I would ask that
21 an oral application be entertained when you're considering this
22 motion, and it is considered both under Rule 80bis and Rule 31.
23 [14.15.09]
24 Your Honour, in addition to that, it is my submission that if you
25 are minded to only consider the application under Rule 80bis I

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1 would invite Your Honours to give clarity to the ambiguity in the
2 Rules and give guidance to the parties as to whether or not, in
3 Your Honours' view, given that these are witnesses that the Court
4 will consider are relevant and pertinent to the determination of
5 matters and to the fairness of these proceedings, whether or not
6 a declaration should be made to assist all parties in this
7 courtroom that the Court will in fact fund and pay for the
8 witnesses to come to this Court and either to give viva voce
9 evidence or alternatively to prepare expert reports that can be
10 filed in the usual manner.

11 Turning now to the issue of the witness list of civil party group
12 number two -- and whilst I do fully accept that Your Honours'
13 concern was in relation to some other witnesses, it would be
14 remiss of me, in my respectful submission, if I did not point
15 out, on behalf of the civil party I represent, that we have the
16 very gravest of misgivings regarding the first three witnesses on
17 the witness list put forward, namely A-01, A-02 and A-03. Your
18 Honours, there is no indication from the face of the witness list
19 submitted by civil party group number two that any contact has
20 been made with these putative witnesses. That is my first point.
21 The second point is that it is very clear from the face of the
22 application, and the witness list, that summonses are being
23 requested. Your Honour, it is a clear principle of law, in my
24 submission, both in the domestic context of Cambodia, also as a
25 matter of international law, as evidence from the practice of the

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1 Yugoslav tribunals and the Rwanda tribunals, that before a
2 subpoena, a summons under Rule 41 of this Court, a subpoena ad
3 testificandum, whatever one wishes to call it, is sought, a party
4 must persuade the Trial Chamber that that witness is not
5 otherwise willing to attend. No such threshold argument has been
6 made out by the civil party group number two in this case. That
7 is my second ground for objection.

8 [14.18.10]

9 Your Honour, the third is in support of the prosecution's
10 opposition, at this stage, and of course our obligations under
11 Rule 23 to support the prosecution, is that it would be perilous
12 in the extreme for any party to call a witness when they do not
13 have, in good faith, knowledge of what the witness is going to
14 say. We have spoken, in relation to our own witness list, to the
15 five experts that are before Your Honour. We have, with
16 reasonable certainty, been able to detail the parameters of their
17 proposed testimony. There is no indication from the filing put
18 forward by civil party number two that similar diligence has been
19 displayed.

20 It is pertinent in this regard, in my respectful submission --
21 and bearing in mind the obligation to support the prosecution,
22 and not torpedo it by unexpected and unknown witnesses whose
23 focus of testimony is a matter of speculation at best, to bear in
24 mind the wise words, in my respectful submission, of the Appeals
25 Chamber of the Yugoslav Tribunal in the Krstic case. Your

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1 Honours, for the record, I will cite that decision. It is a
2 decision on an application for subpoena dated the 1st of July
3 2003.
4 Your Honours, I will invite you in due course to look at
5 paragraph 8 of that decision of the Appeals Chamber of the
6 Yugoslav tribunal. If I may quote, the Appeals Chamber accepted,
7 and I am quoting directly from the decision:
8 "In a situation where the defence is unaware of the precise
9 nature of the evidence which a prospective witness can give, and
10 where the defence has been unable to obtain his voluntary
11 co-operation, it will not be reasonable to require the defence to
12 use 'all mechanisms of protection and compulsion available'. "
13 The Appeals Court Chamber of the Yugoslav tribunal continued: "In
14 order to force the witness to give evidence cold, in Court,
15 without first knowing what he will say" -- and Your Honours, this
16 is the important bit: "That would be contrary to the duty owed by
17 counsel to their client to act skilfully and with loyalty."
18 Your Honour, this is not rocket science. This is not something
19 that is a matter of sophistication, but in order to properly call
20 a witness, even a witness that one can establish to the required
21 standard, has said that they are willing to come, one must be
22 able to, with some degree of precision, be able to tell a court
23 what one believes the witness will say, and give a basis for it.
24 Your Honour, what I would propose, with the greatest of respect,
25 is there is a clear power under the Rules of this Court, Rule 41,

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1 for summonses to be issued. The proper course of conduct, in my
2 respectful submission, is not to go blindly forward into
3 unchartered territories, but for a moving party to seek a summons
4 in order to compel the attendance of an individual to attend an
5 interview. Not to come to court, but to attend an interview.
6 That this is a possibility is supported by the clear
7 jurisprudence of the ad hoc tribunals, and I quote again the
8 Krstic decision of the 1st of July 2003, this time at paragraph
9 10, where the Appeals Chamber, referring to Rule 54 and powers of
10 subpoena, which in material respects, in my submission, is very
11 similar to your Rule 41 here, said, and I quote:
12 "Such a power clearly includes the possibility of a subpoena
13 being issued requiring a prospective witness to attend at a
14 nominated place and time in order to be interviewed by the
15 defence where the attendance is necessary for the preparation of
16 conduct of trial."

17 [14.23.25]

18 So Your Honours, this general principle is open, in my respectful
19 submission, not just to the defence or to the prosecution, but
20 also to civil parties. But a number of hurdles have to be
21 overcome first by a party, particularly where the prosecution
22 have intimated that calling such witnesses is unhelpful. Your
23 Honours, in considering the scope or the merits of the
24 submissions I have just sought to adumbrate, it may also be
25 useful to bear in mind that Rule 23, in my respectful submission,

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1 operates not only as a rule of thumb which should guide the civil
2 parties, but as a limiting factor as to the scope of operation
3 which is open to civil parties in pursuit of representing their
4 clients.

5 It cannot be to put a completely different case to Your Honours.
6 It cannot be to contradict the prosecution in a manner that
7 causes confusion. The whole purpose of civil party intervention,
8 in my respectful submission, is to support the prosecution. Not
9 to follow them slavishly, but to assist the prosecution so that
10 Your Honours can get to the truth. But Your Honours, in relation
11 to the merits of this particular matter, there has been no
12 indication that the witnesses have been spoken to, there has been
13 no indication that the witnesses are unwilling to attend, and
14 therefore justify a subpoena, and in any event, the third point
15 is, if the subpoena is necessary at all, or a summons under Rule
16 41, on the facts of this case it should be granted to compel
17 their attendance to meet with the civil party concerns for an
18 interview.

19 [14.25.20]

20 And only, at that stage, will the civil party, in my respectful
21 submission, be more properly able to more properly appraise Your
22 Honours as to the merit and necessity of calling the requested
23 witnesses for trial. Your Honours, those are my submissions in
24 relation to the filing by civil party number two, unless I can
25 assist further.

1 JUDGE CARTWRIGHT:

2 Thank you, Mr. Khan. Does any other civil party wish to make any
3 observation? No? The defence, does it have any comments it
4 wishes to make?

5 MR. ROUX:

6 Thank you, Your Honour. The defence wishes to take the floor,
7 but not on the group two list, we shall leave that discussion to
8 those people who have just had it. We have nothing to say about
9 that. We watch with keen interest, we await with keen interest
10 what will be said on the other side. However, the defence wishes
11 to share with the Chamber the questions it is asking itself with
12 regard to witnesses, but are yet to be named on list number one.
13 This is for the civil parties who have secured interim
14 recognition and who still have a time limit to comply with. The
15 defence would like, once these witnesses are known, to be able to
16 make observations and if applicable, to call counter-witnesses if
17 this is necessary. We understand that further time was granted
18 to some civil parties, it is in all fairness, in our view. But
19 then the defence, if it became necessary, should be afforded an
20 opportunity to call witnesses in rebuttal.

21 MR. KHAN:

22 Your Honour, if it assists, may I just say --

23 JUDGE CARTWRIGHT:

24 Well I'll just respond briefly to that first, Mr. Khan. Mr.
25 Roux, you will be given the opportunity to respond to the witness

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1 lists yet to be filed, and the Trial Chamber will consider your
2 other concern. Mr. Khan?

3 MR. KHAN:

4 Your Honour, I am grateful. I just wanted to go on record as
5 saying that I would fully support the position put forward by my
6 learned friend for the defence that should additional witness
7 lists be filed by any party, it is only right and proper that an
8 accused should be able to review their witness list, and decide
9 if other evidence is necessary in order to rebut or contradict or
10 clarify the evidence that they've just received. So Your
11 Honours I would support my learned friend's proposition.

12 [14.28.34]

13 JUDGE CARTWRIGHT:

14 Thank you, Mr. Khan. Now, do counsel for civil party group two
15 wish to reply to the observations that have been made? Ms.
16 Studzinsky.

17 MS. STUDZINSKY:

18 Yes. Thank you, Your Honours. First, I would like to ask the
19 Chamber if it is possible, but also if the Chamber has already
20 tried to locate witness 8, or CP2-8, and if the Chamber, if it
21 has not been done yet, intends to investigate and to find out,
22 with the information I've provided the Chamber with, to find out
23 an address of this witness. Yes?

24 JUDGE CARTWRIGHT:

25 I'll just briefly ask the President to deliberate on this

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1 matter, Ms. Studzinsky.

2 Yes, Ms. Studzinsky, this is a matter that has concerned the
3 Trial Chamber, and it will be deliberating on this very point and
4 indicating a decision hopefully during the course of the Initial
5 Hearing. Just as one extra point, do you have any further
6 information concerning the whereabouts?

7 MS. STUDZINSKY:

8 No, unfortunately not, except this document that we have
9 submitted already, and that --

10 JUDGE CARTWRIGHT:

11 Do you refer to the interview?

12 MS. STUDZINSKY:

13 Yes, exactly. But I think maybe there are still information that
14 I have given allow the Chamber to proceed and to conduct own
15 investigation on this, or maybe for example, I indicated the
16 former working place of this witness, or the translator during
17 the interview and so on, and even of the address of the
18 journalist, but so far I have no other information who can assist
19 the Chamber.

20 JUDGE CARTWRIGHT:

21 Can I inquire if you have made any efforts to locate the proposed
22 witness CP2-9, the one who did the interview?

23 MS. STUDZINSKY:

24 Yes, I had contact with this witness, CP2-9, and he agrees to
25 provide his testimony here, and so I received also, as I've

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1 indicated, his address where he can be summoned, but I have no
2 further information received about details maybe about the
3 interview or something like this, maybe the Chamber could
4 request, again, the journalist.

5 [14.33.41]

6 JUDGE CARTWRIGHT:

7 Do you wish to respond to any of the other matters raised by the
8 other parties?

9 MS. STUDZINSKY:

10 Yes, I would prefer to follow the suggestion by the Co-Prosecutor
11 and to deal with this whole issue of witnesses CP2-1, 2 and 3 in
12 closed session, and I only want to respond now so far and add
13 that we are hear before the ECCC where Cambodian law is
14 applicable, and I find no indication until now that the raised
15 questions by the group number one are not covered in the CPC or
16 in the Internal Rules, so that guidance and international
17 procedures, and he referred to the ICTY, and this guidance is not
18 necessary to assess if these witnesses should be heard or not.
19 On further comments, I would like to reserve my right to comment
20 this, but I would request the Chamber to do this in closed
21 session. Thank you.

22 JUDGE CARTWRIGHT:

23 Yes. Thank you.

24 JUDGE LAVERGNE:

25 I would like to seek a clarification from Ms. Studzinsky on

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1 witness CP2-8. It appears to me that the lawyers for group two
2 were asked to clarify whether this witness had any kind of
3 evidence to support the fact that this person had been detained
4 at S21. At this particular stage, do you indeed have any
5 supplementary information that you might provide to the Court?

6 [14.36.34]

7 MS. STUDZINSKY:

8 Concerning the link between this witness CP2-8 and her
9 imprisonment in S21, I have the interview that is mentioned in a
10 press release from 1991, and quotes this witness as a prisoner in
11 S21 who was submitted torture and in particular sexual torture in
12 S21 which this evidence and testimony that she gave to the named
13 witness CP2-9. And Your Honours, I think this should be for the
14 moment enough to show this link between this witness and her
15 imprisonment in S21 and the story about the sexual violence and
16 the mutilation. Thank you.

17 JUDGE LAVERGNE:

18 Have you done any verifications as to the lists of detainees in
19 the file?

20 MS. STUDZINSKY:

21 So far as she is under this name not mentioned as a detainee, but
22 she is mentioned in a book which is a collection of documents
23 related to the trial from 1979 and appears there as a witness but
24 at this point without being asked or without any relation to the
25 details about the sexual violence in Tuol Sleng but a more

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1 general statement. Thank you.

2 JUDGE LAVERGNE:

3 In this latest document that you're referring to, did the witness
4 mention that she was incarcerated in S21 and that she was
5 subjected to sexual violence there? Is there any mention of this
6 in the last document that you have just referred to?

7 MS. STUDZINSKY:

8 Sexual violence, as I said, is not mentioned in this book. But
9 her imprisonment.

10 JUDGE CARTWRIGHT:

11 Yes. Well, thank you. I would like now to note that the
12 deadline for civil party group two for the provision of witness
13 lists expires on the 4th of March next. I would like to inquire
14 if this group intends, at this stage, providing any further
15 additional witnesses.

16 [14.10.25]

17 MS. STUDZINSKY:

18 Your Honours, we will indicate, as soon as possible, and I think
19 really in the next day and before 4th of March if we want to
20 submit an additional witness or document list. There is only one
21 witness still pending, and I cannot today -- I'm not yet able to
22 clarify or tell the Chamber whether we will call this witness,
23 and so we can only tell you that we will indicate it as soon as
24 possible, and in the case that maybe also withdraw the right to
25 submit an addition witness list if we have the information before

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1 the 4th of March.

2 JUDGE CARTWRIGHT:

3 Yes. Thank you. Well, the Chamber notes that you have indicated
4 that you will not be waiving your right and of course you have
5 until the 4th of March to file any further list of witnesses.

6 MR. PRESIDENT:

7 Now the proceedings of the session is according to the agenda,
8 however according to our schedule we will have a break in each
9 morning and afternoon session. Now it's the break time, we will
10 have twenty minutes break, and we will adjourn and resume at 3
11 pm. Please return to your seats before 3 pm. Thank you.

12 (Court recesses from 1442H to 1512H)

13 MR. PRESIDENT:

14 Now we resume the session for the initial hearing. Next, I would
15 like to give the floor to Judge Silvia Cartwright to resume the
16 session. You have the floor.

17 JUDGE CARTWRIGHT:

18 Thank you President. Ms. Studzinsky, I would like to return to
19 our discussion concerning witness CP2/8 or A-07 and CP2/9. In
20 response to some questions put to you by Judge Lavergne, you
21 seemed to indicate that there was a reference to witness CP2/8's
22 imprisonment at S-21 in a book. Is that what you intended to
23 indicate? Could you give me the precise reference please? The
24 name of the book and the reference?

25 MS. STUDZINSKY:

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1 I would like to provide the chamber today or later after this
2 session.

3 JUDGE CARTWRIGHT:

4 Could I ask one further question then? Is the book to which you
5 refer, the record of an earlier investigation? And the witnesses
6 who were called during that period?

7 MS. STUDZINSKY:

8 It is a witness statement in this book.

9 JUDGE CARTWRIGHT:

10 Well I just need to indicate, that if we have the same witness
11 statement, we can find no reference to such imprisonment in that
12 witness statement.

13 [15.14.20]

14 MS. STUDZINSKY:

15 As I said I will provide the chamber with the information later
16 on.

17 JUDGE CARTWRIGHT:

18 Thank you. I would like to have it before we return to court in
19 the morning please Ms. Studzinsky. Thank you. I am now going to
20 turn to the witness lists of civil party group three which is
21 represented by Kim Mengkhy, Moch Sovannary, Martine Jacquin,
22 Philippe Canonne, Annie Delahaie and Elizabeth Rabesandratana and
23 further lawyers yet to be recognized
24 The lawyers for civil party group three filed a witness list on
25 20 January 2009 and another witness list yesterday, on 16

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1 February 2009, in Khmer and French. In addition, they also filed
2 summaries of the facts to which each proposed witness and expert
3 is expected to testify and the list of new documents they intend
4 to offer in the case.

5 The first list filed by this group of civil parties contains two
6 proposed witnesses they wish the Chamber to summon at trial. Both
7 witnesses are identified by their name and a number. No
8 protective measures have been requested for these 2 witnesses.

9 The Chamber will use the pseudonym "Witness CP3/1" and "Witness
10 CP3/2" for the witnesses on this list. The second list contains
11 one proposed witness, identified by her name. She will be
12 identified by the pseudonym "Witness CP3/3". The Chamber has not
13 had the time to review this list before today's Initial Hearing.

14 The lawyers of group three estimate that a minimum of
15 approximately 20 minutes will be required for the testimony of
16 the witnesses on their list.

17 In its Direction requesting additional information in preparation
18 of the Initial Hearing, dated 5 February 2009, the Chamber
19 invited the Defence to indicate whether it contests the facts
20 that Witnesses CP3/1 and CP3/2 of the above-mentioned list
21 propose to testify about. On 12 February 2009, the Chamber
22 received notification from the defence that it does not contest
23 the facts that these witnesses propose to testify about.

24 The Chamber would now like to give the parties the opportunity to
25 make any additional observations on the witness list of civil

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1 party group three. Civil party group three will have an
2 opportunity to reply after all observations have been concluded.

3 Do the Co-Prosecutors have any comments?

4 [15.17.21]

5 MR. PETIT:

6 None at this time, thank you.

7 JUDGE CARTWRIGHT:

8 Thank you. Do any other civil parties have any other comments to
9 make regarding the witness list of civil party group three?

10 MR. KHAN:

11 Your Honour, not at this time for my group.

12 JUDGE CARTWRIGHT:

13 Thank you Mr. Khan, any other civil party lawyers have any
14 observations? None? Thank you. Does the defence have any comments
15 to make regarding the witness list of civil party group three?

16 [15.17.52]

17 MR. ROUX:

18 I was waiting for the interpretation to finish, please forgive
19 me. The defence merely wishes to confirm what it wrote to the
20 Chamber, that is, that it does not intend to challenge the facts
21 about which the witnesses wish to testify in respect to a victim,
22 whose name I shall not call out. But which the Chamber is aware.
23 The defence stated that it was well aware, that if this victim
24 made statements in S-21 then it must have done so under torture,
25 and if the witness implicated anybody, she would have necessarily

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1 done so under torture, and therefore there is no reason to attach
2 any value to a statement taken under torture.

3 The defence therefore confirms that it does not challenge the
4 testimony of these witnesses which may not be indispensable
5 because they are coming after all from very far to give testimony
6 for 10 minutes only about matters that I am not in dispute
7 although of course the defence wishes to register its respect for
8 the two witnesses.

9 With regard to the second list the Chamber has been in a better
10 position than the defence because the defence is yet to receive
11 the second list.

12 [15.20.01]

13 JUDGE CARTWRIGHT:

14 Yes, thank you. Is there any comment that lawyers for civil party
15 group three wish to make in response? Nothing?

16 MS. JACQUIN:

17 Thank you for giving us the floor. We emphasize the calling of
18 these two witnesses because we consider that these two witnesses
19 who agreed to come and testify in person are in a position to
20 provide information to the Chamber and to shed light on the
21 matters that the Court is dealing with in a non-negligible
22 fashion. They are in a position to give testimony that goes to a
23 fact which was not dwelt on at length in the investigation which
24 because it seemed obvious, however, I think every point should be
25 elucidated to determine whether it is true or false because, if

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1 the facts pertaining to some points are real, then it would shed
2 a different light on some of the other counts.

3 It could put a totally different construction on facts. A number
4 of the charges were completely unreal and these witnesses will
5 change that. They will give a view of importance of how this
6 affected the circumstances in S-21.

7 What we expect from these witnesses is to find out the reality.

8 It is obvious that as we discovered in these documents that these
9 two people will be able to shed light and provide accuracy, even
10 if they come from afar. They will shed light on an important
11 point both for the survivors and civil parties, which is they
12 will know the realities that underpin some of the charges. I
13 would also like to say that we might well, submit an additional
14 list of three or four witnesses.

15 JUDGE CARTWRIGHT:

16 Yes, thank you Ms. Jacquin. I was about to note that you have
17 until the 4th of March to submit any further witness lists, and
18 from your comments I infer that you are not waiving that right.

19 Thank you.

20 The witness list of civil party group four is the next matter.

21 [15.23.05]

22 Civil party group four is represented by Hong Kimsuon and
23 Pierre-Olivier Sur. The Chamber has not received any witness list
24 from this Group and its deadline to file its witness list expired
25 on 16 February 2009.

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1 I turn now to the witness list for the defence. The defence filed
2 its witness List on 27 January 2009 in Khmer and French. In
3 addition, it filed summaries of the facts to which each proposed
4 witness and expert is expected to testify and a list of new
5 documents it intends to offer in the case.

6 The list filed by the Defence contains 13 proposed witnesses it
7 wishes the Chamber to summon at trial. All of the witnesses are
8 identified by their name and a number. Eight of these witnesses
9 are character witnesses. five are expert witnesses. No protective
10 measures have been requested for any of the witnesses. The
11 Chamber will use the pseudonym "Witness D-assigned witness
12 number" for all witnesses on this list. The defence estimates
13 that a minimum of approximately 23 hours and 15 minutes, which
14 amounts to approximately 4.5 trial days, will be required for the
15 testimony of the witnesses on their List.

16 The Chamber would now like to give the parties the opportunity to
17 make any additional observations on the Defence witness list. Do
18 the Co-Prosecutors have any comments to make regarding the
19 Defence witness list?

20 MS. CHEA LANG:

21 Thank you, Madame Judge. At this time the Co-Prosecutors would
22 like to rest our remarks on the list of the co-lawyers of the
23 accused, which the co-lawyers submitted to the judges, in general
24 the Co-Prosecutors think the witnesses are not relevant to the
25 charges made by the Prosecutors. Secondly, most of the witnesses

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1 are character witnesses for the accused, from his childhood until
2 his adulthood. Third, other witnesses just wish to clarify for
3 the leniency on the sentencing of the accused.

4 Due to the testimony intended to be made by the witness on the
5 character of the accused which consume a number of days of the
6 court days, and at this stage we have a number of witnesses so we
7 need to consider to select important witnesses to provide
8 testimony during the trial. Particularly to select the witnesses
9 which are relevant to the charges made by the Prosecutors. This
10 is the remarks by Prosecution and I would like the Trial Chamber
11 Judges to decide on this issue. Thank you.

12 [15.27.23]

13 JUDGE CARTWRIGHT:

14 Yes. Thank you. Mr. Petit?

15 MR. PETIT:

16 To clarify, as my colleague said, obviously the Trial Chamber
17 will have to keep in mind the amount of time required to properly
18 assess all the relevant evidence and in so doing will assess the
19 need for testimonies. Obviously we understand and as been
20 announced from the very beginning that the defence intends to
21 bring forth evidence, as my colleague rightly pointed out, that
22 relate to an eventual sentence of the accused. Hence the
23 character witnesses or witnesses identified from 1 to 8 or D1 to
24 D8.

25 As to the witnesses identified from D9 to D13, I would note a

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1 couple of points, or have a few observations, first of all of the
2 witnesses are qualified by the defence as expert witnesses. Now,
3 in different jurisdiction the terms mean different things. I
4 think common thread though throughout those definition is that to
5 be qualified as an expert, a witness must be able to bring to the
6 trial, facts and expertise that the Chamber cannot otherwise
7 have, and having been assessed as an expert -- in other words
8 having established the factual basis, the professional and
9 personal experience that qualifies this person to render opinion,
10 can do so and have those opinions taken into consideration by the
11 Chamber, I leave it to your discretion to evaluate whether if the
12 witnesses identified as expert witness from D9 onwards, do indeed
13 qualify as experts before this Chamber according to criteria it
14 will no doubt establish and we obviously stand ready to assist in
15 that establishment of appropriate criteria for this Court to be
16 qualified as an expert.

17 I particularly would question the expertise of Witness D13, whose
18 sole apparent relevance as described very summarily in the
19 defence filing that would indicate that she would talk about the
20 road to reconciliation. I note that obviously one of the purposes
21 of this court is to promote reconciliation in Cambodia. I would
22 personally, and I think all of us would, welcome expert opinion
23 on the Cambodian context of reconciliation, and how this Court
24 fits within it. Perhaps that expertise is not available, hence
25 the choice of the defence of these various experts some from far

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1 flung destinations indeed. I would however raise one precise
2 point as to the expertise of witness D12. Specifically his
3 qualification to render any opinion and I quote the last phrase
4 or part of the description given by the witnesses that this
5 witness would speak to I quote "the impact of such a system on
6 human behaviour".

7 I am not aware of any material supporting this person's expertise
8 in human behaviour, psychology, sociology or any of the other
9 related fields. I do not question that this individual has
10 studied the factual context and can render assistance to the
11 Trial Chamber and to the parties about that context of the crimes
12 committed during the DK era, I will however, question that
13 person's ability to testify as an expert on human behaviour. And
14 obviously will intend to do so if that person will be called as a
15 witness. Thank you.

16 [15.32.20]

17 JUDGE CARTWRIGHT:

18 Thank you Mr. Petit. Do any of the civil parties wish to make
19 with regard to the witness list of the defence?

20 MR. KHAN:

21 I am grateful, Your Honour. I will not address you on the issue
22 of expert witnesses that has just been referred to by my learned
23 friends for the prosecution. But generally speaking it is my
24 respectful submission that the list assembled by the defence
25 appears to have been very carefully considered is focused and

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1 indeed in a case of this type for a defence case to take up only
2 four days is a matter that my learned friends for the defence
3 deserve to be applauded for. Your Honours those are my only
4 submissions and on behalf of my civil party we look forward to
5 hearing those witnesses come before the Court and speak to Your
6 Honours.

7 JUDGE CARTWRIGHT:

8 Thank you Mr. Khan. Lawyers for any of the other civil parties?
9 Mr. Sur?

10 MR. SUR:

11 Your Honour, I waive present calling of witness for group four of
12 the civil parties for the following reason, and then I shall move
13 on to the point of issue now. The reason is that the accused has
14 fully acknowledged the facts and in support of the prosecution,
15 it did not seem to us, the civil parties who are in second place
16 as it were, it did not seem to us necessary to call witnesses or
17 factual witnesses. The civil parties are not interested in the
18 sentence as such. Judge Lavergne recalled a while ago or made
19 reference to points 23(1) which define civil party action.

20 First report the prosecution and request reparations but, the
21 civil parties are interested in the character of the accused:
22 His previous character, his character during the period under
23 this courts jurisdiction, and his character now. Which is why we
24 support the witness list as presented by the defence lawyer both
25 with regard to what he said at the beginning when he requested

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1 that his client be the subject of another psychological exam and
2 with regard to his character based on the character witnesses
3 that he wishes to call with respect to the period preceding the
4 events.

5 [15.33.16]

6 JUDGE CARTWRIGHT:

7 Thank you Mr. Sur, Mr. Khan?

8 MR. KHAN:

9 Your honour with your indulgence I am not going to address the
10 point put forward by my learned friend Mr. Sur, sufficient to say
11 the position of civil party number one is somewhat different to
12 the position advanced by my learned friend in relation to civil
13 party number four, as of course is evidenced by the witness list
14 and experts that we have put before Your Honours for
15 consideration.

16 Your Honours I don't intend to re-hash or to go into detail as to
17 our position, of course Your Honours may be interested or not in
18 relation to why a witness list was not filed by civil party
19 number four but Your Honours for the record, the position of
20 civil party number one as to the scope of civil party
21 participation is different with the greatest of respect to that
22 which has just been adumbrated. There is no necessity for us to
23 have identical positions. But I thought it was just appropriate
24 to say on this particular issue at least there is some daylight
25 in our respective positions. I am grateful.

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1 JUDGE CARTWRIGHT:

2 Thank you Mr. Khan. Counsel -- Mr. Hong Kimsuon?

3 MR. HONG KIMSOUN:

4 Thank you very much, as the national lawyer along with the
5 international lawyers we note that the right to include witness
6 lists is exercised through the direction requesting for the list
7 of witnesses to be submitted and the reason that Mr. Sur did not
8 request for any additional witnesses. I think I support the
9 Co-Prosecutor concerning the character witnesses because in this
10 case file it is more about the psychological forensic evidence
11 and we need experts and only when we add witnesses to record
12 historical background of an accused for example his childhood I
13 think we probably add more unnecessary witnesses to the list, and
14 I think so far, as I remember, in the last trial management
15 meeting there would be 40 days required for hearing those
16 witnesses.

17 And to add more witnesses I am afraid the trial hearing would be
18 delayed further, so if the witnesses are not really the real
19 experts and their testimony would not be irrelevant so I would
20 like to leave it to your discretion to reduce this number of
21 witnesses because Cambodian people have been waiting for several
22 years already to see the beginning of the substantive hearing so
23 we want really only witnesses who really witnessed the suffering
24 directly in those regimes who actually can testify against or
25 about the roles of the accused and I think it would be wise to

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1 include such witnesses. So I wish the Chamber to reduce witnesses
2 who are only purely character witnesses.

3 [15.39.38]

4 JUDGE CARTWRIGHT:

5 Thank you Mr. Kimsuon. Now no other civil parties wish to
6 comment? In which case I will invite the defence to respond.

7 MR. ROUX:

8 Thank you Your Honour. This is an interesting discussion. It is
9 interesting to hear the positions -- the varying positions taken
10 by some of the civil parties, and the Office of the
11 Co-Prosecutors. I would like to buttress my observations on two
12 points. The text, and jurisprudence. With regard to the texts, I
13 will make reference to Article 116 of the Cambodian Criminal
14 Code, which I would like to respectfully bring to the attention
15 of my colleague on the other side, so as I was saying Article 116
16 makes provision for the punishment under law for crimes and it
17 says that such punishment should be converted or reduced
18 depending on the age of minority or the senility of the person
19 who has been found guilty and that sentencing can be further
20 reduced if it is decided that there are mitigating circumstances
21 in the case.

22 [15.42.05]

23 The other text, to which I wish to make reference is the statute
24 of the Nuremberg Court, in whose Article 8 it is provided, and I
25 would add that this is one of the basis of what is now known as

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1 transitional justice, it says the fact that the accused acted in
2 accordance with instructions by the accused government or a
3 superior does not absolve the accused of his or her
4 responsibility. However, it may be considered in mitigation of
5 the sentence if the court decides that it is in the interests of
6 justice. I refer to a mitigating circumstance, which might arise
7 either because of the character as was recorded or mentioned by
8 the civil parties or depending on the context as one of or expert
9 witnesses will indicate.

10 Furthermore the other foundational aspect is that of doctrine,
11 as I was saying and here I would like to recall what has been
12 written about transitional justice and in particular, for the
13 French speakers who might be interested may I refer them to the
14 book of Pierre Hazan, its called "Judging War, Judging History".
15 This book recalls the foundations of transitional justice and in
16 this context it says the following on page 12 and I quote "a
17 crime against humanity by its very essence, unbinds humans but
18 the transitional justice seeks to accomplish the reverse journey
19 that's to say restoration of the link that rebinds humans in
20 society towards the re-foundation of a equality." And
21 furthermore, on page 53 and I quote "reconciliation demands that
22 both victims and perpetrators manage to accept the past rather
23 than consider the past to be just a mere foreshadowing of the
24 future it requires that they be in a position to perceive the
25 humanity of the other, that they accept each other and that they

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1 be capable of contemplating the possibility of a constructing
2 positive relationship."
3 And lastly, page 102, I quote "transitional justice has one key
4 word or concept which is truth, justice, forgiveness,
5 reconciliation this is one key formula." I end my quotes at this
6 point. I don't think the defence has, when it suggested a list
7 of only 13 witnesses only 4.5 days worth of hearing time and
8 thank you very much for having noted this, when in fact the other
9 side is requiring 40 days of witness testimony for an accused who
10 pleads guilty and seeks forgiveness. So let's put our attention
11 where it is required. Consequently the defence believes that the
12 witnesses that we wish to summon and in particular those who we
13 consider to be expert witnesses we think that these witnesses
14 should be able to go to the very core of what we're about here -
15 which is seeking transitional justice.
16 And on this issue of expert witnesses, I would like to say to my
17 distinguished contradictor Mr. Robert Petit, that, once again, we
18 are not in a common law system where experts are summoned to
19 testify under pressure in a cross examination system; they're not
20 supposed to justify and to account for merits, and de-merits. I
21 am aware of this system I have experienced it in the Mousawi
22 trial in the USA where we spent two hours before a witness could
23 justify - - It took him two hours to justify that he was an
24 expert. Please let us avoid the meanders of this kind of debate
25 which in this particular place would be totally sterile, useless.

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1 The only thing that the Chamber needs to verify is whether the
2 expert witnesses who will appear before this Chamber whether
3 these people are indeed highly ethical persons and whether their
4 known experience and expertise does qualify them to offer truly
5 authoritative testimony. Our expert witnesses have indicated to
6 us that they had no difficulties with my mentioning their names
7 so that I can publicly say that I frankly don't imagine who might
8 possibly want to come and challenge the quality and expertise of
9 Professor Henry King, former prosecutor at the Nuremberg
10 tribunal.

11 [15.50.19]

12 Who would wish to challenge this person and bar him from giving
13 testimony here? Similarly who would challenge the credentials of
14 Richard Goldstone who was a prosecutor at international tribunals
15 and who will talk about the admission of guilt and talk about the
16 sanctions already handed down in cases of accused pleading guilty
17 in other jurisdictions. The competence, and the expertise of his
18 Excellence Ambassador Stephane Eisen, who is now 91 years old,
19 one of the drafters of the universal declaration of human rights
20 who was deported in the Buchenwald camp. Who on earth might
21 challenge his right and expertise as a person who can speak for
22 reconciliation here?

23 Marie Claude Gibraroux, a widow of the Canac Freedom movement
24 leader Jean Marie Gibraroux/ Who would deny this woman the right
25 to speak about reconciliation when this woman has suffered in her

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1 flesh and in her spirit of the consequences of the murder of her
2 husband? Undoubtedly, this is Cambodia and the tragedies
3 experienced by humans know no borders the trajectories here and
4 there to develop resilience, these trajectories are also without
5 borders. So please, let us be humble and respectful when we
6 listen to what such witnesses can convey to us because they will
7 be very helpful for the work that we all must do here.
8 And lastly, as regards Mr. Genard a well known expert on Cambodia
9 who would challenge the quality of his expertise because he can
10 explain to us how the regime in which our client was both as he
11 said, an actor and a hostage of the crimes perpetrated. That
12 witness will be an expert to tell us about how this regime
13 worked. Please, Co-Prosecutors do not prevent us from speaking
14 to the substance of the debate do not prevent us from calling to
15 testify people who can talk about the childhood of Duch. Please
16 keep in mind just this one major question. Have you ever seen a
17 child, who in his childhood or her childhood was dreaming of one
18 day becoming an executioner? Is this debate without any
19 relevance or interest to you?

20 [15.53.56]

21 JUDGE CARTWRIGHT:

22 Thank you Mr. Roux, I just need an opportunity to ask the
23 president if he wishes to deliberate on a matter.

24 [15.56.50]

25 This is the point at which the Trial Chamber anticipated holding

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1 a closed session which would enable it to speak more openly with
2 the lawyers for all parties concerning witness lists. Rather than
3 do that at this stage of the day, the President has indicated
4 that we will finish the hearing now, we will resume tomorrow
5 morning at 0900 hours and at that stage it will be a closed
6 session. This means that members of the public in the public part
7 of the court will be able to be in the courtroom but will not be
8 able to hear what is being said.

9 Following that private session which I anticipate will last at
10 least half an hour it's very likely that the President will wish
11 to retire to deliberate and then the Trial Chamber will resume in
12 open session.

13 MR. PRESIDENT:

14 Thank you Madame Judge now is the time to have a private session
15 but because it is almost the end of the session and we only have
16 15 minutes left we won't be able to hold a private session.

17 Therefore, the Trial Chamber declares adjournment to this
18 afternoon's session and we will resume the session again at 0900
19 hours tomorrow morning. So I would like to invite all the
20 participants and parties that wish to attend the parties
21 tomorrow, please return to the courtroom before 0900 hours. And
22 the Trial Chamber will retreat for the deliberation of the
23 witness raised by the co-lawyer of the accused.

24 Security take the accused back to the detention cell and return
25 him back tomorrow morning before 9 am tomorrow morning.

1 (Court adjourns at 1539H)
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