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

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

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

ឯកសារដើម
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CMS/CFO: Uch Arun

TRANSCRIPT OF TRIAL PROCEEDINGS
PUBLIC
Case File Nº 002/19-09-2007-ECCC/TC

20 February 2013
Trial Day 159

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

Trial Chamber Greffiers/Legal Officers:

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DUCH Phary
Matteo CRIPPA
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SIN Soworn
Beini YE

List of Speakers:

Language used unless specified otherwise in the transcript

Speaker	Language
MR. KARNAVAS	English
MR. KONG SAM ONN	Khmer
MR. KOPPE	English
JUDGE LAVERGNE	French
MR. LYSAK	English
THE PRESIDENT (NIL NONN, Presiding)	Khmer
MR. PICH ANG	Khmer
MS. SIMONNEAU-FORT	French
MR. VERCKEN	French

P R O C E E D I N G S

(Court opens at 0906H)

MR. PRESIDENT:

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

We will, once again, resume the proceeding regarding our request to hear comments and observations from various parties as a result of the Decision made by the Supreme Court Chamber on the immediate appeal by the Co-Prosecutors regarding the scope of Case 002/01. That Decision is dated 8 February 2013. This is for us to clarify all the matters regarding the scope of the proceedings in Case 002 in order to avoid any delays to the proceeding.

[09.08.45]

For today's proceeding, we will first hear the comments and observations from the defence teams to respond to the requests or submissions made by the Co-Prosecutors to the questions 6, 7, 8, and 9, as stated in our memorandum, E163/5/1/13/1. After that, the floor will be given to the Co-Prosecutors and the Lead Co-Lawyers to respond to what has been raised by the defence teams. And for the second part of the proceeding, we will hear comments for the additional questions put to you by the Trial Chamber - that is, in regards to the memorandum that we - dated yesterday, E164 - 264, rather, which was sent to the parties yesterday.

The floor is now given to Nuon Chea's defence to present your

submissions or comments to respond to what has – what was raised by the Co-Prosecutors and the Lead Co-Lawyers for civil parties, as well as to respond to the questions put to you, as I just read out. You may proceed.

[09.10.47]

MR. KOPPE:

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

We will begin today by responding to the comments the OCP made Monday. We have point-by-point answers prepared to the questions posed by the Chamber to all the parties and the defence teams. First, we will take the opportunity to respond to the argument put forward by the Co-Prosecutors and Lead Co-Lawyers on Monday. As the Chamber may recall, when the Severance Order was first issued, we supported it. Indeed, we objected to the prosecutors' request to reconsider that decision. At the time, we thought that severance would be an effective way in which to forge a manageable trial out of a very large and complex Closing Order. We think that expectation has not been the experience of the trial so far, and at this stage, we think the best course is not to sever the Closing Order at all and to proceed with the entirety of Case 002.

[09.12.28]

We need to begin by saying how strange it seems to us to stand before a Court and make submissions about the scope of the

Closing Order to be applied against our client. It is especially strange to ask that our – that our client be, in practice, tried for more crimes, and not for less. But, Mr. President, there are unique circumstances here.

The Case 002 Closing Order is an extremely complex document which has the effect of condemning an entire regime and, very nearly, an entire ideology. Nuon Chea was a senior member of that regime, and he has never tried to hide that fact. He knows that he will never be released from prison, but he believes in what he did and why he did it. It is important to him only that, by presenting his legal defence, he can communicate to the Cambodian public the reasons for his actions.

[09.13.55]

The Closing Order is not a document issued by prosecutors. The Closing Order was the product of a three-year judicial investigation and an order by a judicial authority. It was then confirmed by a five-judge bench, on appeal. It determined – the Closing Order determined that our client was probably – probably – guilty of the various – of the very serious crimes charged therein.

Now, any part of the Closing Order which is not heard at trial will survive as the final adjudication of Nuon Chea's criminal responsibility for the events during Democratic Kampuchea. This trial is Nuon Chea's only opportunity to present his defence to the allegations in the Closing Order, and it is also the only

opportunity for the Cambodian public to hear a fuller version of the historical truth.

In light of that, the main reason, from our perspective, why this Chamber must hear the full Closing Order is that it is the only way that Nuon Chea can advance a full legal defence. Our client has testified in this courtroom that he participated in the decision to evacuate Phnom Penh, and he's not trying to hide that decision, and he is un-repented for having taken it. His defence is that the evacuation of Phnom Penh was one part of a larger effort to restore order to a country and economy devastated by war and independence to a people placed for so many years under the rule of foreign occupying and colonial powers.

[09.16.04]

Now, historians and economists can debate the wisdom or success of that effort, but in this Court, we are talking about Nuon Chea's criminal responsibility. That turns on our client's intent: what was he, what were others trying to do, and what did he mean to accomplish? Needless to say, the plan for the Democratic Kampuchea regime did not end at the evacuees destinations. That plan must be considered and judged as a whole, not as a series of artificial component parts. Now, when the evidence is limited as narrowly as it is in Case 002/01, it is impossible to mount that larger defence.

If we judge the isolated decision to move people without considering what was supposed to happen next, and why, then the

rationale for Nuon Chea's conduct will remain obscured. There would have been no sense at all in just – in just evacuating Phnom Penh.

We are also troubled by the severance because it continues what is, in our view, a pattern of limiting the scope of inquiry to narrow questions just sufficient to check enough boxes for a conviction. Of course, we are referring to the judicial investigation, which failed to adequately consider questions of fact, crucial to the Defence, including living conditions prior to 1975 and the subversive activities of enemy states, including Vietnam and the United States, during the regime. Now, having limited the scope of the evidence in the case file, the Court is now limiting the scope of the inquiry – the inquiry at trial. [09.18.23]

Mr. President, Your Honours, let's offer the Chamber one small illustration of how the scope of Case 002/01 limits our ability to present a defence. In 1975, Nuon Chea was not facing just a humanitarian crisis rooted in the destruction of the country's food supply and agriculture and he was not just facing a direct existential threat from at least two overwhelmingly stronger militaries, he was facing both at the same time. Now, the program he and others initiated was designed to achieve economic security, together with independence and territorial integrity. As a policy, population movement is meaningless, beyond the context of that greater program; and that program is meaningless,

beyond the context of the threat posed by the Vietnamese, or the Americans, or in Nuon Chea's mindset in relation to either. It is, however, no doubt, that if we were to try to discussing that subject, we – and probably our microphones – would be cut off.

[09.19.49]

What's worse is that we have found, in practice, that when witnesses testify, it is very difficult to separate fully the portions of their evidence that are relevant only to the first trial from the rest of the Case 002 Closing Order, and the witnesses we are hearing often have little to say about population movement. They are supposed to testify instead to a general – to general questions, say command structures, administrative practices or communication methods. But if a witness experienced the DK command hierarchy as a head of a cooperative, or a security centre, or a district, he can only describe that hierarchy through that experience, even if he is not technically part of Case 002/01. What we get as a consequence is a lot of indirect references to cooperatives or security centres, but without giving to the Defence any opportunity to place them in a context, or explain how they were supposed to function, or to explain Nuon Chea's role or knowledge in relation to them. All of these important considerations become inadmissible because they are beyond the scope of the Closing Order.

[09.21.32]

Now, this partial approach to presenting the DK regime is not only inconsistent with our client's ability to present a full defence, it seems also a poor way to ascertain the truth. For essentially the same reason, what we hear in Court is neither a precisely circumscribed account of a population movement, nor a comprehensible story about the DK as a whole. What we hear is a series of fragments supposedly relevant to Case 002/01 in some way, but incomplete as a description of what really happened. And, for this incomplete and confusing account of DK, we nevertheless pay dearly.

Because this trial on population movements demands so many forays into areas technically not part of the Closing Order being tried, the process has proven lengthy and burdensome anyways. Witnesses heard in Case 002/01 will, furthermore, need to be recalled in Case 002/02, and 3, and 4. Now, the benefit, in terms of efficiency, has, in short, not proven with the cost in terms of the coherence of the Court's narrative about the regime or the debate over the scope of evidence to be heard.

[09.23.30]

There's another very important reason why this Chamber should decide not to sever the Closing Order. The Chamber obviously anticipates issuing a final judgment on the first component of the Case 002 Trial before moving on to Case 002/02. If the Chamber should happen to find our client guilty in this first

trial, that means it will then continue to try for him… to try him for closely related crimes after having found him guilty. Now, that raises obvious concerns about the presumption of innocence and whether the Chamber is able to fairly judge a person it has already decided is guilty of serious international crimes. Now, certainly from Nuon Chea's perspective, it will be difficult to believe that he is being judged impartially in those subsequent trials.

The Supreme Court Chamber expressly raised the question whether that would disqualify this Chamber for bias. Indeed, it went so far as to say that a second Panel of Judges might be necessary. Now, we agree, of course, with the submissions of the Prosecution and the civil parties, that for many reasons this is not a feasible outcome, and the Supreme Court Chamber must also have understood that. And, Mr. President, Your Honours, we cannot help but suggest that the Supreme Court Chamber may have been sending a message that there is no realistic way to hold successive trials in Case 002.

[09.25.27]

Now, should the Chamber nevertheless decide to sever the indictment, sever the Closing Order, these same considerations require that the Chamber take seriously the instructions from the Supreme Court Chamber to include a properly representative sample of crime sites – crime sites in Case 002/01. It is as important to Nuon Chea and his ability to present a comprehensive defence

as to the Prosecution for the victims that the full theory of the DK revolution be put before the Chamber.

The proposal of the Prosecution presented on Monday to reduce the entire Case 002 indictment – Closing Order to population movement phases 1 and 2, Tuol Po Chrey, and S-21, fails even to direct itself to that standard.

Now, we agree with the Statement of the Law presented by the Co-Prosecutors as to the factors to be considered by the Chamber in considering what constitutes a representative sample of the Closing Order. In the interest of time, we will not address – address these arguments point by point. For us, the more important issue is the bigger picture, what the Co-Prosecutors described on Monday as the fundamental nature of theme of the case.

[09.27.07]

From our client's perspective, this is really the key question: Nuon Chea can only tell his full story – he can only defend himself if all the essential components of the regime are open for discussion. At the same time – at the same time, it's critical for that purpose that every last security centre and cooperative be at issue, that all the strands, all the ins and outs must be out in the open.

Now, in terms of that big picture, we think that the Prosecution's proposal falls short in two significant ways; that is, we think there are two DK themes that are lost in the OCP

proposal. We also think that including S-21 is a very poor way to make a possible Case 002/01 Trial representative. This is why we don't think there is any problem in including it: if you were to select a small number of crime sites, S-21 would not be among them.

Mr. President, Your Honours, let us talk about these issues one at a time.

The first point, we have already touched on. We think the Prosecution's proposal leaves out what is really the essence of what happened in DK, of what our client and others were trying to do, of the Cambodian Socialist Revolution.

[09.28.45]

Now, on Monday, the Co-Prosecutors characterized the heart of the Closing Order as - and I quote - "the implementation of socialist revolution in Cambodia through a great leap forward and to defend the Party against internal and external enemies by whatever means necessary" - end of quote. But the Prosecution's proposal focusses overwhelmingly on the secondary aspect of that common purpose, on the effort to defend the revolution and it almost completely excludes the much more important part, the first half of the sentence, the actual revolution.

Now, we do agree that population movement was an important component of the revolution and a good start in selecting a reasonably representative sample of the Closing Order. We have already talked about why, alone, it is not enough, and we'll not

repeat ourselves now. The balance of the plan of the revolution – what was supposed to happen after the population transfers – that is essential.

[09.30.00]

The second aspect of the Closing Order left out by the Prosecution's proposal, is the gravest charge against our client – the gravest: the crime that defines the Khmer Rouge in the public mind, the only crime pursuant to which our client is accused of specifically – intending to murder the Cambodian people. Mr. President, Your Honours, of course, we are referring to genocide, the crime of all crimes.

Now, it is inconceivable to us that a trial of the Case 002 Closing Order could fail to give our client the opportunity to respond to these allegations. The Case 002 Closing Order, this judicially confirmed indictment, considers that Nuon Chea probably – probably – committed the worst crimes known to man. Now, this Court, this Trial Chamber cannot just decide that count is not important enough to try. It cannot deliberately leave the decision hanging against Nuon Chea that he probably – probably – intended to destroy entire groups of people.

[09.31.30]

The genocide question is one of the lasting issues of the Khmer Rouge period. It is, on the one hand, regularly associated with Cambodia and the Khmer Rouge. The entity which founded the DC-Cam and, in effect, collected most of the evidence at this trial is

Yale's Cambodian Genocide Program. Now, type "Cambodia" into the "Google" search engine, and the first suggestion is for "Cambodia Genocide". The public mind has, in other words, already judged Nuon Chea guilty of genocide.

Yet genocide is one of the few crimes whose very occurrence is contested, even by experts sought by the Prosecution. Addressing and answering the question of whether it was committed would be a rare tangible contribution of this Court to the historical narrative.

Now, in that sense, a genocide question, far more than anything that happened at S-21, goes to the heart of how the DK period – and our client – is publicly perceived. Was it a well-intentioned experiment gone wrong or was it a discriminatory regime intent – intent on purifying the Cambodian people by eliminating ethnic minorities?

[09.33.08]

Now, those questions, Mr. President, Your Honours, are fundamentally – are fundamental, legally and morally, to our understanding – our understanding of the DK regime. A trial that ignores these questions cannot be either representative or in the interest of justice.

Third, in our view, S-21 is not representative at all. It would not be in the interest of justice to include it. It was connected to the core objectives of the CPK. It has nothing to do with the revolutions as such. It deals, in substance, with only one of the

five alleged policies of DK: the re-education of enemies. Only in the most minor and incidental way does it deal with the targeting of groups, something that we will talk about more in a moment. But even in terms of the parties' policy towards so-called enemies, S-21 is possibly the least representative crime site in the Closing Order. Indeed, the Case 001 Closing Order is explicit about that: S-21 was unique in a network of security centres, given its direct links to the Central Committee and its role in the detention and execution of CPK cadres – "unique"; now, the opposite of "representative", I would say.

[09.35.02]

The Co-Prosecutors want to turn this around. The Co-Prosecutors say that S-21 embodies the Party's approach to enemies because it was the most important and most closely connected to the Centre. But this, of course, does not make S-21 representative; it makes it unusual.

A brief review of the Closing Order reveals that S-21 was very different from the other security centres charged – described in the Closing Order – described by the Judges there. According to the Closing Order, security centres were located in a variety of geographic areas and held a mix of Base People, New People, CPK cadres, and ethnic minorities. Now, people were detained for any number of reasons, including, according to the Closing Order: minor offences such as stealing food, so-called moral offences, and serious offences such as political disloyalty. Torture was

allegedly widespread in some, and almost non-existent in others. Executions were allegedly total in some, and occasional in others.

[09.36.24]

Now, S-21, by contrast, is alleged to have been fundamentally a tool of internal political purges. The Closing Order calls S-21 a political and military establishment. It indicates that: of 12,273 known detainees, 9,980 – that is 81 per cent – were members of either the RAK or CPK; another 12 per cent were detained, either for unknown reasons or because of their family ties to another detainee; the remaining 7 per cent counted those detained for all other reasons; and no one group accounted for more than 2 per cent of the total; every detainee at S-21 is alleged to have been tortured, except for a tiny handful; and every detainee at S-21 is alleged to have been killed.

In that sense, Mr. President, S-21 is thematically just about the least representative thing about Democratic Kampuchea. Many regimes have political prisoners, including those who come from within the State. And S-21 fails completely to capture the distinctive elements of the DK period – that is, its socialist revolution through a great leap forwards; it fails even to capture most of the ways in which the regime is alleged to have enforced discipline. The Co-Prosecutors view that S-21 constitutes the heart of this case is a misstatement of the reality.

[09.38.28]
In addition to these considerations, we agree with the Chamber that the fact that has - that S-21 has already been adjudicated before this tribunal is a good reason not to include it again. The Co-Prosecutors seemed to suggest on Monday that the mere fact that S-21 had previously been adjudicated did not preclude its being adjudicated again. Now, we're not certain if we understood that, but in our view, the point is not whether it can be, but whether it ought to be prosecuted - adjudicated, whether it is in the interest of justice that the only crime site about which this Court has found facts, and assigned responsibility, and satisfied victims should be one of the few crimes adjudicated here again. And we agree that the answer to this is no.
We think it's also worth again noting the question of impartiality. Allegations at S-21 are the only ones already adjudicated on by this Chamber. Now, if they were to be tried again, there would be a real question - there would be real questions about whether this Chamber could impartially judge the same facts for a second time.
[09.39.50]
Now, this is especially true as to the credibility of Duch. The Chamber relied heavily on Duch's testimony in the Case 001 Judgement, and as you know, we have challenged the credibility of his testimony. It might be difficult for the Chamber to look at that issue afresh. Now, we realize that disqualification motions

related to this subject have previously been filed and rejected. But even if it's true that the Rule 34 standard is not technically met, it does not mean there is no concern at all as to the appearance of possible bias. Now, unless the Chamber can avoid putting itself in that position by avoiding S-21, then why not do that?

So, Mr. President, Your Honours, these are the ways in which that the OCP request fails to meet the standards set by the Supreme Court Chamber. We will add just a few words about the consequence of adopting so narrow a view of the Case 002/01 Trial.

[09.41.17]

The Civil Party Lead Co-lawyers made submissions on Monday with respect to the participation of civil parties and reparations in the context of a severed trial. My learned friend argued that even if the trial is severed, reparations would remain available to all of the civil parties. It's clear to us, however, that reparations and even civil party status are available only - only - to those civil parties injured by the crimes adjudicated by this Court. Now, the consequence of severance for civil parties is simple. Of the nearly 4,000 individuals currently admitted as civil parties, no more than 1,166 - we have counted them - would be recognized in a final judgment and be eligible - possibly eligible for reparations. Now, that is only one out of four; the rest would be excluded. Alleged victims of every security centre and work site outside of Phnom Penh, the Cham, the Buddhists,

alleged victims of forced marriage – all excluded.

[09.42.50]

And, Mr. President, Your Honours, the civil parties cannot, to use an English expression, have their cake and eat it too, they cannot support the very new, narrow version of the Closing Order suggested by the Prosecution – of the indictment – and pretend that they are not cutting off the access of an overwhelmingly – of an overwhelming majority of victims to justice.

Now, another consequence of the narrow frame of the trial on the consideration by both the Prosecution and the Chamber is that any such decision along those lines would be subject to appeal. That is, in our view, the consequence of the Supreme Court Chamber's ruling on admissibility in its Decision of last week. And, if the Chamber were to include S-21, and only S-21, we would need seriously to consider whether to launch such an appeal, and other parties may act similarly.

Mr. President, as we are coming close now to the end of our remarks in respect of the first four questions, we are forced to ask, If the Prosecution's proposal is so clearly not representative, if it has so obviously so little to do with telling the story of DK, what is it trying to do? Now, to us, the answer to this is, is obvious.

[09.44.32]

First, S-21 is public, it's famous. Very serious crimes were adjudicated by this Chamber to have been committed there. As the

International Co-Prosecutors said on Monday, it is, in those ways, important, but that is not the test; that will not succeed in telling the story of DK, it will not succeed in accurately judging the conduct of our client or his policies throughout the regime, it will not resonate with a representative sample of victims. S-21 probably also seems, relative to the seriousness of crimes determined to have been committed there, to be relatively easy to prove – it seems relatively easy; Duch has already testified, the Case 001 Judgment has already been issued. The Prosecution told us on Monday that they think they can do S-21 with four witnesses. But the objective of this Chamber is not to get a conviction; it is certainly not to structure its trials in ways that it thinks is most likely to lead to a conviction. Now, in this Cambodian procedure, the job of this Trial Chamber is to judge the allegations in the Closing Order as it was presented to it by a different judicial authority. Now, it would constitute a serious failure in that role if the Chamber were to decide not to assess the conduct of the Accused but to move as quickly as possible to get a guilty verdict down on paper.

[09.46.30]

Now, we agree fully with counsel for the civil parties who said on Monday that it is the process which is crucial, and not just the final result. In summary, then, these proposed trials seem designed, more than anything, to rush to a conviction, to determine the guilt of these three Accused on the basis of a tiny

fraction of all the evidence. True, those convictions would concern only some of the charges, but with the Closing Order in the background as an accusation as to everything that allegedly went wrong in Democratic Kampuchea.

Now, Mr. President, Your Honours, there is some irony in the suggestion of the Co-Prosecutors to add only S-21, which to this day exists in Phnom Penh as the Tuol Sleng Genocide Museum. Now, that museum was, of course, founded by members of the breakaway Khmer Rouge fraction which overthrew the leaders of DK, as Nuon Chea feared they would. Who constructed the first narrative of deliberate murder against their former political opponents in the form of genocide, at the 1979 trial? Who used the Tuol Sleng Genocide Museum, where no genocide was in fact committed, as a propaganda tool to establish that it was?

[09.48.08]

If the Chamber accepts the proposal of the Co-Prosecutors, then Tuol Sleng will be used one last time as a rubberstamp for every supposed genocide to have occurred in DK and it will be so used by those same people who, still today, remain at the helm of this tribunal.

Mr. President, I'm coming to answering question 5.

The Chamber has proposed continuing to hear witnesses presently scheduled on the basis of the Severance Order, as it was previously issued pending resolution of the issues being discussed here this week. We are opposed to this proposal.

Of course, we understand that the Chamber is anxious to resume proceedings, but it is clear to us that the benefits of this approach are outweighed by the costs.

On the one hand, proceeding now, before these questions are resolved, is likely to cost significant confusion: witnesses may have to be recalled, the scope of the testimony of those witnesses which are recalled will be contested both before the fact and, possibly, through repetitive objections in the course of testimony.

[09.49.31]

And, on the other hand, the benefit is limited. The Chamber has indicated that it can issue its Decision within two to three weeks. Once it is issued, parties may need some time to further develop their preparation as to any witnesses already scheduled who may give evidence relevant to the expanded portions of the indictment. But, presumably, there are enough witnesses in respect of whom preparation time would not change that the trial could proceed from the time of the Decision, with limited interruption.

But, more fundamentally, it is very unusual for evidence being presented at a trial before the parties know the full scope of the trial. It seems to us that the reasons for this delay, the one we are in now, is maybe that this process moved too quickly to begin with. The questions we are discussing here today and have been discussing Monday are fundamental. It is worth a few

lost days of trial to ensure that parties know the scope of the trial before the evidence proceeds.

[09.50.54]

We would therefore propose the following.

First, no witnesses should be heard until the Chamber issues a decision as to the scope of the trial. If necessary, under the circumstances, the Chamber could issue its disposition with reasoning to follow, and then begin hearing evidence, immediately.

Second, any witness already scheduled whose evidence could reasonably be expected to touch upon any new issues not previously included within the scope of Case 002/01 should be delayed for a brief period, sufficient to allow all parties to adjust their preparation.

Mr. President, I come now to answering question 6: How much evidence would be required with regard to the scope of the trial proposed.

Now, the Chamber has asked for an estimate of the number of documents and witnesses required as to any extension of Case 002/01 still sought. At this stage, we can offer only a preliminary answer as to S-21. It is our position that if S-21 were included, there would need to be a far more searching examination of what, exactly, happened there.

[09.52.22]

We would remind the Chamber that in Case 001, Duch essentially

pled guilty. There was no real debate in that case about what happened at S-21. We don't know, for example, whether and to what extent real enemy agents were detained in S-21. And, because the judicial investigation refused to examine it, we don't' know much about the actual presence of enemy spies in Cambodia during the DK period.

There is, however, much uncertainty about the legality of extrajudicial murder of enemy agents. Only two weeks ago, the United States released a memorandum justifying the murder of U.S. citizens suspected of planning terrorist attacks and causing massive civilian casualties as so-called collateral damage. Now, that is the United States of America, in 2013. And, as many people may know, that memorandum - that very same memorandum - cited the U.S. bombing of Cambodia in 1970 as an instance of lawful state practice in that regard.

[09.53.50]

So, if the indiscriminate bombing of Communists in Cambodian territory was legal, it is so - it's clear that every single murder by DK of a person thought to be an American or a Vietnamese spy was unlawful. Is that so clear? That is the question. Is it clear that there is not a nontrivial number of such cases? Do we have the facts to answer those questions? We think the answer is no and that if S-21 is part of the trial, of this trial, it will require a great deal more evidence. We also think that more evidence will be required in order to

challenge Duch's credibility. How much, exactly, Mr. President, we cannot say standing here right now. We would be able to give the Chamber an indication in relatively short order.

As the Chamber knows, we heard the proposals from the Co-Prosecutors and Lead Co-lawyers as to the scope of the trial less than 48 hours ago. Until yesterday morning, our client remained in hospital and was not easily consulted. We might also note that the prosecutors had, in effect, a full week to review the evidence with respect to its own proposals.

[09.55.24]

We presume that this is a request only for a preliminary indication and that the more formal opportunity to seek new evidence will be provided after the parties – sorry, and that the formal opportunity will be given to us in a later stage.

In any case, Mr. President, Your Honours, that is our view as to the appropriate course of action in respect of question 6.

Question 7 is, Can Case 002/02 proceed while Judgement drafting in 002/01? The Chamber has asked whether the hearing of the evidence can proceed in Case 002 while – while the Judgement is being drafted. In our view, because of the substantial overlap between Case 002/01 and any subsequent trial, that is impossible. The Chamber has, thus far, heard dozens of witnesses concerning questions of general relevance to DK, including the history of the CPK and administrative, communication and command structures.

[09.56.41]

The Chamber will rule on the evidence in the Case 002/01 Judgement, and the Defence assumes that the Chamber intends to characterize those holdings as res judicata in subsequent trials. Now, those rulings will be fundamental to these later trials. But with respect to some charges, they may turn out to be critical to the question of criminal liability.

In light of all this, our objection is basically that under the proposal suggested by the Chamber, parties would do all the pre-trial preparation work, we would identify witnesses and documents, and we would start hearing evidence, and then, at some point, which we don't - we won't be able to anticipate until the moment it happens, the Chamber will issue a decision, a decision of possibly hundreds of pages long, making rulings on questions that are fundamental to the ongoing trial at that moment.

[09.57.46]

Now, Mr. President, Your Honours, we can't even predict, standing here now, what effect that would have on the progress of that trial, but it is inconceivable that the effect would not be very substantial. It is strange enough that so much of the second trial will effectively be decided before the Judgement is issued, but if that is to be the case, we should at least know the answers to those questions before the trial starts, and not in the middle of it.

Mr. President, in relation to question 8, we have no submissions to make.

A short observation in respect of question 9, the last question. In that question, the Chamber has asked whether the SCC's annulment of the Severance Order has impacted negatively on our clients' right to a fair trial.

There is one obvious sense in which that is the case. We have questioned witnesses and introduced evidence on the assumption that we do not have to defend against most of the charges of the Closing Order. Now, that can be easily remedied as long as all the parties have adequate opportunity, after this Chamber issues its Decision with regard to re-severance, to seek witnesses relevant to all of the allegations to be tried in this trial, whether it be the entire Case 002 Closing Order or an expanded version of Case 002/01. Now, this would have to include witnesses who have already testified.

[09.59.46]

Now, Mr. President, Your Honours, that having being said, at this time we can estimate that the number of witnesses whom we think would need to be recalled for our purposes would be limited, but this would have to be available to us as part of the planning process going forward.

These were my remarks and submissions. Thank you, Mr. President.

MR. PRESIDENT:

Thank you, Counsel.

The floor is now given to Ieng Sary's defence. You may proceed.

MR. KARNAVAS:

Good morning, Mr. President. Good morning Your Honours, and good morning to everyone in and around the courtroom. Let me begin by congratulating my colleague for a splendid presentation, all of which we concur with. There may be one minor exception. We're much more harsher on whether we should proceed hearing anything until we have an entire Decision, including the reasoning. But other than that, it was splendid and, indeed, enjoyable to hear the marvellous presentation by our colleague in the Nuon Chea team.

[10.01.10]

Reading the Supreme Court Decision – and I'm going to comment on this because this was commented upon by the Prosecution – reminded me of something that I read by Justice Scalia, of the United States Supreme Court, in his book that he co-authored, called "Making Your Case". Now, here is what Justice Scalia says: "Some judges believe that their duty is quite simply to give the text its most natural meaning – in the context of related provisions, of course, and applying the usual canons of textual interpretation – without assessing the desirability of the consequences that meaning produces. On the other extreme are judges who believe it's their duty to give the text whatever permissible meaning will produce the most desirable result." And with all due respect to the Supreme Court Chamber Judges, they seem to fit within the latter extreme position. They have relied upon law from a foreign system and have read into the ECCC

Internal Rules that which is not there. And, while they accuse Your Honours of a paucity of legal reasoning, at the same time they display a paucity of meaningful authority to justify how it is they reach their position.

[10.02.56]

Now, we recognize that Your Honours, being an inferior court, have to be faithful to what is said from above, which also reminded me of a quote from a Yale law professor, in his book, the "America's Unwritten Constitution", with respect to judges having to follow precedents, and where he says that inferior courts should generally be "bound by the interpretation, implementing frameworks, specific holdings, precedential implications, and remedial precepts – the doctrine – of the Supremes. This is so even if lower courts think that the high court is wrong about the general meeting of the written constitution, or about the best subrules for implementing the document, or about how the specific case at hand or a more general category of cases must be decided, or about the proper set of legal, applicable remedies. Lower courts are free to say that the high court has erred and offer their reasons for so believing. But this agreement does not justify a general right of disobedience."

Now, the only thing missing in this Court is that it's not just the lower judges or the lower courts that are entitled to criticize the higher courts such as the Supreme Court of the

ECCC, but lawyers also are entitled to do so, but then again, not ask the lower court to act in an ultra vires way, which, we submit – we submit – in some ways, the higher court, the Supreme Court is in effect asking the Trial Chamber to act ultra viresly, to be – to act within infidelity towards your judicial oath. And I'll explain why and how.

[10.04.58]

We submit, with all due respect to the Supreme Court – Supreme Court Chamber, that it seems to be asking you to transform the ECCC into the ICTY, where you can look upon ICTY jurisprudence that fits the need for the result and simply apply it, read the rules applicable to the ECCC out of context and devoid of the civil law proceedings – which is French based, not American based as the ICTY is – and to somehow, at the end of the day, ask you if you are to follow the Prosecution's position to cherry pick or, to use Carla Del Ponte, the prosecutor from the ICTY – her term, to engage in "justice à la carte". And if you were to take the Closing Order and to pick and choose portions of it at random, which is – appears to be the sampling of it, what happens to the rest? What happens to the rest when, in fact, even the Supreme Court Chamber says, concerning Ieng Thirith, that you simply cannot wish away counts, dismiss them. You may put them in abeyance, but you cannot just dismiss them.

[10.06.47]

Which brings me to my point – and I'm getting a little ahead of

myself. When the prosecutor says, "Well, presumably, there will be other cases if the others are still around", at the same time, they're saying, "With a limited five witnesses, it won't take that much longer". So will the Trial Chamber not be compelled to still come up with a concrete plan as to how the remainder will be tried? And, if the answer is no, then are you not acting de facto, if not de iure, in dismissing the counts? And, in doing so, are you not acting with infidelity towards your judicial oaths? Because this system does not permit you to simply dismiss the Closing Order or parts of the Closing Order; you must try the entire case.

And I dare say, because we supported, we supported your – the manner in which you severed, when you look at the way you approached the severance, you were very explicit that we are doing discrete segments of the Closing Order, never saying that the rest goes away.

[10.08.06]

And this becomes a terribly, terribly important point because, were we to see exactly what the Supreme Court Chamber is latching on, which is what the Prosecution has suggested for them to latch on, which is one of the ICTY Rules, ICTY Rule 73bis(d) – look at it carefully, look at the history; it's not rocket science, and it has been transformed. Look at it in its original version, and it was amended twice. It's all there. And it is not about severance, it's about dismissing discrete portions of the

indictment. Why? Well, let me answer the question. Perhaps this may remind the Supreme Court what, exactly, 73bis(d) stands for. That rule was amended in order – in order to further the goals of the tribunal in meeting its obligations – its obligations for the completion strategy – in other words, to shut down the ICTY within a meaningful fashion. And Prosecutor Carla Del Ponte, not wanting – not wanting to engage in "justice à la carte" and not wanting to give up her independence as the Prosecutor, and as the ICTY clearly states, they needed to come up with some mechanism to move the process ahead. And I invite you to look at not just the rules, but also the President of the ICTY's report to the Security Council – I shall – I will give it to you in a second – where, concretely, he states the purpose behind it.

[10.10.08]

So, it is rather, fanciful – fanciful – to say that Rule 73bis(d) goes to severance; it goes to dismissal. But why is that important? Because, if you're dismissing portions of the indictment, obviously, you, as Judges, ought to make sure that it is done in a representative manner of the entire indictment which has been confirmed. But, again, it is up to the Prosecution. It is up to the Prosecution. They invite the Prosecution to dismiss portions and they encourage them to dismiss it in a way that it represents, in a meaningful fashion, the scope and essence of the indictment.

I hope the point is so obvious I don't need to repeat it. But

here, they're latching on to that. And now, why is that important? Because the Supreme Court Chamber then latches on to, "Well this reasonable representativeness can be read into the rules."

[10.11.15]

Well, like the ancient Greek, you know, who was running around, looking for – with a lantern, during the day, for an honest person, I was looking in the rule to see where – where on earth does it say "meaningful representation", where on earth does it say, actually, that you're abusing your discretion by not giving us a hearing.

Frankly, I think I applaud them in a sense that it is always good practice to give the parties an opportunity to be heard. But you cannot read into the rules that you are mandated; you have that discretion.

And let me be even more emphatically clear on this. We have been heard; maybe not initially, but we have been heard. The prosecutor was not deprived. They filed a notice – notice of filing of motion for reconsideration. In their notice, they point out concretely – concretely – what they believe is missing. Okay?

[10.12.21]

And then, a few days later, they file their motion for reconsideration, where again, in their motion for reconsideration, not only – not only do they state what is missing, but then they go on to say what would make 002/01 more –

more representative – not reasonably representative, more representative – and they state exactly what ought to be included. You have the decisions – the submissions; I don't need to go into it. But if you look at it very clearly, they were heard; they stated their position. In fact – and I'm going to get to this – in there, they indicate the need for Your Honours to be mindful–

My apologies, Mr. President, I'm getting carried away.

In their motion for reconsideration, they specifically point out to a report which states the average age of a Cambodian male; it's 60 years. They state it. Now, why is this important? I'm going a little bit off script, but I think it's – it's useful.

[10.13.40]

It's important because in 2006, they were instituted and they began their investigation, sort of, to prepare the Introductory Submission. Thereafter, we – they concluded their Introductory Submission sometime around 2007. During the investigative process, they were no fewer than six supplementals for investigation. And so, what happens? The Introductory Submission grew, and grew, and grew during the investigative phase. The supplementary submissions: the first one was on the 28th of March 2008, had to deal with North Zone security; the second was on 13 August 2008, OCP clarification of scope of the indictment; then another one on the 30th of April 2009, on forced marriages; 31 July, genocide of Chams; 11 September 2009, forced marriages and

sexual crimes; 26 November 2009, forced marriages and sex crimes. [10.15.01]

Now, why is that important? Well, let me figure this out. They obviously know where to find the actual lifespan of the average Cambodian, which is 60 years. At the time they drafted the Introductory Submission, Mr. Ieng Sary was approximately 81, 82, perhaps even 83 years old, because today he's either 87 or 88. What part of that did they miss? What part of that, at that point, did they not know that this was going to be a long, convoluted, complex trial? Were they neophytes? Were they babes in the wood that didn't know how long the proceedings would take? Were they so inexperienced that they had no clue? No, these were highly experienced prosecutors who had previous experience in trying war crimes cases, so they knew that with the scope of the indictment that they drafted, at the very minimum this was a four-year trial, excluding - excluding the time that it would take to actually get the case to trial, because you have this investigative phase, and then, of course, for the drafting of the submission. And, since we are dealing with very high-calibre and experienced prosecutors, no doubt they would have known that, unless the matter goes all the way and is litigated to the Supremes and there is finality - that all of it is not necessarily settled.

[10.16.55]

What's the point I'm making? The point I'm making is, they

drafted an introductory submission that was so complex and they're claiming, "This is what we need". During the investigative process, they said, "No, no, no, that's not enough. That's not enough. Here's some more. Add some more", and then they come in, and it would appear that the Trial Chamber are at fault – you're the bad guys. It's your fault; it's your fault that they have presented you with this unmanageable case, the size the way it is. And now, somehow, they seemed to be worried. We submit, much like our Nuon Chea colleagues, that when you look at the proceedings that we have before us, when you look at what was presented to you, you have no choice. This is not the ICTY. The Prosecution drafted this indictment, this Closing Order, they drafted the Introductory Submission, the investigators took their time, expanded it, it was confirmed, and now your hands are tied. And the position that you took was the correct position.

[10.18.21]

Now, I will be the first one to say that subsequent to 002/01, there are logistical issues – not just logistical but also substantive and procedural – that need – that need to be considered. We assumed – we presumed that, at least in some general fashion, you considered those. Of course, until we see what you have in mind, we cannot comment concretely as to what our position will be, but at least, in the manner in which you severed the case – it was severed in the way it could only be severed. But now the Trial Chamber is saying – the Supreme Court

Chamber is saying, "You have two choices: choice number 1, continue as you are continuing, only give us explanations that-" It's about manageability; case number 2, have a mini-trial. Now, I used the term last week – two days ago, and I'm using it again. I didn't use it before because I never thought what we were conducting were mini-trials. But what they're asking you is, is a mini-closing-order trial – that's what they're asking you. And they make no provisions in their instructions to you as to what you do afterwards. And, if you listen to the Prosecution, we're only talking about another month or so. And the Supreme Court did not say – they said you can have trials, but they don't say how were you – what are you to do after you finalize this mini-trial that is more representative.

[10.20.22]

Are you not still obliged to try the rest? Yes. Do you still not have the logistical problems that were outlined by the Prosecution and by the Nuon Chea team? Yes. Do you still not need to have a plan? Yes. Will there still be uncertainty on our part? Yes. But then, more importantly, how do you go back and try? It's like a dog's breakfast because you pick and choose here and there. How do you go back without there being a certain amount or a substantial amount of repetition? Do you call back witnesses? But how is it – how did they – how does the Prosecution or the Supremes envision it?

Now, they do make some suggestions, but let's face it, those

suggestions are from the Mladic Decision. So, forgive me if I'm not prepared to give credit to the Supreme Court for thinking outside the box in trying to find creative solutions. The Mladic Decision mentions those about a separate – a separate Trial Chamber, but of course we're talking about the ICTY, where you have several panels of judges and it's easy to constitute a Chamber. Here, we don't. And also, we have the realities. The Cambodian staff in this institution are not getting paid on a regular basis or on a timely basis. And how is it possible to then have the second panel? It's just unworkable.

[10.21.58]

So that's where we are today.

Now, let me speak a little bit about this representativeness. If you look at the various positions that the Prosecution has taken, on the first hand, when they filed their Request for Reconsideration on 3 October 2011, which is E124/2, they mentioned District 12. That's now been thrown out the window. Aside from S-21, they talk about the North, Central, East Zone, they talk about work sites, they talk about security centres other than S-21, they talk about Kampong Cham.

And I find it rather strange that – as a defence lawyer, as my colleague did, to be wondering whether the civil parties are actually going to be getting their day in Court. And have they actually consulted? Have they? Because they are – the lawyers, that is. They have clients. The prosecutor doesn't have a client,

in a sense, but the civil parties do. Have they actually consulted with all the civil parties that they are jettisoning them and abandoning them by latching on to the Prosecution's proposal?

[10.23.25]

And, as my colleague pointed out – as my colleague pointed out, it is – well, he wasn't so strong, but I'll be a little bit stronger – it is ridiculous to suggest that you can enter a legal finding on matters which you haven't heard. They're abandoning these paragraphs, but then they say, "But nonetheless, all the civil parties affected ought to be declared civil parties as damage and they deserve reparations, by law." How on earth do you get there? Based on what legal authority?

Have the lawyers from the civil parties actually consulted the civil parties who claim that they have been victims of forced marriages? Have they consulted with them? Have they consulted all the other civil parties that they represent? Because those are their clients, and just like we defend clients, they defend clients. And before coming in Court and making a – taking a position on whether to abandon and throw away somebody's rights to – in Court, they need to get the client's authorization.

So, when my colleague here says, "Who is to say that there won't be litigation afterwards", can – even in the context of which we work, where we – in order to make it manageable, we have the current situation where you have two Lead Lawyers for the civil

parties, can they override the rights of the civil party and say, "We're deciding for you after you've gone through all the pains of making your application – some of them had to even appeal – that now we are just giving up on you"? I don't see how is it possible, and I think that has to be taken into consideration. [10.25.36]

So, when we're talking about this reasonable representativeness – and in the context of that – in the context of that, we've heard the Prosecution say that it has to be a sampling. Well, what does "a sampling" mean? Does what the Prosecution now propose, which is vastly, vastly different, what they proposed earlier, when they said it would be more representative – not "reasonably", "more" – and in my language, "reasonably" seems to be more than just "more" representative. But it doesn't even meet what they initially requested. Were they being disingenuous when they said, "We need to hear this"? Because, when you look at their proposals and you look at what they're coming into Court today or yesterday and saying – two days ago, "Well, just give us S-21; and with S-21, we just figured it out, we can cover the entire Closing Order, in essence, satisfy this criteria" – which is not even in the law; it's based on something that the Supreme Court Chamber and they have used and borrowed from the ICTY, which is not necessarily applicable because it connotes that the rest of it gets dismissed. What about all the other charges? [10.27.08]

And if the Prosecution says, "Well, presumably, we may have some trials", is the sword of Damocles still not hanging over the head of the clients? Is there any legal certainty there? What's the difference between having the trial that we're having now or this more representative trial such as it will be if we go that route? What's the difference? At the end, you still need to have the funding, the logistics, the plan, and we need to have it now, and we will be insisting on it, and we're entitled to it. And we will be appealing it because, actually, it would amount to a – to a violation of our clients' rights. And it might be interesting to see what the Supreme Court Chamber does then.

But you – so, when you sit there and you have to make up this concrete plan, you have to do it for both. And that's why, with all due respect, Your Honours, when I saw "two to three weeks" – that's an ambitious undertaking. I think you're going to need a lot more time because nothing in the Supreme Court Chamber's Decision says that you've abdicated your role, that they – that you have lost your authority and your power over the Closing Order, and that what "reasonably representative" means is what the Prosecution tells you.

[10.28.37]

You have your own judicial oath that you have to abide by, which means you have to now go through the entire Closing Order, and you have to come up with what you believe – not what the prosecutor believes, not what the civil party believes – and you

have to keep in mind all those civil parties that are part of the process, all the victims that will not be heard, all the counts that the Prosecution is willing to dismiss effectively, and you will have to decide whether it is feasible to come up with a mini-closing-order trial, the sort of buffet-style, à la carte - whatever you want to call it - Closing Order. And at the same time, to satisfy everyone - including us, and the public, and the victims, and the civil parties, and the donors - how are you going to try what remains? It is, in essence, a logistical nightmare.

Which brings me to my point, and that is, the only way forward - the only way forward - because we're here essentially because of the Prosecution; they drafted whatever they drafted. They knew well in advance the age of the Accused. They took that risk. Your Honours exercised your discretion; they didn't like it. You did so based on the law. Nothing prevents you from saying, "Since the Supreme Court Chamber has annulled the Decision, we're going to try the entire thing."

[10.30.14]

Isn't that more intellectually honest? Isn't that more what the public expects, or are we here, as my colleague pointed out, to a rush to judgement? Because it would appear to me - and I daresay I say this with the greatest respect to the - to the Supreme Court Judges, but when I read between the lines, when I read between the lines in paragraph 50 - because in some ways, the

Decision – and I hope they forgive me for this characterization – is a bit schizophrenic when they give you the choices, because, on the first hand, they pound on you for the manner in which you severed, then they say, "Oh, well, you can still do it that way; just give us some more reasoning, and then don't say anything about the age of the Accused, you know, pretend that they're going to be still alive, forget that part, just tell us its manageability, and give us a little plan; or you have this mini-trial that's more representative." And in a way, they gratuitously throw in the word "acquittal", when, in fact, the unintended consequence and the perception that one sees from that, as my colleague pointed out, that the whole point of this exercise seems to be, "They're guilty; let's have something that's representative but quick, let's get them convicted so we can close shop and declare victory."

[10.31.58]

Which begs the question: Is there a presumption of innocence? And if so, are the Accused not entitled to that?

If you try this mini-trial that they're suggesting, are the clients not entitled to some certainty as to what will happen to the remainder? Are they supposed to be held dangling in the air, not knowing whether they're going to be tried some more? What does that do for the expeditiousness? Because you hear that often. What happens to the – not only the justice being done, but being perceived to be done? And then you have the Prosecution who

bandies about the term "reconciliation" and the historical truth, having a historical record. I'm not – I'm not a big fan of that, I have to say. A criminal trial is about finding somebody guilty of the charges of which they're – they're accused of, not about finding the historical truth, because obviously, as my colleague pointed out, the United States – which seems to be sometimes acting above the law, or at least above international law, as do other members of the permanent – permanent members of the Security Council – is not cooperating, is not part of the indictment. Vietnam has not offered their archives. So you can't get to the historical truth.

[10.33.31]

But if, in fact, this is part of the exercise, because we cannot get reconciliation in this country that has suffered so much, and unless we at least know most of the history – setting aside what China or the United States, what Russia and other players might have been engaged in before and after the temporal period – if that is the case, are you not obligated in having a mini-trial that promotes that concept which the Prosecution says is so essential and it is one of the – one of the international principles upon which some of these tribunals operate.

Now, we're at the point of a break, Your Honour. This may be a good point, and then I can speedily go through the questions, some of which, as you probably know, I've already answered. But I can nonetheless go through them so that we have a concrete record

as to what our position is. But I do hope – I do hope that, thus far, the thrust of my argument is rather clear.

Thank you. I'm in your hands.

[10.34.50]

MR. PRESIDENT:

Thank you, Counsel.

The time is now appropriate for the morning adjournment. The Chamber will adjourn for 20 minutes and will resume at 11.00.

The Court is now adjourned.

(Court recesses from 1035H to 1105H)

MR. PRESIDENT:

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

Once again, the floor is given to Ieng Sary's defence to continue their response to the questions put by the Chamber.

In fact, question number 5 was actually removed, and it was – another question was added, and you may respond to the last question in the afternoon session.

[11.06.59]

MR. KARNAVAS:

Very well, Mr. President.

Before I go on to the questions, just a point of clarification because I was told that perhaps some may have been lost in translation, and I failed to cite some of the authorities, just so you have it on the record and for easy access, and because my team work very hard to organize everything, and I went off

script. Concerning Rule 73bis, I invite your attention to look at the 28 July 2003 version, where, under Rule 73bis(d), it says: "After having heard the Prosecutor, the Trial Chamber may fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which..." And it goes on.

[11.08.02]

So, this was the second version of Rule 73bis and, of course, this was in – seemed to be in conflict with the statute, because the Prosecutor is obviously very independent.

And then, if you look at the latest amended version, which is 28 August 2012 – I'm sorry; let's see. I just want to make sure I have it right; my apologies.

The first amendment was 17 July 2003, and then the subsequent was amended in 30 May 2006, where it says:

"After having heard the prosecutor, the Trial Chamber, in the interest of a fair and expeditious trial, may invite the Prosecutor to reduce the number of counts charged in the indictment..." – and so on. So, obviously, this rule is designed to dismiss counts, which is – and because the Prosecution has that authority to do so, the Trial Chamber is inviting the prosecutor to be heard and to initiate any dropping of charges.

[11.09.32]

I made reference to a United Nations report – or a report to the United Nations; this is to the General Assembly and the Security

Council. It's 21 August 2006, wherein – and we can provide it to Your Honours – wherein it states: "Trial Chambers..."

This is by the President of the tribunal, who has to report regularly to the Security Council.

"Trial Chambers are also proactively expediting trials. Notably, Trial Chambers are using Rule 73bis to oblige the Prosecution to focus its case. Rule 73bis allows the Trial Chamber, at the Pre-Trial Conference, to order the Prosecution to limit the presentation of its evidence and to fix the number of crime sites or incidents contained in one or more of the charges..." And it goes on.

But this is so you can make reference to it, because it's good to know the historical aspects of it.

[11.10.55]

And then, just to highlight a couple of other points, the prosecutor should have made reference of the Stanisic Case –the Stanisic and Simatovic Case. And, if you read that, this is a decision based on Rule 73bis(d). Again, it goes to dropping or reducing the counts in the indictment. Paragraph 7 states very clearly: "The Trial Chamber…"

73bis(d) gives the Trial Chamber discretion to invite the Prosecution to make reduction of the crimes of the indictment. So, this is the difference in the system. You have no authority, with all due respect, to reduce the Closing Order. It is what it is. You have other discretionary powers, such as how you will

proceed in trying it, but you cannot, willy-nilly, dismiss that which has been proposed by the Prosecution and then investigated, and now you have the Closing Order, this elaborate process. So I point this out.

And also, since the Mladic Case was also mentioned, the Decision on consolidation of a Prosecution's motion to sever the indictment, where they wanted to take out Srebrenica and try it with the Karadzic Case, there, there is one reference to 73bis(d), but only in the context of reducing the indictment – nothing, nothing, nothing about severance. And, therefore, it is more like apples and pears when you compare it, not to mention we're dealing with a system that is wholly different.

[11.12.45]

And finally, I had made reference to Your Honours of a decision that was taken by the Supreme Court, on Ieng Thirith – and I'm referring to E138/1/10/1/5/7 – a lot of slashes. 14 December 2012. And just – just to make sure that you have this – and my apologies for not being more fluent in my presentation. But in paragraph 37, it states:

"Traditionally, most civil law jurisdictions have adopted the principle of legalism (or, otherwise, mandatory prosecution), pursuant to which the Prosecution has no discretion to discontinue or ask for the discontinuation of a criminal action once it has been initiated, and the Court, which has sole authority to terminate proceedings, can only do it for a reason

specifically expressed in the law."
Of course, I'm speaking to the converted because you all know the civil law system. And perhaps some Anglo-Saxon judges or lawyers may not appreciate that because they have certain powers to dismiss in the Anglo-Saxon system, but in the civil law system, it's rather clear.
[11.14.19]
And then, if you look at paragraph 38, Your Honours, it's the Supreme Court that is saying:
"The causes of extinction of criminal action are explicitly listed in Article 7 of the CCP and are limited to the death of the Accused, the expiry of a statute of limitations, the grant of an [immunity], the abrogation of the law, and res judicata. It follows that the Court operating under the CCP has no authority" – let me underscore that, no authority – "to order termination for other reasons."
And so, effectively, going back to what I was saying earlier, were you to adopt the second prong that is being suggested by the Supreme Court and – as an option and which the Prosecution is proposing, at least in the version that they're proposing, in order to have it a quick one, or even in the version that I am proposing and the Nuon Chea team is proposing, which is, you still have to go through the entire Closing Order, you're still mandated to come up with a plan and to figure out what are you going to do with the rest. You simply cannot just park it.

Parking it does not count, and that's not one way to, sort of, alleviate any pain or discontent to the civil parties by saying, "Maybe we'll get to it."

[11.15.52]

I think it is rather clear. When you look at the Supreme Court Chamber's Decision and the arguments that are being presented, there will be no other trial. Those who are being left out, willingly or unwillingly, knowingly or unknowingly, with or without their consent, or at least even knowledge, will not have their day in Court. And that's why it is incumbent upon the Trial Chamber to make sure that before it does anything – that it is satisfied that everyone, all, receive their due process and justice in Court; justice for all or justice for none.

With respect to your questions, on question – the first question, our position is rather clear. We have no particular concerns. We didn't draft it. I did point out what the Prosecution noted in E124/2 – this is the Request for Reconsideration – where, in paragraph 25, they say:

"The advanced age of the Accused: Given that the average life expectancy in Cambodia is 61 years, the advanced age of the Accused is a critical factor in predicting whether a second trial will be possible."

[11.17.29]

What was the – what were the OCP concerns when they were drafting the Introductory Submissions? How could they have missed that

point?
And that's why I say, to lay the blame on your footstep and to say, "Now, you figure it out; at the same time, satisfy us" is unfair. They drafted it, they asked that it be even expanded, knowing full well that the average expectancy is 61 years of age, and this is based on the World Health Organization, so it is not based on some inconsequential, unknowing NGO. And this is 4 April 2001, if you look at footnote 42.
So, obviously, they weren't concerned then. Why are they concerned now? And why the rush? And why this ingenuousness in saying that if we only add S-21, what has already been tried, then we need not go any further, "that's representative"?
And what my colleague indicated, the Supreme Court does point out the possibilities of conflicts of interest of the judges and the need, perhaps, to have a second panel. That is also a consideration, and which is - and I think the comment should be taken with due consideration by the Trial Chamber that simply adding that or adding -- or, in fact, by excluding that, perhaps there is no appearance. But if you add that, that alone is not sufficient, even by the Prosecution's own submissions in their notice and their subsequent motion for reconsideration.
[11.19.25]
Question Number 2. Our position is rather clear that the entire case should be tried. I think I would be repeating myself if I were to say anything further on that.

I do note that our preference would be that Mr. Ieng Sary have certainty that he's going to be tried once, that there will be one trial. I don't – while it may be a factor, it may be a consideration, it may be something that we all should keep in mind – "all" meaning – excluding us because we were invited here, so we're here – as to whether our clients will be able to follow the proceedings or be alive so that there is a resolution, I think that – were the Trial Chamber to take a pause and look at the remainder of the Closing Order, I am certain that with some creative thinking, it can reduce the scope of the witnesses. And the system does provide for the admission of evidence. For you to try the entire case, obviously, it would prolong it by six months, maybe a year, but the Prosecution is willing to risk it – at least prolonging it by a month. In for a penny, in for a pound. If they're willing to risk it, why not try the entire Closing Order once and for all? It provides certainty. It will certainly provide – it will certainly eliminate the constant procedural battles that go on in this courtroom, where we're trying to decide, "Is this within the limits, the scope, or is it out?" It certainly allows the Defence the opportunity to know exactly who are the witnesses.

[11.21.40]

And, since the Supreme Court seems to be suggesting that this is an adversarial proceeding in the sense that I understand "adversarial", the Prosecution needs to point out, since they

have the burden of proof, what are the actual witnesses and evidence they need to produce in order to prove their case, the Closing Order, which is – which they are, essentially, the author of. So, it shouldn't – the onus shouldn't be on the Trial Chamber; the onus should be on the Prosecution, if we are to believe what the Supreme Court Chamber says, because they make it very clear that this is sui generis, a term that is often used in order to justify importing procedures from foreign jurisdictions which may or may not necessarily be consistent with the proceedings.

But there's nothing to prevent the Trial Chamber from ordering the Prosecution – and, in fact, we are suggesting that you order them to come up with a list of witnesses and documents that they believe will prove their case for the entire Closing Order. At least, at the very minimum, we will know for certainty who, and what documents, and what civil parties are not going to be represented, who are they willing to throw – to cast away for maybe – maybe, maybe – some other proceeding which everybody admits will not occur.

[11.23.16]

Question Number 3. Again, we've indicated that we want the entire case tried – not some portion of it, not justice à la carte, not where you pick and choose. We believe that the Trial Chamber had it right initially. We knew and recognize that there were some logistical problems. But now the Prosecution points – points to

us and tell us it's impossible. Okay, unless you have some sort of a plan. And, as I've indicated, a plan will still be needed for another case. Otherwise, you are effectively violating what the Supreme Court has already told us, which is you cannot abandon or set aside or dismiss counts, and you can't just keep them out there is the stratosphere, saying, "Well, we just parked them, we'll get to them when we get to them." They still exist.

Question Number 4. Now, maybe I'm reading too much into it, but when I read your question, you seem to be suggesting that what is being proposed by the Prosecution – that is, merely S-21 – certainly, or not necessarily meets the criteria of reasonable representativeness. That's a reading that I see. Maybe I'm overreaching. But I think we've answered the question that certainly, what is being proposed by the Prosecution is by no means representative of the – of the Closing Order.

[11.25.02]

We have pointed out that the Prosecution has taken at least three different positions, starting with a notice and a motion for reconsideration. And in the motion for reconsideration, they point out what would be more – as opposed to reasonably – representative. And, if you look at what would be more, it's a lot, lot, lot more than what they're asking now, and more civil parties would not be abandoned.

So – and as I've indicated also, it is up for you, Your Honours, to decide. And then, of course, the parties will decide,

including civil parties, whether they are satisfied with what you come up with reasonably representative, sufficiently satisfies this definition which seems to be like a moving target.

[11.25.56]

Question Number 5. Okay, we already – we already – we already discussed that. Okay.

I concur with my colleague that certain witnesses will have to come back and give – give evidence; I think that's unavoidable. We submit that, since this is an adversary proceeding, it is for the Prosecution to inform the Chamber what evidence it wishes to put forward. We don't have that onus. We also think that everybody should be rescheduled. In other words, no evidence be heard, none, zero, until we have finale on this issue. This is a matter that's normally dealt with at the pre-trial phases. As I've indicated in my response to the appeal – to the Prosecution's appeal, which I thought was untimely, that the moment that they weren't satisfied with your Decision on the motion for reconsideration, the Prosecution should have moved an appeal at that stage; that might have been more timely. The Supreme Court saw it differently, as one continuum. Perhaps they are right, which is why – which is why I say, the Supreme Court, in a rather gratuitous fashion, said that there was a paucity of reasoning, because it's one continuum. Then, obviously, all of your reasoning, starting with the very beginning, all the way to the impugned decision, counts. And we submit that sufficient

reasoning was provided by the Trial Chamber.

[11.27.47]

Question – question 7. In theory – in theory – at the conclusion of 002/01, we could proceed – in theory. Of course, we would need to see exactly how – what plan that the Trial Chamber has in mind. When I – when I look at this, and based on my 30 years plus experience and how you severed, because you've not dismissed, but merely severed, and if this is a continuation of one trial, only we're doing it in segments, okay, in my humble opinion – and some of my colleagues may disagree – nothing prevents the Trial Chamber from giving the parties some – some respite to regroup and to begin immediately with the other segments, because it's one Closing Order; there lies the difference.

And so I think it is, in theory, possible. There are complications, and I think the Prosecution has pointed out some realistic complications that need to be considered. But I think that all parties would have to see what the plan is, how you envisage, but also – I mean, there is also the realistic possibility that there will not be any funding. But that's something that cannot be taken into consideration; no more, as I would say, you should consider whether my client will be alive, and therefore we have to quickly make sure that he's found guilty.

[11.29.29]

They wanted a Closing Order that big, they wanted to have all

these – they claimed all these crimes were committed, they claimed all these people are victims, they claimed that there were forced marriages, that there was enslavement, that there were all these – they have to prove it; not for us to decide.

Question 8. The way I read the question – again, I'm trying to read it as a lawyer, which doesn't mean I always get it right, but it seems to me that you are asking if we have been prejudiced by not – by this uncertainty.

Well, if the answer (sic) is, "Have I been prejudiced in a manner in which I've been trying the case thus far?", the answer is no. I haven't suffered from any anticipatory anxiety, to be honest – no angst on my part, in the sense that you've indicated these are the witnesses, this is what we're trying, and we prepare as we go along. So I haven't – frankly, I haven't lost any sleep. No need for tranquilizers to keep my heart still as to what will happen in 002/01. We've been proceeding as we would normally proceed.

[11.30.53]

That doesn't mean that others have not been prejudiced. The Prosecution has indicated that it does affect the manner in which they present their case, and we take them at their word. But have we been prejudiced at all? No. But, again, will we be prejudiced down the road? That's a separate question because that depends on how you formulate the plan.

And to that extent, if I could, with all due respect, provide my observations on that, the Trial Chamber would have been – would

have been better off if it had first heard the parties to see whether severance would be appropriate and to what extent, and second of all, come up with a – some sort of a – at least a boiler-plate plan in advance so at least we could provide our input and think about it as we go along. But those are my comments on that.

As far as the annulment, we think, we believe, we submit that the annulment of the Severance Order will actually result in a more expeditious trial and a more expeditious way of going forward on the entirety of 002. It brings certainty, there are fewer procedural disputes in Court, the prosecutor will know exactly what it needs.

[11.32.33]

And might I add here – might I add here one observation on this, it might be – it might be useful, I don't know. At the ICTY, the Prosecution is very independent, and the judges certainly can only do so much to cajole the Prosecution. Even with Rule 73bis(d), you can see the Trial Chamber does not have carte blanche to do what it wishes. That would be ultra vires; that would be against the statute. But the Trial Chambers have in many instances determined the amount of time the Prosecution will have in trying its case.

So, let me give you an example. In the Prlic Case, which took five years to try – I'm a victim of that trial, "victim" in the sense that I was representing one of the accused, two years later

we're still waiting for the Decision – the Judgement – initially, the judges had offered the Prosecution 400 hours, actual hours with a counter, in presenting their case – 400 hours. And I can provide the transcripts if necessary.

[11.33.53]

And six months or eight months into the trial, one Monday morning, we came in – or Monday afternoon, because we always had Court on the afternoon on Mondays – the judges said, "By the way, we've decided – no hearing – we've decided to slash to 300 hours." In other words, 25 per cent of the time allocated to the Prosecution's case was taken away. And then they said, "By the way, if you want to be heard we'll hear you." And then, after we were heard, they took seven more hours away from the Prosecution, but then said, "If you need additional hours, just justify it, and we'll give it to you."

Now, why – why am I saying all of this? I'm saying this because at the ICTY, based on that procedure, you have 73bis(d) as a mechanism to encourage the Prosecution to cut away part of the indictment, but the judges cannot force. So, they have the power, but you have the discretion on running the Court. And so the way to work this out is for the Court to say, "Fine; if you want to try this entire indictment, this convoluted complex case which you put together, that's your business. We're saying cut; you don't want to cut, that's fine." And this is based on Madam Del Ponte's approach: no justice à la carte. But they're saying, "I'm

in control of the courtroom, I'm entitled to control the flow of the evidence in the temple of the trial. So, you maintain your position, but we're going to put you through the paces, we're going to decide how much time you will actually have to try your case, and then, hopefully, you will have to make some decisions. Either do a little bit of everything and hope that you accomplish what you want or reduce the indictment to something that is manageable and triable so that the case doesn't – is not prolonged."

[11.36.00]

And the point that I'm trying to make, Your Honours, is the onus is on the Prosecution. They came up with this Closing Order; let them come up with a plan on how to try the entire Closing Order at this stage. Concurrently, you can work on whatever plans that you may have, if you want to work on a plan for option 1 or option – and/or option 2. Either way, you're going have to come up with plans. But the easiest way is to take the path of least resistance, the path of least resistance which maximizes justice for all, and that is to have a targeted trial for the entire Closing Order. And it is the Prosecution who have risked the prolongation of this case by appealing Your Honours' reasonable approach in trying to manage this unmanageable Closing Order which they drafted, knowing full well the age of the Accused and knowing full well that the average lifespan in Cambodia is 61 and my client at least has surpassed the average by at least 20

years. And, when you're considering the lifestyle, the years in the jungle, and everything else, it's virtually a miracle that he's still here. But nonetheless, they went forward and they drafted it.

These are our submissions, Your Honour. I hope – we hope that we have been helpful.

[11.37.45]

MR. PRESIDENT:

Thank you, Counsel.

But, as far as I understand, it appears that you have failed to answer question 6. You should advise the Chamber concerning the request by the Co-Prosecutor to expand the scope of Case 002/01 as per their submission yesterday. Please advise the Court whether or not your team has prepared a list of witnesses concerning this new issue and, if any, how many witnesses do you expect to hear, and when you can submit this list of witnesses, because this will form the basis for the Chamber to decide concerning the possibility of including these witnesses or to defer these witnesses, or so. We have to factor the time into our consideration as a consequence of this request for the expansion of the scope.

[11.38.46]

MR. KARNAVAS:

Thank you, Mr. President. Perhaps I skipped over that.

Basically, let me be very clear, we're not proposing any new

witnesses, any new evidence. It is not for us, it's for the Prosecution. So whatever the Prosecution says, we accept them at their word, but that does not mean that after we proceed as we go along, we may not make other observations. But as far as us making proposals at this point in time, since it's adversarial, we're not prepared to make any – to make any submissions on that because our starting position is, we believe, now that the Severance Order has been annulled, that you try the entire case. That is our position. And I believe my colleague indicated the pitfalls of just going on with the four or five witnesses that the Prosecution has indicated. And given the complexity of the issue, certainly it will take more time, but be it as it may, we have no intention, in this adversarial setting, as we've been now informed by the Supreme Court, of putting forward what we believe are witnesses – any witnesses that need to be heard. Thank you.

[11.40.15]

MR. PRESIDENT:

Thank you.

The Chamber now hands over the floor to the defence team for Mr. Khieu Samphan. You may proceed.

MR. VERCKEN:

Thank you, Mr. President. I'll try not to come back over points which have already been covered by my learned colleagues, in cases where I concur with them. However, the conclusions I reach are not identical to those of my colleagues on the Defence about

what we ought to be doing. And, if I have not arrived at the same conclusions, it is because I believe it can be said here that we are not - Mr. Khieu Samphan is not in the same position as the other Accused. I'm referring here to your first question, which concerns the state of health of the Accused.

[11.41.31]

You seem to wish to do some kind of package deal on this question, medically speaking, but the answer is: No, Mr. Khieu Samphan is not going to die; yes, Mr. Khieu Samphan is fit to stand trial. Notwithstanding the last few days of hospitalization which he had not requested himself, Mr. Khieu Samphan is in fairly good health - as much, in any case, as you might expect for a man age 82 who is kept incarcerated in 10 square metres for five years and two months without receiving a judgement and while the perspectives of such a judgement occurring do seem to be growing ever more distant.

The second point that I would like to make by way of an introduction is that Mr. Khieu Samphan, who is here in front of you all, not only is he in good health and fit to stand trial, but he has every interest in being tried as quickly as possible. He is pleading for acquittal from the totality of the Closing Order, and the sooner he is therefore tried, the quicker will he be acquitted, and therefore the sooner can he go back to his wife and children to live the remainder of his life with them in peace.

[11.43.31]

Now, the fact is that you, first and foremost, Your Honours, and the Prosecution, and the civil party bench as well are telling us, "Time is short, the Accused are going to die, they won't be fit to be tried; we won't have time to judge them." And, since you're in such a hurry, you're telling us that you're going to be judging this several times over. However, that does not concern us. The decision simply does not tally with the position of Mr. Khieu Samphan.

And as far as he is concerned, whether – as far as Mr. Khieu Samphan is concerned, whether you choose option 1 as described by the prosecutor, involving a succession of mini-trials in the interest of justice, or whether you opt for choice number 2, which would consist of a first trial that is more representative of the whole so that the other Accused could be quickly judged, one or the other, for Mr. Khieu Samphan the position is the same: he is younger; he is the person whose health has made it possible to attend 90 per cent of your hearings, morning and afternoon over the last year and a half; and, if you wish to make a slightly odd comparison, he is very much exposed in the shop window, so to speak, he is the only one who sits down on the accused bench morning and afternoon, day in and day out, and this repeats itself and repeats itself.

[11.46.48]

And so, if you, in the Decision that we will be receiving from

you, opt for a series of mini-trials, well, there are rules – as quoted by the Prosecution, who referred to the Supreme Court, and mentioned also by my colleague, Mr. Koppe – which need to be observed, because our client is concerned in both cases – option 1 or option 2. Either way, the situation is the same: he's going to survive, he's going to be alive, and he is entitled today, whatever ultimate option is proposed to you, which does not directly concern us – he has the right to know how you intend to judge him, whether you set up a series of mini-trials because you believe that serves the interest of justice and then you explain to us as well how you're going to solve the juridical and material problems that that poses – our colleagues have already gone into that – or whether, on the other hand, you decide to comply with the Prosecution's argument to add a site to this trial which has lasted for a year and a half and which seems to fit itself into all sorts of shapes so that it may become, so to speak, more representative as a trial – and there I would endorse what my friend, Mr. Koppe, said, and bearing in mind what my colleague Mr. Karnavas said at the hearing on Monday and the fact that when – your Chamber drafted its Severance Order in September 2011 – if it is possible and if the Accused survive, then they will be judged for the remainder of the Closing Order.

[11.49.28]

Now, in both cases, the person who is going to survive, among the accused persons, is called Khieu Samphan; because he's in good

health, because he's attended 90 per cent of the hearings, and because he is fit to stand trial, and because he's asking to be tried and he is asking for his acquittal. And he's been waiting for that for five years and two months.

And, hearing the arguments that were batted back and forth on Monday and looking at all the documents that have been exchanged between the parties on this question, I have to say that optimism about reasonable timelines within which Mr. Khieu Samphan can be tried as he requests is not very high. Even if you go along with the combined appreciation of the Prosecution, that told us on Monday that they were envisaging an end of the hearings – evidentiary hearings – in 2013, when – when – will we reach the end of the evidentiary hearings, whatever decision you take – at the end of 2013, at the start of 2014? I haven't a clue. If the Decision you hand down is not considered acceptable by the different parties, there may be problems.

[11.51.31]

Judge Fenz, perhaps not intending to support my request today, nevertheless reminded us on Monday what the timelines involved in the Duch Case, in which there was one single Accused who accepted the facts and which entailed one crime site. The Chamber took eight months to draft its Judgement, and the Supreme Court Chamber took a year and a half to hand down a verdict, which is the final Decision on Duch.

Now, everybody, despite everything, agrees – and even the Chamber

and the Prosecution agree that you can't really seriously talk about studying evidence in a 002 second-stage trial while the foundation of 002/1 is proposed to be used for subsequent trials, because doing such a thing would violate the rights of the Defence – and of all of the parties, for that matter. And that is why, on the other side of this room, my learned colleagues have made that point. So, if we base ourselves on what happened in trial number 001 – eight months for a verdict, and it is easy to imagine how much time your Chamber will need to draft a verdict in a much more complex affair – and if you bear in mind the time taken by the Supreme Court to hand down its verdict in the Duch Case, which was a year and a half, then you have over two years, plus a year of hearings, so we're talking about a low estimate of three years, bearing in mind the complexity of this trial. We will need at least three years – at least three years – for Mr. Khieu Samphan to be – to receive justice. And when you have been detained for a long time, and you are age 82, and you're presumed innocent, that is really quite a considerable length of time.

[11.54.47]

So I frankly would like to say that here and now, the fine words in favour of severance that will accelerate the procedure are totally imaginary, fantastical, because in point of fact the result, as far as we're concerned, is the precise opposite. Whatever you decide, we will be prejudiced. Whether you opt for mini-trials in the interest of justice or whether you go for

something that is more representative, and even if you opt for the solution which my colleague suggested, which is to judge the entire Closing Order, we are still prejudiced.

And that is why I can say that, contrary to what is being said in this courtroom, the Severance Order did not protect the rights of Mr. Khieu Samphan to a trial within a reasonable time limit. Your severance, in fact, excessively lengthened the procedure, and now there is very little at your disposal to make up for what happened in that respect.

[11.56.37]

Even, as my colleagues are asking, you did decide to have a trial on the entire Closing Order, which, I agree, would have been the best thing to do at the outset, rather than severing – it would have been the most expeditious solution, but the consequences of such a choice would have been so important in terms of the time needed to deal with the arguments and contestations that would have been raised here and there, would have been so considerable that the prejudice for Mr. Khieu Samphan would not have been any less; it comes to the same thing as it does here with options 1 or 2.

And there's another thing I should draw to your attention, Your Honours, as regards the outcome of uncertainty in which we seem to be caught from the very start of this trial. Ever since this trial began – and this is precisely what the Supreme Court has criticized – we have been caught in a state of uncertainty. The

dimensions of our trial are variable, and we don't really know what we are being tried for. Over the last year and a half, as the Supreme Court said very accurately, you have left, in your various decisions about severance, the doors perpetually open. And that is why the Supreme Court decided to declare the prosecutors' recent appeal admissible – because you never took a final decision about the scope of the trial until the day when, through a memorandum – now, rather late in the day – we are allowed to discover that there have been certain decisions taken, and through the appeal – we discover certain things and we are now told, "That's it, stop; herein you will find the definition of the trial." But frankly, it's a little bit late in the day, and the Supreme Court pointed this out in its Decision. And that's why the Prosecution's appeal was considered admissible. [11.59.30]

But when the rules change from one day to the next and they're never firmly and clearly defined by the Bench, then what does the accused person do, who doesn't know on what basis he's going to be tried? Ah, you can say that there's the Closing Order and he's perfectly well aware that that Closing Order was there, but the fact does remain that we do not know and we still do not know what the scope of the trial is. And obviously this is harmful to our cause, but I would also like to point out that the situation has also had an influence on the decision that we took to remain silent. And somewhere along the line, this is not acceptable. You

have to accept that by not strictly defining the boundaries of the trial and what you are judging Mr. Khieu Samphan for, you are encouraging him to keep silent because he's uncertain about what to expect.

[12.00.51]

And among other consequences of the present situation, I could also quote the fact that in the interest of speed – although we're not actually concerned by the need for expeditiousness and that my client is fit to stand trial and attends all of your hearings – you have contributed, as I see it, to gagging the Accused and the Accused's defence team, because how, otherwise, can one interpret your completely unrealistic requirement not only to ask us, right in the middle of a trial, to submit a final memorandum on applicable law – but then what's going to happen to that if you change the scope of the trial, we'll have to come back and revise it – not only that, but also you tell us, again in the interest of expeditiousness, that the final submissions of the Defence should be limited to 100 pages, 100 pages of final submission covering so far about 50 witnesses and maybe another 50 –some 5,000 documents, and then – 100 pages; that's some sort of bicycle thief's piece of paper. It's – I'm sorry, but it's just a – it's just a joke. It's ludicrous. You can't expect the Defence to put its thoughts on such a complicated trial on 100 pages of paper. And I'm absolutely certain that you're preparing to go even further than that – in other words, to restrict our

pleading time in Court. I'm absolutely sure we haven't got there yet, but we are coming very, very close. I can tell you, we're going to suddenly be told, "Oh, the Defence is going to have three hours to plead."

[12.03.24]

Today, we are being asked to take positions on option 1 or 2. What we are much more interested in seeing is rules that are permanent rather than fluctuating. It's not up to us to tap the hourglass and make forecasts week by week as we go along. We want a clear timetable that is respected. We want our rights to be respected.

MR. PRESIDENT:

The Chamber has outlined very clearly to the parties as to what subject matters are supposed to be dealt with. We asked the parties to discuss the implication as a consequence of the Decision of the Supreme Court Chamber in validating the impugned Decision on the severance of Case 002.

The Chamber is now intending to listen to the various comments and views of the parties in respect of this Decision. In particular, the Chamber advised the parties to look at paragraph 50 of the Decision, that – the Chamber advised the parties specifically the purpose of this Chamber so that the Chamber will have the basis for consideration in – as to how the Chamber will proceed in respect of the Decision of the Supreme Court Chamber.

[12.05.27]

You are now being - deviating away from the intended purpose of today's hearing as required by the Chamber for all the parties to express their views in respect of this matter before the Chamber. The Chamber advised you to review the agenda and the subject of the hearing that the Chamber has communicated to all the parties. The Chamber wishes to gather all the views from the parties so that it has the basis to issue a new Decision in respect of the Decision of the Supreme Court Chamber. The parties are not supposed to raise any other issue out of the items of agenda the Chamber has decided. And, if you have any basis for any other observation on any other matters, then you may submit to the Chamber. The Chamber will probably allocate other times for the purpose. But today's hearing is meant to address certain matters that the Chamber has clearly communicated to the parties. We want to hear views from the parties so that we will have the basis for the Decision as the result of our consideration of all views of parties in our basis so that we can decide on the scope of Case 002 in the future.

[12.07.14]

MR. VERCKEN:

Yes, Mr. President. It is our view that at this precise moment-

MR. PRESIDENT:

If you understand the instruction, please compose yourself and try to be prepared for your submission so that you respond specifically to the question asked by the Chamber. Otherwise,

your response will not address the issues that have been raised by the Chamber. So we ask you to revise your proposition, and you may submit your points again this afternoon.

The time is now appropriate for lunch adjournment. The Chamber will adjourn now and resume this afternoon, from 1.30.

Security guards are now instructed to bring Mr. Khieu Samphan down to the holding cell downstairs and have him back to this courtroom before 1.30.

The Court is now adjourned.

(Court recesses from 1208H to 1334H)

MR. PRESIDENT:

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

The floor is once again given to Khieu Samphan's defence to continue your submission.

Please be reminded that you shall respond directly to all the questions and issues raised by the Chamber and by the Co-Prosecutors and the Lead Co-Lawyers, in particular to the four questions – number 6, 7, 8 and 9 – so that your responses and submissions will be used as the basis for our Order in regards to the effect of the Order by the Supreme Court Chamber.

You may proceed.

[13.35.53]

MR. VERCKEN:

Thank you, Mr. President.

Just to pull the threads together, I would like very quickly to

recall that with respect to the state of health of the Accused – I'm not empowered to come down to any verdict on the health of the others, to whom I wish long life, but with respect to Mr. Khieu Samphan, he feels neither sick nor moribund. I think he has a certain amount of time left to live, and that's why, when you asked the question of if we would prefer a complete but incomplete or partial yet completed trial, we believe that Mr. Khieu Samphan would survive either hypothesis and that this dilemma, which may be warranted – I'm not saying that it isn't – which may be warranted for other Accused, should not be put before Mr. Khieu Samphan to justify a breach of his basic rights. I'm not coming back to this because I've talked about it already. [13.37.21]

With respect to the question of whether the addition of S-21 – because now, if we refer to the Prosecution's request, it seems to me that we're only talking about the addition of S-21 at this juncture, so let me echo and endorse my learned colleague Mr. Koppe's remarks, which I wholly concur with.

On question number 6, what will be the position of the Khieu Samphan defence if you do decide to add S-21 when it comes to documents to be placed on the case file and witnesses that should be summoned and experts and so forth, our position is very straightforward. In the past, we said that we did not have any particular witnesses to call with respect to S-21. We do, nevertheless, reserve our right to call back to this courtroom

certain witnesses that we have already heard and to request the submission of documents as well. And we will very quickly be informing the Chamber of the details of this.

[13.38.54]

On question 7, which concerns the matter of whether it would be wise, after a certain preparation time, whether your Chamber, composed of the same Judges, should immediately move into substantive hearings on the second part of Case 002, I think I answered that this morning already. The answer that we give you to that - on that is negative. We do not believe that that would be wise, and I explained why this morning.

Turning now to question 8, which says that the remaining allegations were not discontinued by your good selves in consequence of the Severance Order and could be the subject of future trials, which is why you're asking the parties what prejudice might result from the absence of a timetable, I would say it's not so much the absence of a timetable - I might have said this a little forcefully this morning - that matters; what we care about is not the timetable and the meticulous day-by-day accounting that is done.

[13.40.30]

When these questions were referred to in August 2012, the Prosecution was talking about 33 days. Now we're talking about 11 days of hearings. I don't know if this takes account of the civil party participation. I don't know if this is simply what the

Prosecution believes is necessary for the Defence to cross-question the witnesses. All of this is a secret pudding that has been cooked in the Office of the Co-Prosecution. And, as far as I'm concerned, this is a highly inexact science. And, as I see it, what the Supreme Court Chamber was criticizing in the series of decisions on severance was not so much the absence of a timetable as much deeper problems.

And the way this question is posed I find a little bit awkward. I can't really answer it without extrapolating, and that is why this morning I did refer to a certain number of points that seemed to me of crucial importance and which are breaches of Mr. Khieu Samphan's right to a trial within a reasonable period of time in respect for his fundamental rights, because the problem of a timetable is procedural housekeeping.

[13.42.19]

What really matters is whether or not the accused know why they are being tried and how they are being tried. Hitherto fore, although we have been running for a year and a half now, we haven't really known the answer to that question.

This leads me straight into question 9, what would the impact be of the annulment by the Supreme Court Chamber, to - the effect of the rights of the Accused to a trial within timely period and to their basic rights. And I did answer that this morning. That's why, this morning, I did believe that I was actually responding to the questions put by the Chamber and I did say that. As I said

– and as far as Mr. Khieu Samphan is concerned, whatever decision you take, his entitlement to a fair trial and a timely one have been violated by today's present circumstances. And, whether you decide to have a trial on the entire Closing Order – although over the last year and a half we have been having hearings already – or whether you decide on a whole series of mini-trials in the interests of justice, or whether you decide on having a single trial that is more representative but which is a single trial, perhaps, for the other two co-accused, but which won't be a single trial for Mr. Khieu Samphan – let's be clear on this, and that's why I don't feel concerned by that choice, which seems to be somewhat abstract.

[13.44.18]

The medical experts who tell us about the state of health of Mr. Khieu Samphan will tell us, coming up in the middle of March, that Mr. Khieu Samphan, they will say, is fit to stand trial and is not, therefore, concerned by the need for expeditiousness, which seems to concern everybody here.

This situation could, perhaps, let me propose, be compensated for. And I haven't drafted this in very fine detail because time is short, but you could consider a severance in persona – in other words, judging Mr. Khieu Samphan for the entire Closing Order on his own, which would mean that, when the other Accused encounter health problems that make it impossible for them to come to the courtroom, you would be able to concentrate on his

trial. And, were you to take that decision, I believe that the logic of my proposal applies to what you might call compensation or, let us say, at least the merits of bringing in to the maintenance of Mr. Khieu Samphan in detention.

[13.46.02]

We are shortly going to be submitting a request that Mr. Khieu Samphan be placed under house arrest. We do not believe that simply by adding S-21, were that to be done, or under the hypothesis that you originally set without including S-21 - one way or another, we're not out of this for the next three or four years before we have a final verdict, and it seems to us entirely reasonable that - or unreasonable, rather, that an 82 year old should not wait eight or nine years for his trial. And so I'm announcing now that we are going to be submitting a request for release, which would not change the prejudice my client has undergone, but would allow him, at his age, to calmly await your verdict.

Mr. President, I was going to suggest that I answer the questions put in the additional memo that came out at a later stage, but perhaps I'm jumping the gun here. Thank you, sir.

[13.47.27]

MR. PRESIDENT:

National Counsel for Khieu Samphan, you may proceed.

MR. KONG SAM ONN:

Thank you, Mr. President. Good afternoon, Mr. President, Your

Honours, everyone in and around the courtroom. I would like to supplement to what has been stated by my colleague. I fully support the statement and submissions made by my colleague. The Trial Chamber's Severance Order, as we all know, is no longer valid, as it has been annulled by the Decision of the SCC. This means that we virtually start the case anew. But why do we have to hold today's proceeding?

[13.48.52]

Per the Trial Chamber's instruction, this is a time to correct the errors made in the Severance Order or, we can simply say, to remedy the Severance Order, which had some mistakes. The proceedings, so far, seem to make two issues, especially the issues that have an impact on my client – that is, Mr. Khieu Samphan – in particular his right as stated in the constitution – that is, the presumption of innocence.

Many of the learned friends say that the Severance Order was prejudicial – prejudiced. And why is that? When we make a presumption that certain facts will be cherry-picked for trial and some other facts shall be packed to one side. And the presumption that the facts that – hand-picked for trial is already a sign of a presumption that (inaudible) the guilt of the Accused before even this trial started. So, the cherry-picking of certain facts shall not be done, as it seems to violate the constitution on the principle of the presumption of innocence, because such a principle is not applicable before this Chamber

when certain facts are hand-picked for trial.

[13.51.54]

The second point is my client's right to have a fair and expeditious trial, as expressed by my colleague. Whatever the trial options selected by the Chamber, it will continue to violate my client's right. As Your Honours have noticed and as raised by my international colleague, my client participates almost fully in all the proceedings, and in other cases he has to wait at the detention centre due to the unavailability of the co-accused. We can see that when other co-accused are unavailable, then my client has to be detained in the detention centre and he cannot exercise his right of fair trial, and that is a clear violation of his right.

We can look at the proposals made by the Trial Chamber as to whether we shall reduce or remove part of the facts and we only select some facts which are represented, as requested by the Co-Prosecutors, which is the second option – and, as claimed by the Co-Prosecutors, that is the best option so far. The application of either the first or the second option does not benefit my client in exercising his right. The reason is that it is not up to my client or the proceedings against him alone, but it is the proceedings against all the co-accused. If one approach is used for all the co-accused in this instance, that approach is not applicable for all the Accused. I can, on the one hand, say the application of the approach for my client may not be

necessarily applicable for the other co-accused. So, we can say, circumstances for all the Accused are distinct in its (sic) own way. If you use one approach or one principle or one application of law for one Accused, it might have an impact on the other co-accused.

[13.55.41]

And the response to the questions put to us by the Chamber - that is, what I wish to say - as my international counterpart has said sufficiently, but anyhow I'd like to add some comments.

Regarding the first question as raised by the Co-Prosecutors regarding the advanced age of the co-accused that requires expeditious trial proceedings, I am of the opinion that the advanced age is not the fault of the co-accused, nor of my client. The question is: How come such proceedings have dragged on so far? I mean, the trial started 38 years after the crimes were allegedly committed; is it the fault of the Accused?

The first issue is actually the establishment of this very Court to prosecute such crimes.

Second, it is the strategy employed by the Prosecution regarding the situations of each Accused. As I indicated at the outset, the Co-Prosecutors know very well about the advanced age and health issue of all the Accused. For that reason, they should have factored in all these issues before they make their presentations for the Prosecution, and that is their own discretion and choice-

[13.58.25]

MR. PRESIDENT:

Counsel, that point was raised – were raised this morning, and what we need from you, actually – your responses to the questions put to you as a result of the effect of the Decision by the Supreme Court Chamber to annul the Severance Order by the Trial Chamber.

In the Decision of the Supreme Court Chamber, they presented two options: one is the entire facts in Case 002 shall be tried; and the second option is to advise the Trial Chamber to reconsider severing facts in Case 002 pursuant to Internal Rule 89ter. And that is the instruction from the Supreme Court Chamber. And, of course, we'd like to get precise responses from you whether you would present to us appropriate methods or solutions to these two options presented to us by the Supreme Court Chamber, what would be the pro and con for the one whole trial of facts in Case 002 or the severing of the facts. And, of course, we did that in 002/01 proceeding.

[14.00.26]

And with the submissions to expand this Court in Case 002/01, we acknowledged to accept one fact and rejected two facts by the Co-Prosecutors, which led to the appeal to the Supreme Court Chamber. And of course, as a result, we are here today to discuss this very issue.

And I sincerely hope that you would take this floor to make your points directly connected to what I just said, in particular

connected and related directly to our memorandum, so that the Trial Chamber would have all the complete feature from all the parties.

MR. KONG SAM ONN:

Thank you, Mr. President. I am, yes, now responding to the questions raised by the Chamber.

It is rather convenient for us to respond yes or no, but of course we would to present a more – fuller picture in our response to what has been raised by the Co-Prosecutors. Allow me to continue, Mr. President.

[14.01.58]

Mr. President, Your Honours, we, the Khieu Samphan's defence, do not support any option which require the severance in this case – for example, the addition of facts, which would violate my client's right. That is the gist of my submission, Mr. President. And the point that I raise – that is, the advanced age of the Accused – it is not the fault of the Accused. It is the point that the Prosecution was well familiar from the outset. If they were to think that because they are old, then they should think of the strategy for an expedited proceeding by taking into account the fair trial process and right of all the Accused. And it does not mean that we have to jump to only certain facts to be tried because of the advanced age of the Accused. That is improper, in my opinion.

[14.04.00]

The respond to the fourth question – and, of course, I will respond from question number 4, as my international colleague already responded to questions 1, 2, 3 – if the Trial Chamber acknowledges and accepts S-21 as part of the trial, then we need additional time to prepare ourselves for the debate on that fact, as we need to conduct further research on this very topic.

Now, I'd like to jump to question number 6, as question number 5 is excluded.

In fact, witnesses have already been proposed, in particular the witnesses proposed by the Co-Prosecutors. In the case where the Co-Prosecutors would like to present additional documents and witnesses, so do the defence teams. We would need to review once again all those related documents, witnesses, and experts and need to make a new submission.

And, to respond to Your Honours' question number 7, it is my opinion that the Trial Chamber indicates that it is likely or there is a possibility that there could be other smaller trials after the conclusion of 002/01. We can only respond to this question, only in connection to question number 9, as what would be the impact on our client and on other co-accused. Here, I refer to a fair and expeditious trial.

[14.07.16]

As I indicated from the beginning, my client's presence to follow the proceedings is almost permanent. And, of course, he lost his opportunity when another co-accused is not available during the

trial proceeding, and of course, he does not - he has not waived his direct presence to participate in the proceeding. And as a result of the unavailability of other co-accused, my client has to wait, and he has to wait not at his house, but at the detention facility, and that is a clear violation of his right. If the Trial Chamber reviews once again the proceedings in Case 002/01 and if this standard keeps going on for 02/02 or /03, then my client's right - my client's right continues to be violated. The Trial Chamber is competent to provide assurance to all the parties that in the likely event there shall be no case 002/02, and 03, and so on and so forth. However, this has to be in agreement with the Co-Prosecutors that they will not seek another trial segment in Case 002/02 or 03 against my client, as the continued detention of my client in this instance has violated his right.

[14.09.28]

So, the postponement of the proceedings, of course, has an impact on my client's time, as he should have been with his family. Of course, based on the principle, my client is not guilty as charged and he is not guilty for any alleged crimes by the Co-Prosecutors.

Once again, I'd like to recap my main points. And, as raised by my international counterpart, we seek the release of my client, Mr. Khieu Samphan - that is, to release on bail-

MR. PRESIDENT:

Counsel, it seems that you wander far away from the focus point in this proceeding. If you have other points to raise, please do it in your written submission. The agenda has been clearly stated in both the memorandum of understanding and at the beginning of the opening of this proceeding, on the morning of the 18 February 2013. And this morning, once again, I reminded all the parties of what needs to be discussed during today's proceeding. Please stick to the instructions as set out by the Trial Chamber, and if you have any other issues, please do your submission in writing so that it does not confuse people and have an impact on the current proceeding before us.

[14.12.00]

You need to consult all the instructions that we raised in our memorandum. And the sole purpose of that memorandum is to get all the opinions, submissions, and observations by all the parties in this case so that we can reissue our Decision and not to delay the proceedings against your client.

This is another reminder to you so that you only respond to the very issues raised for today's proceeding.

MR. KONG SAM ONN:

Thank you, Mr. President. Of course, what I raised is the violations and the impact on my client's right; that is in response to your question number. 9.

MR. PRESIDENT:

You – I understand that, Counsel, but you also made a submission

which is out of the question for today's proceeding. Please do not do so.

[14.13.05]

MR. KONG SAM ONN:

My apology; of course, we have a submission to make and, of course, that is the strategy we use to defend our client-

MR. PRESIDENT:

I understand your right. However, for the proceeding before us, we determined the agenda and the points to be raised during the proceeding, and please use the time appropriately as instructed.

MR. KONG SAM ONN:

Thank you, Mr. President. What I have raised – have raised so far is the impact on my client. And, of course, we will make our submission in due course.

To summarize my point – that is, regarding the impact on my client – I raised two points; that is: one, the violation of the principle of the presumption of innocence as stated in the constitution; and the second point is the violations to the principle of a fair and expeditious trial. My client's rights in these two whole themes were not entertained by your Severance Order, Your Honour, and I appeal to you to review these two principles.

[14.14.45]

MR. PRESIDENT:

Thank you, counsel. However, you have not responded to some

questions.

In question number 6 - we put a question to all the parties that - in relation to an extension of the scope of Case 002/01 still sought - that is, the inclusion of S-21 and the great breaches of the Geneva Convention related to Security Centre S-21, we asked all the parties to indicate how many documents, witnesses, and experts that you may wish to add. As we said this morning, this is one of the elements that the Chamber will use in order to consider the request for extension of scope by the Co-Prosecutors.

Can you kindly respond to this question? In fact, it has been put to all the parties long before the trial started.

MR. KONG SAM ONN:

Yes, Your Honour. We cannot indicate the exact times. It depends on the submissions of the list of documents or witnesses by the Co-Prosecutors. By then, we will be in a position to respond.

[14.16.40]

MR. PRESIDENT:

Thank you.

In the Decision by the Supreme Court Chamber dated 8 February 2013, which gives us two options, one is whether we, the Trial Chamber, shall conduct a one full trial for all the facts in Case 002 or, second option, alternatively, to reconsider the Severance Order based on the spirit of Internal Rule 89ter, and I'd like to get your clear position on that so that we can prepare - or we

will be in a better position to look at the remaining facts besides the one included in Case 002/01.

If I am not mistaken, neither you nor your international counsel has responded to this question. Or whether you believe that these two options are not applicable? Please clarify your position.

[14.18.11]

MR. KONG SAM ONN:

Thank you, Mr. President.

In fact, if we look at the impact on the right of my client, the expeditiousness of the proceeding cannot be guaranteed. The best choice is to sever my client from the trial – I mean, from the joint criminal enterprise principle.

If we look at the overall facts and proceedings for the entire case, my client does not object to the overall proceedings. However, if there is an inclusion or extension of scope in this case or in the possible Case 002/02 or 03, it will definitely have an impact on my client's right.

MR. PRESIDENT:

Thank you.

I hand over to Judge Lavergne. You may proceed.

[14.19.36]

JUDGE LAVERGNE:

Thank you, President. I seek some clarifications. I'll be quite brief.

We've heard from – the defence team for Mr. Khieu Samphan evoke a

possibility to release – request to release their client – the client and that they intend to make such a request at a later stage in time, and not officially today. We have also heard a request to have the participation of Mr. Khieu Samphan severed. Are we to understand that such a request is officially being submitted today, at these hearings, or at a future stage, when your request for provisional release or release on bail will be made, or at the time when the fitness to stand trial will be assessed by the medical experts?

MR. VERCKEN:

To answer your last question, Your Honour, we have envisaged all of the possibilities that are being entertained by Your Honourable Chamber in order to address the current situation. Is it necessary for us to formalize a request for severance with further reasoning?

[14.21.10]

It is incumbent upon your Chamber to decide. We are simply raising the possible consequences stemming from the Decision of the Supreme Court Chamber and the effects on the current trial. You must also bear in mind that this puts us in an extremely difficult predicament, and this is why I am addressing the matter now.

It is difficult to provide counsel to Mr. Khieu Samphan, since to date, or at least up until the moment you will have definitively defined the confines of the scope, we have no overall perspective

or knowledge of the facts that Mr. Khieu Samphan is being tried for.

And, once again, the Decision of the Supreme Court Chamber exasperates the difficulty because it effectively orders us to begin from scratch, and we consider the entire case. Therefore, it is very difficult for us to weigh the pros and the cons when we are still unaware of exactly what we are dealing with. [14.22.39]

What the heart of the matter – in fact, the reason why we have invoked such a request is not because we have been able to develop it extensively, but it just demonstrates the extent to which we must call for justice to be done and justice to be properly served. And, following the issuance of a decision and following the assessment of the medical condition of the Accused or a possible improvement of their status or their participation in Court or through video-link, those are entirely within the realm of possibility, but it is a very onerous decision.

For the time being, Your Honour, we are simply making a suggestion, a proposal to illustrate to what extent this situation is of the utmost urgency and is extremely difficult. If you believe that such a request must be submitted in a formalized manner, then perhaps it would be well advised to have the doctors make an assessment of his health condition. And it is following the medical reports – and, in fact, yesterday you issued a memorandum in which you indicated that there would be fresh

medical hearings in mid-March 2013, and I believe that there are still some outstanding issues. But today, as it stands, my national colleague and I are stating that this is certainly a possibility that we envisage.

[14.25.04]

MR. PRESIDENT:

Thank you.

Now I hand over to the Co-Prosecutors and the Lead Co-Lawyer for the civil parties to reply to the various submissions and observations by the three defence teams. You may proceed.

MR. LYSAK:

Thank you, Mr. President. Good afternoon to everybody. There has been a lot said by the three defence teams since this morning, some of it, I would say, rather new and surprising. But let me start by trying to distil a little their positions, strip away some of their rhetoric, and see where we are in terms of there being a number of issues on which the parties actually agree and where the parties disagree, starting with where the parties all seem to agree.

One issue on which we agree is that the Trial Chamber should not simply return to the terms of the original Severance Order. The Prosecution, the civil parties and all three defence teams have expressed that position.

[14.26.44]

It would also appear that the parties are in agreement that the

Chamber should proceed on the basis that there will be one trial. I say this because the Nuon Chea and Ieng Sary teams have both requested that you do not do any severance at all. And, while the Khieu Samphan team's position is a little fuzzy at times, they have stated that they do not favour any severance. So there seems to be a consensus among the parties that we should proceed at this time on the basis of there being one trial rather than series of trials.

The parties agree or at least do not dispute the principle that this one trial needs to be more representative. I add as a caveat to this that the Ieng Sary team, Mr. Karnavas, has made an argument to the effect that the Trial Chamber may just ignore the Supreme Court Chamber's Decision. But, as I will address a little later, we do not view this as an argument that you can seriously consider. And ultimately, Mr. Karnavas suggests – and I'm paraphrasing – that the Trial Chamber should look to the Prosecution for the plan on how to proceed.

[14.28.37]

The disagreement between the parties seems to boil down on what should be included in this one trial and on how long – and, therefore, on how long the trial should be. So I will now focus on some of the specific issues that have been raised by each of the teams, particularly in regards to this last point of what should be included in the trial, which is really the most important task that lies with this Chamber.

Starting with the position of the Nuon Chea team expressed today – and I must say it was with some surprise that I heard them – when I heard them stand and say – state their position now that Case 002 should not be severed at all. This could be called the mother of all flip-flops.

It was not long ago that the Nuon Chea defence team made the following statement after the Court's Severance Order. It called it – quote – "without a doubt, the most sensible decision to emerge from the ECCC" – end of quote. That position remained in effect as of when it was brought up last August, and they opposed our appeal. Nonetheless, they have now changed their view. Indeed, so has the Ieng Sary team changed its view in asking now that this Court try all of the issues of Case 002.

[14.30.48]

And counsel himself said he felt rather strange standing up and making this argument; I would concur with that. But I think it is not too difficult to figure out why the defence teams are now taking the position that this Chamber should try all of Case 002 and not proceed based on the severance that is proposed by our office.

One can assume that they have read the Supreme Court Chamber's Decision and understand that there has to be some representativeness in this trial, and therefore it would be difficult for them to stand and argue that we should only proceed with forced movement. With that option having been taken away

from them and facing a request from us to add S-21, perhaps they consider their next best option to create as much chaos as they can, as much delay as they can, and to request a trial that may very well and probably would not be able to be completed while their clients remain fit. That is, at least, our observations on this rather surprising flip-flop in the Defence positions that we have witnesses here today.

[14.32.38]

In regards to some of the arguments that were made by Nuon Chea's counsel as to the problem of a severed trial, he raises the argument that a limited scope trial prevents them from mounting their defence. We dispute this very much. It is not in any way supported by the record of the proceedings to date. This is the defence team, I would remind everyone, that regularly asks witnesses questions relating to events that occurred after 1979. They have not in any form or fashion been limited from questioning witnesses about matters that had any potential of being relevant to Case 002.

The argument is made that there was confusion on their part, that they did not know how to proceed questioning witnesses because of the severance, and this is an argument that has been pulled out every now and then by the defence teams. And for that reason, I would like to go back just for a moment and to remind everyone of what this Court said at the time the Severance Order was initially made.

[14.34.16]

First – and I'm referring here to document E124/7, which was the 18 October 2011 Decision of this Court on our motion for reconsideration of the Severance Order. And in paragraph 10, the Chamber indicated that its Severance Order "was motivated by" – and it listed a number of items. One of those was – quote – "to ensure that the first trial encompasses a thorough examination of the fundamental issues and allegations against all Accused, to provide a foundation for a more detailed examination of the remaining charges and factual allegations against the Accused in later trials", and, later on, to – quote – "ensure, as far as possible, that the issues examined in the first trial provide a basis for the consideration of the mode of liability of joint criminal enterprise by including all Accused".

The Trial Chamber then stated in the immediate following paragraph, paragraph 11 – quote: "It follows that the Chamber, during the early trial segments, will give consideration to the roles and responsibilities of the Accused in relation to all–"

[14.35.51]

MR. PRESIDENT:

Prosecutor, please be reminded that you should slow down a bit. I have signalled you several times, but you did not pay attention.

MR. LYSAK:

My apologies, Mr. President.

Referring to paragraph 11, let me start again with the quote –

quote: "It follows that the Chamber, during the early trial segments, will give consideration to the roles and responsibilities of the Accused in relation to all policies relevant to the entire indictment." End of quote.

On that same date, the Trial Chamber issued another order regarding the scheduling of the start of trial – and this is document E131 – and in that Order, the Chamber made the following statement to all the parties – quote: "As explained in the Chamber's Decision of 18 October 2011, E124/7," and that was the Decision that I just quoted from, the Reconsideration Decision; as explained in that Decision – quote – "the Accused must confront all allegations contained in the indictment in Case 002. And while the Chamber's Severance Order of 22 September 2011 separates proceedings into a series of smaller trials, it is envisioned that the first trial will provide a general foundation for all the charges, including those which will be examined in later trials." End of quote.

[14.38.12]

I go back to these statements to remind everyone as to why the trial proceeded in the fashion that it did, as Mr. Koppe complained that it took a long time to deal with these issues and that this was a surprise to them. In fact, everyone – everyone knew that this first trial would proceed in a manner where we would start by building the foundation for all trials. There was a trial – a meeting of all parties with the Senior Legal Officer

where it was made clear that it would be expected that this phase would require at least a year. And so it is unfair to walk into court now and to complain that they were confused about how to question witnesses. All parties have understood in proceeding here that the witnesses that are being examined on what we call these foundation issues – the policies, how the regime functioned, what the roles of the Accused were, and what authority different people and different organizations had – that these were issues that would be used for all Case 002 crimes. [14.39.56]

Because of that – because of that, we are in position now to add additional crimes, we are in position to proceed without the nightmare scenarios that the Defence now tried to bring to your door.

We have always been proceeding on the understanding that the evidence being used in this case applies to all crimes on which the Accused are charged. What we submit must happen now is, this Chamber must decide what additional crimes will be added to this trial. That will not prejudice anyone, and–

MR. PRESIDENT:

Thank you, Mr. Prosecutor, but the time is now appropriate for the afternoon adjournment.

The Chamber will adjourn now until 3 o'clock.

(Court recesses from 1441H to 1502H)

MR. PRESIDENT:

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

Mr. Co-Prosecutor, you have the floor now. And please be brief, Mr. Co-Prosecutor.

MR. LYSAK:

Thank you, Mr. President. I will try to respond to the Defence positions as quickly as I can.

When I left off, I was - I had just responded to the concept that was advanced by the Defence that they had been prejudice either by the original Severance Order as causing confusion as to how to proceed in the trial or by the Supreme Court Chamber's Decision, and I wanted to make clear that we are in no way in a position that we cannot proceed at this time because of this fundamental purpose of the original trial of building a foundation that would support all crimes.

[15.04.12]

Let me turn now to the arguments that were advanced by Mr. Koppe, specifically on the representativeness issue, which, as I said is the main area of disagreement of the parties as to what exactly should be included in the trial.

Mr. Koppe argues that our proposal is not representative because it does not accurately or fairly represent the revolution that his client was attempting to implement in this country. And I believe he has missed the actual test. We've heard from - the Nuon Chea defence, throughout this trial, complain that this is a political trial. Now it seems that the Nuon Chea defence wants to

turn this into a political trial where what is judged is the politics of the regime rather than the criminal issues in the indictment.

So, when this Court considers representativeness, it is not that this trial needs to be a forum on the Communist Party of Kampuchea. When we talk about representativeness, it is to select crimes, the crimes from the indictment that are most appropriate to try against these Accused, that fairly represent the criminal charges of this indictment.

[15.05.49]

And the reason S-21 is advanced is very simple: it was the most important prison; it is a prison from which prisoners from every region of the country, every organization – the military, the provinces, the ministries, all people – were subject to this prison, unlike other security centres; and it is a prison that was literally within a mile of where these Accused were located, a prison that reported directly to them. It is at the core of the criminal charges against these Accused, and that is a fundamental consideration in deciding the scope of the trial.

They also argue that S-21 is not enough, that there needs to be more – there needs to be more crimes added in order for this to be representative. We disagree with that position; we believe S-21 is sufficiently representative.

[15.07.06]

And let me say here, in response to arguments that have been made

by all the teams, that what the Supreme Court Chamber Decision requires is that the Chamber make an effort for the trial to be reasonably representative; it certainly will not be possible, we believe, for it to be completely or perfectly representative. Given the circumstances, the effort that must be made is to find a trial that is reasonably representative, and unfortunately that means that we cannot – in our position, we cannot include everything that is in the current indictment. That is obviously something that is painful to all of us, but it is the reality of the situation that we all face.

However, if the Chamber disagrees with us and agrees with defence counsel that S-21 itself is not enough – enough to satisfy the representation issue, there are other options that the Trial Chamber could pursue, other than trying the entire case 002. We do not think it is necessary to add more than S-21, but you do need – you need not add all charges of the indictment.

Let me give you just one example. Mr. Karnavas has pointed out to you that in one of our filings, we proposed some additional sites. One site – one site alone that would – the Trial Chamber could look at if it believed it needed to add more than S-21 is the Tram Kak cooperatives. And I raise that particular crime site for a couple of reasons.

[15.09.12]

First, Mr. Koppe says that we need to have a crime site to see where the policies of the revolution were implemented. The Court

may remember that Tram Kak district was recognized by the Party leadership as one of the three model districts of Democratic Kampuchea. Therefore, this is a crime site that, even in the Nuon Chea defence's position, has been endorsed by the Party as one that operated according to the principles of the Communist Party of Kampuchea.

The allegations in this crime site are fairly broad. The allegations in the Closing Order – paragraphs 304 to 306 – concern the influx and treatment of evacuees and New People in that district. Paragraphs 307 to 311 deal with forced labour, cooperatives, and lack of freedoms. Paragraphs 312 to 313 address lack of food, starvation, and health problems. Paragraph 314 addresses forced group marriages in that district. Paragraphs 315 to 318 relate to the treatment of enemies and the Krang Ta Chan Security Centre. Paragraphs 319 to 320 concern treatment of Lon Nol officials, Cham, Vietnamese, and Khmer Krom; and paragraph 320 deals with Buddhism and disrobing of monks in that district. [15.11.09]

Now, in making our proposal to you, we have to make choices; we evaluated what was most important and what could be done in the most efficient time. But this is an option that is available to the Court if it believes it needs to add more than S-21. And, if that were the case, we would certainly respond to you with a plan for the expeditious trial of that crime site also.

The other issue that I wish to respond to with respect to the

Nuon Chea team concerns their responses to the Trial Chamber's question as to additional witnesses or documents that would be needed. In fact, I will make this comment for the Khieu Samphan team as well. Both of them said they could not respond precisely at this time and needed more time to address this issue. I would simply remind the Chamber that this exact question was asked of all the parties, including the Khieu Samphan and Nuon Chea teams, back in August of last year. They were asked what additional witnesses they would need, what additional evidence would be needed if S-21 was added.

[15.12.50]

There was a lengthy period of communications with the Senior Legal Officer, the result of which is a document, E236, a document that collectively indicates the parties' responses to that question. And in paragraph 7, the Khieu Samphan team advised that it had no further individuals to propose regarding these additional crime sites, including S-21. The Nuon Chea team provided a list of 31 people which mentioned - referred to the other day. So I am somewhat surprised by the responses form counsel that they need more time to answer this question, as it was asked and responded to by them over - at least six months ago. In any event, the Court should be directed to this document because this was the result of at least a month effort and consultation with the parties, specifically on this question of whether additional witnesses would be needed on S-21.

[15.14.06]

Turning quickly to the positions of the Ieng Sary Team, as I mentioned, Mr. Karnavas spent much of his argument not addressing the questions that the Trial Chamber had raised but rather making an argument attacking the validity of the Supreme Court Chamber Decision and seeking to put blame on who is responsible for this issue.

I would simply say first that this is not productive, this is not helpful to this Court. This Court is looking for guidance in response to these questions as to how to go forward. I'm not going to spend any time responding to the assertions that we are to blame for this problem – or who is to blame. The suggestion that this Court can simply disregard the Supreme Court Chamber's Decision because they are asking you to act ultra vires does not merit any response.

I would simply note that Mr. Karnavas makes much of the issue of the representativeness requirement not being in our statute, in our rules. What is in our rules, I would just remind you, is a requirement that severance be in the interests of justice, and the Supreme Court Chamber has now made an interpretation of what that means, and that interpretation relies on analogous precedent and rules from the ICTY. We all recognize that there are some differences between the ICTY rule and our rule; this is an interpretative guide for the Court in determining how to apply the interests of justice requirement in our rule.

[15.16.27]
The other issue that Mr. Karnavas has raised is that he seeks certainty, he asks this Chamber to be definitive about what will happen with the claims – any claims that are severed.
The suggestion that in any way we have proposed dismissing those claims is incorrect. As I stated the other day, that is not part of the authority that is provided under Rule 89. Just so we are clear, what we are proposing is that the Court sever some of these crimes and charges, not dismiss. And, unless this Court decides to continue with the notion of a series of trials, the Supreme Court Chamber Decision does not require you to set a plan. If you go for what we have called option B, which is to have – proceed on the assumption that they're will be only one smaller trial and to make that representative, you're not required – not required to have a plan for other trials because the assumption is that that prospect is intangibly remote.
[15.17.55]
That does not mean that we should not consider what we do with the severed charges. And our position and suggestion on that is fairly straight forward. If the Court does pursue option B, which is one trial rather than a series of trials, our position is that the severed charges should be stayed and that the Court should schedule a hearing following the issuance of its Judgement in the trial. At that time, this Court can consider all the relevant factors and make a decision, on that time, on how to proceed with

respect to the severed charges. That would include, of course, a valuation of where we are with the health or fitness of the Accused, the position of the Court, and a multitude of factors that the Court could look at.

And I raise this issue also because the Khieu Samphan team has said, "What about me? I am more healthy." And we cannot completely discount the possibility that when Judgement is reached in the first trial, two of the Accused may not be fit to proceed, one may be; we simply do not know. But that would seem to me that an appropriate time to table the issue of how to proceed on severed charges would be immediately following a judgement issued by this Court in the first trial.

[15.19.47]

And, turning to the positions of the Khieu Samphan defence, I don't think that this Court will obtain much benefit in its Decision from their positions. The most telling statement that they made, to me, was – quote: "Whatever you decide, we will be prejudice. Whether you pursue the entire Case 002 or adopt mini-trials, we are prejudiced." So, to me, from our perspective, the Khieu Samphan team has declined – respectively declined not to give this Court much guidance on the issues that it has asked regarding the scope of this trial.

And I must also note that they have, in their submissions, made many complaints about their client's right to a speedy trial. And certainly, it is our view that, given all the obstacles, we have

proceeded as quickly as we can here. I would note that Khieu Samphan himself was in the hospital this month. But what I wanted to observe for this Court is, at the same time that the Khieu Samphan defence is asking for a speedy trial, suggesting that they should be severed and released, at the same time that they are – that they are saying this trial is not proceeding quickly enough, they are asking for more time to prepare for S-21, they asked to differ the hearing of their character witnesses just a few days ago. They cannot have it both ways. If they want to proceed expeditiously, then we will proceed expeditiously. They, themselves, are regularly making requests to delay the proceedings. That is inconsistent with the position there now taking, that they had been prejudice and that the right to speedy trial has been violated.

[15.22.33]

There are many other issues that were raised, many that have nothing to do with the matters that you need to decide. I will not respond at this time to the merits of the Khieu Samphan proposal that he be released, placed on house arrest, and the case against him severed. We will respond to that if the Khieu Samphan team makes a motion. Seems to me that this is a serious matter that needs to be made in a motion to the Court and responded to by the parties and is unrelated to the matter presently before you, which is the scope of the future trial. Thank you for the opportunity to respond. And that is our

observations of the defence positions today.

MR. PRESIDENT:

Thank you, Mr. Co-Prosecutor.

Now I hand over to the Lead Co-Lawyer for the civil parties to reply to the responses by the three defence team. You may proceed.

[15.23.55]

MR. PICH ANG:

Good afternoon, Mr. President, Your Honours, fellow members of the defence teams, and colleagues. I would like to reply to a few issues raised by the defence team.

The first point I would like to respond to the collective stance of the defence teams, that they do not envisage that there should be any severance of the whole case; they want the case to be tried as one. And I would like to respond to the observation made by the defence team as he quoted his client, saying that if the case was to be severed, then only portion of the history would be brought up to be heard in the Court; the entire history of Cambodia would not be reflected through the proceedings of this Court. And he further stated that this Court is to find the truth, is not only meant to bring up only a few or portion of the history.

And it is worth mentioning that this Court is not a - is not mandated to find the entire history of Cambodia. And, of course, the Court that we are now attending cannot address the entire

history of Cambodia. And of course, during the hearing, the Accused would be given the opportunity to tell the truth, which is part of the history that is beneficial to the younger generation of Cambodia. So, the assertion by the defence teams that any severance of the case would not reflect the reality of the history of the Democratic Kampuchea or the period was not appropriate.

[15.26.30]

And, in addition, the defence team for Mr. Nuon Chea also added that, even though there was severance of the case, the defence team had actually mentioned a number of facts as well. He discussed the roles of the Accused, and we also dealt with the population movements, phases 1 and 2. As a matter of fact, the Chamber heard those facts, and we believe that through additional testimony as well as evidentiary documents, we will be able to tell the truth of the period.

And in response to the observation by the defence team by Mr. Khieu Samphan, which refers the severance of the case to the potential delays of the entire proceeding, I am of the opinion that any possible delay would not be the result of Mr. Khieu Samphan's intervention, but it was because of, basically, the health status of the co-accused, and I believe that the Chamber has reasonable basis to decide on the severing based on Rule 89bis of the Internal Rules. But the Chamber will of course have the discretion to decide as to what scope of the proceeding to be

heard in the first phase.

[15.28.28]

And, as for another point which I got through the translation and I don't know whether or not I got it right from Counsel Karnavas – he asked whether or not the civil party lawyers did consult with their clients concerning the representability of the case being heard. If I understood Mr. Karnavas correctly – I stand to be corrected, but I would like to emphasize the stance of the defence – of the civil party lawyers: that we have our internal working procedures among the civil party lawyers and we work very closely with the civil parties and with our fellow colleagues, and I don't think that that needs to be raised into debate or discussed in this Court. And I believe that we have our own strategy to defend the interest or represent the interest our clients. And I will not question whether or not the defence lawyers have consulted or discussed with his client, because it is entirely internal matters of each team.

[15.29.45]

And, in response to the observation made by Mr. Michael – Victor Koppe, who asserted that S-21 should not be the facts incorporated in the trial and it does not necessarily reflect the representation of the entire case, if you look at the S-21, the prisoners detained and executed in S-21 came from all walks of life in the period; they were ordinary people as well as senior officials in the government at that time. For example, one of our

civil parties, Mr. Chum Mey, was a worker at that time and he was also imprisoned at S-21, and if we look at the geographical representation of the prisoners in S-21, they were from different corners of the country. So I think that the inclusion of S-21 is clearly a representation. And we can also examine other evidentiary documents, particularly the living witnesses and civil parties who may bring along with the story, as well as other document to testify before this Court.

[15.31.10]

And Mr. Karnavas also mentioned that certain fact has already been adjudicated and it should not be brought up again. Please bear in mind that in Case 001, Duch was the only Accused, but in Case 002 there are co-accused, and we cannot assume that the facts that have already been adjudicated could not be brought for discussion in the next trial.

Judge Claudia Fenz mentioned that the trial of this nature may last up to 10 years or so, taking into consideration the advancing age of the Accused. If it continues up to 10 years or so, we may - we may run the risk of not having any verdict. So there might be a question why we should establish this Court in the first place.

[15.32.56]

The civil parties who are participating in this proceeding is to claim for the justice; so, they want to see justice done for them. So we want, actually, to see the verdict to be rendered by

the Chamber. So, even if there is – anything happens – for example, the death of the Accused – at least one verdict was rendered by the Chamber so that the victims will be able to receive some sort of justice, they know that – what was right and what was wrong during the period. And in that sense, they would heal the wounds of their past and, at least partially, the victims could attain some justice.

The defence teams seem to have articulated that there should not be any severance of the case at all, and the – according to the Decision of the Supreme Court Chamber directing the Trial Chamber to revisit the mode of severance of trial of Case 002. So, this is the mission of the Trial Chamber and it is the discretion of the Chamber to decide whether or not to sever the case or not. [15.34.43]

And I believe that the trial will have to go forward, no matter how, and I simply support the points raised by the Co-Prosecutors, and I believe that we have to decide on the appropriate representability of this case so that it is feasible, viable, and substantial for the parties as well as the victims.

On a separate point, concerning the reparation, which was also touched upon by the defence teams as well, I have my esteemed colleague Simonneau-Fort who will enlighten the Court on this point, but I would only like to pick up only one point from the defence team of Mr. Nuon Chea, who said that we could not eat a cake and have it too (sic). And I would like to make my point on

this as well, on the viewpoint of the civil parties. We, civil parties, have many people and we have one slice of cake; we will share with each other, no matter how small it is, but we will have to share.

But I don't want to elaborate further on this point because I will leave it to my esteemed colleague, Madam Simonneau-Fort, who will take the floor from me.

[15.36.18]

MR. PRESIDENT:

Thank you.

Yes, you may proceed, but please be reminded that you should brief on each point. And please go straight and to the point.

MS. SIMONNEAU-FORT:

Thank you, Mr. President. I don't intend to take up too much of your time. I want to make a few points. The least we can say at the start is that the extraordinary decision of the Supreme Court seems to be eliciting equally extreme and extraordinary positions within this courtroom.

And the first extraordinary thing that I heard today was that – two and a half defence teams explaining to us, by some kind of logic, that we had to think in terms of the entire trial today, while in 2011, as the Prosecution reminded us, some of them said that severance was the best Chamber decision. And now we are being told that we have to look at the entire trial, and that is interesting.

[15.37.47]

I would add that the Khieu Samphan defence team is in a rather difficult position as well because, apparently, neither severance nor the complete trial is a good solution. I can see that from the point of view of an accused, it is preferable not to be tried, but I think, frankly, it is necessary to opt for one of the two solutions.

When, in October 2011, the – excuse me, the Chamber decided to sever, we all agreed on the fact that severance was something that was possible, and the Defence said nothing other than the fact that they fully support it – severance. One has to ask oneself what the reasons may be for them taking a position today that is diametrically opposed, and I believe that these reasons should not be found within a legal context, because it's nothing to do with law, in my opinion. I believe that the position has been evinced by Mr. Khieu Samphan.

It's very simple: there are two Accused who are extremely weary, who have difficulty in attending the hearings, and whose fitness is regularly called into question by their lawyers, and who, of course, say to themselves that thinking in terms of a new trial in its entirety is a way of not being tried; and then on the other side you have Mr. Khieu Samphan, who is in rather good health and who is understanding that he may be tried on his own, whatever severance or lack thereof there is in the trial, and obviously that is somewhat problematic for him. If two defence

teams today are supporting the lack of any severance, this is a purely strategic consideration in the hope that they will never be charged.

[15.39.56]

I would add a few additional words on the reasons that have been adduced.

I heard, for example, that Mr. Nuon Chea believed that genocide was essential to the process – to the trial. That, frankly, is surprising. I agree, as I said yesterday, in the sense that the legal attributes of crime cannot themselves be subject to severance. Now, I have to say that my position is legally based, and there should certainly not be any severance on the nature of the crimes, and genocide should be included among those items that are referred to in the trial, including, for example, religious persecution as well, etc.

I also heard an argument put forward according to which we had to respect the Accused's entitlement to an expeditious trial. I'm not sure if being expeditious is to have the entire trial or to have severance. I didn't quite understand the link between cause and effect in that particular argument. But I do have to stress that a timely trial is not the privilege of the Accused; it's also a right that belongs to the civil parties, and that is precisely what we have been advocating from the start.

[15.41.42]

I also heard the Defence saying that if you decide to accept S-21

in the trial, then the Accused would suffer from the uncertainty that continue to reign over the scope of the trial, upon which I would respond that the S-21 request is 16 months old. There have been repeated discussions on the subject, and ever since the start we have all imagined that S-21 could be included in the trial, in addition to the fact that the Chamber itself said from the very outset that it reserved itself the possibility of including it. This, therefore, does not cause prejudice to anybody, and everybody has prepared their files taking account of that.

The second extraordinary thing that I heard today relates to the civil parties. I'm only too delighted to see the outstanding interest that, all of a sudden, two defence teams have in the civil parties. I fully support my colleague Pich Ang's comment: I don't think it's up to any counsel here to ask us to explain how we consult the civil parties. I heard the defence counsels talking about "abandoning" civil parties, "sacrificing" civil parties, and so on and so forth.

[15.43.27]

Yesterday, basing my argument on the relevant law in the ECCC, I said that all civil parties collectively participate, without a single one being excluded, in all trials before this Chamber. And I didn't make that up nor is it ridiculous; it is the law that applies in the ECCC. I didn't hear a single legal argument put forward today to contradict what I said yesterday, and I would

ask the Chamber to take that argument into account. It applies to the participation of the civil parties and it is also intimately connected with reparation and the allocation thereof.

One final point is that there appears to be a certain amount of misunderstanding about trials – single trials, mini-trials, different trials, series of trials, big trials, and so on. I totally disapprove of the term "mini-trial" which has been echoed very widely in the media and which I consider extremely regrettable, but I would like to say that severance does not make it possible, does not allow the Chamber to bring to a close the facts upon which the trial is founded.

[15.45.11]

In civil law, the Chamber is seized with all of the facts and it cannot decide that there will be one single trial; legally, it is an impossibility. On one side you can assess the risks of, in practical terms, only one trial happening, but that is completely different to what the Chamber can do – or the Prosecution.

Neither the Chamber nor the Prosecution can say there will be only one trial. The only thing the Chamber can do is bring about a severance. And, in deciding to do so, the Chamber does not remove any charges from the file nor the legal attributes of the crimes. It judges individuals, first and foremost, and it is legally obliged to continue to try the remainder of the entire file, unless an external event prevents it from doing so. So we cannot talk about a single trial; we have to say "a first trial

followed by others". Because we are aware of the risks, the Chamber can think of severance in terms of a first representative trial and if the risks do eventuate subsequently. But, before that happens, the Chamber has to give a timetable, calendar – whatever you want to call it; you can be scornful of it or not, but the Chamber has to provide a timetable. It is bound by the Closing Order and it cannot take an initiative to do anything else in the current juncture.

[15.47.30]

So, what we want to see, yes, is a severance with a first representative trial. We would very much hope not to hear the term "mini-trial" being repeated in the future. We would ask the Chamber to plan for future trials and we believe that all of the legal aspects should be maintained because, under severance, it is not possible in civil law to pick and choose among different types of crimes. So, there are not certain – there's not certain kinds of crimes that can be set on one side in this kind of process.

Thank you, Mr. President.

MR. PRESIDENT:

Now I hand over to the defence team to reply to the Co-Prosecutor or the civil party lawyers.

We may start with the defence team for Mr. Nuon Chea first, if you have any last reply to these issues. Counsel, please be reminded to be brief on your reply.

[15.49.03]

MR. KOPPE:

Thank you, Mr. President, Your Honours. I am mindful of the time, but maybe I need 10 minutes to reply. If that is not good for you, maybe we can do it tomorrow, but I'll give it a start.

I think there's an old Spanish proverb that says, "A wise man changes his mind; a fool never will." But the thing is, I don't think the Nuon Chea defence team really did change its mind. The submissions about the Decision of the original severance were indeed applauded by my predecessors, but that was done in, if I'm correct, October 2011, before the trial started. Now, when the trial was on its way, it was our client himself who said at one of the first trial days, 22 November 2011, that – and I quote from the transcript:

"I am of the opinion that this Court is unfair to me since the beginning because only certain facts are to be adjudicated by this Court. I must say only the body of the crocodile is to be discussed, not its head or the tail, which are the important parts of its daily activities." End of quote.

[15.50.41]

So, it was my client who was criticizing the way he felt restrained already in the first days of the trial, and that has been his position ever since. He felt curtailed, and that was the thing that we were trying to say this morning.

So I beg to differ that we are – we are not the mother of

flip-flops. As a matter of fact, I think the grandfathers of flip-flops are sitting opposite of me, because they were the ones who drafted the original Introductory Submissions on the basis of which the Closing Order was drafted. It was them who thought it wise, in 2006-2007, to put the whole DK regime on trial. All the crimes, including genocide, came from the original pen from these grandfathers of flip-flop. And now I'm saying that now they want to reduce this trial to forced transfer and S-21. So, who is changing his mind here?

[15.51.47]

The other thing I would like to say in rejoinder of what my learned friends have said is the things that I have said earlier about genocide and the fact that it is really, deeply the wish of my client to be able to defend himself of these charges that he finds himself innocent of.

Now, next week, as I understood, it's - it's a recess week. I'm going back to my country, where I will listen to a judgement in a case in respect of the Rwanda genocide. Now, time and time again, in cases in respect of what happened in 1994 in Rwanda, genocide is always cited as the crime of all crimes, the most important thing, the most grave accusation that someone - someone can be - can make. Now, I hear nothing from the civil parties in respect of this serious accusation. It is not accurate, I mean, to just read the Closing Order to say that S-21 is representative of the Closing Order. The civil parties might argue that the victims

there - the alleged victims - come from all walks of life, but obviously that is not the case. For instance, I just give one example because of time: no Chams, to my knowledge, have ever been killed in S-21.

[15.53.45]

Mr. President, I will - I will finish because we don't have time. The one thing that I do have a problem with is the fact that we are now being accused by the prosecutor - by the prosecutors as causing chaos and delay as much as possible. That is not the case. We are just trying to ask your Chamber to have our client tried in such a way that he can say all the things that he really wants to say.

And, about the delay that might be caused by having one big trial, I could say the following. When we break at 4 o'clock, there's only three people who do not go home, there's only three people who go back to prison. They are the ones awaiting this trial. They are the ones, right now, most affected by a prolongment of the procedure.

Thank you.

[15.54.51]

MR. PRESIDENT:

Thank you.

Now, the defence team for Mr. Ieng Sary, you have the floor to reply to the responses by the Co-Prosecutors and the Lead Co-Lawyers for the civil parties.

MR. KARNAVAS:

Thank you, Mr. President. Good afternoon, Your Honours, and good afternoon to everyone in and around the courtroom. I'll try to be brief. I'll cover the major points.

First, misrepresentation by the Prosecution that we all agree on one trial.

We agree that we should have the entire trial – one trial on Case 002. We do not agree – we do not agree that you should have a trial that is merely representative of a sampling of the Closing Order. We were clear on that. And from what I hear from the Prosecution, although later they want to cover themselves, what they're saying is, there's only going to be one trial.

[15.56.04]

And then, later on, when they talk about the interest of justice and how it was defined by the Supremes in this case – is it in the interest of justice for you to dismiss the rest? Is it in the interest of justice if you're going to take one year – one year or so in rendering your Decision, your Judgement, to then say, "Okay, let's see who's sitting around, and we've heard that perhaps it may only be Khieu Samphan; now let's put him through the meat grinder of a trial process once again"? Is it in the interest of justice and is it consistent with the principle of having a fair and expeditious trial? Is that an expeditious trial? The answer is no.

The Prosecution – the Prosecution accuses us of changing our

position. I won't go into flip-flopping because it may not translate very well, but essentially they're saying that we changed our position. That is a mischaracterization because, if you look at what I – what we've filed in E124/3, which was "Ieng Sary's Conditional Support to the Co-Prosecutors' Notice of Request for Reconsideration", and then our subsequent filing, which is E124/6, which is our response to their request, we were very consistent.

[15.57.48]

We agreed to the approach taken by the Trial Chamber. We disagreed – in fact, if you read our submissions, Your Honours, you don't even have to go beyond the first paragraph because, in the opening paragraph, I set out the reasons why we are compelled to respond and why we submit the Prosecution's motion for reconsideration in severing Case 002 in the manner in which they proposed was wrong-headed, and we maintain that position. We maintain that their interpretation of Rule 97ter is erroneous. Now, we've heard from the Supreme Court – I disagree vastly with their interpretation of using Rule 73bis(d), which is doing away with counts as a means of interpreting Rule 89 in the ECCC, which deals with severance. But be that as it may – be that as it may, we submit that you must try the entire case. And now that we've heard from the Supremes and now that we have seen the options that are available–

[15.59.20]

I won't put – I won't quote a Spanish saying, but in the U.S. we say, "When circumstances change, so should one's opinion", or at least they should consider. And so we have considered it and we are entitled – we are entitled to change our opinions when circumstances change. I thought I had it right, but I am told differently from the Supremes; they're telling us that we're in this adversarial setting à la ICTY, hence the position that we're taking.

The Prosecution says we are causing chaos and delay – chaos and delay. Well, let me remind the prosecutor they had Stephen Heder working for them in drafting the Introductory Submission, and they embedded him or he embedded himself into the OCIJ and essentially confirmed what he had already written to investigate what he was already putting into the Introductory Submission. And not only that, it was the OCIJ that asked for supplementary submissions – or they asked for supplementary submissions – and, of course, were granted. So who has caused chaos and delay?

[16.00.37]

We have been – we are not setting anything at your footstep. We were presented with this situation. The Trial Chamber moved. We supported the Trial Chamber's position. And then I am shocked – I am literally shocked to hear the Prosecution this afternoon stand up and wax eloquently on the Decision – your Decision on rejecting their motion for reconsideration. And I'm wondering, why on earth did they appeal? It seems that all the answers were

in there, which also shows you that you did, in fact, issue a reasoned Decision, because we just heard it. They embraced it. They use it.

And so we have not created a nightmare scenario; we're responding. And where there's action, there's reaction.

Now, more or less, I've covered what I needed to cover, Your Honours. The only point I wish to make is as follows. You simply cannot park the remainder of the – of the Closing Order as it's being suggested. And they say, quite interestingly, "Well, you have not been ordered." Well, you don't need to be ordered by the Supreme Court Chamber; it is within your duty, especially since you've been lectured by the Supreme Court with option number 1 and before that, in the entire Decision, why you haven't provided a plan. But we would submit that it is implicit – it is an implicit obligation of the Trial Chamber, based on the Supreme Court's Order, ordering you to come up with a plan that if, indeed, there are going to be more trials after the mini-trial that is being suggested by the Prosecution, then you still are compelled to have a plan.

[16.02.53]

And, as day follows night, if there is no plan but merely, "Here it is, we'll see what happens later on", I can assure you – I can assure Your Honours that the Ieng Sary team will certainly be filing an appeal. Now, I don't know what the Supreme Court Chamber will do, and it will be interesting to see whether,

indeed, they will change their position to conveniently fit whatever decision they have in mind, but we submit that, if you decide not to try the entire case of 002 as reflected in the Closing Order – that you have to come up with a plan, and you can't say, "We'll figure it out one year after the close of the evidence, when we've reached the Judgement. Y'all just don't worry, be happy where you are." You have to do that; it's implicit.

And with that, Your Honours, I want to thank you very, very much for allowing us to make these submissions. And we certainly hope we have been helpful. Thank you.

MR. PRESIDENT:

Thank you.

Counsel for the – for Mr. Khieu Samphan, you may proceed.

[16.04.12]

MR. VERCKEN:

Thank you very much, Mr. President.

I for one wish to clarify the following, and I'm not sure if this stems from lack of understanding of our position or merely bad faith, but our stance is one in which we insist that the guidance, criteria, and directives issued by the Supreme Court Chamber in the scenario that you would elect the first option would be equally valid in the case that you would opt for the second scenario. What this means is that this Chamber cannot today simply decide that it can refrain from clearly defining the

terms by which Mr. Khieu Samphan will be tried and on the specific facts and allegations that he will be tried, based on the fact that he's in bad health and that he is going to die, which is not the case. And this is where I criticize the Decision of the Supreme Court Chamber and where my friends on the other side of the Chamber are trying to draw an advantage.

[16.05.54]

It speaks to paragraph 50 and 51 of the Supreme Court Chamber Decision, according to which it is stated: Either we deal with successive and multiple trials, in which case many questions and matters would have to be answered – and that would require a timetable, as was directed by the Supreme Court Chamber – in fact, it orders much more than that; it talks about developing a very specific and exhaustive plan in order to cover the totality of the charges. And in paragraph 51, it goes so far as to state that the Chamber must decide as to whether or not there should be a second trial panel or if there is any appearance of bias of judges from the first trial adjudicating the second trial.

As far as the first option is concerned, the Supreme Court Chamber has ordered a certain number of elements. And, as far as the defence team for Mr. Khieu Samphan is concerned, those directives are entirely valid in any hypothesis, in any scenario, whether you go with option 1 or whether you go with the option of holding a trial that is more representative of the crimes, because Mr. Khieu Samphan will live to see the day of those

trials. And you, Your Honours, have said so yourselves, as well as the Co-Prosecutors - and it was echoed by the civil parties - he will see through the remainder of the Closing Order.

[16.07.57]

And this is precisely why I talked about false choices, fictitious alternatives, because in reality this Supreme Court Chamber Decision states that all of the problems must be raised, and this is exactly why we have stated and argued, and not alleged, as the civil parties have, that neither the severance order nor the - trying the totality of crimes would be the ideal solution. We are not - we are not trying to find the - to devise the ideal solution; we are here to defend Mr. Khieu Samphan, we are here to call to your attention the prejudice that we are subjected to. And, regardless of the choice that you would embrace - that is, to go with the first option, to try the entire case file, or the second option, which is to try successive cases, either way, we are subjected a prejudice since this trial has been underway for the past year-and-a-half, and for the past year-and-a-half we are completely ignorant of the facts on which we are being judged and we are under extreme pressure and duress to expedite these proceedings.

[16.09.50]

The Trial Chamber is trying to impose restrictions on page numbers and finding other ways to impose restrictions. All of these are examples of the prejudice that we are being subjected

to. And the Supreme Court Chamber Decision was very clear: there is harm, there is prejudice.

Therefore, with that clarification, Your Honours, I hope that the opposition understands the position of the Khieu Samphan defence.

And to conclude, when our friends across the way state that we can await the results of the first representative trial to state to Mr. Khieu Samphan how he will be judged subsequently, well, we outright reject and refute that possibility. We assert that this would be a continued infringement of the rights of Mr. Khieu Samphan and that it would only sustain the prejudice that we are suffering.

We have just been criticized for not being logical in our comments relevant to S-21. I believe, given the allocation of time, I was rather clear and I laid out my arguments. This would be something only considered by the Chamber during its deliberations, and I believe that the criticism launched by my opponents is not well-founded.

[16.11.26]

And in terms of the postponement of the hearing of character witnesses, once again, you take us for fools. We are the Defence; we are not here to make sure that there's going to be a speedy conviction and to allow Mr. Khieu Samphan to be lynched and pilloried, we are here to defend him, and I think that's entirely clear.

Your Honours, those were the clarifications I sought to put

before you. Thank you very much.

MR. PRESIDENT:

Thank you. Thank you for the various views from parties concerning the question raised by the Chamber.

The time is now appropriate for the day's adjournment. The Chamber will adjourn now and will resume tomorrow, starting from 9 o'clock in the morning.

[16.12.56]

The Chamber advises the parties to respond to the various questions raised by the Chamber, as indicated in memorandum dated 19 February 2013, document E264. So, the Chamber advises the parties that they are well prepared in response to the question so that the proceedings tomorrow will be smooth and you respond to the question appropriately.

The Chamber wishes to advise the support staff as well as members of the public of the upcoming hearings.

Security guards are now instructed to bring the co-accused back to the detention facility and have them back to the courtroom before 9.00 in the morning. Mr. Ieng Sary is to remain in the holding cell downstairs, where audio-visual equipment is there to connect him to the proceeding upstairs.

The Court is now adjourned.

(Court adjourns at 1614H)