



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

ឯកសារដើម
ORIGINAL/ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ (Date): 07-Jul-2011, 14:07
CMS/CFO: Uch Arun

TRANSCRIPT OF INITIAL HEARING
NUON CHEA, IENG SARY, IENG THIRITH, KHIEU SAMPHAN
PUBLIC
Case File N° 002/19-09-2007-ECCC/TC

27 June 2011, 0900H

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

The Accused: NUON Chea
IENG Sary
IENG Thirith
KHIEU Samphan

For the Accused: SON Arun
Michiel PESTMAN
Victor KOPPE
ANG Udom
Michael KARNAVAS
PHAT Pouy Seang
Karlijn VAN DER VOORT
SA Sovan
Jacques VERGÈS

Trial Chamber Greffiers/Legal Officers:
SE Kolvuthy
DUCH Phary
Franziska ECKELMANS
Natacha WEXELS-RISER

For the Office of the Co-Prosecutors:
CHEA Leang
Andrew CAYLEY
CHAN Dararasmey
William SMITH

For Civil Parties
PICH Ang
Elizabeth SIMONNEAU-FORT
MOCH Sovannary
HONG Kimsuon
Martine JACQUIN
Olivier BAHOUGNE
Lyma NGUYEN
Silke STUDZINSKY
Emmanuel JACOMY
Philippine SUTZ
Fabienne TRUSSES-NAPROUS
Pascal AUBOUIN

For Court Management Section:
UCH Arun

List of Speakers:

Language used unless specified otherwise in the transcript

| Speaker | Language |
|--|-----------------|
| MR. ANG UDOM | Khmer |
| JUDGE CARTWRIGHT | English |
| MR. CAYLEY | English |
| MS. CHEA LEANG | Khmer |
| MS. JACQUIN | French |
| MR. KARNAVAS | English |
| MR. KOPPE | English |
| JUDGE LAVERGNE | French |
| MS. MOCH SOVANNARY | Khmer |
| MR. NUON CHEA | Khmer |
| MR. PESTMAN | English |
| MR. PHAT POUV SENG | Khmer |
| MR. PICH ANG | Khmer |
| THE PRESIDENT (Nil Nonn, Presiding) | Khmer |
| MR. SA SOVAN | Khmer |
| MS. SIMONNEAU-FORT | French |
| MR. SON ARUN | Khmer |
| MS. VAN DER VOORT | English |

1

1 PROCEEDINGS

2 (Judges enter courtroom)

3 [09.00.07]

4 MR. PRESIDENT:

5 Please be seated.

6 Today, Monday the 27th of June 2011, the Trial Chamber of the
7 Extraordinary Chambers in the Courts of Cambodia started a
8 hearing on Case number 2 concerning the fore accused: 1) Nuon
9 Chea, male, born on the 27th of July 1926; 2) Khieu Samphan,
10 male, born on the 27th of July 1931; 3) Ieng Sary, male, born on
11 the 24th of October 1952; and Ieng Thirith, female, born on the
12 10th of March 1932, all of whom are charged with crimes against
13 humanity -- genocide -- through the killing of members of the
14 Chams and the Vietnamese, grave breaches of Geneva Convention of
15 the 12th of August 1949 and violation of the 1956 Cambodian Penal
16 Code which includes murder, torture, and religious persecution
17 which have actively and passively been acted through joined
18 criminal enterprise, planning, instigating, ordering, aiding and
19 abetting, committed in Phnom Penh within the territory of
20 Cambodia and during the period from 1975, the 17th of April
21 through the 6th of January 1979.

22 The Bench is composed of Judges Nil Nonn, myself, the President,
23 Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne, Thou Mony, and
24 reserve Judges You Ottara, Claudia Fenz.

25 This initial hearing is held pursuant to Rule 80 bis of the

2

1 Internal Rules. In accordance with this rule and as described in
2 the agenda issued to the parties on the 14th of June 2011, the
3 Chamber shall at this hearing consider the list of potential
4 witnesses, civil parties, and experts submitted by the parties as
5 relevant to the first segments of the trial.

6 {09.04.15}

7 It will further consider preliminary objections pursuant to
8 Internal Rule 89 and has allotted time to the civil party lead
9 co-lawyers to provide initial specification of the substance of
10 the reparations awards they intend to seek are pursuant to
11 Internal Rule 23 quinquies 3(b).

12 Although the agenda is intended to provide guidance to the
13 parties on the scheduling of the initial hearing, all dates and
14 times are indicative only. These dates and times are subject to
15 change based on progress over the following days on all items for
16 discussion.

17 [09.24.48]

18 Before we proceed to the actual hearing as planned, the Chamber
19 would like to invite Mrs. Se Kolvuthy to report on the presence
20 of the parties to the proceeding.

21 THE GREFFIER:

22 Good morning, Mr. President. Parties who are present and absent
23 include -- the prosecution is present. The accuseds are all
24 present except -- our national co-lawyers are present and Diana
25 Ellis, the international co-counsel for Ieng Thirith, is absent.

3

1 The civil party lawyers are present, 13 people all together.

2 MR. PRESIDENT:

3 Thank you, Mrs. Se Kolvuthy.

4 Next we proceed to the recognition of foreign lawyers. Before we
5 start the hearing, the Chamber would like to invite each national
6 lawyer pursuant to Rule 22.2 (a) to proceed with any requests for
7 the recognition of foreign lawyers not previously recognized by
8 the Chamber.

9 (No interpretation)

10 MR. PRESIDENT:

11 We shall now start from counsel Sa Sovan team and we would like
12 to invite him to seek -- or proceed with a request for
13 recognition of his co-counsel.

14 MR. SA SOVAN:

15 Good morning, Mr. President, and thank you, Your Honours.

16 [09.07.36]

17 I would like to now introduce counsel Jacques Vergès the
18 international co-lawyer for Mr. Khieu Samphan, the former Head of
19 State.

20 MR. PRESIDENT:

21 Thank you, Mr. Sa Sovan. Mr. Jacques Vergès, you are now
22 recognized by this Trial Chamber as a defence lawyer for the
23 purposes of the trial proceedings before this Chamber. Pursuant
24 to this recognition, you enjoy the same rights and privileges as
25 a national lawyer. Please be seated Mr. Sa Sovan.

4

1 (No interpretation)

2 MR. PRESIDENT:

3 The Chamber has noted the presence of Mr. Pich Ang and Mrs.

4 Elizabeth Simonneau-Fort, the international civil party lead

5 co-lawyers appointed by the ECCC in accordance with the

6 provisions of Rule 12 ter of the rules.

7 Next, we would like to invite Mr. Pich Ang, national civil party

8 lead co-lawyer, to request the recognition of the foreign civil

9 party lawyers in attendance in accordance with the provisions of
10 Rule 22.2(a) of the rules.

11 THE INTERPRETER:

12 Mr. Pich Ang microphone is not activated.

13 (No interpretation)

14 MR. PICH ANG:

15 Good morning, Mr. President, Your Honours.

16 [09.09.45]

17 The Co-Prosecutors and counsels for the accused and everyone in

18 and outside this courtroom, I am Pich Ang and I would like to add

19 a little bit and I think the greffier of the Trial Chamber

20 already indicated the presence of the civil party co-lawyers here

21 we have with us. Only I am alone as the national co-lawyer. The

22 other national co-lawyers are not available to be here since the

23 seats are limited. They will be attending these proceedings

24 during the break, I think perhaps at 10 o'clock.

25 With regard to the recognition of the international co-lawyers

5

1 for the civil parties, I am honoured to indicate that there are
2 nine civil party lawyers here -- present in this courtroom. We
3 have already requested for the recognition of two international
4 co-lawyers and these nine civil party international co-lawyers
5 are representing 3,850 civil parties all together. And I have
6 referred to the statistic by the figure released by the Court
7 recently and in light of that -- of the Court release statement,
8 these counsel have been appointed to represent them fully and the
9 civil parties have been very grateful
10 to the decision by the Pre-Trial Chamber regarding the civil
11 party applications. Behind me there are nine co-lawyers which --
12 that I would like to really seek recognition from the Trial
13 Chamber.

14 First, may I introduce -- may I seek recognition of Ms. Lyma
15 Nguyen? Could you please rise? She is an international
16 co-lawyer from Australia representing foreigners who are
17 Cambodian civil parties living abroad and they are ethnic
18 Vietnamese. She -- representing the clients with counsel Sam
19 Sokong from the Legal Aid of Cambodia or LAC.

20 [09.13.00]

21 Number 2, Mr. Olivier Bahougne, international co-lawyer from
22 France. He is representing victims, the Chams, and also victims
23 who have been -- suffered from the crimes committed on the
24 religious grounds and he representing the clients from the --
25 counsel from the LAC.

6

1 I would like to introduce another counsel, Emmanuel Jacomy, from
2 France as well. He represents civil parties in France and in
3 Cambodia and he works with Sam Sokong.
4 Number 4, Ms. Philippine Sutz. She is an international co-lawyer
5 from France and she is representing clients with Mr. Emmanuel
6 Jacomy and counsel Sam Sokong.
7 Number 5, Ms. Silke Studzinski who is present today in this
8 courtroom. She is an international co-lawyer from Germany. She
9 is representing general civil party lawyers and in particular
10 those clients who suffered from the gender based violence. And
11 she is from the -- worked with lawyers from LAC and also CDP.
12 Mr. Pascal Aubouin, number -- co-counsel from France. He
13 represents clients from France and he works with his
14 co-colleague, Mr. Hong Kimsuon, from CDP.
15 [09.15.25]
16 Number 7, Mrs. Martine Jacquin. She is an international
17 co-lawyer from France. She is French and she is representing
18 general clients along with her two national co-colleagues, Mr.
19 Kim Mengkhy and Mrs. Moch Sovannary.
20 Mrs. Fabienne Trusses-Naprous also representing clients in the
21 same group and she is from France. She is representing clients
22 along with counsels Moch Sovannary and Kim Mengkhy.
23 Last, but not least, counsel number 9, Counsel Christine
24 Martineau, French national, international co-lawyer from Avocats
25 Sans Frontiers. She represents her clients along with counsels

7

1 Kim Mengkhy and Moch Sovannary.

2 Your Honour, these are all the civil party co-lawyers who are
3 representing the clients for the time being in this courtroom and
4 I would like to seek the Chambers recognition so that they can
5 fully represent their clients before the ECCC.

6 I am very grateful, Your Honours.

7 MR. PRESIDENT:

8 Thank you very much Counsel Pich Ang.

9 The nine civil party co-lawyers as represented by Counsel Pich
10 Ang and seek recognition by the Trial Chamber, now, you are
11 recognized by this Chamber as the civil party lawyers for the
12 civil parties and for the purpose of the trial proceedings before
13 this Chamber. Pursuant to this recognition, you enjoy the same
14 rights and privileges as the national co-lawyers for the civil
15 parties.

16 [09.18.25]

17 Next, we would like to inform the court officers that in order to
18 facilitate the smooth operation or functioning of the proceedings
19 and in particular with regard to the advanced age of the accused,
20 we would like to instruct that the curtain of the courtroom is
21 drawn closed when the Judges of the Bench is -- are proceeding to
22 the deliberation room. And this is a general instruction unless
23 there is a new amendment to this current instruction.

24 Next, we proceed to the other item of the agenda concerning the
25 pronouncement of the list of witnesses. At the Trial Management

8

1 Meeting, the Chamber advised the parties of its intention to
2 commence the hearing of the substance in the following order:
3 number 1) the structure of Democratic Kampuchea ; 2) roles of
4 each accused during the period prior to the establishment of
5 Democratic Kampuchea including when these roles were assigned; 3)
6 role of each accused in the Democratic Kampuchean Government,
7 their assigned responsibilities, the extent of their authority
8 and the lines of communication throughout the temporal period
9 with which the ECCC is concerned, and number 4) policies of
10 Democratic Kampuchea on the issues raised in the indictment.
11 The purpose of this early indication was to give advance
12 notification to the parties regarding the sequence and
13 organization of the trial. The Chamber also advised that it
14 would give advance notice of which witnesses, experts, and civil
15 parties will be called by the Chamber in relation to each segment
16 so as to allow timely preparation by the parties and Witness and
17 Expert Support Unit.
18 To assist the Chamber in its identification of witnesses relevant
19 specifically to these early trial segments, the parties were
20 requested to provide supplementary lists of all witnesses, civil
21 parties, and experts sought by the parties in relation to these
22 early segments no later than 20th of June 2010.
23 [09.22.10]
24 Based on these supplementary submissions and the parties' earlier
25 witness, civil party, and expert lists, the Chamber has since

9

1 drawn up a tentative list of witnesses, civil parties, and
2 experts that it intends to call during the first trial segments.
3 In order to avoid resorting to closed session at this stage, the
4 Chamber has prepared for the parties a written list of witnesses,
5 civil parties, and experts tentatively proposed for these early
6 trial segments. This will now be distributed to them. Court
7 official is now invited to distribute the list to parties.

8 (Court officer distributes witness lists)

9 MR. PRESIDENT:

10 Mr. Son Arun, you may now proceed.

11 [9.23.45]

12 MR. SON ARUN:

13 I am Son Arun, national co-lawyer representing Nuon Chea.
14 First of all, Your Honours, Mr. President of the Trial Chamber,
15 my client is of advanced age and his health is deteriorating. I,
16 therefore, request Your Honours to allow him to wear the hat
17 because he has been affected by the circulation of the air
18 conditioning without wearing that hat and on top of that, we
19 would like to ask that he could wear his sunglasses to protect
20 his eyes from this glaring light in the courtroom.

21 Furthermore, in my capacity as the co-lawyer for Nuon Chea, I
22 already wrote a letter to the CMS so that the desk for Nuon
23 Chea's counsel who has already been recognized as the full-
24 rights counsel as the other counsel to -- of course, we requested
25 that the desk is prepared so that it can accommodate the counsel

10

1 comfortably, but it has not been -- the request has not been
2 entertained and as I already indicated, we would ask that we
3 enjoy the same right -- equal rights as the other parties to the
4 proceedings so that we can actually comfortably remain seated
5 when representing our client in this particular courtroom. We
6 already made the request to Mrs. Nisha so that she could --
7 actually, I mean the head of the DSS so that the message can be
8 communicated to the Trial Chamber or to the CMS, but the response
9 is rather negative because they said that these desks can only
10 accommodate -- I mean the desk has already been fixed and I'm
11 afraid that the status quo remains. We are afraid if the hearing
12 lasts several months then we will have much difficulties
13 consulting our colleague or client.

14 [09.27.00]

15 Thank you.

16 MR. PRESIDENT:

17 Thank you, Mr. Son Arun.

18 MR. SON ARUN:

19 My client would like to have a few words before this Chamber. I
20 believe that he will be brief if Your Honours allow.

21 MR. PRESIDENT:

22 Please let the Bench solve the issues concerning your request for
23 your client to wear a hat and glasses in the courtroom. The
24 Chamber finds that it is appropriate that your client can be
25 allowed to wear the hat because he may not be used to the

11

1 condition in the courtroom. And when it comes to the glasses, of
2 course, he will be allowed to wear sunglasses to protect his
3 eyes.

4 [09.28.07]

5 Regarding the desk, we have taken note of your request and we
6 hope the CMS will be well communicated and we believe that it is
7 not really a very big concern to be addressed and we are
8 convinced that this will be resolved as soon as possible.

9 And we would like now to hear from Nuon Chea. You may speak
10 while remain seated.

11 MR. NUON CHEA:

12 First of all, my sincere respect to Your Honour, the President,
13 and the Judges of the Bench, my fellow Cambodian citizens, inside
14 and outside Cambodia.

15 I am not happy with this hearing and I would like to make -- to
16 allow my co-counsels to actually explain the reasons behind this.

17 MR. PRESIDENT:

18 We allowed the accused to briefly speak of what is on his mind
19 and that should be brief. For other matters, the Chamber will
20 not allow it because it's outside the agenda for this particular
21 initial hearing.

22 You may now be seated and we will proceed with our proposed
23 agenda. You may speak when the time comes. We can't still allow
24 your clients to briefly speak and besides that you are not
25 allowed to stand and to speak when the time is not yours. And

12

1 for other miscellaneous matters, it will be at the end of the
2 initial hearing.

3 [09.31.20]

4 This list is provided to the parties on a strictly confidential
5 basis.

6 MR. PESTMAN:

7 I have a point of order I would like to raise with regard to the
8 agenda.

9 [9.32.00]

10 MR. PRESIDENT:

11 How much time will you need to make this short speech? You may
12 proceed.

13 MR. PESTMAN:

14 Thank you very much.

15 As my client explained, he's not very happy. I would like to
16 explain why he's not very happy. This is not an Initial hearing.

17 It may be in the case against Ieng Sary, but not against -- in
18 the case against our client.

19 [09.32.48]

20 As you know, we have raised several preliminary objections and,
21 most importantly, our main objection was against the judicial
22 investigation carried out by the Investigating Judges that was so
23 unfair and so harmful to the rights of our client, Nuon Chea,
24 that we think -- that we are of the opinion and so is our client
25 that these proceedings should be terminated.

13

1 We also asked for over 300 witnesses, witnesses we think should
2 be heard in public. Witnesses about the whole historical context
3 of this trial, of these proceedings, of the conflict, and also
4 witnesses on the judicial investigation. We wonder why we
5 bothered.

6 This Trial Chamber, Your Honours, have set an agenda for a
7 full-day hearing when none of our objections and none of our
8 witnesses will be discussed although the rules of this Court
9 state that these objections and all of our witnesses should be
10 discussed in this very hearing.

11 Our client sincerely believes that he has the right to raise
12 preliminary objections and he believes he has the right to
13 explain why these objections are so fundamental that they should
14 be discussed before the beginning of the trial, and he believes
15 that they should be allowed -- by all of his witnesses, he should
16 be allowed to explain why all of his witnesses should be heard at
17 trial.

18 And crucially, our client, Nuon Chea, he believes that all of
19 this discussion should be done in public, should be made in
20 public for the benefit of the Cambodian people.

21 [9.35.00]

22 Why is our client, Nuon Chea, not given the opportunity to
23 explain? Why is he not allowed to explain why the judicial
24 investigation was so unfair, fundamentally unfair?

25 The sole purpose of the judicial investigation was to collect

14

1 evidence against our client and to ignore all the evidence that
2 could put his role during the Khmer Rouge year in a different,
3 more positive light.

4 Why can he not explain? Why can he not say so? Why are we not
5 allowed to tell this Court today to explain to the people of
6 Cambodia that the government has from the very beginning
7 obstructed the investigation in the case against our client like
8 they're now doing in Cases 3 and 4?

9 We sympathize with the prosecutor and understand, fully
10 understand his current frustrations about Case 3 and 4.

11 We have filed over 20 -- 26, to be precise, requests for
12 investigative action, and the investigating Judges largely
13 ignored them. They didn't do anything with them.

14 [9.36.20]

15 Why were the terrible American bombings of Cambodia, why were
16 they not investigated and their lasting impact on this -- on the
17 people in this country? And why not the dubious role played by
18 Vietnam, the Vietnamese in this country, in Cambodia, before,
19 during and after the Khmer Rouge years?

20 Is this Court trying to bury history? And why? Why were these
21 indispensable insider witnesses, seven witnesses, why were they
22 not heard by the investigating Judges? It is not because we
23 didn't ask for them. It is not because there was no reasons to
24 hear them.

25 [9.37.10]

15

1 These insider witnesses were all important, key figures in the
2 eastern zone where, according to the prosecutor, terrible crimes
3 happened and took place. These insider witnesses, these
4 important, key witnesses, were not heard because the country of
5 this -- the government of this country failed to cooperate. They
6 simply ignored Court Orders.

7 The way the initial investigation unfolded shows that this
8 government still fails to understand the importance, the crucial
9 importance, the meaning of an independent judiciary. Government
10 should not tell Judges what to do.

11 And there is strong evidence that that is exactly what happened
12 in the investigation, the Judicial investigation against Nuon
13 Chea. And that is what our client would have liked to explain
14 today and in the coming days.

15 [9.38.10]

16 As said, that judicial investigation was so unfair that the case
17 against Nuon Chea should be stopped and should not go to trial.

18 A trial is like building a house. I've almost finished. It
19 needs solid foundations, solid judicial investigation. Without a
20 proper foundation, the trial will sooner or later collapse.

21 This is an historic occasion; at least, it should be. But it's
22 not the first time that alleged leaders of the Khmer Rouge are
23 put on trial.

24 As you know, in 1997(sic) Pol Pot and Ieng Sary, they were
25 convicted for genocide after a trial completely orchestrated and

16

1 controlled by the Vietnamese. Since 1979, very little seems to
2 have changed.

3 [09.39.00]

4 If this Court is to avoid a show trial, it should start showing
5 its teeth. Your Honours should not make the mistakes made in
6 1979, the mistakes by the investigating Judges.

7 The decision to exclude Nuon Chea from this initial hearing is
8 regrettable, but hopefully it's not too late. Not only Nuon
9 Chea, our client, but also the people of Cambodia deserve a fair
10 trial, a proper trial aimed at establishing the truth and not
11 simply at rubber stamping history books written in Vietnam or in
12 America.

13 We want a fundamental discussion on the judicial investigation,
14 the foundations of a future trial, and a discussion on all of the
15 witnesses to be heard at trial when it really matters.

16 [09.40.00]

17 For over three and a half years, the Investigating Judges carried
18 out a secret investigation. Nobody knew what they were doing.
19 Our client didn't know; the public did not know. It is time for
20 transparency, not for sealed envelopes.

21 Our client cannot resign from these proceedings like the
22 international staff has done -- is doing at the office of the
23 Investigating Judges, but he cannot be forced to stay in his room
24 today.

25 He will leave and only come back when the Trial Chamber, this

17

1 Trial Chamber, Your Honours, are willing to discuss his
2 objections and all of his witnesses. If not this week, then at
3 the next Initial Hearing.

4 Our client does not longer want to honour these proceedings with
5 his presence unless his objections and all of his witnesses; not
6 just the ones in the envelope, but all of his witnesses are put
7 on the agenda as the rules of this Court prescribe.

8 [9:41:15]

9 MR. PRESIDENT:

10 The Chamber will not allow such interruption again. We shall now
11 proceed with the agenda of the initial hearing.

12 This list is provided to the parties on a strictly confidential
13 basis and indicates the pseudonyms by which all witnesses,
14 experts and civil parties contained on this list are to be
15 identified in open session.

16 [9.41.55]

17 This is pending ultimate decisions on whether or not each
18 witness, expert or civil party on this list will be called or
19 protective measures where required. Time has been allocated
20 during the final day of the initial hearings for the parties to
21 comment on this provisional list.

22 Nuon Chea, if you would like to speak, you may proceed.

23 [9.42.55]

24 MR. NUON CHEA:

25 Mr. President, Your Honours, I'd like to request to leave the

18

1 Courtroom and I will prepare myself to return if Your Honours
2 will consider my request to be put for discussion before the
3 general public in the open Court.

4 MR. PRESIDENT:

5 The security guards, you are instructed to bring him back to the
6 detention facility.

7 [9.43.45]

8 Time has been allocated during the final day of the initial
9 hearings for the parties to comment on this provisional list of
10 witnesses, civil parties and experts. If the parties agree to
11 refer only to these pseudonyms indicated for each witness, expert
12 or civil party when discussing this list, the Chamber considers
13 that most segments of the initial hearing, including those
14 pertaining to witnesses, civil parties and experts, may remain in
15 open session.

16 Would any party object to this or propose that the Chamber go
17 into closed session during its final day when the provisional
18 witness, civil party and expert list will be discussed?

19 If you have, you can take the floor.

20 [9.44.40]

21 You may proceed, counsel.

22 MS. SIMONNEAU-FORT:

23 Mr. President, the Chamber is aware that we will not depose as
24 civil party lawyers the list of civil parties and we know that on
25 Thursday we will have the opportunity to speak on this subject,

19

1 but we think it will be appropriate that we be allowed to furnish
2 some particular explanations today, for reasons of good faith in
3 respect of which we have not filed at this stage of the
4 proceedings the list of civil parties.

5 [9.45.15]

6 Would you allow me to explain in a few words these good faith
7 reasons?

8 MR. PRESIDENT:

9 You are not allowed because we already mentioned if need be, the
10 closed session will be conducted and open sessions will be used
11 if all the parties agree that pseudonyms will be used for all the
12 witnesses, experts and civil parties contained in the list
13 already.

14 If, depending on the view of the parties, and if the -- when the
15 Chamber considers it's appropriate, closed sessions may be
16 conducted where it deems appropriate.

17 MS. SIMONNEAU-FORT:

18 Mr. President, I have understood that we have the opportunity of
19 making submissions in closed session, but I want to refer to the
20 decision of the Pre-Trial Chamber issued on Friday.

21 [9.46.35]

22 We now have 2,124 civil parties. There are 3,800 civil parties
23 we have to defend, and that is why we have not yet filed any
24 list. And I thought I should be allowed to furnish some
25 explanations because we need your clarifications as to the

20

1 procedure we will use with a view to choosing specifically civil
2 parties who will appear before the Court to explain themselves.
3 It would appear that the trial cannot proceed without the civil
4 parties being given an opportunity to choose their lawyers and,
5 in consultation with their lawyers, to be able to come and
6 explain before the Court. We have not submitted a list so far.

7 [9.47.25]

8 We are in a position to justify our lists, citing proper
9 jurisprudence, and I would like to explain the situation to you
10 and to request your clarification on how these lists should be
11 drawn up because we definitely intend to draw up such lists.

12 MR. PRESIDENT:

13 Any other parties who would like to give their opinions on the
14 proposed lists that are just mentioned?

15 MR. KARNAVAS:

16 Good morning, Mr. President; good morning, Your Honours, good
17 morning to everyone in and around the Courtroom.

18 It would be our submission that there be a general discussion in
19 public as far as who can and who cannot appear before this Court
20 in public. Then, with respect to specific individuals, there
21 could be closed hearings.

22 [9.48.30]

23 But as far as the debate as to how one is chosen to go
24 confidential or in closed session versus open session, I think
25 that needs to be aired out in public without mentioning any

21

1 names. This way, it's a transparent process and everyone knows
2 why certain evidence cannot be heard in open session.
3 With respect to the specific witnesses, of course, that should be
4 in closed session. Thank you.

5 MR. PRESIDENT:

6 Thank you, counsel, for your suggestion.

7 The Chamber have noted the suggestions by the counsel. If there
8 are no more opinions or suggestions, the Chamber will consider
9 the suggestions when the time comes to discuss the list of
10 witnesses, experts and civil parties.

11 [9.49.40]

12 You may proceed.

13 MR. SA SOVAN:

14 Good morning, Your Honours. Good morning, everyone. I am the
15 defence counsel for Mr. Khieu Samphan, the former head of state.
16 I noticed as the President just spoke, on Thursday we will
17 discuss the list in public. I'd like to suggest that on Thursday
18 we shall discuss it in public -- or in closed session because my
19 list of witnesses do not have the pseudonyms in the envelope that
20 we received, so when Thursday comes we shall discuss the list of
21 my witnesses in closed session.

22 [9.50.45]

23 Thank you, Mr. President.

24 MR. PRESIDENT:

25 Thank you, counsel.

1 MS. SIMONNEAU-FORT:

2 Mr. President, I believe I have understood that consequently we
3 will not be able to furnish explanations today. We'll do that on
4 Thursday.

5 [9.51.10]

6 We'll also obviously draw up the list of civil parties, and we
7 believe that pursuant to Rule 80 based of the internal rules we
8 are the only party that will be able to proceed to reduce the
9 list, so we'll propose a reduced list on the first four subjects
10 to be dealt with at trial.

11 We will not be able to explain why today. We will do that on
12 Thursday.

13 MR. PRESIDENT:

14 Thank you for all the suggestions regarding the proceedings in
15 deciding on the list of witnesses, civil parties and experts to
16 be summonsed to provide testimony on the four subjects during the
17 certainty of hearing and whether it shall be conducted in public
18 or in closed session.

19 [9.52.10]

20 We have heard your opinions and suggestions, although they are
21 different in nature, and we have noticed all those suggestions
22 and we will consider these issues either on Thursday or on the
23 last day of the hearing.

24 In its tentative list of witnesses, civil parties and experts,
25 the Chamber has indicated those it considers to be most relevant

1 and probative of the facts at issue in the early trial segments.

2 [9.53.00]

3 Over the course of trial, the Chamber will also consider calling
4 other witnesses, experts and civil parties so it considers this
5 necessary to comply with Rule 87(4) of the internal rules. The
6 Chamber will also take into account those civil parties who are
7 newly admitted following the recent Pre-Trial Chambers decision
8 ruling on their status.

9 These new civil parties are now part of the consolidated group.
10 Some may be considered for admission to the list of those who may
11 be heard concerning the impacts of the alleged crimes at a later
12 stage of the trial.

13 In view of the Chamber's obligation to ensure an expeditious and
14 fair trial, however, the Chamber will not, as a rule, call
15 witnesses, experts and civil parties whose testimony, even if
16 relevant, is likely to be repetitive of other evidence before the
17 Chamber.

18 [9.54.15]

19 As the evidence of a cumulative total of 1,054 witnesses, experts
20 and civil parties have been sought by the parties, the Chamber
21 has previously indicated that it intends to hear the testimony at
22 trial of potentially fewer persons than this total.

23 Following oral argument on its provisional list, the Chamber
24 expects to provide a definitive list of witnesses, civil parties
25 and experts for the early trial segments shortly after the

1 initial hearing.

2 [9.55.00]

3 Further information concerning proposed witnesses, civil parties
4 and experts who are considered by the Chamber to be instead
5 relevant to later places of the trial will be communicated to the
6 parties at a later date.

7 The Chamber is in receipt of a number of motions from the parties
8 seeking clarification as to what, if any, contact is permitted
9 between the parties and witnesses and experts in advance of their
10 testimony at trial.

11 A feature of the civil law system which governs proceedings
12 before the ECCC is that the vast majority of witnesses and
13 experts relevant to this trial have previously been heard before
14 the Co-Investigating Judges. Accordingly, witnesses who have
15 already been the subject to a judicial process and if appearing
16 before this Chamber do so as witnesses of the Court.

17 [9.56.15]

18 In a select number of cases and where the Chamber has doubts as
19 to the internal consistency of these witnesses' and experts'
20 prior statements or whether a witness or expert may recall
21 features of them, the Chamber may take steps to ascertain this.

22 The party will, in all cases, be advised of the Chamber's
23 initiatives in this regard.

24 Where proposals to hear new witnesses are accepted by the
25 Chamber, it will be for the Chamber to ascertain whether

1 testimony from these new witnesses or experts complied with Rule
2 87(4).

3 [9.57.15]

4 This may also, in some cases, entail the Chamber having direct
5 contact with proposed witnesses or experts to ensure that
6 valuable Court time is not wasted in calling witnesses or experts
7 whose testimony may not comply with Rule 87(4).

8 The Chamber had earlier advised the parties that in due course
9 indications of documents considered relevant to the early trial
10 segments would also soon be sought from them. The Chamber
11 requests the parties to indicate which documents and exhibits
12 from their earlier document and exhibits list are considered to
13 be relevant to these early trial segments no later than Friday,
14 22nd July, 2011.

15 [9.58.25]

16 These early indications will allow the interpretation and
17 translation pool to ascertain the translation status of key
18 documents and the Chamber to identify pending difficulties as
19 soon as possible.

20 The Chamber also provides early notification to the parties that
21 it will shortly, after this date, set deadlines for the filing of
22 return submissions outlining any admissibility challenges to
23 those documents indicated as relevant to the first trial
24 segments.

25 The parties will now have an opportunity to raise any other

26

1 points on which they seek clarification with respect to these
2 provisional witnesses, civil parties and expert list and the
3 procedure to be followed in relation to it. If any party wishes
4 to raise your point, then you may proceed, starting from the
5 Co-Prosecutors and then the lead co-lawyers.

6 [9.59.40]

7 Mrs. Chea Leang, you may now proceed.

8 MS. CHEA LEANG:

9 Your Honours, the President, as the Chamber has already indicated
10 concerning the witnesses, in general, the Co-Prosecutors have
11 fully agreed with the intention as indicated by the Chamber.
12 However, we still have some points that we need clarification on,
13 including the lists given to the parties.

14 [10.00.50]

15 Having reviewed the lists, I can conclude that, of course, there
16 are the confidential links and I agree that hearings on these
17 lists of witnesses shall be made in public because it is of
18 course, for the interests of the public. However, during the
19 final day, I fully agree that the witnesses shall be -- the names
20 of the witnesses shall be adapted with code names if they are to
21 be discussed in the hearing.

22 [10.01.45]

23 I would like to ask, for example, if any witness' name is to be
24 discussed in the public that names must be coded with a code
25 number to conceal the identity of the witnesses.

1 MR. PRESIDENT:

2 Thank you for your observation.

3 International Prosecutor, you may proceed.

4 MR. CAYLEY:

5 Yes, thank you, Mr. President.

6 I obviously share all of the remarks made by my colleague, but I
7 would make -- like to make one further point, and that is this.

8 [10.02.22]

9 You will recall that we filed quite recently with the Chamber our
10 position on the testimony, the evidence of the four accused
11 should they choose to give evidence, so we would obviously like
12 this particular order -- proposed tentative list order of
13 witnesses to be considered in the light of our position on
14 evidence by the accused in that we believe that all four accused
15 should give evidence in this case before any of the other
16 substantive evidence is heard.

17 Thank you.

18 MR. PRESIDENT:

19 Thank you, Mr. international Co-Prosecutor.

20 [10.03.15]

21 Counsel Pich Ang, you may now proceed.

22 THE INTERPRETER:

23 Could the court officer be instructed to make sure the counsel's
24 mic is activated?

25 MR. PICH ANG:

1 My apologies.

2 [10.03.38]

3 When it comes to the list of witnesses and experts, the colleague
4 lawyers do not have any objection to having the lists be
5 discussed in public because the certain numbers of witnesses have
6 already been coded with pseudonyms, in particular those who are
7 confidential witnesses.

8 MR. PRESIDENT:

9 Thank you, counsel.

10 [10.04.10]

11 International lead co-lawyers, you may now proceed.

12 MS. SIMONNEAU-FORT:

13 Mr. President, I wish to reassure the bench that we intend to
14 file the list of civil parties. I want to take this opportunity,
15 nonetheless, to emphasize that we now have 3,800 civil parties
16 and that our lists will depend on these new civil parties.

17 [10.04.45]

18 I also wish to express to you that we are delighted with the
19 decision of the Pre-Trial Chamber that has admitted new civil
20 parties to these proceedings. This will not be an obstacle for
21 us. This will simply provide a broadening of the foundation that
22 the civil parties intend to contribute to this trial.

23 As representatives of all civil parties because there are groups
24 that comprise this collective made up of individuals, individuals
25 who have each suffered, we will be utterly careful and attentive

29

1 because these civil parties intend to preserve their role as
2 parties to these proceedings, which must not be confused with the
3 status of witness, and this will certainly be emphasized when we
4 establish and address the first list of witnesses and make sure
5 that this distinction is drawn.

6 [10.06.05]

7 We will also be very careful during the trial that the civil
8 parties are recognized during these proceedings and that they
9 enjoy their full rights.

10 We will file this list, a reduced list, on Thursday, and we will
11 seek clarification from the Chamber. We have already sought
12 clarification on the issue of policy of Democratic Kampuchea,
13 which will allow us to fine tune our list, and we await those
14 clarifications by jeudi(sic). But I can reassure you that we
15 will file a reduced list of civil parties by Thursday.

16 [10.06.40]

17 Thank you.

18 MR. PRESIDENT:

19 Thank you, counsel.

20 Does any other party wish to add additional points of this? If
21 not, then we may proceed further.

22 [10.07.05]

23 The Chamber has taken note of the points raised by the parties
24 and will return to them during the final day of the initial
25 hearing, or subsequently.

1 The Chamber has scheduled oral argument during the initial
2 hearing in relation to those matters which it considers to fall
3 within the scope of internal Rule 89. The Chamber has already
4 indicated that some legal issues characterized as preliminary
5 objections by the parties will be decided by the Chamber on the
6 basis of the written pleadings alone.

7 [10.08.00]

8 The Chamber has also already indicated that Khieu Samphan's
9 preliminary objection concerning the ECCC's personal jurisdiction
10 over him requires a mixed assessment of law and fact. It will
11 accordingly be decided at a later date.

12 The Chamber considers that early clarification of a number of
13 other legal issues, whether included as part of the parties'
14 objections, filings or raised subsequently in other filings may,
15 nonetheless, assist in the fair and expeditious conduct of the
16 trial.

17 [10.08.45]

18 The Chamber refers in this regard to the following legal issues
19 raised in the parties' filings: the ECCC's general jurisdiction
20 over international crimes under the principle of legality; the
21 application of joint criminal enterprise and superior
22 responsibility as modes of liability; the application of forced
23 marriage; rape within forced marriage, and forced disappearance
24 and forcible transfer as other inhumane acts as well as
25 imprisonment and torture as crimes against humanity; whether the

1 facts establishing the conduct of rape should be characterized as
2 the crime against humanity of rape rather than the crime against
3 humanity of other inhumane acts, and whether or not crimes
4 against humanity before the ECCC require a link to armed
5 conflict.

6 [10.09.50]

7 The Chamber considers that many of these matters which were
8 raised by the parties as part of their preliminary objection and
9 submissions have already been adequately briefed. It is unlikely
10 to seek further submissions in relation to these areas.

11 In relation to legal issues raised more recently by the
12 Co-Prosecutors, the Trial Chamber has since granted all defence
13 teams an extension of time until Friday, the 22nd of July, 2011
14 to respond to filings E-95, E-99, E-100, and one further
15 prosecution motion, E-96.

16 [10.10.40]

17 The prosecution may reply to these responses should it so choose
18 within days of that date. After having received these additional
19 filings and any other submissions that it may request, the
20 Chamber will rule on these issues at a later date. Any hearings
21 that may be required in this connection will take place at a date
22 and time to be determined.

23 In response to various motions challenging the fitness of three
24 accused to stand trial, the Chamber appointed an expert
25 geriatrician, Professor John Campbell, to assess these accused.

32

1 Professor Campbell has since undertaken these assessments and
2 submitted his report back to the Chamber in relation to all
3 accused.

4 [10.11.35]

5 The Chamber forwarded Professor Campbell's report in relation to
6 two accused to their defence teams on a strictly confidential
7 basis on 13th of June, 2011 in English and on 23rd of June, 2011
8 in Khmer.

9 Should these teams have any comment on or objection to make to
10 the report, written submissions setting forth the basis of any
11 objection should be filed before the Chamber no later than
12 Friday, 8th of July, 2011.

13 [10.12.22]

14 The Chamber will, on that date, file these reports along with any
15 objections received within this dateline confidentially on the
16 case file. The other parties, should they wish to do so, may
17 then respond to these reports and any objection lodged to them no
18 later then Friday, the 15th of July, 2011.

19 Counsel, you may proceed.

20 MS. VAN DER VOORT:

21 Your Honour, I'm not sure this is the appropriate time to raise
22 this objection, but we do object to the report of Dr. Campbell to
23 be put on the confidential part of the case file.

24 [10.13.00]

25 Do you want me to address this issue now?

1 (Deliberation between Judges)

2 MR. PRESIDENT:

3 With regard to your observation, we believe that you may include
4 it in -- during the time when you make your submission.

5 [10.14.20]

6 The expert's report in relation to the third accused was issued
7 on 23rd of June, 2011 and communicated to the relevant defence
8 team on a strictly confidential basis on the same day in English.
9 Its Khmer translation will follow as soon as possible.

10 Should this defence team have any comment on or objection to make
11 to this report, written submissions setting forth the basis of
12 any objection should be filed before the Chamber no later than
13 Monday, 18th of July, 2011.

14 [10.15.07]

15 The Chamber will, on this date, file the report along with any
16 objections received within this deadline confidentially on the
17 case file. The other parties, should they wish to do so, may
18 then respond to the report and any objection lodged in relation
19 to it no later than Monday, the 25th of July, 2011.

20 Should the Chamber consider that additional hearings are required
21 in relation to the fitness of any accused to stand trial, these
22 hearings will be scheduled at a later date. Any such hearings
23 are likely to occur in August, 2011.

24 [10.15.55]

25 The Chamber advises the parties that the Courtroom holding cells,

34

1 which contain a video link and direct phone line between each
2 cell and the Court, are fully operational. Any of the accused
3 may, at any time during this hearing, choose to participate in
4 these proceedings via video link rather than appearing in person.
5 Whereas an accused chooses to remain in Court but requires a
6 short break, for instance, to use the bathroom, he or she may at
7 any time be escorted from the Courtroom without seeking the leave
8 of the Chamber.

9 [10.16.57]

10 The accused are also not required to stand when the Chamber
11 recesses or resumes its session.

12 The parties have any points to raise concerning this observation?

13 [10.17.25]

14 Counsel Karnavas, you may now proceed.

15 MR. KARNAVAS:

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

18 With respect to your observations concerning the recent filings,
19 we do -- we appreciate the extension. We think it's a modest
20 extension. It's not sufficient.

21 [10.17.55]

22 We do think that the prosecution deliberately waited on these
23 issues to file them at this point when they should have been
24 raised earlier. Some of the matters are clearly, clearly beyond
25 the time limit.

35

1 If it had been the Defence, you would either not have accepted
2 the filing or directed the DSS not to pay us. Here, they have
3 been accepted and, for instance, the JCE in particular, if you
4 look at the substance of it, at the very end what they're asking
5 is another bite at the apple regarding JCE-3 when, in fact, this
6 was a jurisdictional issue. They knew they were going to appeal
7 it, and they waited until the very end.

8 [10.18.35]

9 And so at this point in time, Mr. President, I would simply ask
10 for the following.

11 That the parties, including the Defence, be directed as to a
12 cut-off date as to when jurisdictional issues should be time
13 barred because you have to look at the substance.

14 We do feel that the prosecution has deliberately tried to
15 sabotage this trial by suggesting in their JCE motion that even
16 if you find JCE-3 to apply, that you should then go ahead and
17 have amicus, amici, outsiders come in to brief you on what the
18 law should be after all of these months. And this is clearly a
19 tactic to either delay or obstruct.

20 [10.19.25]

21 And I mention this on the record because we're always being
22 accused of that.

23 Now, they do say, "But we can proceed in any event". And I want
24 to be clear on the record, we cannot proceed with the trial
25 unless we know what the modes of liabilities are. I cannot

36

1 defend. I will not know which questions to ask or not to ask.
2 The prosecution had months and months and months to file this. I
3 do not object to them filing. I believe that they should avail
4 themselves as much as we do. But they have to do it within the
5 time frame.

6 And so please, instruct the parties when the cut-off date is
7 because we're approaching the stage where we need to focus on the
8 facts, get the witnesses and begin this trial as quickly as
9 possible.

10 [10.20.10]

11 The people are waiting and the defence is not obstructing. I
12 believe it is the prosecution that is trying to deliberately
13 impede the ability of the defence to carry on with their work.
14 Thank you.

15 [10.20.30]

16 MR. PRESIDENT:

17 Thank you, counsel.

18 International Co-Prosecutor, you may now proceed.

19 MR. CAYLEY:

20 Thank you, Mr. President.

21 [10.20.45]

22 First of all, let me emphasize to the Court that we were
23 perfectly entitled to file those recent motions to which Mr.
24 Karnavas is referring.

25 I take great exception, great exception to being accused of

37

1 sabotaging this case. And I would like to say to the Court and
2 to Mr. Karnavas at the beginning of proceedings that these kinds
3 of terms and references in civilized proceedings are
4 inappropriate and I will not accept them.

5 [10.21.15]

6 I would simply ask the Court to direct Mr. Karnavas to file his
7 response in the time that has been given and to desist in future
8 from making these kinds of comments, which I do not accept.

9 MR. PRESIDENT:

10 We believe that it is an appropriate time to take the
11 adjournment, so we will take 20 minutes break and resume at 20 to
12 11:00.

13 THE GREFFIER:

14 All rise.

15 (Judges exit courtroom)

16 (Court recesses from 1021h to 1048H)

17 (Judges enter courtroom)

18 MR. PRESIDENT:

19 Please be seated. The Chamber is now back in session.

20 The International Co-Prosecutor, you may proceed.

21 MR. CAYLEY:

22 Thank you, Mr. President.

23 Very briefly -- and I have not addressed this this morning

24 because I know the Court has established a schedule for these

25 hearings.

38

1 We obviously listened with some interest to the representations
2 made by the defence counsel for Nuon Chea and we have some
3 concerns about some of the matters that were stated during that
4 address; in particular, obviously, because these proceedings are
5 public and matters are reported in the press, and we would like
6 an opportunity later today as the Trial Chamber sees fit.
7 We don't want to interrupt the schedule of things this morning to
8 respond to what was stated because we believe that there are some
9 factual inaccuracies in what has been stated and we think it's
10 very important the public, essentially, has the entire picture.
11 Thank you.
12 MR. PRESIDENT:
13 Thank you, International Co-Prosecutor, for your remark.
14 Phat Pouv Sang, you may proceed.
15 MR. PHAT POUV SEANG:
16 Thank you, Mr. President, for allowing me to stand. First of
17 all, my respect to the Bench.
18 Due to the health of my client, I'd like to seek leave so that
19 she can return to the detention centre. She will remain so until
20 the conclusion of the Initial Hearing due to her poor health.
21 Thank you.
22 [10.51.40]
23 MR. PRESIDENT:
24 Thank you, counsel.
25 For this request, with appropriate reasons, and also there is the

1 rights of the accused to participate or not in this hearing, the
2 Chamber allows and grants the request.

3 The Chamber instructs the security guard to bring Ieng Thirith
4 back to the detention facility.

5 Also, I would like to instruct the ICT to link the audio-visual
6 communication of this hearing, which has already been prepared,
7 for her to follow the proceedings.

8 You may take the floor.

9 MR. KOPPE:

10 Mr. President, Your Honours, we have two requests for
11 clarification in respect of the matter of witnesses; the
12 discussion on Thursday.

13 Our question is whether we are only discussing, coming Thursday,
14 the witnesses mentioned in your list of tentative witnesses or
15 are we also discussing the witnesses which seem, at this stage,
16 to have been denied by Your Honours? That is our first request
17 for clarification.

18 Our second request for clarification is the following. Could you
19 please provide clarification as to why on Thursday we have to use
20 pseudonyms for the witnesses that have been put on the list. We
21 haven't quite understood the reasons for this decision and, at
22 this stage, I might add that it is our position that at this
23 point there seems to be no reason to use pseudonyms for the
24 witnesses to be discussed on Thursday. So two requests for
25 clarification.

40

1 [10.54.20]

2 MR. PRESIDENT:

3 Thank you, counsel, for your remark which is rather important.

4 The Chamber takes note of that and we'll advise the parties and,

5 of course, yourself at the appropriate time; that is before the

6 date on the discussion of the list of witnesses, experts and

7 civil parties.

8 (Deliberation between Judges)

9 After my discussion with Judge Cartwright, I'd like to respond to
10 Nuon Chea's counsel regarding your remark.

11 As the Chamber has sufficiently indicated the reasons that when
12 it is not the appropriate times for the identification of the
13 witnesses, experts or civil parties in response to the principle
14 of the protective measures for those witnesses, experts and civil
15 parties, the Chamber has so far not received any report from the
16 victims and Witness Support Section regarding the status and the
17 requirements as to whether which civil parties or civil -- the
18 expert witnesses require the protective measures. And the extent
19 to the harm, and the Chamber will consider that.

20 [10.57.05]

21 For that reason, the Chamber will not allow the presentation of
22 the identification of names of those witnesses, civil parties or
23 experts on the tentative list. It has to be confidential at this
24 stage. And we advised against; it could only be done in public
25 or open session only once the -- all the parties agree to the use

41

1 of the pseudonyms of those witnesses, experts and/or civil
2 parties. So I hope this matter is now clear.

3 The Chamber has already worked on the pseudonyms in the tentative
4 list.

5 Mr. Sa Sovan, I noticed, do you want to raise any matter?

6 [10.58.20]

7 MR. SA SOVAN:

8 Thank you, Mr. President. Good morning, Your Honours.

9 I'd like to make two observations briefly so not to interrupt the
10 proceedings, that is, in response to the national and

11 international counsel in regards to the status of the victims.

12 I congratulate those victims and I think we should not confuse
13 the role of the victims and the witnesses. Of course, we observe
14 that there are more than 1 million victims but there are only
15 3,800 plus represented by those 9 lawyers. Therefore, I would
16 like to emphasize that sitting in front of me there are 9 lawyers
17 representing more than 3,000 victims and, to my right, we have
18 the international Co-Prosecutor and the national Co-Prosecutor
19 who are the main leaders in charging my client.

20 [10.59.50]

21 And in my role as their defence counsel, I would like to suggest
22 that both the National and international Co-Prosecutors in their
23 arguments in order to find justice for the general public my
24 client, of course, wants to see the truth as well and he's not
25 afraid of seeking the truth. And for the co-prosecutors, of

42

1 course you can charge my client of any crimes if they wish to do
2 so. This Chamber has already decided that on the killing or the
3 genocide of course is not committed by the head of state, it's
4 like the former king, and it is alleged that my client is
5 involved in the alleged acts.

6 And, point number two, I would like to seek the permission from
7 the President and the Bench that if my client is exhausted --
8 because if you observe, the rest of the accused are not present
9 here and only my client has the better health, and my client
10 wants to also participate in ascertaining the truth. Who killed
11 those people?

12 My client seeks the permission to leave but will return in order
13 to co-operate fully with the Chamber and I hope the Chamber will
14 grant such a permission.

15 MR. PRESIDENT:

16 Before the break, the Chairman already advised you and the public
17 clearly on the proceedings during this initial hearing to give
18 the priority to those accused who have problems with health, who
19 has advanced age, that they are allowed to leave the courtroom
20 for a short break, for example, to use the bathroom without
21 seeking permission from the Chamber.

22 [11.02.55]

23 And, secondly, even if for them to stand, there is no need when
24 the Judges enter or exit the courtroom, which is usually
25 mandatory, that all the participants and the public are required

1 to stand as a respect to the Judges entering or exiting the
2 courtroom, but we grant that permission due to the advanced age
3 and poor health of the accused.

4 If you have any other matters which have not yet been raised,
5 please do so firmly, objectively, rather than on what has been
6 said already by the Chamber. For example, any substantive issue
7 on the list of witnesses, civil parties or experts that deems the
8 appropriate issues to be raised so that we can share the views
9 and make the decision appropriately accordingly, and that the
10 list can be finalized by the end -- well, by the conclusion of
11 the hearing.

12 Now, we proceed to the oral argument on statutory limitations in
13 relation to ne bis in idem.

14 The Chamber will today commence oral argument in relation to a
15 number of defence preliminary objections. The first for
16 consideration is the preliminary objection concerning the
17 principle of ne bis in idem or the prohibition of multiple
18 prosecutions in relation to the same offence. This preliminary
19 objection has been raised by the Ieng Sary defence. The Ieng
20 Sary defence has been allocated to one hour for the presentation
21 of this preliminary objection. The Co-Prosecutors then have 45
22 minutes in response and the civil party lead co-lawyers, 30
23 minutes, but Ieng Sary's defence then have 15 minutes in reply.

24 The Chamber reminds the parties that it is familiar with all
25 written pleadings filed to date and urges them not to merely

1 repeat these in oral argument.

2 [11.06.00]

3 We would like now to proceed to the defence counsels for Ieng
4 Sary concerning the preliminary objection with regard to ne bis
5 in idem.

6 MR. ANG UDOM:

7 Good morning, Mr. President, Your Honours. I am Ang Udom and
8 with me is Michael Karnavas. We are honoured and privileged to
9 represent Mr. Ieng Sary.

10 Over the next three days, we will be addressing certain
11 preliminary objections we have to the jurisdiction of the
12 Chamber.

13 Today, we will address the principle of ne bis in idem and also
14 the issue of Mr. Ieng Sary's Royal Pardon and amnesty. Tomorrow,
15 we will address the statute of limitations for breaches of the
16 Geneva Conventions and also the statute of limitations for
17 national crimes. Our oral submissions on these issues will be
18 brief as we have clearly set out our position in our written
19 submissions.

20 We are mindful, however, that this is the first time these issues
21 have been addressed in oral argument before this Chamber and are,
22 therefore, grateful for this opportunity.

23 With Your Honours' indulgence, we submit a brief summary which
24 will be of assistance in following our presentation. With each
25 preliminary objection, therefore, I will give a brief

1 introduction to the issue and to each of our arguments. Mr.
2 Karnavas will follow up with further analysis and will answer any
3 questions Your Honours may have.

4 [11.09.55]

5 I should also note that, at this time, we submit with all due
6 respect that perhaps it would be more constructive and more
7 efficient if any question you may wish to pose to us be done at
8 the conclusion of each segment of our oral submissions. This
9 aids the interpreters in not having to constantly switch between
10 the parties to the proceedings. It also avoids the situation
11 whereby a question is asked prematurely which would have been
12 answered in the general course of the submissions.

13 We trust that both the prosecution and the lawyers for the civil
14 parties will also wish to take this approach in the interests of
15 efficiency and in the desire to place all arguments in front of
16 the Bench.

17 I would now like to proceed to the subject of the submission --
18 our submission on ne bis in idem. I will commence by introducing
19 our arguments on the issue of ne bis in idem and my colleague,
20 Michael Karnavas, will follow up with more detailed explanation
21 of our argument and will address any questions Your Honours may
22 have.

23 Under the principle of ne bis in idem, a person cannot be tried
24 again for the same conduct for which he was previously acquitted
25 or convicted. Mr. Ieng Sary was already tried and convicted in

1 absentia in August 1979 for having committed genocide in addition
2 to several other crimes. He was sentenced to death and all of
3 his property was ordered to be confiscated.

4 [11.13.55]

5 It violates the principle of ne bis in idem enshrined in 1)
6 domestic Cambodian law; 2) the International Covenant on Civil
7 and Political Rights to which Cambodia is a party; and number 3)
8 procedural rules established at the international level to
9 re-prosecute Mr. Ieng Sary at the ECCC. Let us consider each of
10 these in turn.

11 First, the Cambodian Criminal Procedure Code. Article 7 of the
12 Cambodian Criminal Procedure Code requires criminal actions to be
13 extinguished where they are res judicata or, in other words,
14 where they have been finally settled by judicial decision. Mr.
15 Ieng Sary's case is, of course, res judicata. The present trial
16 deals with acts which have been definitely settled by a judicial
17 decision in 1979. Article 7, thus, prevents the current
18 prosecution of Mr. Ieng Sary.

19 [11.16.30]

20 Article 12 of the Criminal Procedure Code states:

21 "When applying the principle of res judicata, any person who has
22 been finally acquitted by a court order cannot be accused once
23 again for the same courses of action, including the case where
24 such action is subject to different legal qualification."

25 Article 12 does not define res judicata for purposes of Article 7

1 or limit its application. On the contrary, it ensures that the
2 principle of res judicata is read broadly to encompass acquittals
3 and situations where an accused is charged with the same courses
4 of action as in a previous case.

5 But such action is subject to different legal qualification. It
6 is not necessary to interpret Article 12 in this case because Mr.
7 Ieng Sary's present trial is prohibited based on the broader
8 principle contained in Article 7.

9 Mr. President, Your Honours, even if the Trial Chamber finds it
10 necessary to apply Article 12 in conjunction with Article 7,
11 Article 12 must be interpreted to apply to those who have been
12 finally convicted as well as those who have been finally
13 acquitted because limiting it to those finally acquitted would
14 lead to an absurd result.

15 The purpose of the ne bis in idem principle applies equally in
16 either case. The ne bis in idem principle is aimed at protecting
17 the finality of judgements. The idea is that once a case has
18 been dealt with it should not be re-opened as this would
19 seriously undermine respect for judicial proceedings and the
20 judiciary in general.

21 [11.20.55]

22 The need for the ECCC to act as a model court for Cambodia by
23 appealing to the rule of law and the principle of legality and to
24 increase respect for the judiciary and judicial proceedings
25 should lead the ECCC to respect and apply the principle of ne bis

1 in idem.

2 Another purpose of the ne bis in idem principle is to spare an
3 individual from undergoing the psychological, emotional, physical
4 and monetary stress associated with a criminal prosecution twice.
5 This purpose does not only apply when an accused has been
6 acquitted. The anxiety and stress caused by repeated
7 prosecutions affect families, businesses, and even victims that
8 is likely to be exacerbated by media attention.

9 These purposes of the ne bis in idem principle demonstrate that
10 it would be absurd to limit the ne bis in idem protection
11 afforded by the Criminal Procedure Code of Cambodia to only those
12 who have been finally acquitted.

13 Let us next consider the International Covenant on Civil and
14 Political Rights, or ICCPR. Article 14 (7) of the ICCPR states:
15 "No-one shall be liable to be tried or punished again for an
16 offence for which he has already been finally convicted or
17 acquitted in accordance with the law and penal procedure of each
18 country."

19 This article is applicable at the ECCC and bars Mr. Ieng Sary's
20 present prosecution because Cambodia is a party to the ICCPR, and
21 its constitution mandates that it respect covenants and
22 conventions related to human rights to which Cambodia is a party.
23 There are sometimes issues applying this provision when a court
24 of one state is asked to recognize a previous judgement of a
25 court in another state. It is sometimes held that this provision

1 does not apply in such situations, however, such a situation does
2 not exist in this case.

3 [11.26.25]

4 The 1979 trial was held in Cambodia by a Cambodian court and the
5 ECCC is also a Cambodian court. The ECCC is unlike the ad hoc
6 tribunals which are not mandated to respect the ICCPR.

7 Finally, let me address procedural rules established at the
8 international level. Procedural rules established at the
9 international level only need to be considered if existing
10 procedures do not deal with a particular matter, or if there is
11 uncertainty regarding their interpretation or application, or if
12 there is a question regarding their consistency with
13 international standards.

14 This is not the case in the present situation. The Criminal
15 Procedure Code of Cambodia and the ICCPR adequately deal with the
16 matter and there is no uncertainty concerning the interpretation
17 or application. Both the procedure code of Cambodia and the
18 ICCPR are clear and applicable.

19 Nonetheless, should the Trial Chamber determine that it must
20 consider procedural rules established at the international level,
21 it should follow the guidance of the ICC statute since it was
22 ratified by a large number of state parties and is more
23 representative of international consensus than the states of
24 other criminal tribunals. The ICC statute contains ne bis in
25 idem provision which would prohibit the current prosecution of

50

1 Mr. Ieng Sary.

2 In conclusion that the Criminal Procedure Code of Cambodia, the
3 ICCPR, and consideration of international procedural rules all
4 require that the ECCC terminate Mr. Ieng Sary's prosecution and
5 find that it does not have the jurisdiction to try him for the
6 crimes charged on the basis on ne bis in idem.

7 [11.31.35]

8 That concludes my submission and my colleague, Mr. Karnavas, who
9 also represents Ieng Sary will be adding further on this.

10 I am very grateful, Your Honours and Mr. President, for your
11 attention listening to my submission.

12 MR. KARNAVAS:

13 Good morning, Mr. President. Good morning, Your Honours, and
14 good morning again to everyone in and around the courtroom. I'll
15 try to be be brief and try not to repeat the arguments that were
16 made either by my colleague or the arguments that we believe are
17 rather comprehensively set out in our numerous submissions
18 concerning these issues.

19 The Trial Chamber requested that we address two particular
20 matters, you know, supplementals. One was the Pre-Trial
21 Chamber's decision itself, and then the other was to consider
22 whether the 1979 trial that was provided by the People's
23 Revolutionary Tribunal was conducted in conformity with basic
24 fair-trial standards, including the legal framework upon which it
25 was based. And I think that it might be better to address the

1 second question first before I go to the first one dealing with
2 the Pre-Trial Chamber's overall decision.

3 So was the 1979 trial a proper trial, at least based on the legal
4 framework upon which it was existed? Would anybody among us in
5 this courtroom want to be tried in that fashion? I think the
6 answer to that question is resoundingly "no". Was it perfect?
7 No. Did it follow the procedure that was set at the time? Yes.
8 [11.33.55]

9 More importantly, I think this is the issue that needs to be
10 addressed and, I respectfully submit has not been raised before,
11 is if Mr. Ieng Sary had been detained and incarcerated, would he
12 have been given the death sentence; would he have been executed?
13 And the answer to that is "yes", and that's the proof in the
14 pudding as to whether that judgement would have been considered
15 proper and final.

16 The prosecution nor the Pre-Trial Chamber nor the United Nations
17 before Mr. Ieng Sary had appeared to after the issuance of the
18 judgement, none of them came out and said that that trial was a
19 sham trial and that the sentence itself could not and would not
20 be carried out if Mr. Ieng Sary had been detained up until the
21 time he was granted the Royal Decree pardon and amnesty.

22 Now, granted the Constitution had changed, where the death
23 penalty was done away but the fact remains that even if he had --
24 if he had been arrested after the change of the Constitution, the
25 death penalty would have resulted in a life imprisonment

1 sentence.

2 [11.35.30]

3 So while the trial may have had its limitations based on what we
4 would consider a fair trial, especially a fair trial for
5 ourselves, I mean if you compare it, for instance with a trial
6 that Saddam Hussein received certainly it was a better trial;
7 Saddam Hussein's trial was not a fair one by any stretch of the
8 imagination, it did not meet international standards, he
9 nonetheless was executed. You may say he had a final judgement
10 because it summarily went up to the Court of Appeals.

11 The point being is, if you are judging that particular trial
12 based on what the law was at the time, and the system that was
13 available at the time, then the answer to that question is it
14 would have been a proper trial because the sentence would have
15 been carried out and that is why -- and we'll get to this in our
16 next argument -- when Mr. Ieng Sary negotiated with the
17 government, the government having approached Mr. Ieng Sary
18 concerning an amnesty and a pardon, was made very clear that the
19 1979 conviction and judgement would be set aside and not carried
20 out.

21 So I believe I have nothing further to add to that unless there's
22 something from the Bench.

23 [11.36.55]

24 I understand that the prosecution has argued, well that wasn't a
25 final -- final judgement because they didn't have a second

1 instance court to review it and also it could not have been final
2 because he was tried in absentia.

3 The fact is the Lebanese Tribunal, for instance, provides for
4 trial in absentia. The then system provided trials in absentia
5 and even currently today, I daresay in Cambodia, trials in
6 absentia can be carried out and it is not mandatory -- it is not
7 mandatory based on their current rules of procedure that a
8 retrial be held, not to mention the fact that it would be up to
9 the Accused to determine whether he or she wished to have a
10 retrial.

11 Now, I understand that the prosecution, in their brief, have
12 pointed out certain articles in the criminal procedure. We
13 respectfully submit that you look at Articles 365 and 368 and
14 Articles 489 and 493 as well because we believe that the
15 prosecution erred in pointing out what can or cannot be done
16 under the criminal procedure, the current one.

17 Needless to say, the current criminal procedure did not exist at
18 the time. And again, we briefed this issue comprehensively so
19 I'll move on to the next issue, unless there are questions from
20 the Bench. Seeing no questions I'll move on to the next issue.

21 And here my argument may seem a little disjointed, it won't flow
22 as well as my colleague's because I just want to touch upon some
23 matters that were not touched upon by my colleague.

24 [11.38.55]

25 I'm going to try to restrict my comments to matters that were

1 brought up by the prosecution in their response, so in other
2 words my remarks will be more in line of a reply, thus you will
3 have our reply to what was raised by the prosecution and they of
4 course will then have an opportunity to response to us in like
5 kind.

6 With respect to ne bis in idem, since there's no need for me to
7 go into the specifics as to what it is, what it's purpose, its
8 intended purpose is, the prosecution, their entire argument,
9 essentially, if I may speak for them, or paraphrase them, rests
10 on the fact that they look at Article 12 as opposed to Article 7.
11 And they argue -- and I believe this is in paragraph 11 of their
12 response to our supplement -- that under Article 12 that article
13 defines what in fact is res judicata. In that that sets out the
14 parameters, in a sense, of Article 7.

15 We of course have argued that Article 12 simply expands upon
16 Article 7 and so we would submit that when you do do the analysis
17 to look at both of them together. Although as indicated by Mr.
18 Ang Udom, we rely primarily on Article 7 and simply submit that
19 you need not go to Article 12.

20 But be that as it may, the prosecution, we submit, is incorrect
21 when it states that we have accepted that Article 12 defines
22 Article 7 simply because we did not explicitly argue that. You
23 will find that in paragraph 11 of their response where they make
24 this bold assertion.

25 The prosecution wrongly asserts that the position that Article 12

1 defines Article 7 and that this in fact has been the position,
2 the accepted position by the Pre-Trial Chamber and the
3 prosecution cites paragraph 120 of the Pre-Trial Chamber's
4 decision on our appeal against the closing order in support of
5 this proposition. So they rely on paragraph 120 in support of
6 this assertion.

7 [11.41.50]

8 Now, this paragraph quotes Article 12 but it makes no findings as
9 to the relationship with Article 7 and in fact this is what the
10 Pre-Trial Chamber stated -- I'll keep it brief. It states:

11 "Article 12 of the CPC as set out above at paragraph 45 may be
12 regarded as an example of the application of the doctrine of res
13 judicata." As an example; there lies the difference and we
14 highlight this because we believe here the prosecution has
15 mischaracterized or has not accurately, I should say,
16 characterized the position taken by the Pre-Trial Chamber. I
17 don't wish to turn this into a personal attack, all of us see
18 things differently at times but in this instance I believe they
19 simply get it wrong.

20 Then the prosecution asserts in paragraph 13 of its response that
21 Article 7 cannot be considered on its own because it is
22 insufficiently specific and that the Trial Chamber must therefore
23 look to international principles.

24 We submit that this is also incorrect. While the Cambodian Code
25 of Criminal Procedure does not define -- does not define res

1 judicata this does not mean that the term is insufficiently
2 specific. And we also submit that res judicata has a commonly
3 accepted legal definition, full stop.
4 But even if the prosecution is correct, even assuming that they
5 are correct, that the Trial Chamber should look to international
6 principles to determine the meaning of res judicata this does not
7 translate into looking at procedural rules established at the
8 international level concerning ne bis in idem. Res judicata is a
9 general principle of law, so while you may look what others -- or
10 how others have defined it we submit that looking at procedural
11 rules is not the definitive translation. And of course how did
12 Cambodia function before -- the judiciary function before the
13 ECCC where they have a term like res judicata in it; clearly the
14 judges, the prosecutors, the lawyers, would have known what it
15 meant and clearly they would have known how to apply it.
16 [11.45.10]
17 They didn't need the establishment of this institution to come to
18 a conclusion that they must look at other international
19 institutions and to look at other procedure principles to define
20 it and to define its applicability, even with respect to this
21 particular case which while acknowledge has crimes which have
22 been characterized as international in nature.
23 Now, the Pre-Trial Chamber, if I may address -- make some
24 observations there, the Pre-Trial Chamber, in paragraph 122 of
25 its decision on our PO found that Article 12 would not apply --

1 would not apply to prior convictions since Article 12 uses the
2 word "finally acquitted", finally acquitted and expanding the
3 scope of Article 12 to include convicted persons would conflict
4 with other provisions of the Cambodian Criminal Code Criminal
5 Procedure which allow proceedings to be reopened in case of
6 convictions.

7 So here the Pre-Trial Chamber focuses on these two words "finally
8 acquitted", so somebody has to be finally acquitted in order for
9 res judicata to kick in, in a sense that's what they're saying.

10 Then the Pre-Trial Chamber goes on to state, in paragraph 123 of
11 its decision, and here I'll quote a little bit. It says:

12 "Expanding the scope of Article 12 to include convicted persons
13 would conflict with other provisions of the Cambodian Code of
14 Criminal Procedure which allow proceedings to be reopened in
15 cases of convictions. In particular -- in particular the
16 Cambodian Code of Criminal Procedure provides for the
17 possibilities to (1) review the proceedings in case of conviction
18 and (2) for a person convicted in absentia to make opposition to
19 the judgement and to be tried again."

20 [11.47.50]

21 And it further goes on to say: "Applying Article 12 to
22 convictions would rule out these two possibilities of reopening
23 the proceedings as pursuant to Article 5" -- presumably they mean
24 7 -- "Article 5 of the Cambodian Code of Criminal Procedure the
25 criminal charges could no longer be pursued or would have to be

1 terminated."

2 As I've indicated before, the purpose for ne bis in idem is for
3 the Accused to avail himself or herself to that particular
4 protection. It is thus consistent with other provisions of the
5 Cambodian Code or the current procedure which act to protect the
6 interests of the Accused and in this instance we're submitting
7 that Mr. Ieng Sary should not be tried twice for the same crimes
8 when the first time he was convicted and that conviction was
9 final at the then existing procedure that was in place in the
10 laws and the Court had been duly constituted and was fairly
11 capable of not only carrying out the trial but also carrying out
12 the sentence itself; the government would have carried it out.
13 Now, my colleague has discussed briefly a little bit about the
14 International Covenant on Civil and Political Rights, I don't
15 want to go into a lengthy exposé on that, I think we all fully
16 understand that. We know that it does apply because it's
17 explicitly set out, as was noted, it's implicitly set out in the
18 Constitution, explicitly for the ECCC.

19 And the Pre-Trial Chamber determined, however, that Article 14.7
20 of the International Covenant on Civil and Political Rights was
21 inapplicable because this article has no "trans national
22 application" but only to an internal domestic effect.

23 [11.50.20]

24 So first time in the proceedings, as I'm aware of, we have this
25 term "trans national application" not international but trans

1 national. Now, how they came up with that there's no real
2 explanation, there's no guidance as to why they see this as a
3 trans national application.
4 We do submit that in this instance the Pre-Trial Chamber got it
5 wrong. There are no issues of trans national application
6 relevant to this matter, absolutely none. And I believe we have
7 set it out in our submissions and so I won't repeat our arguments
8 but simply to say that the 1979 trial occurred in a Cambodian
9 court and just as the present case is being conducted in a
10 Cambodian court.
11 Which brings me to my next issue, and I can address it now or we
12 can address it at some other point during the next two or three
13 days or I can simply make a few comments and rest on what we have
14 filed in our copious submissions throughout the last two or three
15 years concerning this particular issue; and that is whether the
16 ECCC is a national court or an international court or whether it
17 is this hybrid or it is something in between this
18 internationalized court, something which, with all due respect, I
19 don't think that such a thing exists, especially here at the ECCC
20 because all they're doing -- all the Cambodian government is
21 doing is accepting assistance, financial, as well as personal
22 assistance in a trial of these cases. And even though this
23 particular institution avail itself and is responsible for trying
24 international crimes it does not make it an internationalized.
25 So unless -- I'm prepared to go forward on that but I would

60

1 prefer that we deal with this at some other point suffice it to
2 say it is our respectful submission that the ECCC is a national
3 court; that's how it was designed, that's what the Government of
4 Cambodia agreed to. That's what was agreed to by the United
5 Nations.

6 [11.53.15]

7 There are copious quotes everywhere concerning the nature of this
8 particular tribunal and we submit that simply to make it into
9 some sort of an internationalized -- come up with a catchy phrase
10 saying it's internationalized for the purposes of then
11 disregarding some rather important legal issues such as the --
12 pardon and amnesty in order to get around that particular block
13 to this particular case is inappropriate.

14 I just have a few more remarks, Your Honours, and then I'll sit
15 down.

16 I just want to wrap up by saying, again, the prosecution's
17 argument -- you know -- they rest their case, primarily,
18 concerning the previous trial; that it was not conducted
19 according to law -- to law and that the judgement was not final
20 and that it was in absentia and of course there was no second
21 instance.

22 Now, I'm not going to lecture to the Trial Bench as far as the
23 second instance, we all know when finally Cambodia came up with a
24 second instance court.

25 But let's assume for the sake of argument that you need a second

61

1 instance court in order for those judgements to be final. Is the
2 suggestion then being made that every single judgement that was
3 conducted from -- on trials conducted from 1979, in the national
4 context, from 1979 into the time that Cambodia finally had a
5 functioning second or third instance court where you could
6 finalize the judgements; are we saying that all those cases were
7 not final? That all those individuals that were convicted did
8 not fully enjoy their rights, that there has been this gross
9 miscarriage of justice for all those cases and that any one of
10 those individuals at this point in time can raise the issue that
11 they have not been availed of all their rights, because that's
12 the implication.

13 [11.56.00]

14 We submit at the time we did not have a functioning second
15 instance because it wasn't meant to have a second instance, that
16 was a final judgement and the final judgement could have been
17 executed the moment that Mr. Ieng Sary would have been captured.
18 I don't believe I have anything further to add, Your Honours. I
19 am prepared to answer any questions, if there are any questions
20 from the Bench, otherwise I would make one request and that is,
21 if we have not taken the full time, the full one hour allotted to
22 us for our opening remarks, if it would be possible to have that
23 time tagged on towards the end for us to use in the event -- in
24 the event it's necessary. I don't believe it will be necessary
25 but if we do need it, if we could use any time that we haven't

62

1 used in this, our opening remarks, concerning this particular
2 issue.

3 Thank you, Your Honours, for your attention.

4 MR. PRESIDENT:

5 Thank you, Counsel, for your oral submission concerning the
6 preliminary objection with regard to the ne bis in idem
7 principle.

8 It is now appropriate time for lunch adjournment. The Chamber
9 will take the adjournment for lunch, until 1:30. The session
10 will resume by 1:30. All parties are invited to return to the
11 Courtroom before 1:30.

12 The security guards are now advised to bring Mr. Khieu Samphan
13 and Ieng Sary to the holding cell and that you are instructed to
14 bring them back to the courtroom before 1:30.

15 Thank you.

16 (Judges exit courtroom)

17 (Court recesses from 1157H to 1405H)

18 (Judges enter courtroom)

19 MR. PRESIDENT:

20 The Court is now back in session.

21 Before we proceed this afternoon session, the Chamber would like
22 to notify the accused and their counsels that according to the
23 Internal Rule 81(3), (4) and (5), the accused's presence is
24 required during the trial proceedings. The accused shall be
25 present in this courtroom. With regard to the other provisions

1 in Rule 81(3), (4) (5), it depends on the health of the state of
2 the health of the accused who cannot for that reason be attending
3 the trial proceedings, and for that reasons there must be
4 reasoning to be submitted to the Trial Chamber for consideration.
5 And the Trial Chamber would like to also inform that each and
6 every day of the court proceedings, the accused person shall be
7 present before the Chamber preliminarily before presenting the
8 reasons that lead to the request for withdrawal from the
9 courtroom or retired from the courtroom to the holding cells or
10 to the detention facility and observing the proceeding through
11 remote participation.

12 [14.07.48]

13 The AV equipments have been installed so that the accused can
14 also observe the proceeding through remote participation. From
15 now on we would like all parties to abide by this provision.

16 And the Chamber will reserve its discretion to grant permission
17 to the accused persons whether he or she shall be allowed to be
18 absent from the courtroom or not.

19 And as I already indicated, holding cells have been well equipped
20 with the AV equipment, and that the accused person who would wish
21 to go and stay in the cells can observe the proceeding, unless
22 his or her health condition needs him or her to be taken back to
23 the detention facility.

24 Counsel Sa Sovan, we note you wish to make some observation.

25 MR. SA SOVAN:

1 Thank you, Mr. President. We have been very well informed and
2 will take this very seriously. However, during this time of the
3 hearing my client has been rather tired and fatigued. And he
4 would like to ask for the Chamber's permission to allow him to go
5 to the holding cell downstairs, and that he will be coming back
6 to the courtroom tomorrow.

7 He says it would be okay now for I will be representing him in
8 this courtroom, and that the court proceedings today are
9 dedicated to other defence counsel rather than to him in
10 particular, so he would like to reserve his energy for tomorrow's
11 session instead.

12 (Deliberation between Judges)

13 [14.11.15]

14 MR. PRESIDENT:

15 The Chambers has noted the request by counsel Sa Sovan, and of
16 course noted the reasoning behind this request. The Chamber
17 notes also the situation or the health condition of the accused,
18 Mr. Khieu Samphan does not appear to be deteriorating or severe,
19 that's why the Chamber finds that he shall remain seated in this
20 courtroom.

21 MR. KARNAVAS:

22 If I may be heard, Mr. President, concerning my client, and
23 concerning the remarks made by the Trial Chamber concerning this
24 matter, which I think it's a rather serious matter. Let me begin
25 by first describing how things are happening at the ICTY since

65

1 the prosecution, in particular, seems to enjoy how things are at
2 the ICTY, and how this Trial Chamber should look to them for
3 guidance. I'll also touch upon, a little bit, on some of the
4 international principles.

5 First and foremost, Mr. President, with the deepest respect, I
6 believe that when an accused believes that he is not able to be
7 in court, and is willing to waive his rights to be present, that
8 those wishes have to be granted by the Trial Chamber. At the
9 ICTY, nobody is forced to come to court. No one. They don't
10 even have a holding cell for the individuals to watch the
11 proceedings. They have made provisions in their cells at the
12 detention centre to participate, or to watch the proceedings,
13 should any of the accused feel unable or simply unwilling to
14 attend the trial, their particular trial.

15 [14.13.25]

16 And when an accused waives his presence, or her presence, that
17 accused cannot later on say that they were not afforded their due
18 process rights, because that was a personal waiver made by the
19 accused. And in the trial that I just finished, which lasted
20 five years, several of the accused, at times, simply did not show
21 up because they did not want to show up, not because they could
22 not show up. They chose not to show up for a variety of reasons.
23 Including my own client. And this was for weeks and months at a
24 time. I'm not saying it's a good practice or a bad practice, but
25 I'm merely pointing it out to the Trial Chamber.

1 We respectfully request that some further consideration be given
2 to this matter, because these individuals are old. They may look
3 fine by appearances, but our client in particular has problems
4 sitting for long periods of time. He also needs to use the
5 restroom virtually every half hour. It is painful for him to be
6 here, he cannot concentrate, he cannot really assist in his own
7 defence.

8 However, the Trial Chamber has adopted a procedure, which I
9 believe is on the cutting edge of the law, which is to have
10 holding cells nearby where the clients can participate and can
11 assist their clients. Now that our client, and the others, have
12 made their initial appearance, I would respectfully suggest that
13 the accused, if he or she were to represent to their lawyer, and...
14 and if they were to sign a written waiver, so that there is a
15 document that the client actually is waiving, as opposed to
16 merely a representation by the lawyer, even though lawyers are
17 effectively officers of the Court, and are duty bound to speak
18 the truth, we believe that the Trial Chamber should honour the
19 accused's wishes not to be present.

20 [14.15.55]

21 Forcing an accused to be present, when they cannot or do not wish
22 to be here, is not a solution. As I've indicated, if an accused
23 wishes not to attend, for whatever the reason may be, that is a
24 personal decision being made by the accused, and no rights are
25 being taken away from him by the Trial Chamber.

67

1 Conversely, forcing an accused to be in Court when they're
2 physically, or even mentally, not willing, capable or willing to
3 be here, I respectfully submit, borderlines on a violation of an
4 accused's fair trial rights and their human rights.

5 Now, I understand that that's not the intention of the Trial
6 Chamber, and I'm not suggesting that that is what the Trial
7 Chamber is attempting to do, but I simply point out that perhaps
8 further consideration of this issue may be warranted. And of
9 course we need to be flexible, keeping in mind that our
10 respective clients are rather old.

11 [14.17.10]

12 With respect to my particular client, for this afternoon, he was
13 ordered to be back in court even though he'd indicated to
14 Chambers privately that he was unable to be here. He is here,
15 presently. He wishes to participate for the rest of the
16 afternoon in the holding cell, watching the proceedings, in the
17 holding cell that was prepared for him. And so we would
18 respectfully request that his... that his particular request be
19 granted.

20 And following that, Your Honour, I have one point of
21 clarification I wish to make concerning one of the remarks I made
22 this morning to clarify the record.

23 (Deliberation between Judges)

24 MR. PRESIDENT:

25 Counsel Karnavas, I have noted your observation and I thank you

1 for sharing with us the experience with reference to the
2 international tribunals in which the accused person of advanced
3 age, as those who are before this Court, and that you mentioned
4 about the rule, for example, that accused person shall not be
5 forced to appear before the courtroom, and also you touch upon
6 the issue concerning the participation through remote
7 participation for example. And you indicated finally that you
8 would like the Chamber to address some of your requests. I think
9 through Khmer translation we have not been fully seized of what
10 kind of request you would like the Chamber to address for this
11 moment.

12 [14.20.20]

13 Because the issue for the time being is of course concerning the
14 presence of the accused at the hearing, and that you indicated
15 your client would be attending these proceedings in the afternoon
16 session, but at the same time you requested that the Chamber
17 address some of your requests, but what requests are certainly?

18 MR. KARNAVAS:

19 I apologise, Mr. President, for not being clear in stating my
20 point. For this afternoon proceedings, our first request is that
21 Mr. Ieng Sary be excused from being in Court, and that he
22 participate for the remainder of the afternoon in the holding
23 cell that has been prepared for him. That's our first request.
24 The previous request that I had made is for the Trial Chamber to
25 reconsider its position, the remarks given by you earlier, Mr.

69

1 President, where you indicated, effectively, and I might have
2 misunderstood, because something may have been lost in
3 translation, that even where an accused is unable to come to
4 Court, or is unwilling to come to Court, the Trial Chamber would
5 force the accused to be in Court. Effectively, that's what my
6 understanding of it was.

7 [14.21.50]

8 And if I may use an example, when the attorney for Mr. Khieu
9 Samphan indicated that Mr. Khieu Samphan wishes to be excused,
10 that request was denied, so effectively Mr. Khieu Samphan is
11 being forced to attend a proceeding where he either is unable to
12 or is unwilling to attend, and I'm not going to speculate, but
13 the remarks were that he's unable to, in addition to the fact
14 that these matters to not touch upon him at this point in time.
15 So based on that, as an example, Your Honour, what I am
16 requesting that subsequent to the proceedings today, that perhaps
17 Your Honours can more fully discuss this matter amongst
18 yourselves, and consider the ramifications.

19 [14.22.45]

20 The alternative is to allow the parties to brief the issue.
21 Although I think writing more on this particular issue at this
22 point in time of the proceedings may not be a beneficial way of
23 spending our time. But I do believe that if a client does not
24 want to be in Court, he cannot be forced to be in Court. And if
25 he's unable to be in Court, he should not be forced to be in

70

1 Court. And I do believe, my personal opinion, and I can do more
2 research on it, but I believe that forcing an accused to be in
3 Court, when the accused is waiving his or her presence,
4 recognising the Court, or even not recognising the Court, once
5 they waive their presence, it is a voluntary waiver, their rights
6 are not being violated, but I think it is a violation of human
7 rights to force an accused to be in Court when he or she is
8 clearly unable to be here.

9 Now I hope I got my request - - I hope they are clear at this
10 point in time. So for right now, Mr. Ieng Sary be excused, for
11 at some point after the hearings for Your Honours to reconsider -
12 - and I point this out because I've noted, and I don't wish to
13 make a point of this, but when Your Honours gathered together to
14 discuss it, not all Judges were participating in that discussion.
15 Now I assume that this discussion took place prior to coming to
16 the Bench, and that's why there was no need, but I think this is
17 a very fundamental issue. This is an extremely important issue,
18 and I think we're being judged how we're going to proceed with
19 these proceedings.

20 [14.24.35]

21 I clearly want to state on the record that our client wishes to
22 participate in this tribunal. But when he cannot, he will inform
23 his lawyers, we will inform you, and I think that's the better
24 approach. But I'm simply seeking you to reconsider your position
25 based on the arguments, and any arguments you may find amongst

1 yourselves. Thank you.

2 [14.25.10]

3 MR. PRESIDENT:

4 International Co-Prosecutor, you may now proceed.

5 MR. CAYLEY:

6 Thank you, Mr. President, and I'll be quiet brief in responding

7 to my learned friend's comments.

8 There is, of course, in any legal proceeding, a basic requirement

9 that an accused attend those proceedings, and whereas Mr.

10 Karnavas gives examples from the Yugoslav war crimes tribunal of

11 individuals not attending trial, and there are some examples of

12 that, the vast majority of individuals - -

13 MR. ANG UDOM:

14 Our sincere apology, actually, my colleague has two requests, and

15 both of them have not been addressed. May I also reiterate that

16 my client be excused, and that he remain in the holding cell

17 observing the proceedings please.

18 MR. PRESIDENT:

19 The international Co-Prosecutor, you may now continue.

20 MR. CAYLEY:

21 Thank you, Mr. President. As I said, there is a basic

22 fundamental requirement that an accused attend trial. There are

23 some exceptional examples at the Yugoslav war crimes tribunal

24 where individuals either could not attend, through illness, or

25 refused to attend. Now, I think first and foremost in terms of

1 any of these accused being unable to attend through infirmity or
2 physical or mental condition, the Court actually needs to have
3 expert evidence on that issue, and not just evidence from Mr.
4 Karnavas about the state of his client.
5 Now, in terms of an accused actually not being present in the
6 courtroom during the proceedings, if the Court were to grant that
7 application, it needs to be very clear why the individual is not
8 attending. Is the individual not attending because they don't
9 want to be here, like Mr. Nuon Chea this morning? Or is the
10 individual not able to attend because of physical or mental
11 infirmity? And I think for the sake of the record of these
12 proceedings, and in order to ensure that there aren't later
13 complaints by the accused that they haven't been able to
14 participate in their own proceedings, that every time that they
15 are excused from the Court, for whatever reason, the reason is
16 actually recorded in writing, and as Mr. Karnavas says, they
17 expressly waive their right to be here.
18 [14.28.10]
19 I think it's absolutely essential that that record is kept,
20 because otherwise what we will find is, later on in these
21 proceedings, accused make complaint, even though it wasn't their
22 own choice that they weren't attending, that they haven't been
23 able to participate in the proceedings. But fundamentally,
24 fundamentally, I would remind the Court that in all
25 jurisdictions, and certainly in my own jurisdiction in England,

73

1 and certainly in the international jurisdictions, accused are
2 expected to attend their proceedings.

3 Thank you, Mr. President.

4 [14.28.45]

5 MR. KARNAVAS:

6 Just very briefly, Mr. President. There may be this expectation

7 - -

8 MR. PRESIDENT:

9 Could you please stop here. The Chamber will of course consider
10 your observations. We have already noted the reference to the
11 international tribunals, and you also indicated that you would
12 conduct further research to this to help expedite the
13 proceedings. We can reiterate that we have taken note of your
14 observations, and that we are not now in the position to rule on
15 this yet.

16 We will deliberate on this to see what kind of approach shall be
17 conducted pursuant to both national and international standards.

18 So we would like to end this debate on this issue now.

19 MR. KARNAVAS:

20 Thank you, Mr. President. May we then get a decision on our
21 first request, and that is for Mr. Ieng Sary at this point in
22 time, to be excused, or is he going to be forced to sit here for
23 the rest of the afternoon without some kind of medical
24 examination, as Mr. Cayley is suggesting.

25 [14.30.20]

1 May he be excused at this point in time?

2 JUDGE CARTWRIGHT:

3 Resume your seat until the Judges have had an opportunity to
4 discuss these matters please. Please do us that courtesy.

5 MR. KARNAVAS:

6 My apologies.

7 (Deliberation between Judges)

8 [14.33.25]

9 MR. PRESIDENT:

10 May the Chamber seek clarification with regard to the requests
11 made by counsel for Ieng Sary, so that the Bench can have it as a
12 foundation for our consideration.

13 MR. ANG UDOM:

14 Thank you, Mr. President. This morning, there were two cases,
15 Mrs. Ieng Thirith and Nuon Chea requested to be excused, and when
16 the requests were made then the Chamber ruled on immediately. My
17 client, Mr. Ieng Sary, has three key ailments, in particular he
18 has severe back pain, that's why we have requested that the
19 Chamber allow him to be excused and observe the proceeding in the
20 holding cell.

21 MR. PRESIDENT:

22 Judges of the Bench are now allowed to actually make comment
23 concerning this, because so far as we have observed that the
24 request, in the request itself there is a conjunction ?or?.

25 JUDGE LAVERGNE:

75

1 In an attempt to clarify matters, the Chamber wishes to draw the
2 attention of parties on the fact that the Internal Rules provides
3 for two situations, two different situations. The first is this:
4 It is set out in Internal Rule 81(3). In the event that the
5 accused refuses to appear, in such a scenario he can waive his
6 right to be here and allow his counsel to make representations,
7 but to make a deliberate choice to not appear. But in order to
8 make things perfectly clear and transparent, the Chamber wishes
9 to know at the beginning of each hearing day, the Chamber wishes
10 to know if each accused person intends to appear before the
11 Chamber or not. Is that clear?

12 The second scenario is set out in paragraph 4, where the accused
13 may not refuse to appear, but may participate remotely. Now, in
14 the event that the accused does appear remotely, it is only when
15 the accused has made known that he or she suffers from health
16 problems or any other serious matter. In order for the Chamber
17 to make a determination, the Chamber must know what those health
18 reasons are, or what those serious reasons are, in order to
19 understand the basis for wanting to participate in the
20 proceedings remotely.

21 [14.37.45]

22 Now, for the two accused persons who are present this afternoon,
23 the Chamber considers that there's a difference between the
24 situation of the accused person Khieu Samphan and the accused
25 person Ieng Sary. Mr Sary's counsel has pointed out that their

1 client suffers some health problems. To this date, the Chamber
2 is unaware of any medical reasons, and in fact the Chamber
3 believes that he has refused medical examination.
4 Now, in order to clarify the situation, the Chamber wishes to
5 draw the attention of all parties on the differences between
6 paragraph 3 and 4 of the specific rule within the Internal Rules.
7 I beg your pardon, those are paragraphs 4 and 5.

8 [14.38.50]

9 MR. KARNAVAS:

10 Judge Lavergne, if I may respond briefly. And first I wish to
11 say that when I was standing I was not trying to be discourteous
12 to the Court, in my jurisdiction I'm expected to stand until
13 given permission to sit down, once I'm on my feet and the Court
14 is addressing me. So I apologise if it appeared that I was being
15 discourteous.

16 To my understanding, my client has never refused medical
17 treatment, and has never refused to be examined. That came out in
18 the translation. There's a third scenario, Your Honours, where,
19 for instance, the accused wishes to be present, refuses to waive
20 their presence because they're not medically fit. That's not the
21 situation that we're faced here today. In other words, he's not
22 going off to the hospital, but still wishes to be here and
23 therefore the proceedings should not go forward.

24 Our client, in the medical records that are available to the
25 Trial Chamber, suffers from a variety of illnesses. He's 85, 86

77

1 years old. I don't need a medical doctor to tell me that Mr.
2 Ieng Sary has a problem concentrating or sitting, because I've
3 met with him for the last three years. Granted, my word should
4 not be sufficient. I indicated, and this was brought out by the
5 prosecution, perhaps more clearly, that on each occasion -- and
6 that's what I mean, on each occasion -- that is, every day that
7 someone is not here, or there's a morning session, afternoon
8 session, there needs to be a written record, something signed by
9 the accused, that they're voluntarily waiving their presence.
10 I do not agree with forcing an accused to be in Court if they're
11 physically incapable of being here. I also personally do not
12 agree, and I think it is a violation of an accused's rights, to
13 force them to be in Court when they don't wish to be here.
14 That's a personal choice. With respect to Mr. Ieng Sary, this
15 afternoon he's suffering. He was forced to come up. He is
16 suffering right now. We have made this request, we were very
17 clear. He wishes to participate, for the rest of the afternoon,
18 downstairs in the holding cell. The United Nations spent a lot
19 of money preparing those cells for these eventualities. This is
20 one of those occasions wherein it's going to be put to good use.
21 [14.41.55]
22 Now tomorrow morning, if Mr. Ieng Sary is in fact unable, unable
23 to come, he will communicate that to us, perhaps he can be
24 examined as well. We will notify the Chamber, and we're prepared
25 to have him sign a waiver, indicating exactly the reasoning why

78

1 he does not wish to be here, or cannot be here, so that there is
2 a record.

3 So later on, on appeal, there can be no challenges that he was
4 not present, and was not able to have a fair trial. And I think
5 that solves the situation.

6 [14.42.55]

7 MS. SIMONNEAU-FORT:

8 Mr. President, very briefly, civil party lawyers will defer to
9 the Chamber in order to put weight on the representations made by
10 the counsel for the accused. We simply want to recall that, to
11 the extent that it is possible, and to the extent that all of the
12 rights are respected, this is a matter of respect for victims and
13 civil parties. And some of these civil parties are also of an
14 advanced age, and they have deployed significant effort to be
15 here, and to participate in these proceedings is something quite
16 tremendous. And if possible, they would like to see the accused
17 present during these proceedings.

18 (Deliberation between Judges)

19 [14.48.35]

20 MR. PRESIDENT:

21 Having observed the request made by counsel for Ieng Sary and
22 also the response by the Co-Prosecutor and lead co-lawyer and
23 having discussed on the request, the Chamber has found that the
24 accused person has reason for us to believe that his health
25 condition is warranted for permission to remain seated at the

1 holding cell and that he observes the proceeding through remote
2 participation with AV equipment installed in the cell.

3 The Chamber would like to reiterate that all accused persons
4 shall be brought to the courtroom early in the morning of every
5 session, and the Chamber will look into the request on a daily
6 basis, on a case-by-case situation; for example, if such a
7 request is made concerning the presence of the accused in the
8 courtroom and whether the Chamber would grant permission or not.

9 [14.50.39]

10 The detention facility security personnel are now instructed to
11 bring the accused person, Mr. Ieng Sary, to the holding cell and
12 that he will be observing the proceeding through AV install
13 equipment.

14 Next the Chamber would like to proceed to the floor for the
15 Co-Prosecutor to respond to the observation made by counsels for
16 Ieng Sary this morning with regard to the preliminary objections
17 on ne bis in idem.

18 The Chamber would like to also note that this morning the
19 Co-Prosecutor submitted a request before the Chamber in which he
20 indicates that he would like to address or respond to the
21 observation made by defence counsel for Ieng Sary.

22 The Co-Prosecutor has requested the Chamber to grant the
23 prosecution some time to respond to that observation, and the
24 Chamber has agreed to the prosecutor to respond for five minutes.

25 Please hold on.

1 You may proceed.

2 [14.52.45]

3 MR. KARNAVAS:

4 Just a point of clarification to my argument this morning because
5 I might not have been clear on one point when I indicated during
6 my remarks that the Appeals Chamber -- and I have quoted -- had
7 noted concerning Article 12 of the Cambodian procedure --
8 criminal procedure -- where it said that "Article 12 of the CPC
9 as set out above at paragraph 45 may be regarded as an example of
10 the application of the doctrine of res judicata". That quote was
11 from an earlier decision, Your Honours, not from the closing
12 order or the appeals to the closing order. It was from their
13 decision dated 17, October 2008. It's found in paragraph 47 of
14 Document C22/1/73. I just wish to clarify that point so there's
15 no misunderstanding as to where that quote comes from. That's in
16 17, October, 2008.

17 MR. PRESIDENT:

18 Counsel Karnavas, could you please hold on. How much time is
19 needed for you to do that? Because I felt that the allocated
20 time for the defence counsel has already been used up and that we
21 already made it clear that counsel is not allowed to make
22 repeated the same observation, and the Chamber also advised the
23 parties to really write in written submission if they would wish
24 to really add further observations on top of the allocated time.
25 We just would like to know how much time would you need to

81

1 address this matter before us so that we are decisive on this?

2 We made it clear, as I indicated that one hour has been allocated
3 for your counsel and for your team and that it has already been
4 used.

5 [14.55.09]

6 MR. KARNAVAS:

7 Mr. President, again to clarify, I don't know how things are
8 happening in translation but perhaps I'm speaking too fast. It
9 is not further observations. This morning when I was discussing
10 the interplay between Article 7 and Article 12 I may have given
11 the wrong impression when I quoted from what the Pre-Trial
12 Chamber had found. The quote where I indicated that the
13 Pre-Trial Chamber had suggested or had found that Article 12
14 should be regarded as an example of the application of the
15 doctrine of res judicata that is found in there provisional
16 detention order of 17, October, 2008. It is not in the closing
17 order or the appeals to the closing order. And so I wanted to
18 make sure that I clarified that point for everyone's convenience.
19 And that's found in paragraph 47 of that decision -- of that
20 order.

21 So that's the only point I wanted to clarify because it appeared
22 from my colleagues that I might have given the wrong impression.
23 That's all, Your Honours. I apologize if I've -- I'm testing the
24 Trial Chamber's patience.

25 MR. PRESIDENT:

1 The International Co-Prosecutor, you may proceed.

2 MR. CAYLEY:

3 Thank you, Mr. President.

4 Actually just one point of clarification to Mr. Karnavas, and
5 it's quite right he was actually clarifying things this morning,
6 he said "Appeals Chamber" in his first set of submissions and I
7 think he meant the Pre-Trial Chamber. So it was the decision of
8 the Pre-Trial Chamber and not the Appeals Chamber.

9 [14.56.48]

10 Yes, Mr. President, thank you. I need five minutes to address
11 the submission made this morning by defence counsel for Nuon
12 Chea.

13 A number of points I think need to be made to really clarify
14 matters for the public. I think that the Trial Chamber is aware
15 of many of the facts that I'm going to state but nevertheless I
16 think for the purposes of the people who are watching in the
17 world at large a number of points need to be made.

18 First, defence counsel for Nuon Chea essentially state that their
19 client had been subjected to a secret -- a secret investigation.

20 This is not correct. Whilst the investigation is not public, the
21 Nuon Chea team have been aware of every step taken in that
22 investigation over the four years in which they have been
23 instructed in this case. The witnesses, the statements and the
24 documents on which this trial has been based have all been
25 accessible by the defence team for Nuon Chea.

1 The fact that it's been confidential to the public during that
2 time period is a requirement of investigations within the legal
3 system of the ECCC but of course now that evidence will become
4 public and will be scrutinized not just by this Trial Chamber but
5 by the public at large during the course of this trial. So to
6 suggest that Nuon Chea has been subjected to a secret
7 investigation is very misleading indeed.

8 Secondly, defence counsel for Nuon Chea stated that his client's
9 26 investigative requests had been ignored by the investigating
10 judges. This is not correct. A number of the requests that they
11 have made have been accepted in full or in part by the
12 Co-Investigating judges and a number have been rejected, and that
13 has happened to all of the parties to these proceedings. And a
14 number of those investigative requests that have been rejected
15 have been appealed.

16 [14.59.22]

17 The defence are aware also that they have opportunity within
18 these proceedings to request that the Trial Chamber investigate
19 matters further under Rule 93, which they've done so, and to
20 which we, the office of the Co-Prosecutors, have responded and
21 indeed we are awaiting your decision on that matter.

22 The prosecution's position on this issue is very clear. We
23 believe that this trial must be fair, it must be expeditious, but
24 we will always support any request from any party where it has
25 the potential for producing relevant evidence as to determination

1 of the innocence or guilt of the accused, and for that matter,
2 anything that would mitigate their criminal liability.

3 However, it must be said that not every investigative request
4 that is made by a party may be crucial to determining the
5 principle issues in this case. Also some requests may become
6 more or less relevant as the proceedings progress. But to
7 suggest that there has been a blanket refusal of all
8 investigative requests that Nuon Chea has made is simply not
9 right.

10 Counsel for Nuon Chea stated this morning that there were over
11 300 witnesses that they had requested that have not been taken
12 into account. It must be remembered that on their initial
13 witness list they actually had 527 witnesses of whom, certainly
14 in the prosecutor's view, a very small proportion offered any
15 evidence that was relevant to the crimes or the role of the
16 accused in this particular case.

17 [15.01.13]

18 The defence have put forward hundreds of witnesses that testify
19 to the general conditions, the role of the United States in the
20 pre-democratic Kampuchea period, the general state of affairs
21 during the democratic Kampuchea period, but provided little
22 information as to the description of the evidence they intend to
23 offer or what that evidence actually does to assist the judges in
24 determining matters in the closing order.

25 The Nuon Chea defence have not objected to the approximately 300

1 witnesses that the prosecution originally put forward, as
2 required under the rules, four months ago. This means, at least
3 to us, that they agree with the presentation of this evidence,
4 i.e. that it will provide relevant and probative evidence and
5 that they will be given the opportunity to question those
6 witnesses on the context that they think is relevant to this
7 case.

8 We would also say that I think at this stage the statements that
9 they've made are rather premature, bearing in mind that the
10 Chamber has already stated that the issue of the witness list
11 will be discussed on Thursday and all of the parties will have
12 the opportunity to make representations.

13 On the fair trial issues that they raised, the fair trial issues
14 that have been raised by the Nuon Chea defence team have been the
15 subject of extensive public written litigation to suggest somehow
16 that their complaints have been ignored again is unfair and
17 misrepresents the reality of the situation to the general public.
18 This is a matter that we have responded to. It is under judicial
19 consideration as we speak. And the public need to know that
20 fact.

21 [15.03.07]

22 Lastly, we would reiterate, and we say this most respectfully,
23 because we recognize the responsibility that the Trial Chamber
24 has, you have a responsibility to manage this trial. All of the
25 issues that the defence raises are issues that you need to

1 properly determine.

2 Walking out of trial on the first day of a trial simply shows an
3 intention not to participate. Now, that is his choice. He can do
4 that if he wishes. He must, as we've previously discussed when
5 Mr. Karnavas raised the issue, he must sign a written waiver
6 stating that he doesn't want to participate in the proceedings.
7 But let us be absolutely clear that many of the reasons that the
8 defence counsel have given for their client walking out this
9 morning, and which have been received by the public, are simply
10 not true.

11 Now, I don't have anything further to say on the matter other
12 than that I think all of the parties, all of the parties because
13 of the public interest in this case, are obliged to represent
14 things properly before the Trial Chamber so that ideas don't
15 develop outside this courtroom that may be destructive to the
16 processes that are going on here.

17 Thank you very much indeed, Mr. President, for the time that
18 you've given me.

19 MR. PRESIDENT:

20 Thank you, Mr. Co-Prosecutor.

21 Next we proceed to the response to the preliminary objection
22 concerning ne bis in idem raised this morning by defence counsels
23 for Ieng Sary.

24 [15.05.23]

25 MS. CHEA LEANG:

1 Thank you, Mr. President, Your Honours.

2 I am responding to the preliminary objections concerning ne bis
3 in idem.

4 Your Honours, during this initial hearing the counsel for Ieng
5 Sary raised the issue concerning the violation of Ieng Sary when
6 the ne bis in idem principle is introduced at this Court. They
7 indicated that Ieng Sary was already tried by a court in 1979 the
8 15th of August and that the judgment of that court bars Ieng Sary
9 from any further prosecution and that if it is applied it will
10 apply then Ieng Sary would be sentenced for the -- twice.

11 Before I proceed to these arguments -- these observations, I
12 would like to draw Your Honours and the parties attention to the
13 principle of res judicata, as indicated by Ieng Sary's defence
14 team, that these kinds of principle has been indicated or set
15 forth in Article 12 of the Code of Criminal Procedure of
16 Cambodia, which states very clearly that a trial of the same fact
17 cannot -- or Act cannot be brought again or conducted again on
18 the same accused person.

19 And in light of that, with regard to the facts before this
20 Chamber, we found that the defence is erroneous when making such
21 observation because the situation back then -- or in the
22 provision is more about when the accused person has been
23 acquitted not convicted. For that reason there is no -- he is
24 not barred from being prosecuted again.

25 From this my colleague Mr. Andrew Cayley will also be elaborating

1 further on the ne bis in idem and that the trials in 1979 were
2 not conducted according to the international standard and fair
3 trial standard. He also will be touching upon the -- with
4 reference to the International Covenant on Civil and Political
5 Rights concerning the principle of ne bis in idem.

6 [15.08.39]

7 Mr. Ieng Sary was sentenced to death by the People's
8 Revolutionary Court in Phnom Penh for his crimes committed during
9 the period of three years, eight months and 20 days. The court
10 trials proceeding were conducted on the 15th of August 1979 and
11 ended on the 19th of August 1979, and the court was established
12 in accordance with the decree law dated on the 15th of July 1979
13 for the prosecution of genocide committed by senior Khmer Rouge
14 leaders, including Pol Pot and Ieng Sary. The court sentenced
15 Pol Pot and Ieng Sary to death and all their property was ordered
16 to be confiscated.

17 In the judgment of the People's Revolutionary Court stated, in
18 particular, facts with relation to the crimes committed under
19 Democratic Kampuchea and there was only one offence which is the
20 genocide. However, if you look at the case file 002 as dated on
21 the 19th of September 2007, the current case before us, there are
22 several facts against the accused person Ieng Sary, including
23 crimes against humanity, grave breaches of Geneva Convention of
24 the 12th of August 1949, genocide and crimes as set forth under
25 Penal Code of 1956, all of which have already been laid down in

1 detail in the closing order of the Co-Investigating Judges.
2 The People's Revolutionary Court conducted the proceedings in
3 1979 for five days and the hearing ended on the 15th of August
4 1979 -- rather, on the 19th of August 1979 at 11 a.m. The
5 People's Revolutionary Court did not actually conduct a broad
6 investigation concerning the severe crimes and the complexity of
7 the crimes that were committed all across the country and where
8 more than roughly two million people died.

9 [15.11.30]

10 The court -- the PRT Court in Phnom Penh in 1979 was conducted or
11 started and of course we understand that there were shortcomings
12 in certain procedures, law making and human resources, but the
13 court itself already sentenced Pol Pot and Ieng Sary and that the
14 procedures at that time were legal and they were conducted to
15 respond to the anger of the people of Cambodia, those who
16 survived the Khmer Rouge Regime. They were suffering both
17 mentally and physically and that's why the court set up to
18 prosecute the crimes committed to serve the interest for the
19 victims as well.

20 Your Honours, the President, and parties to the proceeding,
21 currently if we compare these proceedings before this Tribunal to
22 the proceedings before the People's Revolutionary Court in Phnom
23 Penh in 1979, we can see that there were still shortcomings
24 during that time and that we also can see that Cambodia was not
25 yet the signatory to the ICCPR at that time. We were the

1 signatory of that covenant only in 1992 when we was then
2 represented by the National Supreme Council of Cambodia, the only
3 legitimate institution, and then of course it was before the
4 general election organized by the United Nations Transitional
5 Authority in Cambodia or known as UNTAC.
6 Because the People's Revolutionary Court of Phnom Penh in 1979
7 lacked legal basis and other key procedural standards, the
8 prosecutor would like to respond to the arguments raised
9 concerning the ne bis in idem that the law of the ECCC and the
10 Internal Rules do not really state any guidance concerning the ne
11 bis in idem with regard to the same fact. It is therefore
12 required that the ECCC seek guidance from Criminal Procedural
13 Court of Cambodia and International Instruments.
14 [15.14.37]
15 Article 12 of the Criminal Code of Procedure of 2007 states
16 concerning the res judicata and it states very clearly concerning
17 the ne bis in idem that shall not be applied with regard to the
18 same offence. The Article 12 states that in applying the
19 principle of res judicata any person who has been finally
20 acquitted by a court judgment cannot be prosecuted once again for
21 the same act. For that reason Ieng Sary shall not be barred from
22 any further prosecution and that Article 12 of Criminal Code of
23 Cambodia of 2007 shall not be applied with regard to Ieng Sary's
24 case.
25 The purpose of the principle of double jeopardy or ne bis in idem

1 is to protect an accused from the hardships of enduring multiple
2 trials and punishments. However, Mr. Ieng Sary was not present
3 at the trial nor has he suffered any punishments. On top of
4 this, the ne bis in idem principle concerning the same fact has
5 been mostly found on the notion that it is unfair for the accused
6 to receive a double sentence for the same fact.

7 So in conclusion, the current proceedings before this Chamber
8 does not really put the accused person in a situation where he
9 suffers from any hardships, and the principle of ne bis in idem
10 is established to bring justice to everyone, and of course it is
11 fair for everyone already. And in all circumstances the ne bis
12 in idem principle can be applied here and there is no provision
13 stating that the principle of ne bis in idem shall not be applied
14 with regard to the same fact.

15 And that If you look at the Criminal Procedure of Cambodia and
16 although the judgment of the People's Revolutionary Court of
17 Cambodia of 1979 was not the final one, and that the trial was
18 concluded and the judgment was not subject to an appeal, Ieng
19 Sary shall not be barred from prosecution before the ECCC and
20 that ne bis in idem is not violated here at this Court.

21 [15.18.29]

22 The Co-Prosecutor, therefore, would request respectfully that the
23 Trial Chamber reject the request -- the submission by the defence
24 counsel for Nuon Chea -- for Ieng Sary rather, concerning the ne
25 bis in idem that shall not be applied before this Chamber.

1 And the accused person has committed -- as they already
2 indicated, the defence counsel stated about the judgment of the
3 People's Revolutionary Court of 1979 indicated clearly about the
4 deprivation of his -- that the Trial Chamber has no jurisdiction
5 over the accused person but we object to that observation.

6 My colleague Mr. Andrew Cayley will touch upon the Covenant on
7 Civil and Political Rights and other remaining issues.

8 Thank you, Your Honours.

9 MR. PRESIDENT:

10 Thank you, Ms. Chea Leang.

11 The International Co-Prosecutor, you may now proceed.

12 MR. CAYLEY:

13 Thank you, Mr. President.

14 First, Your Honours, I'm conscious of the direction that's been
15 given by the Trial Chamber, first in stating in the agenda for
16 today's hearing that you are familiar with all of the written
17 filings that have already been filed in respect to this matter,
18 and secondly, the direction that you gave to the Ieng Sary
19 defence that we concentrate on first whether the People's
20 Revolutionary Tribunal was fair in accordance with basic trial
21 standards, and secondly, whether the Pre-Trial Chamber's decision
22 actually gave rise to any new arguments in respect of the ne bis
23 in idem principle.

24 [15.20.50]

25 I will be repeating very briefly some of the points made by my

1 colleague simply to give a logical sequence to my argument, but I
2 will principally be concentrating on the fair trial issue in
3 connection with the People's Revolutionary Tribunal.
4 To the extent that arguments already made before the Pre-Trial
5 Chamber have been repeated and are to be further considered by
6 the Trial Chamber, we expressly reserve the right that our own
7 prior arguments should be considered, and in fact we state that
8 in paragraph 31 of our response to the further submissions by
9 Ieng Sary. That's our filing of the 7th of June 2011.
10 In essence, the position, I think, of the prosecution rests on
11 three points. First of all, we say that the provisions of the
12 Cambodian Code of Criminal Procedure dealing with ne bis in idem,
13 dealing with double jeopardy, the res judicata provision do not
14 apply to this situation.
15 Secondly, we say -- and as my colleague has already stated, we
16 say that the Pre-Trial Chamber was correct in finding that
17 Article 14.7 of the International Covenant on Civil and Political
18 Rights does not apply to proceedings before the ECCC.
19 [15.22.28]
20 Lastly, we say relying on guidance provided by the provisions in
21 the ne bis in idem parts of the statutes relating to the
22 international courts, the Yugoslav Tribunal, the Rwanda Tribunal,
23 the Special Court for Sierra Leone and the ICC, we say that the
24 ECCC is required to refrain from exercising jurisdiction only --
25 only -- when national proceedings have been conducted

1 impartially, independently and in accordance with the norms of
2 due process recognized by international law.

3 That part of my argument will lead directly into my discussion on
4 the fair trial issues surrounding the People's Revolutionary
5 Tribunal, which we say was not a fair court, was not independent
6 and was certainly not impartial.

7 So the first part of my argument, very briefly, the provisions of
8 the Cambodian Code of Criminal Procedure of 2007 simply do not
9 apply here. Why? Well, because the principle of res judicata
10 referred to in Article 7 and 12 of the Code essentially barring a
11 second prosecution for the same act only applies to a person
12 who's been finally acquitted, very, very clear when you read 7
13 and 12 together.

14 Now, the Pre-Trial Chamber examined this issue in some detail.
15 You'll find that at paragraphs 122 and 123 of their judgment,
16 including the defence assertion that one should interpret Article
17 12 as applying to those finally convicted, like their clients,
18 even though that's not what the provision states at all.

19 The Pre-Trial Chamber examined other provisions of the Cambodian
20 Criminal Code and found that there was actually very good reason
21 why Article 12 only refers to those finally acquitted. And one
22 of the reasons for those -- and my learned friend Mr. Karnavas
23 has already referred to this, and I'll give one of the reasons,
24 is because other parts of the Cambodian Criminal Code of
25 Procedure give a convicted person, a person who's been convicted

1 in his or her absence, to come back before the court and
2 challenge that judgment in person. That's under Articles 365,
3 370 and 371.

4 [15.25.13]

5 If the principle of *res judicata*, Article 12, applied to
6 individuals who had been convicted it would actually deny that
7 individual an express right set out in the rules, in another part
8 of the rules to challenge the judgment against them. That can't
9 be right.

10 Now, the defence response to that argument is this; that double
11 jeopardy, *ne bis in idem*, is only a right which the accused can
12 invoke. I mean, it cannot be used to deny the accused of other
13 beneficial rights, such as the right to challenge a judgment
14 against that person under the Cambodian Criminal Code of
15 Procedure.

16 Now, the ACP position on that defence argument is very clear. We
17 say you cannot argue in a single case that the rules say you
18 cannot try me because you've already tried and convicted me,
19 double jeopardy, but on the other hand the same set of rules
20 allow me to challenge the conviction against me in my absence and
21 have a re-trial.

22 Now, it doesn't make any sense to me, and I think, Your Honours,
23 it probably won't make any sense to you, that argument. You
24 cannot argue that *res judicata* applies in all cases except where
25 you don't want it to apply.

1 [15.26.34]

2 The Pre-Trial Chamber was absolutely right in its determination
3 on this issue. Article 12 does not apply to convicted
4 individuals. So in my respectful submission the Trial Chamber
5 must look elsewhere for guidance on this issue.

6 Let's look very briefly now at the second plank of my argument,
7 the International Covenant on Civil and Political Rights, Article
8 14.7. My colleague has already addressed briefly the
9 transnational application of the ICCPR to the ECCC and I'm not
10 going to repeat that part of the argument, other than to
11 reiterate that the Pre-Trial Chamber rightly found that there is
12 no international protection for double jeopardy under the
13 International Covenant on Civil and Political Rights since the
14 Extraordinary Chamber in the courts of Cambodia is an
15 internationalized court.

16 Now, my learned friend Mr. Karnavas says where does this concept
17 of an internationalized court come from?. Well, I'm not going to
18 labour the point, but there are a number of decisions, including
19 decisions by this Chamber, and I'll simply cite one of them.

20 This is a decision E395 of the 15th of June 2009 where this
21 Chamber notes that the Extraordinary Chamber in the courts of
22 Cambodia which were established by agreement between the Royal
23 Government of Cambodia and the United Nations is a separately
24 constituted independent and internationalized court.

25 Now, the Pre-Trial Chamber has also found this to be the case.

1 There are a number of decisions. I won't labour the point, but
2 it is a fact that both the Pre-Trial Chamber and this Chamber
3 have found this Court to have a special status, and there are a
4 number of reasons for that in those decisions, which I won't
5 labour, but which have been examined by the Chambers and which
6 give a very solid foundation for the argument that this Court has
7 a special internationalized place within the domestic legal
8 system of this country.

9 [15.28.44]

10 So we say on that basis that the Covenant does not apply to
11 proceedings before the ECCC. Article 14.7 does not apply.

12 Now, lastly, even if you find that the Pre-Trial Chamber was
13 wrong and that Article 14.7 does apply, we maintain our position
14 that the substantive requirements of Article 14.7 are not met and
15 we refer you to paragraph 18 of our response to Ieng Sary's
16 supplementary submission. That's our response of the 17th of
17 June of 2011. And I'm not going to repeat those arguments again
18 here because the arguments are clearly set out.

19 So lastly, and moving on really to the final part of my argument,
20 looking to guidance provided at the international level and the
21 international courts in respect of this principle of double
22 jeopardy or ne bis in idem, in essence, the Yugoslav Tribunal,
23 the Rwanda Tribunal, the Special Court for Sierra Leone and the
24 International Criminal Court Governing Instruments all contain
25 provisions which require them to refrain from exercising

1 jurisdiction where an individual has been tried for the same
2 conduct before a national court as long as those national
3 proceedings meet certain specific requirements.

4 What are those requirements? Well, the ICTR -- the ICTY, ICTR
5 and the Special Court for Sierra Leone all require that in order
6 for ne bis in idem to apply the national proceedings must have
7 been conducted independently and in accordance with norms of due
8 process recognized by international law.

9 Now, the provision of the International Criminal Court has an
10 additional requirement which states that not only that the
11 national proceedings must have been conducted independently and
12 in accordance with the norms of due process recognized by
13 international law, but also that those proceedings were conducted
14 in a manner which un the circumstances was inconsistent with an
15 intent to bring the person concerned to justice.

16 [15.31.07]

17 Now, let us look very briefly at Article 23 of the Rome Statute.
18 And I will read part of it out to you because I think it's
19 important that it's on the record, and this is what it says: "No
20 person who has been tried by another court for conduct also
21 prescribed under Article 6, 7 or 8 shall be tried by the court
22 with respect to the same conduct unless the proceedings in the
23 other court A) were for the purpose of shielding the person
24 concerned from criminal responsibility for crimes within the
25 jurisdiction of the court or B) otherwise were not conducted

1 independently or impartially in accordance with the norms of due
2 process recognized in international law and were conducted in a
3 manner which in the circumstances was inconsistent with an intent
4 to bring the person concerned to justice."

5 Now, concentrating on part B, the second test, now, the defence
6 interpret the second part of the sentence of Article 23B -- in
7 that second sense let me remind you, Your Honours, "and were
8 conducted in a manner which in the circumstances was inconsistent
9 with an intent to bring the person concerned to justice" -- they
10 interpret that, the defence interpret that as meaning that the
11 proceedings were conducted in a manner to assist an individual in
12 evading justice. And that's paragraph 37 of their appeal against
13 the closing order of 25, October 2010, and they repeat that
14 argument in paragraph 28 of their supplementary submission to the
15 Court of 27, May 2011.

16 Now, I would submit to you, with all the respect that I owe the
17 defence that that interpretation of 23B of the Rome Statute is
18 simply wrong. Why? Well, because Article 23A, you will recall,
19 which I read out earlier, which deals directly with the issue of
20 shielding a person from the jurisdiction of the court, deals with
21 that situation, proceedings contrived to shield an individual
22 from responsibility.

23 [15.33.34]

24 It's my submission that these two different sections cannot mean
25 the same thing. The drafters cannot have intended for A and B to

100

1 mean exactly the same thing.

2 As the Pre-Trial Chamber points out at paragraph 141 of its
3 judgment the defence don't cite any case law at all for the
4 proposition that these two sections actually mean the same thing.
5 And at paragraph 152 of their judgment, the Pre-Trial Chamber,
6 they state that there is nothing to suggest that the words "was
7 inconsistent with intent to bring the person concerned to
8 justice" requires an intent from the state prosecuting to make it
9 more difficult to convict the accused.

10 The last sentence of paragraph 152 of their judgment says the
11 following: "This requirement of shielding the accused from
12 criminal liability is already mentioned in Article 23A and so
13 interpreting 23B as also including it would make the provision
14 redundant and therefore useless."

15 Now, I'm not going to repeat all of the written submissions
16 already made but I would invite the Chamber to read paragraphs
17 153 to 156 of the pre-trial judgment which examines jurisprudence
18 of the Inter-American Human Rights Court which actually bolsters
19 the position of the OCP which I am submitting to you.

20 [15.35.07]

21 In conclusion, Your Honours, we submit that procedural rules at
22 the international level establish that an internationalized
23 tribunal -- you've declared that yourselves, that this is an
24 internationalized court -- cannot exercise jurisdiction in
25 respect of individuals that have already been tried for the same

101

1 acts by national authorities unless it is established that
2 national proceedings were not conducted independently and
3 impartially with regard to due process of law.

4 We agree with the Pre-Trial Chamber and we submit to you that
5 proceedings before the People's Revolutionary Tribunal fell far
6 short of independence and impartiality and regard for the due
7 process of law.

8 Now, my final submissions to you will be a brief examination of
9 why I say that. A cursory review of the surviving record of the
10 People's Revolutionary Tribunal demonstrates that it was not an
11 impartial and independent process. I would refer the Court to
12 paragraph 162 of the Pre-Trial Chamber's judgment which contains
13 a very useful chronology of the People's Revolutionary Court --
14 the Court's activity. So it basically gives you a calendar, a
15 diary of what happened.

16 Now, the People's Revolutionary Tribunal was created not by law
17 ---

18 MR. PRESIDENT:

19 We have been notified by the AV official that the DVD has run
20 out. We would like to break for a few minutes so that a new DVD
21 can also be put in place. Could you please hold on?

22 [15.36.58]

23 MR. CAYLEY:

24 Thank you, Mr. President.

25 Of course.

1 (Short pause)

2 MR. PRESIDENT:

3 The DVD is ready.

4 The Co-Prosecutor is now advised to continue his submission.

5 MR. CAYLEY:

6 Thank you, Mr. President.

7 Just to repeat, I would refer the Court to paragraph 162 of the
8 Pre-Trial Chamber judgment, which I think this is the judgment on
9 the appeal against the closing order, which contains a very
10 useful chronology of the People's Revolutionary Tribunal's
11 activities.

12 Now, the People's Revolutionary Tribunal was created not by law
13 but by a decree of the People's Revolutionary Council of
14 Kampuchea and that document is D288/6.9/9.3. Since it's largely
15 accepted in law that a court is normally created by law through a
16 sovereign parliament and not by subsidiary regulation, the very
17 basis of the establishment of the People's Revolutionary Tribunal
18 is questionable.

19 [15.38.35]

20 Now, the text of that decree, if you look at it, expresses the
21 views of the executive branch of the government in respect of the
22 guilt of the accused in that case, Ieng Sary and Pol Pot, before
23 there had even been an investigation or the trial had even
24 commenced. At least three members of the court were also members
25 of the government.

103

1 The Minister of Information of the time Mr. Keo Chanda was also
2 the president of the court and two assessors were government
3 employees and that you will find in the book *Genocide in Cambodia*
4 which has records of this Tribunal. That's D427/1/17.1.133 at
5 pages 56 and 57. This is a book that contains the remaining
6 records of the court.

7 Now, the president of the court held a press conference on the
8 28th of July of 1979 in which he declared the Pol Pot/Ieng Sary
9 clique guilty of crimes including genocide three days after the
10 opening of an investigation and again before the trial had even
11 started. And you'll find that on page 47 of the same book that
12 I've referred to, *Genocide in Cambodia*.

13 Two of the assessors in the court who appear by virtue of the
14 decree which establish the court to have powers equivalent to the
15 presiding judge at the trial provided evidence to the court, one
16 in the pre-trial stage and the other as an expert. And again,
17 you'll find that material in the same book, *Genocide in Cambodia*,
18 pages 335 to 337 and 56 to 57.

19 One of the defence counsel appointed in absentia for the accused
20 gave a statement for the prosecution during the investigation,
21 and that you will find at pages 134 to 138 of the same book that
22 I referred to.

23 There was no cross-examination of witnesses even though the right
24 had been enumerated beforehand. That you will find referred to
25 at page 16.

1 [15.40.56]

2 No evidence was offered in defence of the accused. No meaningful
3 arguments were presented in closing.

4 Indeed Mr. Hope Stevens of the United States and one of Ieng
5 Sary's defence counsel described the crimes committed as
6 disgusting and unspeakable and declared Pol Pot and Ieng Sary to
7 be criminally insane monsters. And that you will find at page
8 504.

9 Witness statements relied on at trial appeared to be stage
10 managed. Witness statements used similar jargon like the Pol
11 Pot/Ieng Sary clique referring to the two individuals as
12 traitors. That you'll find at page 75, page 102 to 103, page
13 120, page 122 and page 127.

14 The length of the proceedings were 20 days from the opening of
15 the investigation. Five days were allocated to trial. On the
16 last day of the trial, August the 19th, 1979, there were
17 statements of the defence, closing arguments to the parties,
18 deliberations by the judges and delivery of a 31-page judgment
19 all in a day, indicating, in my submission, that guilt had been
20 predetermined in this case. That you will find at pages 67 to
21 69.

22 And yet the defence are requesting you apply the principle of ne
23 bis in idem and are asking you to respect these judicial
24 proceedings in paragraph 9 of their supplementary submissions,
25 proceedings which we accept had very limited resources but did

105

1 not even meet the most basic standards of a fair trial.
2 The defence at paragraph 10 of their supplementary submissions
3 argues that one of the purposes of the double jeopardy rule is to
4 spare an individual from undergoing all of the physiological,
5 emotional, physical and monetary stress associated with criminal
6 prosecution twice.

7 [15.42.56]

8 As my learned colleague Chea Leang has already pointed out, Ieng
9 Sary was not even present for the trial and he didn't even suffer
10 the sentence imposed against him. He simply was not there for
11 trial and he was not there for imposition of the sentence. So to
12 suggest that he suffered stress during a trial for which he was
13 not even there is not convincing.

14 My submission to Your Honours is that double jeopardy simply does
15 not apply in this case for all the reasons that we've stated both
16 now and in our written submissions. I would respectfully request
17 that you dismiss this argument. Please let us get on with the
18 trial.

19 Thank you.

20 MR. PRESIDENT:

21 Thank you, Mr. Co-Prosecutor.

22 We now proceed to the lead co-lawyers for the civil parties if
23 they would wish to make some observation.

24 MR. PICH ANG:

25 Mr. President, the lead co-lawyers would like permission from the

106

1 Chamber to allow two civil party lawyers of making such
2 observations, Ms. Moch Sovannary and Ms. Jacquin.

3 MR. PRESIDENT:

4 We allow you both to make these observations for 30 minutes all
5 together.

6 [15.45.42]

7 MS. MOCH SOVANNARY:

8 Thank you, Mr. President, for giving us the floor to make our
9 response to the defence.

10 First of all, good afternoon, Your Honours.

11 My name is Moch Sovannary. On behalf and for the interest of the
12 victims who are civil parties in this case we would like to
13 express our position in support of all arguments raised by the
14 Co-Prosecutors, in addition to the written response of the civil
15 parties filed to the Chamber on the 6th of June 2011. We will
16 make further submissions with the emphasis on some legal
17 arguments and views from the victims of this serious
18 international crimes when it comes to the application of ne bis
19 in idem.

20 In all cases I support that the International Court of the Former
21 Yugoslavia was right when it comes to the application of ne bis
22 in idem, and this is the jurisprudence which the Trial Chamber
23 shall uphold, that is the international criminal crimes shall be
24 punished.

25 I also uphold a firm position that this principle does not

1 prevent the prosecution of Mr. Ieng Sary before this Court
2 because his 1979 trial was not conducted independently,
3 impartially or in light of the equal trial standards. Therefore,
4 the requirement for impartiality, independence, or equal rights
5 were not satisfied in the proceeding before the National Court.
6 Before my colleague Ms. Jacquin takes the floor to give further
7 details in relation to Mr. Ieng Sary's 1979 trial, I would like
8 to present a number of Crowns that support the exception of ne
9 bis in idem in which we must consider also the views of the
10 victims who claim that their rights and interest will be
11 overlooked when an international like court does not apply
12 prejudice of international standards which support the exception
13 of this principle application.

14 [15.48.07]

15 According to the criminal procedures of each court of each state
16 the ne bis in idem shall not be applied if the trials were not
17 conducted under norms of due process or international standards.
18 The internationalized court and procedures have to guarantee the
19 judicial safeguards and that if a court has not really maintained
20 such a procedure then it shall be rendered as not really fair for
21 the person involved according to the International Covenant on
22 Civil and Political Rights.

23 It is correct that no one shall be liable to be tried or punished
24 again for an offence for which he has already been finally
25 convicted or acquitted in accordance with the law and penal

108

1 procedure of each country. However, the trials were back then
2 not of such a standard.

3 According to the Human Rights Commission Report on its 48 Session
4 indicate very clearly concerning the principle of ne bis in idem
5 and ---

6 MR. PRESIDENT:

7 The interpreter have notified us that you spoke too fast and that
8 your message cannot be fully covered. So please slow down a
9 little bit for the record.

10 [15.50.27]

11 MS. MOCH SOVANNARY:

12 We support that the Pre-Trial Chamber has ruled already on the
13 appeal against the closing order and according to the same report
14 of the International Law Commission on the work of its 48
15 session, 6th of May to 26th of July 1996 it states that if the
16 national jurisdiction has not been upheld pursuant to the norms
17 of due process that the international community shall not be
18 bound by the result of such unfair trials.

19 And I would like to stress that this statement has been fully
20 supported by the declaration of the Amnesty International.

21 We also maintain that the exception with regard to these ne bis
22 in idem shall not really damage what we call the complimentary
23 principle. For example, if there is shortcomings in the national
24 procedures it is different from what the defence has indicated
25 with ne bis in idem with regard to the same fact has been

1 intended for the truth and justice.

2 According to the judgment or the decision on the appeal filed by
3 Ieng Sary's team, it has to be balanced that the fair trials have
4 to be maintained for the purpose of the interest of the victims
5 in particular and this balance shall be struck.

6 And that before this Court we shall not only answer to the
7 requirement of legality but at the same time we need to answer to
8 the need of humanity, and we hope that the Trial Chamber shall
9 rule on several legal arguments, and we believe that the Trial
10 Chamber will also look into the observations or comments made by
11 the victims.

12 [15.53.36.]

13 For victims, if the trial -- the trial in 1979 were not fair and
14 that their rights have not been fully respected because victims
15 have been deprived of their right to understand the full truth of
16 the events that happened back then during the Khmer Rouge Regime.
17 This Tribunal is, of course, the final hope for victims, victims
18 who really rely heavily upon the Court so that their rights and
19 dignity can be restored.

20 The trials in all kinds of criminal procedures against humanity
21 the Chamber shall be bound or expected to answer to the needs and
22 expectation of the victims because victims need to understand the
23 truth, the truth that they have been long waiting for, so that
24 they can really move on with life with hope.

25 As the Amnesty International already indicated, the international

110

1 communities has a legitimate role to claim for fairness for
2 victims through trials because it is, of course, intended to make
3 sure that such crimes shall never be reintroduced or occur and
4 that proper reparations shall be rewarded to the victims, and
5 that if the trials have not been conducted fairly then these
6 reparations and fairness would have been deprived from the
7 accused -- rather, from the victims.

8 It is very important and of course vital for the younger
9 generation to see that the trials are fair, because if the trials
10 are fair the truth have been revealed through that particular
11 trial.

12 And we have observed that from the Nuremburg Tribunal the
13 proceedings have been improved and that the international
14 community really put more focuses on the eradication of impunity
15 and the restoration of victims' dignity and interest. And for
16 that reason any person who has committed severe crimes of that
17 magnitude shall not enjoy any impunity at all.

18 [15.56.46]

19 Once again, if trials were not conducted properly or fairly the
20 rights of the parties concerned would not have been properly
21 respected. And this Tribunal, as we believe, will not really
22 take the exception of the ne bis in idem before its -- and the
23 culture -- and that the Cambodian people and the Royal Government
24 of Cambodia will also look forward to see that the accused be
25 prosecuted.

111

1 And I would like to refer to a case in France concerning the
2 accused who has been charged with persecution against the Jewish.
3 In 1946 that person was sentenced to death in absentia, however,
4 the sentence term was not served. In 1971 he was given amnesty
5 or pardoned by the senior head of France. However, the victims
6 were not very happy and their complaint was reintroduced so that
7 the person be put into -- liable for the crimes he committed and
8 proper investigation was conducted again. In 1975 the person was
9 sentenced to life of imprisonment.

10 I would like to draw your attention to this particular case
11 because we would like to stress that victims cannot really
12 tolerate the culture of impunity in whatever aspect, and that
13 their voice was heard and they were successful.

14 I think as victims we believe that the ECCC would not really step
15 back. The ECCC will continue listening to the voices of the
16 victims, and that they will help victims to break the silence.

17 [15.59.28]

18 And our humble request is that ne bis in idem shall not be
19 applied here as it would really violate the rights of the victims
20 should it be introduced.

21 I would like now to share the floor with Ms. Jacquin.

22 MS. JACQUIN:

23 Mr. President, Your Honours, good afternoon.

24 Before proceeding allow me to impress upon you how moved I am to
25 plead before you again on behalf of the civil parties.

112

1 I will use the time allotted to me to share with you three
2 remarks pertaining firstly to the August 1979 judgment,
3 statements made by the accused and thirdly, I wish to speak on
4 the Touvier case and cited as jurisprudence.
5 First and foremost, I wish to draw your attention on some of the
6 elements of the judgment that was issued in 1979. As a civil
7 party lawyer I would have liked to see you, the accused, summon
8 the courage to rupture defence and explain to the civil parties
9 the following: At what point in time and why did your
10 revolutionary project plunge into the realm of terror, torture
11 and murder?
12 But what you seek and what you ask for during these final
13 chapters of your life is impunity and denial of the reality that
14 unfolded in Cambodia between 1975 and 1979 and to seek shelter
15 behind the first judgment of August 1979 that was issued in Phnom
16 Penh which was followed by a pardon.
17 [16.01.39]
18 The name of that tribunal was the People's Revolutionary Tribunal
19 that was set up in Phnom Penh to try the crime of genocide
20 committed by the Pol Pot/Ieng Sary clique. It sought only to try
21 the crime of genocide. That was its sole jurisdiction.
22 Pol Pot and Ieng Sary were charged with the following crimes:
23 Firstly, systematic execution of a plan to massacre, a plan that
24 became increasingly unrelenting of all cadres and specifically
25 former officials and members of the Lon Nol administration;

1 secondly, the elimination of ethnic minorities and thirdly, the
2 elimination of all enemies even those imagined.
3 The forced evacuation from the cities and systematic displacement
4 of entire populations caused the death of many people. The
5 regime was structured in a way by using repression and coercion
6 through forced labour and enslavement of an entire population to
7 the point of physical and psychological annihilation.
8 The destruction of all social bonds and connections, restrictions
9 on freedom of thought, man became a slave whose sole link was
10 subordinate to Angkar. There was systematic elimination of all
11 members of religious orders, Monks, Muslims and believers and
12 intellectuals. There was the massacre of children. There was
13 the brain washing of teenagers to mould them into torturers
14 stripped of any human quality. And lastly, there was the
15 sabotaging of the national economy which condemned an entire
16 population to starvation.
17 Those were the charges launched by the prosecutors.
18 [16.03.37]
19 Witnesses took the stand and some of whom we may hear again
20 during these new proceedings. Some inquiries and investigations
21 were carried out, specifically at Tol Tseng. Reports were
22 tabled. And a death sentence was handed to you, the accused, Mr.
23 Ieng Sary. You were not there but your defence was heard and a
24 judgment was rendered. The facts were retained and liability
25 recognized.

114

1 You were not there but you were defended. And again, the facts
2 were retained. Your liability was determined and a death
3 sentence was pronounced. However, you Mr. Ieng Sary, you the
4 accused person, you never acknowledged the validity of that
5 judgement. You could have decided to accept that legal decision
6 in its entirety and all of its consequences. However, that was
7 not your choice.

8 [16.24.05]

9 In an interview with Mr. Jean-François Tain that took place in
10 November 1996 you stated publicly on the radio the following
11 words, and I quote you. "Remember that the 1979 Tribunal
12 sentenced me to death, it was not legitimate because the Tribunal
13 was organized during the Vietnamese occupation. It is useless to
14 backtrack, I am not guilty."

15 Mr. Tain asked Mr. Ieng Sary the following question: "In the
16 event that a Tribunal is established in the shorter medium term,
17 be it a national or international court to try the crimes of the
18 Khmer Rouge, do you truly believe you can escape justice?"

19 The Accused answered this: "You know fully well that no Tribunal
20 or trial will ever take place on Cambodian territory. I cannot
21 accept the idea that a genocide happened in Cambodia but what
22 must be acknowledged is that the implementation of policies at
23 the time caused immense damage and profound trauma amongst the
24 Cambodian people. I wish to say that I greatly regret this."

25 "Then why Mr. Ieng Sary, why do you refuse to explain yourself

115

1 today before the Cambodian people, before this international
2 tribunal that is being held in Cambodia that has given you a
3 chance to speak and is willing to listen to you?"

4 And lastly, I wish to recall the Touvier case. On September
5 17th, 1946 Paul Touvier was sentenced to death by the Court of
6 Justice of Lyon, he was also sentenced again in March 1947, the
7 same sentence by the Court of Justice of Chambéry.

8 [16.06.52]

9 Paul Touvier was to be pardoned by presidential decree, issued by
10 Georges Pompidou in 1972. The pardon would have been relative to
11 the two death sentences he received in 1946 and 1947 in Chambéry.

12 In 1973 in Lyon, and in 1974 in Chambéry, the children of victims
13 filed complaints for crimes against humanity. In 1976 the Court
14 of -- in the final court of appeal, relying on international
15 conventions, declared that prosecution was not time-barred.

16 It then followed that the final court of appeal by its decision
17 of October 12th, 1993 dismissed Touvier's appeal on the ground
18 that the principle of *ne bis in idem* was not applicable in this
19 case in light of the new characterization of the facts, mainly
20 the crime against humanity.

21 By a decision dated April 20th, 1994, Paul Touvier was sentenced
22 to a life imprisonment by the *cour d'assises* for aiding and
23 abetting crimes against humanity.

24 In conclusion, Mr. President, Your Honours, my thoughts are the
25 following: Can justice heal or manage the suffering -- or

116

1 mitigate the suffering of victims? Justice can only restore
2 whatever harm is reparable and whatever injury for which victims
3 can claim compensation. But justice cannot restore that which is
4 beyond reparation, the physical and psychological wounds and
5 scars that borne by the victims for an entire lifetime.
6 But at the very least this trial can ascertain the truth,
7 acknowledge facts, provide a sense of tranquility for victims and
8 bring closure to their process of grieving. A trial can also
9 allow victims to manifest their desire for reparations.

10 [16.09.40]

11 Precisely today those are the demands of the civil parties who
12 wish to be heard before this Tribunal.

13 I thank you, Mr. President.

14 MR. PRESIDENT:

15 Thank you, counsels for the civil parties.

16 We have already observed observations and it has been intense
17 because we did not really observe a mid-session adjournment and I
18 think it is now an appropriate time to already adjourn for today.
19 So the Chamber will take the adjournment now and that tomorrow's
20 session will be resumed by 9 o'clock.

21 Personnel security officers are now advised to bring the Accused
22 back to the detention facility and return them to the courtroom
23 by 9 a.m.

24 THE GREFFIER: All rise.

25 (Court adjourns at 1610H)