



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

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

ឯកសារដើម
ORIGINAL/ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ (Date): 08-Jul-2011, 15:30
CMS/CFO: Uch Arun

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

29 June 2011, 0902H

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

Christine MARTINEAU
SAM Sokong
LOR Chunthy
Lyma NGUYEN
Philippine SUTZ
Emmanuel JACOMY
CHET Vanly
KIM Mengkhy
VEN Pov
SIN Sovorn

Trial Chamber Greffiers/Legal Officers:

Matteo CRIPPA
DUCH Phary
SE Kolvuthy
Faïza ZOUAKRI

The Accused: NUON Chea
IENG Sary
IENG Thirith
KHIEU Samphan

For the Office of the Co-Prosecutors:

SENG Bunkheang
Andrew CAYLEY
Tarik ABDULHAK
VENG Huot
Vincent DE WILDE D'ESTMAEL

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

For Civil Parties

PICH Ang
Elisabeth SIMONNEAU-FORT
Martine JACQUIN
Pascal AUBOUIN
Silke STUDZINSKY

For Court Management Section:
Kauv Keo Ratanak

List of Speakers:

Language used unless specified otherwise in the transcript

Speaker	Language
MR. ANG UDOM	Khmer
MR. AUBOIN	English
MS. CHET VANNLY	Khmer
MR. DE WILDE D'ESTMAEL	French
MR. KARNAVAS	English
MR. KIM MENGKHY	Khmer
JUDGE LAVERGNE	French
THE PRESIDENT (NIL NONN, Presiding)	Khmer
MR. LOR CHUNTHY	Khmer
MS. NGUYEN	English
MR. NUON CHEA	Khmer
MR. PHAT POUV SEANG	Khmer
MR. PESTMAN	English
MR. PICH ANG	Khmer
MR. SA SOVAN	Khmer
M. SAM SOKONG	Khmer
MR. SENG BUNKHEANG	Khmer
MS. SIMONNEAU-FORT	French
MS. VAN DER VOORT	English

1

1 PROCEEDINGS

2 (Judges enter courtroom)

3 MR. PRESIDENT:

4 Please be seated.

5 The Court is now in session.

6 Yesterday, we already heard observations concerning the

7 preliminary objections on the grave breaches of the Geneva

8 Convention and we left off with the response from the prosecutor.

9 Next we would like to proceed to the civil parties and the lead
10 co-lawyers for the civil parties to make their oral submissions.

11 [09.04.45]

12 MR. PICH ANG:

13 Mr. President, Your Honours ---

14 MR. PRESIDENT:

15 Mr. Nuon Chea, you may now proceed.

16 MR. NUON CHEA:

17 I am Nuon Chea.

18 Mr. President, Your Honours, my fellow Cambodian citizens, since

19 today's hearing is still about Ieng Sary's case, I am Nuon Chea,

20 and I would like to ask that I am excused. I would like to

21 return to the detention facility.

22 I only return to this courtroom and to cooperate with the Court

23 actively when my case is on the agenda.

24 MR. PRESIDENT:

25 Having heard your request concerning your reason for being

2

1 accused and according to Rule 81(4), such request is relevant.

2 You are now allowed to be excused from today's hearing.

3 [09.06.40]

4 The security personnel are now instructed to bring the accused,

5 Nuon Chea, back to the detention facility.

6 We shall now proceed to the lead co-lawyers.

7 MS. VAN DER VOORT:

8 Your Honours, sorry for the interruption.

9 Yesterday Your Honours announced that the hearing may continue
10 until Friday. Until now, I don't know when I will be flying back
11 to Europe, and it may very well be tomorrow night. And I would
12 like to be sure that I'm present during the objections to the
13 witness lists.

14 [09.07.26]

15 So I would ask Your Honours to schedule the hearing in such a way
16 that tomorrow we'll deal with the No. 8 on the agenda, the
17 objection to the witness lists.

18 Thank you.

19 MR. PRESIDENT:

20 The Chamber thanks you for your observation.

21 [09.08.27]

22 Yesterday, the Chamber only made an estimation having looked at
23 the items of the agenda that have already been conducted during
24 the last few days, and we have observed that we may lag behind
25 the schedule. That's why we have planned that Friday may be

3

1 continued -- may be considered as another day for the hearing and
2 because we, of course, believe that on Friday all lawyers will be
3 present.

4 However, we are seized with your request and we will take the
5 matter into consideration, and the Chamber will do its best to
6 make sure that the items of agenda are well covered as scheduled
7 and that if it can be finished by Thursday.

8 MR. PICH ANG:

9 Good morning again, Mr. President, Your Honours.

10 [09.09.48]

11 With regard to the topic for discussion as yesterday, today the
12 civil party lawyers would seek the President's permission to let
13 the three civil party lawyers to respond to the observation.

14 First. counsel Sam Sokong will be giving his oral submission,
15 followed by Lyma Nguyen and finally Mr. Pascal Aubouin.

16 MR. PRESIDENT:

17 Those civil party lawyers are, of course, allowed to make their
18 oral submissions and please be informed that the three lawyers
19 have 30 minutes allocated time for such submissions.

20 MR. SAM SOKONG:

21 Good morning, Mr. President, Your Honours. I am Sam Sokong
22 representing civil parties in case 002 before the ECCC.

23 I will be responding with regard to the observation by the
24 defence counsel of Ieng Sary with regard to the observations by
25 the defence counsel of Ieng Sary regarding the grave breaches of

4

1 the Geneva Convention.

2 [09.11.39]

3 I, of course, will speak firstly on the proper statute
4 construction concerning Article 6 of the ECCC, Article 109 of the
5 Cambodian Code.

6 My international colleagues, Ms. Lyma Nguyen and Mr. Pascal
7 Aubouin will then speak about the jus cogens nature of grave
8 breaches of the Geneva Conventions.

9 Yesterday, having studied further the case file and having
10 observed the response by the Co-Prosecutor to the defence
11 counsel, I am, Sam Sokong, here, I would like to really strongly
12 support the arguments by the prosecutors and, at the same time, I
13 would like to add a few more points for Your Honours'
14 consideration.

15 [09.12.51]

16 Before the ECCC law was established, the Royal Government of
17 Cambodia and the United Nations had several rounds of discussions
18 and negotiations, and the national laws, all together with
19 international laws, had been in consideration.

20 Article 1 and Article 2 of the law states the purpose and the
21 jurisdiction of the Court, and the Court itself has jurisdiction
22 over Cambodian law and international law.

23 [09.13.44]

24 Article 3 and Article 5 really state the matters with relation to
25 the domestic laws. Article 6 of the ECCC law provides that the

5

1 ECCC has the power to bring to trial all suspects who committed
2 or ordered the commission of grave breaches of the Geneva
3 Conventions of the 12th of August, 1949.

4 The contended question is whether the statute of limitations and
5 Article 109 of the 1956 Cambodian Penal Code applies to grave
6 breaches within the Court's jurisdiction.

7 The defence argues about its application are irrelevant,
8 particularly when examined in light of the very function and
9 purpose of the ECCC.

10 [09.14.56]

11 The drafters of the rule already had in mind when it comes to
12 having these articles included in the law. The defence raised
13 the specific provisions in Articles 4 and 5 of the Establishment
14 Law, which provides that no statute of limitations applies for
15 genocide and crimes against humanity.

16 They contend that the statute of limitations in Article 109 of
17 the Cambodian Penal Code is applicable to all crimes committed in
18 Cambodia at the relevant time.

19 They then conclude that silence in Article 6 in respect of the
20 statute of limitations means that the drafters intended that a
21 statute of limitations should apply to grave breaches.

22 [09.15.59]

23 To respond to the defence team, we believe that the defence
24 counsel has misunderstood this article.

25 The defence argued that to follow would lead to an absurd

6

1 outcome. If domestic statute of limitations applies to grave
2 breaches, none of the crimes could actually be prosecuted before
3 the Court, as the statute of limitations would have expired in
4 1989. This is almost 14 years before Article 6 was ever drafted.

5 [09.16.49]

6 The Code clearly applies only to persons who committed a felony
7 within the meaning of the 1956 Penal Code and cannot be
8 constructed as a felony as understood in Article 109. It
9 follows, then, that the statute of limitations referred in the
10 1956 Penal Code cannot apply to grave breaches.

11 Clearly, the legislators would not have included grave breaches
12 in the normative jurisdiction of the ECCC knowing that the
13 enumerated crimes could never be prosecuted. It was clear at the
14 time that the ECCC Law was drafted that grave breaches under the
15 Geneva Conventions was understood to have already attained the
16 status of jus cogens norm of international law.

17 And like crimes against humanity and genocide, the Geneva
18 Convention had an established status internationally with 133
19 state parties in 1975, and did not require special mention of
20 non-applicability of a statute of limitations.

21 [09.18.27]

22 Any such mention would have been both redundant and completely
23 unnecessary.

24 Cambodia's National Assembly, in discussing during the drafting
25 of the ECCC Law, also decided to extend the statute of

7

1 limitations for crimes within Article 3 but did not discuss such
2 a limitation for the international crimes under Articles 4, 5 or
3 6.

4 [09.19.00]

5 This indicates clearly that the statute of limitations does not
6 apply to Article 6. Further, the report by the group of experts
7 supported the fact that the legislators deliberately considered
8 the potential implications of the statute of limitations for the
9 only offenses for which a statute of limitations was intended to
10 affect: national crimes under Article 3.

11 The Trial Chamber in case 001 found the accused, Kaing Guek Eav,
12 alias "Duch", guilty of violations of grave breaches as defined
13 in Article 6 and noted that each grave breaches provision
14 enumerates particular offenses for which universal mandatory
15 criminal jurisdiction exists among contracting states.

16 In case 001, the statute of limitations received extensive
17 judicial consideration, but only in relation to Article 3, and
18 this leads to a clear conclusion that the drafters and,
19 subsequently, the Trial Chamber Judges never contemplated the
20 application of a statute of limitations for Article 6.

21 [09.20.22]

22 This leads to a very clear conclusion that the Trial Chamber
23 Judges, of course, never contemplated that application of the
24 statute of limitations for Article 6.

25 And as indicated earlier, my co-colleagues will be also making

8

1 oral submissions concerning the jus cogens and also the grave
2 breaches of the Geneva Convention.

3 I am very grateful, Your Honours, and I would like to now hand
4 the floor to my colleague, Lyma Nguyen.

5 MS. NGUYEN:

6 Good morning, Mr. President, Your Honours, and colleagues. If it
7 pleases the Court, my name is Lyma Nguyen, appearing for the
8 civil parties.

9 [09.21.44]

10 Yesterday, our colleagues from the prosecution made comprehensive
11 submissions on the status of international law at the ECCC and
12 the customary international law status of grave breaches.

13 Today, the civil parties will emphasize the jus cogens status of
14 grave breaches in responding to the question from the Trial
15 Chamber as to whether a statute of limitations was envisaged and
16 permissible in customary international law within the period 1975
17 to 1979.

18 Jus cogens norms are understood as mandatory or peremptory norms
19 of general international law accepted and recognized by the
20 international community as a norm from which no derogation is
21 permitted. These norms create obligations erga omnes, or
22 incontrovertible obligations which apply to all states.

23 [09.22.44]

24 Much has already been said about Article 53 of the 1969 Vienna
25 Convention on the Law of Treaties, and prior to the formal

9

1 recognition of jus cogens norms in the Vienna Convention, there
2 had been significant debate and discussion about the concept.
3 Importantly, Cambodia was amongst the first states to sign the
4 Vienna Convention at the drafting conference at which there was
5 full agreement as to the existence of such norms.

6 [09.23.14]

7 Our learned colleague from the prosecution yesterday addressed
8 the criteria for a norm to attain the status of customary
9 international law. The civil parties will address the criteria
10 today for the elevation of a norm to jus cogens status in
11 international criminal law.
12 These requirements are, firstly, that a large number of states
13 ratify a treaty. Secondly, that the language in the preamble or
14 treaty provisions indicate the higher status of the relevant
15 crimes in international law. Thirdly, if there are ad hoc
16 international investigations and prosecutions of the perpetrators
17 of such crimes. And fourthly, where there is evidence of opinio
18 juris demonstrating that the norm is general customary law.

19 [09.24.04]

20 The Geneva Conventions regime is one of the most time honoured,
21 well established and universally accepted codifications of
22 international law. It has foundations dating back to the Lever
23 Code of 1863, which dictated how soldiers should conduct
24 themselves during the American Civil War.
25 Grave breaches of the Geneva Conventions are jus cogens norms of

10

1 international law. This means that these particular war crimes
2 are not subject to a statutory limitation, and particularly not
3 one imposed by a domestic penal code that does not even refer to
4 such crimes.

5 [09.24.43]

6 The civil parties assert that grave breaches of the Geneva
7 Conventions had attained jus cogens status prior to the 17th of
8 April, 1975, when the accused persons undertook their roles as
9 leaders of the Democratic Kampuchea.

10 The number of state parties to the Convention at the relevant
11 time may speak for itself. As at the 17th of April, 1975, 133
12 parties out of 138 UN member states, and including all the
13 permanent members of the UN Security Council, had become parties
14 to the Conventions. This number constitutes 96 percent of all UN
15 member states at the time.

16 [09.25.30]

17 Importantly, Cambodia ratified and acceded to all four Geneva
18 Conventions on the 8th of December, 1958 and, more importantly,
19 without recording a single reservation or raising any issue about
20 statute of limitations.

21 To properly place the acceptance of the norms contained in the
22 Geneva Conventions in relation to other international norms, it's
23 worth it to highlight that no other international human rights
24 treaty, including the Genocide Convention, the International
25 Covenant on Civil and Political Rights and the International

11

1 Covenant on the Economic, Social and Cultural Rights came close
2 to having the same number of state parties in 1975. This is also
3 true as at today.

4 Prior to the 17th of April, 1975, the international community
5 clearly understood that grave breaches of the Geneva Conventions
6 had elevated status in international law. And the clearest
7 example of this is the preamble to the 1968 UN Convention on the
8 Non-Applicability of Statutory Limitations to War Crimes and
9 Crimes Against Humanity stating that these crimes are amongst the
10 gravest crimes in international law.

11 [09.26.48]

12 Now, we note yesterday that the defence had raised objections --
13 the objections made by Honduras to the statute of limitations
14 provisions during the drafting of that Convention. But to rebut
15 this point, the civil parties wish to make clear that the fact
16 that a limited number of states dissented against a norm of
17 international law does not bar that norm from becoming a
18 customary international law.

19 Rather, a state's persistent objection to such a norm may allow
20 that state to assert that the norm does not apply to the state
21 concerned.

22 [09.27.27]

23 War crimes prosecutions constitute a central feature of both the
24 Nuremberg and Tokyo tribunals undertaken by the international
25 community in the wake of World War II. From 1945 to 1948, three

1 separate tribunals, the International Military Tribunal, the US
2 Nuremberg Military Tribunal and the International Tribunal for
3 the Far East had tried suspected criminals for these crimes, and
4 this has later served as the foundation for the grave breaches
5 regime.

6 The lack of prosecutions on war crimes and grave breaches between
7 the period 1970 to 1990, as mentioned by our colleagues, the
8 prosecution, yesterday were, the civil parties assert, a
9 consequence of the geo-politics of the period. However, the
10 first tribunals to emerge in the 1990s took for granted that both
11 the obligation to prosecute and the crime of grave breaches in
12 themselves were already well established as jus cogens norms.

13 [09.28.34]

14 The ad hoc international courts, including the International
15 Criminal Tribunal for the Former Yugoslavia, the International
16 Criminal Tribunal for Rwanda and the Special Court of Sierra
17 Leone have jurisdiction over and have prosecuted cases of grave
18 breaches.

19 The ICTY case of Prosecutor v Kupreskic found that most norms of
20 international humanitarian law and, in particular, those
21 prohibiting war crimes, crimes against humanity and genocide, are
22 also peremptory norms of international law or jus cogens, that
23 is, norms of a non-dirigible and overriding character.

24 [09.29.14]

25 Article 53 of the Vienna Convention sets out that a jus cogens

13

1 norm can only be invalidated through a subsequent norm of the
2 same standing. If there is doubts as to the interpretation of a
3 jus cogens norm, other subsidiary norms, including customary law
4 and positive law, and whether or not domestic or international
5 law, must be interpreted in a manner confirming to the
6 requirements of the jus cogens norm.

7 Consequently, it is our submission that the statute of
8 limitations provision under the 1956 Cambodian Code which
9 undermines and contradicts the jus cogens nature of grave
10 breaches and the corresponding duty to prosecute these crimes
11 cannot apply to grave breaches.

12 [09.30.05]

13 The prosecution have yesterday already addressed the absolute
14 duty to prosecute grave breaches, and we will not repeat those
15 submissions.

16 In summary, statutory limitations in relation to grave breaches
17 of the Geneva Conventions were never envisaged within customary
18 international law and, in particular, in the period 1975 to 1979.
19 nor were they permissible under customary international law at
20 the relevant time. And this is precisely because the crimes of
21 grave breaches had, by the 17th of April, 1975, not only become
22 customary international law, they had, by then, reached the state
23 of jus cogens under international law.

24 And I now give the floor to my colleague, Mr. Pascal Aubouin, to
25 further this point.

14

1 MR. AUBOUIN:

2 Mr. President, Your Honours, colleagues, I will simply add a few
3 observations saying that grave breaches are not subject to
4 statutes of limitations.

5 [09.31.14]

6 Jus cogens has a unifying effect on the statute of limitations
7 contained in the Cambodian Penal Code of 1956. In this case, a
8 jus cogens norm requiring the prosecution of grave breaches of
9 the Geneva Conventions cannot be overridden by an inferior rule,
10 namely, a statute of limitations provisions under domestic laws.
11 The Geneva Conventions are silent on the question of a statute of
12 limitations for grave breaches. Reservations made by states
13 parties to the Geneva Conventions do not refer to statutes of
14 limitations or the non-retroactivity of the provisions of the
15 treaty.

16 Moreover, a number of domestic laws explicitly prohibit the
17 application of a statute of limitations for war crimes.

18 [09.32.19]

19 The Vienna Convention provides that a national procedural norm
20 conflicting with a jus cogens norm cannot prevail over the jus
21 cogens norm. In this case, the statute of limitations provisions
22 under the 1926 Cambodian Code cannot impede on the prosecution of
23 grave breaches.

24 The Convention under Non-Applicability of Statutory Limitations
25 to War Crimes and Crimes Against Humanity places an absolute ban

15

1 on the application of statutes of limitations to war crimes and
2 crimes against humanity. At the Convention entered into force in
3 1970, the normative principle that no statutes of limitation
4 should apply to grave breaches existed during the period of the
5 temporal jurisdiction of the ECCC.

6 [09.33.27]

7 By April 1975, the obligation to prosecute grave breaches of the
8 Geneva Conventions had already reason to the label of a jus
9 cogens norm under international law. No inferior norm can
10 frustrate or invalidate the erga omnes obligation arising from a
11 jus cogens norm.

12 The International Criminal Tribunal for Former Yugoslavia case of
13 Furundzija is one example where an international court decided on
14 whether a domestic level law can override the jus cogens
15 prohibition on torture.

16 [09.34.14]

17 In this case, the ICTY held that domestic law on statute of
18 limitations cannot apply.

19 The defence preliminary objections are based on an erroneous
20 premise that the statute of limitations may apply to grave
21 breaches of the 1949 Geneva Conventions. The defence arguments
22 should be dismissed on the basis that the obligation to prosecute
23 grave breaches is a jus cogens norm from which there can be no
24 derogation.

25 [09.34.56]

16

1 The statute of limitation would amount to such a derogation which
2 is prohibited under international law.

3 Thank you very much.

4 MR. PRESIDENT:

5 Thank you, counsels for the civil parties, for your presentation.

6 I would like now to give the floor to the Ieng Sary's defence
7 team to take the floor for 15 minutes to reply if they wish to do
8 so.

9 MR. KARNAVAS:

10 Good morning, Mr. President. Good morning, Your Honours, and
11 good morning to everyone in around the courtroom.

12 I just have a few brief remarks.

13 The presentations by the prosecution as well as by the civil
14 parties has been an excellent one and somewhat persuasive. We do
15 depart on various grounds, however, and we do maintain that while
16 their argument may appear to be persuasive, it lacks traction.

17 We do not agree that by 1975 to '79 that grave breaches had
18 reached, or had been elevated to jus cogens. So we have that
19 fundamental disagreement.

20 [09.36.56]

21 Yesterday, we presented concrete evidence showing that there has
22 been an ongoing debate concerning the applicability of statute of
23 limitations. Now, there was a rhetorical question posed
24 yesterday by the prosecution, "How could this be" and to some
25 extent that rhetorical question also is being echoed today by the

17

1 civil parties. Well, when it comes to the grave breaches -- war
2 crimes -- it could be that there may be an exception, if you
3 will, that parties -- the states -- are reluctant to simply go
4 along on this particular area of the evolving law of
5 international criminal law because it is states that go to war
6 and perhaps because of their narrow interests -- their interest
7 in guarding their national sovereignty.

8 It is for those reasons why we present to you the various
9 discussions and various positions taken by the various states and
10 so when you look at the discussions and you look at the number of
11 states that have signed on to the non-applicability of the
12 statute of limitations concerning war crimes, one cannot come to
13 any other conclusion that by the period of 1975 to 1979 it had
14 not reached the level of customary international law, let alone
15 be elevated to jus cogens, and, therefore, giving rise to the
16 arguments that we heard today by the civil parties.

17 So we maintain our position that from 1975 to 1979 the statute of
18 limitations applied to the grave breaches of the Geneva
19 Conventions. We've argued this point extensively in our
20 pleadings. You've heard our initial argument yesterday and
21 you've heard very eloquent arguments from the other side and I'm
22 sure you'll reach the right decision based on the written and
23 oral submissions.

24 [09.39.24]

25 Thank you, Your Honours.

1 MR. PRESIDENT:

2 Thank you, counsel.

3 We will now move to the next agenda. There is the oral argument
4 on statutory limitations in relation to offences contained in the
5 1956 Cambodian Criminal Code. The Chamber will now hear oral
6 argument on the final preliminary objection for consideration
7 during this initial hearing concerning statutory limitations in
8 relation to offences contained in the 1956 Cambodian Criminal
9 Code. This preliminary objection has been raised by all defence
10 teams.

11 The defence has been allocated a total of two hours for the
12 presentation of this preliminary objection as previously
13 indicated unless agreement between the various teams has been
14 reached to the contrary. The Chamber will allocate 30 minutes to
15 each defence team. The Co-Prosecutors and civil party lead
16 co-lawyers so then each have one hour in response and the defence
17 teams have a combined total of 30 minutes in reply.

18 The Chamber has not stipulated any particular issue to be
19 considered by the parties in relation to this preliminary
20 objection. It has, however, clarified that the Ieng Sary defence
21 may address orally the points it has raised in supplementary
22 submission E94 within the time allocated to it if it so chooses.
23 The Chamber would like now to give the floor to the four defence
24 teams to make their presentations on the arguments in relations
25 to the national crimes as stated in the 1956 Cambodian Criminal

19

1 Code.

2 [09.42.03]

3 Mr. Karnavas, you may proceed.

4 MR. KARNAVAS:

5 Good morning Mr. President, Your Honours. Again, I am told that
6 the Nuon Chea defence team will not be making presentations today
7 so we will be going first and I turn the floor to my colleague,
8 Mr. Ang Udom.

9 MR. ANG UDOM:

10 Good morning, Mr. President. Good morning, Your Honours.
11 Today, I will make a brief presentation in relation to the
12 applicability of national crimes and arguments and my colleague,
13 Mr. Michael Karnavas, will follow-up with more detailed
14 explanation of our argument and we will address any questions
15 Your Honours may have.

16 The 1956 Penal Code has been recognized as the penal code which
17 was in effect during the time period over which the ECCC has
18 temporal jurisdiction. This penal code contains provisions
19 criminalizing homicide, torture, and religious persecution. It
20 also contains a statute of limitations which prohibits
21 prosecution of these crimes after ten years have passed since
22 their commission. But, Your Honours, the statute of limitations
23 for crimes allegedly committed in 1975-1979 which is the temporal
24 jurisdiction of this Court expired by January 1989.

25 In 2001, the law on the establishment of the Extraordinary

20

1 Chambers in the Courts of Cambodia for the prosecution of crimes
2 committed during the period of Democratic Kampuchea was enacted.
3 Article 3 of this law gave the ECCC jurisdiction over the 1956
4 Penal Code crimes of homicide, torture, and religious persecution
5 and expanded the applicable ten-year statute of limitations by an
6 additional 20 years.

7 [09.46.14]

8 In 2004, this law was amended apparently because a 20-year
9 extension of the statute of limitations would expire before all
10 expected cases could begin at ECCC. The extension of the statute
11 of limitations under Article 3 was changed from 20 to 30 years.
12 The Establishment Law essentially goes back in time and makes it
13 as if the statute of limitations never expired. This creates a
14 problem because the principle of legality prohibits the
15 retroactive application of law.

16 It is also problematic because the Establishment Law applies only
17 at the ECCC. This means that Mr. Ieng Sary could be charged with
18 a crime that a similarly situated accused in any other court in
19 Cambodia could not. This violates his right to equality before
20 the law.

21 Your Honours, one of the Co-Investigating Judges apparently
22 realized this problem. In the Closing Order, the
23 Co-Investigating Judges stated that they attempted to issue a
24 common text on the questions of being tried twice for the same
25 facts, the limitation period for the relevant national crimes,

21

1 and on the effect of the Constitutional Council decision of 12
2 February 2001, but they have not been able to.

3 [09.49.50]

4 The Co-Investigating Judges did not elaborate upon their
5 respective positions on these issues. They stated that they
6 found themselves in a procedural stalemate which is partly due to
7 the hybrid stature of the ECCC.

8 The Co-Investigating Judges chose not to employ the procedural
9 mechanism in the rules for resolving disputes, believing that
10 this would put into peril the entire legal process and they
11 decided to leave it to the Trial Chamber to decide what
12 procedural action to take regarding crimes in the 1956 Penal
13 Code.

14 We submit that Article 3 (new) may not be applied because: a) the
15 Co-Investigating Judges disagreed as to whether it is applicable
16 and it thus may not be applied; b) application violates Mr. Ieng
17 Sary's fundamental right to be treated equally before the law and
18 c) application violates the principle of non-retroactivity.

19 Your Honours, my oral argument and presentation comes to an end
20 now and my colleague will provide further details to Your
21 Honours.

22 Thank you, Mr. President and Your Honours for your attention.

23 MR. KARNAVAS:

24 Mr. President, Your Honours, as I've indicated on past occasions
25 our written submissions are rather...

22

1 (Deliberation between Judges)

2 MR. PRESIDENT:

3 In order to clarify the time and location for the four defence
4 teams as they all have a total allocated time of two hours and
5 for Ieng Sary's team so far have made their presentation and for
6 Mr. Nuon Chea's team according to the counsel for Mr. Ieng Sary
7 said they did not wish to make their presentation or argument on
8 this issue.

9 [09.56.02]

10 And I'd like to clarify with the counsels for Mr. Nuon Chea if
11 they wish to take the floor. If not, then the Chamber will
12 reallocate the time to the other defence teams so then they would
13 have the appropriate allocation of time for the three remaining
14 defence teams unless the four defence teams agreed to the time
15 allocation within amongst themselves.

16 MR. PESTMAN:

17 Your Honours, we donate our time to the Ieng Sary team. We are
18 not going to speak on this issue.

19 MR. PRESIDENT:

20 Thank you, counsel.

21 What about the defence team for Ieng Thirith? If you -- would
22 you wish to make your presentation regarding this preliminary
23 objection?

24 MR. PHAT POUV SEANG:

25 Good morning, Your Honours.

23

1 As the defence team for Ms. Ieng Thirith, we would not take the
2 time to make any oral presentation as we already have made our
3 written submission.

4 MR. PRESIDENT:

5 What about the defence team for Mr. Khieu Samphan? Mr. Sa Sovan,
6 you may take the floor.

7 MR. SA SOVAN:

8 Good morning, Mr. President, Your Honours, prosecutors and
9 lawyers for the victims.

10 [09.57.57]

11 As for us, the defence counsels for the accused, I do not want to
12 interrupt the flow of the proceeding. As my colleagues just
13 said, we already filed our written pleadings to the Trial Chamber
14 regarding this preliminary objection on the statutory limitation
15 of the 1956 Penal Code.

16 So far, based on my observations, sometimes the word used here
17 are so technical and sometimes I -- it is hard for me to follow
18 and to understand.

19 MR. PRESIDENT:

20 Counsel, what the Chamber would like to know is that regarding
21 the statutory limitation of the 1956 Penal Code and where the
22 time and location has already been assigned for each defence
23 team, would you take that time to make your arguments regarding
24 these objections or not? If you say "No", the time will be
25 allocated to Ieng Sary's defence team to use it. If you need to

24

1 take the time to make your presentation then, of course, you will
2 have that time and the rest of the time will be reallocated
3 amongst your group and the Ieng Sary's defence; otherwise, you
4 are not allowed to talk on other topic.

5 MR. SA SOVAN:

6 As the President said, for each of the four defence team we have
7 30 minutes. I do not want to take 30 minutes. I only need 20
8 minutes to talk on the statutory limitation of the 1956 Penal
9 Code.

10 MR. PRESIDENT:

11 Yes, that is all what we want so that the rest of the time
12 allocation can be given to Mr. Karnavas, Ieng Sary's defence
13 team.

14 [10.00.36]

15 I think it is time for Mr. Karnavas to continue with his
16 presentation and your time will come next. Mr. Karnavas, you may
17 now proceed.

18 MR. KARNAVAS:

19 Thank you, Mr. President.

20 First, let me preface my remarks by saying we are grateful with
21 the generosity extended by the Trial Chamber in allowing us to
22 make these submissions so I will not abuse that generosity by
23 spending all of the time that has been allocated, but rather I
24 believe I only need about 10 or 15 minutes at most. And again,
25 thank you.

25

1 I just want to address a little bit or expand a little bit on the
2 argument concerning Article 3 and a couple of the arguments that
3 were raised by the prosecution.

4 With respect to Article 3 (new), the national crimes may not be
5 applied because the application would violate the principle of
6 non-retroactivity. That's our position. We maintain and we
7 submit that the Constitutional Council which concluded that the
8 extension of the applicable statute of limitations of Article 3
9 (new) was constitutional. We submit that that was an error, but
10 we also recognize that you, Your Honours, and the ECCC, in
11 general, does not have the authority -- the competence -- to
12 decide on issues of constitutionality.

13 [10.02.26]

14 However, even if you were to -- even if we assume for the sake of
15 argument -- in which we must -- that this is constitutional, the
16 principle of non-retroactivity of law is a fundamental principle
17 and Mr. Ieng Sary has a right not to have retroactive laws
18 applied against him. That's our fundamental argument concerning
19 this particular point.

20 And we rest on Article 6 of the 1956 Penal Code which forbid the
21 retroactive applications of law. You can also find in the
22 international convention such as the Universal Declaration on
23 Human Rights and the International Covenant on Civil and
24 Political Rights that that also is recognized; the
25 non-applicability or forbidding retroactive application of laws.

26

1 And again, we have covered that extensively in our brief so I
2 won't belabour the point.

3 Now, the prosecution has asserted that Article 3 (new) may be
4 applied without violating the principle of non-retroactivity
5 because the statute of limitations in Article 109 of the 1956
6 Penal Code says, "...may have been told" and thus the original
7 statute of limitations may have been extended before it expired.
8 So they're resting their argument that there is this possibility
9 that it may have been told. Well, as a matter of legal
10 principle well recognized, the statute of limitations under some
11 circumstances may indeed be told. For instance, where there is
12 an investigation in process, that might be one such situation.

13 We submit, with this particular case, we had the 1979 trial so
14 clearly there was the recognition of the events, of the
15 individual, and you could consider the trial, itself, as an act
16 of prosecution which could (indistinct) the statute of
17 limitations, but thereafter, after 1979, we see no evidence of
18 further investigative action; nothing whatsoever. It could be
19 that there simply wasn't any political will, but lack of
20 political will is not an exception.

21 [10.05.22]

22 We maintain that the judicial system in Cambodia during the
23 periods of 1979 all the way up until 1991 was, indeed,
24 functioning. And Cambodia had the capacity to investigate if it
25 wished to investigate this matter; it simply chose not to for

27

1 whatever the reasons were. It certainly wasn't because war
2 prevented it because we can see from the records that the
3 judiciary was functioning and the trials were being carried on
4 and investigations carried on throughout Cambodia during this
5 period. But perhaps like cases 003 and 004, there may have been
6 a lack of political will to prosecute which is why there was a
7 lack of investigation or lack of a follow-up on these events.
8 Next, the prosecution has suggested that the extension of the
9 statute of limitations is a procedural rather than a substantive
10 matter and, therefore, the principle of non-retroactivity may not
11 be applicable since it only deals with procedure and not
12 substance.

13 We maintain that it matters not whether it's procedural or
14 substantive. A law extending a statute of limitations has a
15 bearing on the prosecution and sentencing which sets it apart
16 from procedural laws. And even if it were procedural, Mr. Ieng
17 Sary is entitled to just as much -- he's just as much entitled to
18 procedural justice as he is to substantive justice.

19 We have demonstrated in our written submissions that there are --
20 there's evidence that states view the abolition of amendments of
21 a statute of limitation for crimes that have already been time
22 barred as a violation of the principle of non-retroactivity and
23 this can also be seen by way of analogy also when you look at the
24 1968 convention on the non-applicability of statutory limitations
25 to war crimes and crimes against humanity.

28

1 [10.08.08]

2 I urge Your Honours to look at that carefully because you see a
3 discussion and you see the reasoning behind why states disagree
4 on this notion that you can simply restart the clock by passing a
5 law after the law has expired or the time to investigate and
6 prosecute has expired.

7 I believe this concludes my remarks, Your Honours, and again,
8 thank you for giving us the opportunity to address this very
9 discrete issue on this matter of law. Thank you.

10 MR. PRESIDENT:

11 Thank you, Counsel.

12 We would like now to proceed to counsel for Khieu Samphan,
13 counsel Sa Sovan. You may now present your oral observations
14 concerning the topic being discussed.

15 MR. SA SOVAN:

16 Good morning, Mr. President, Your Honours, the prosecution, and
17 the civil parties for the victims, and the counsels for the
18 accused and the public.

19 I will not repeat what Counsel Karnavas already indicated, but
20 what I would like to stress is that my client -- who is behind me
21 -- was the former Head of State. In English, it is the Head of
22 State and in French, Chef d'état and, of course, in Khmer, (Khmer
23 language). I think at that time there were three important
24 people as the State Presidiums: Mr. Khieu Samphan; Ros Nhim ; and
25 Sao Phim.

1 [10.10.26]

2 My impression is that my client who was the former of the State
3 Presidium or the Head of State, he received this functions from
4 the former king when the king resigned on April 1976. From April
5 1976 until the collapse of the Democratic Kampuchea there was --
6 or there had been only one constitution; the constitution of the
7 Khmer Rouge, the 1976 constitution. He was in his capacity as
8 the State Presidium or Head of State.

9 I would like now, wish to touch upon the statutes of limitation
10 with regard to the 1956 Penal Code of Cambodia. His function
11 back then was not different from Mr. Sarkozy. In the democratic
12 country, I think there are problems inside that states, but I do
13 not want to really dig into that matter. I would like to come
14 back to the statute of limitations of the 1956 Penal Code.

15 The code states if someone commits a crime the statute of
16 limitation will run out after 10 years when the crime was
17 committed if there was no proper prosecution, but the statute of
18 limitation here is also seen in the statute of limitation in
19 sentencing. And, for example, if a person is found to be guilty
20 and sentenced to ten years of imprisonment, the person escaped or
21 was at large then that statute of limitation will lapse after
22 that period of time.

23 Yesterday, there was in that debate on this and Mr. Ieng Sary
24 made a request. And counsels for the civil party lawyers
25 referred to the amnesty as "optinoy" (phonetic) in French. And,

30

1 of course, I am not really acting to protect any of the accused
2 if he or she is found guilty of war crimes, things like that.

3 MR. PRESIDENT:

4 Counsel, Sa Sovan, could you please be reminded that you are
5 allowed to only make your oral submission with regard to the
6 statute of limitations concerning the 1956 Cambodian Penal Codes
7 and whether such code is applicable before the ECCC with regard
8 to three crimes here. This is the primary agenda for your
9 submission.

10 THE INTERPRETER:

11 Counsel Sa Sovan's mic is not activated.

12 MR. SA SOVAN:

13 I apologize, Mr. President. I fully support the arguments made
14 by counsel Karnavas for Ieng Sary. I just would like -- wish to
15 add a few more points and, of course, I will be brief because I
16 have to respect the time given.

17 [10.14.49]

18 The statute of limitations is intended for some certain period of
19 time and, of course, it will run out after that certain period of
20 time lapsed. And we have to really be abided. Everyone have to
21 respect the non-retroactivity of criminal law and for some severe
22 crimes, for example, such principle shall be strictly applied.

23 And I think I'm running out of time.

24 We, of course, would like the society to forgive and forget. My
25 father died and, of course, I thank the civil parties for helping

31

1 to really commemorate the death of people who perished, of
2 course, during the Khmer Rouge regime. And I would like to
3 reiterate my position that if any of the clients here is found to
4 be guilty then they shall be prosecuted and sentence. I am not
5 really saving them, but I would like only the Court to make sure
6 that justice is done and that I would like all Cambodian people
7 to understand the truth.

8 And thank you very much, Mr. President and Your Honours.

9 MR. PRESIDENT:

10 Next the Chamber would like to give the floor to the prosecutor
11 to respond should they wish to do so.

12 MS. CHEA LEANG:

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

14 I will be responding to the statute of limitations with regard to
15 Penal Code of 1956.

16 [10.17.36]

17 The Office of Co-Prosecutor would request that the Trial Chamber
18 set aside all the oral submissions as indicated by the defence
19 counsel.

20 MR. PRESIDENT:

21 Counsel for Ieng Sary, you may proceed.

22 MR. ANG UDOM:

23 Mr. President, may we request that Mr. Ieng Sary be excused and
24 that he can observe the proceeding from the holding cell because
25 he has experienced back pain? And I recall that yesterday in the

32

1 morning the President asked me about the reasoning behind our
2 request for Mr. Ieng Sary to be excused and observe the
3 proceeding at the holding cell so I may now wish to also make
4 sure that this request also be considered for this afternoon
5 session.

6 MR. PRESIDENT:

7 The Chamber has taken note of the request by the defence counsel
8 and hereby grants permission for Ieng Sary to be excused and
9 observe the proceeding from the holding cell due to his health
10 condition.

11 Mr. Ieng Sary shall still participate in the proceedings through
12 remote participation through the AV equipment that have been
13 installed at the holding cell where he will be staying. And he
14 will be allowed to observe the proceeding for the whole day today
15 without coming back to this courtroom.

16 The security personnel are now instructed to bring Ieng Sary back
17 to the holding cell and make sure that AV equipment is installed
18 so that he can fully observe the proceedings from that room.

19 [10.20.22]

20 The counsel -- the national Co-Prosecutor, you may proceed.

21 MR. SENG BUNKHEANG:

22 Thank you, Mr. President.

23 We would like now to proceed with our oral submission and that
24 the statute of limitation in the 1956 Penal Code has not yet run
25 out because we, the Co-Prosecutors, submit that this statute of

33

1 limitation can be extended if there is reasonable grounds for
2 such extension as follow, for example: number one, no statute of
3 limitations existed under the RPK period until the UNTAC code was
4 issued in 1992; two, the general principle of the suspension of
5 the statute of limitations and the suspension of limitation was
6 in place because the court was not functional; the suspension of
7 statute of limitations due to the situation of war and also the
8 suspension of the statute of limitations because of the error
9 committed by the accused.

10 I would like now to respond to the defence counsel concerning the
11 suspension of the statute of limitations with regard to Penal
12 Code of 1956.

13 Point one, the law system of Cambodia: during the Democratic
14 Kampuchea the court system was ground to a halt. According to
15 some documents, the reason why the judicial system was
16 dysfunctional was because the CPK treated judges, lawyers as
17 target for extermination. Although in the constitution of the DK
18 there is the existence of the court system, but such a court
19 would never be functional.

20 [10.22.47]

21 From 1979 to 1991: during this period of time, the judicial
22 system was established by the People's Republic of Kampuchea and
23 was functional until 1992 and 1993. During this period of time
24 both civil law system and the Penal Code of 1956 were not
25 applied. They only applied this decree law of 1980 and another

34

1 decree law created in 1982 and the main offence at that time was
2 on the offence concerning the betrayal of the revolution. Those
3 who drafted the rule and provisions for judicial system at that
4 time were former teachers and people who had very little training
5 in law.

6 And, on top of that, the accused person, at that time, did not
7 really have a choice to legal representative of his own choice
8 and there was no right to appeal because at that time the court
9 was established for only one level and the trial was conducted
10 once and for all. And the Supreme Court was established in 1955.
11 According to some documents, in particular the text entitle
12 Cambodia: Building a Law System From Empty Hand. In that
13 particular text it indicates the right to appeal was reduced to
14 none. And in reality the Ministry of Justice was the only
15 institution to review the judgment and the accuracy of both legal
16 and factual issues and the role and power of the judicial body
17 was limited.

18 [10.25.02]

19 Until 1992, after the Paris Peace Accord and during the
20 transitional period a letter by the United Nations Transitional
21 Authority in Cambodia, the judicial system was improved and they
22 had provision regarding the judicial system, criminal law, and
23 criminal procedural code were implemented and enacted over times.
24 And at that time, also, courts had been -- was established at
25 cities and provinces. The Supreme Court was also established and

1 the rights of the accused was also restored. And there was
2 lacking or shortcoming in the judicial system -- the existing
3 judicial system -- and we note that such a shortcoming was in
4 place.

5 And in 1993, the National Assembly of Cambodia enacted the law on
6 the criminal procedures and this law encompassed all the
7 significant provisions of French civil code in which the roles
8 and responsibility and the power of the investigating judges and
9 prosecutors been restored and in the law itself, the right to
10 appeal was also recognized. And later on, the Constitution was
11 established in 1993.

12 In that Constitution, commitment has been made and that equality
13 of arms has been recognized along with the respect of general
14 norms of human rights. The principle of independent court was in
15 place, and such an effect was really supported by international
16 community, and the government was established from elections in
17 the 1993 general elections although the Khmer Rouge boycotted
18 such election.

19 Later on, higher institution on law were also established where
20 people could be trained on legal issues and these session could
21 last up to four to five years compared to the previous period
22 where such education was only conducted for a short period of
23 time.

24 [10.27.59]

25 Until 1995, the Bar Association of Cambodia was then established.

1 In light of that, the legislative body and the executive body are
2 able to work together to make new laws including the laws on the
3 outlawing of the Khmer Rouge of 1994.

4 In 1997, the Royal Government of Cambodia made request to the
5 United Nations to establish a court that is in conformity with
6 the international standard to prosecute crimes committed under
7 the Democratic Kampuchea.

8 According to these arguments, we can note that the judicial
9 system of Cambodia in the past was shortcoming because it was
10 destroyed by the Democratic Kampuchea. Times are needed to make
11 sure that a proper and functional judicial system could be
12 re-established. For example, trainings of lawyers, judges, and
13 prosecutor need to be underway to improve the judicial system and
14 legal system in Cambodia.

15 There is an organization, an establishment of the judicial system
16 to be functional and so far they are still not competent to be a
17 standard.

18 Number two, in relation to the social instability in Cambodia.
19 After the liberation day of 7 January 1979, Cambodia was still in
20 the civil war, and instability, and the accused still continue to
21 lead the forces opposing the government. The forces of the
22 accused controlled parts of Cambodia and they used the
23 mountainous areas near the Thai border to be their stronghold to
24 oppose the government and, in particular, at that time, the
25 United Nations still recognized the Democratic Kampuchea as the

1 legitimate government and it had occupied seat at the General
2 Assembly of the United Nations.
3 [10.30.45]
4 The accused could act in their full capacity against the
5 government. If we look at each role of the accused, at that
6 time, they were senior leaders. For example, Ieng Sary was the
7 former Minister of Foreign Affairs of Democratic Kampuchea and
8 the legal representative at the United Nations to seek fund to
9 support the Khmer Rouge resistance movement and later on, he
10 controlled areas and he had his own forces at Pailin.
11 Khieu Samphan was another leader of the rebel group and he was
12 the Deputy Chief in charge of the foreign affairs within the
13 coalition government of Democratic Kampuchea.
14 Ieng Thirith was the leader of the delegation for the
15 negotiations on behalf of the coalition government of Democratic
16 Kampuchea, and she was appointed as the Secretary-General of the
17 Ministry of Foreign Affairs.
18 Nuon Chea was the leader, and he controlled the areas from
19 Samlaut to Koh Kong and he gave instructions to those rebellious
20 forces.
21 These combined factors make the accused and their colleagues to
22 control the armed forces in the forest and continue to wage war,
23 consequently, against the government, despite the assistance of
24 the Paris Peace Agreement in October 1991. And even after the
25 establishment of Kingdom of Cambodia in 1993, the forces are

1 under the control of the accused still continued to wage war
2 against the government.

3 [10.32.53]

4 Cambodia, at that time, still had certain areas under the control
5 of the accused and not under the control of the Phnom Penh
6 government, and those accused were in that separate areas at the
7 time.

8 The most important issue at that time was to make Cambodia to
9 receive peace as strived by the government through various
10 solutions and negotiations which took quite a long time to end
11 the war and, at that time, the Khmer Rouge played an important
12 role in the peace-negotiation process.

13 The judicial proceedings during such a war was unlikely to result
14 anything legitimately, as the country did not receive peace or
15 security at the time. The judicial system was not fully
16 independent. For that reasons, the investigation or the
17 prosecution of various crimes alleged to be committed by the
18 accused during the DKperiod could not be carried out. Only in
19 1996, due to the implementation of the win/win strategy by the
20 Royal Government of Cambodia, Cambodia gradually received peace,
21 and later on certain of the Khmer Rouge leaders reintegrated with
22 the government.

23 Despite all that, Nuon Chea and Ieng Sary rather, continued to
24 lead armed forces against the government and did not defect to
25 the government until December 1998.

1 [10.35.14]

2 After the reintegration of the Khmer Rouge with the Royal
3 Government, Cambodia started to enjoy peace and stability. After
4 that the Khmer Rouge Tribunal was established. Therefore, the
5 acts of the accused to create wars and to wage wars against the
6 Cambodia government for a long period was one of the main factors
7 to prevent the development of the judicial system to be
8 effective. Therefore the accused shall be responsible for their
9 acts.

10 MR. PRESIDENT:

11 We need to have a short break so that the DVD disc can be
12 changed.

13 (Short pause)

14 MR. PRESIDENT:

15 The Deputy Co-Prosecutor, you may now continue with your
16 presentation.

17 MR. SENG BUNKHEANG:

18 Thank you, Mr. President.

19 Just then I presented the roles of the accused during the civil
20 war period in Cambodia. In fact I made a mistake. The accused
21 would be Nuon Chea and Khieu Samphan, not Nuon Chea and Ieng
22 Sary, when they continued to lead the armed forces against the
23 government; my apologies.

24 The accused shall be responsible for these acts to prevent the
25 establishment of the effective judicial system. And regarding

1 this point, the Pre-Trial Chamber also noted that the accused
2 cannot benefit from the passage of time if the accused was
3 alleged to be responsible -- partly responsible for the
4 incompetency of the judicial system in regards to investigation
5 and trial.

6 [10.37.02]

7 Point number three, it is related to the ECCC Law. The ECCC Law
8 was adopted by the legislative body of the Kingdom of Cambodia,
9 and on the 7th August 2001, the Constitutional Council reviewed
10 this law, in particular Article 3, and decided that this Article
11 3 was constitutional according to the Constitution of the Kingdom
12 of Cambodia.

13 In addition, the legislative body of Cambodia is the supreme body
14 which has the authority to legislate any law and the authority
15 for implement those laws. And the implementers, including the
16 judicial body, needs to abide to all of the existing laws adopted
17 and legislated by the legislative body. Article 136 (new) of the
18 Constitution. which states that the Constitutional Council shall
19 have the right to review the law, and Article 142 (new) clearly
20 states that:

21 "In cases that the Constitutional Council ruled that any Article
22 is unconstitutional, it cannot be promulgated or implemented."

23 But in our case the Constitutional Council of Cambodia, which is
24 the supreme body, issued its decision number 40/12 02 2001 and
25 another decision 43/07 08 2001, deciding that the ECCC Law as a

1 whole, in particular Article 3, is constitutional. In addition,
2 this decision is final and not subject to appeal.
3 The Pre-Trial Chamber also decided, regarding this point, that
4 ECCC is a separate institution and any Chamber of the ECCC has no
5 competence to decide to review any decision of Articles besides
6 the ECCC. Therefore, the declaration by the Constitutional
7 Council that Article 3 (new) of the ECCC Law is constitutional is
8 clear and final decision, and binding and cannot be reviewed by
9 the ECCC because the Judges, the prosecutors have no authority to
10 interpret the law enacted by the National Assembly.

11 [10.28.13]

12 In addition, the decision of the Constitutional Council is
13 consistent with the ECCC Law, with the Constitution, and the
14 Cambodian obligations to the international law. Therefore, as
15 the law implementer we need to respect our obligation, meaning
16 the implementer shall be responsible to implement the existing
17 law, as stated in Article 51 (new) of the Constitution of
18 Cambodia, the separate authorities between the legislative power,
19 the executive, and the judiciary.

20 The Constitution also clarifies that the National Assembly and
21 the Senate are the bodies with the legislative power; that is, to
22 legislate the law. And in Article 129 (new) of the Constitution
23 it states:

24 "Only judges so have the rights to adjudicate. A judge shall
25 fulfil this duty with strict respect for the laws, wholeheartedly

42

1 and conscientiously."

2 Therefore, for all the existing provisions, the implementer shall
3 implement it wholeheartedly. For that reason the ECCC Law, in
4 particular Article 3, that the legislative body of the Kingdom of
5 Cambodia already enacted and it was reviewed by the
6 Constitutional Council as constitutional shall be applicable
7 before the ECCC.

8 [10.43.30]

9 I would like now to give the floor to my colleague, Mr. Vincent
10 de Wilde to continue to present our argument.

11 MR. PRESIDENT:

12 Thank you, national prosecutor, for your presentation. It is now
13 appropriate for us to take a break. We shall have a 20-minute
14 break and we shall resume at 5 past 11.

15 THE GREFFIER:

16 All stand.

17 (Judges exit courtroom)

18 (Court recesses from 1045H to 1105H)

19 (Judges enter courtroom)

20 MR. PRESIDENT:

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

22 The Chamber would like now to give the floor to the international
23 Co-Prosecutor to make their presentation.

24 [11.08.26]

25 MR. DE WILDE D'ESTMAEL:

43

1 Mr. President, Honourable Judges, good morning. May I inform you
2 that I'll use all the time allotted to us, about 35, 36 minutes.
3 Since your decision E187 on case number one on the same subject,
4 the situation has changed. The research during the period from
5 1975 to 1993 has changed, new arguments have been raised, and on
6 the 11th of January last year the Pre-Trial Chamber took a
7 decision which is in line with the position adopted by the three
8 national Judges of that Chamber a year ago.
9 Another fact will justify a review of the situation by your
10 Chamber; that is, the timing of its considerations. Your
11 decision of the 26th of July 2010 was taken on the same day as
12 Kaing Guek Eav, alias Duch, was convicted. In the separate
13 decision of the Chamber, I quote:
14 "Due to the substantial overlap between the elements of these
15 domestic crimes and their international corollaries, this finding
16 has had no impact on the Chamber's evaluation of the totality of
17 the accused's criminal culpability or on the sentence ultimately
18 imposed."
19 Let me point out in passing, to clarify this sentence, which
20 prompted the Co-Prosecutors not to lodge an appeal against the
21 decision, the most important point is to look at the judgments.
22 It is not that we acquiesced in your decision with regard to your
23 decision on national crimes.
24 The situation and the timing is different here and your directive
25 of the 5th of April 2011, you ruled on the issue, on the merits.

44

1 The situation is not the same, the stakes are different today.
2 Since the Chamber has to rule without having looked at the
3 evidence in the case, it is important to note that the elements
4 of international (sic) crimes are satisfied. In fact, the
5 elements of these national crimes; that is, homicide, torture,
6 and religious persecution, cannot be likened to those of
7 international crimes even though they are similar to a large
8 extent. We are of the view that the facts and the law in our
9 written submissions are, today, sufficiently supported.
10 [11.11.50]
11 With regard to the lack of the elements -- the lack of statutory
12 limitations for domestic crimes for the period from 1992 to 1993,
13 we would like to point out that the statutory limitations period
14 did not start running before that period. And once they started
15 running they were extended by 20 years, pursuant to the ECCC Law
16 and the amendment to the law in 2004. Regarding the hypothesis
17 that the prescription period would have expired before the
18 adoption of the 2001 law, I would like to refer you to the
19 decrees we sent to you previously.
20 Before looking at the substantive issue I would like to raise, to
21 address two points of law that the defence referred to a while
22 ago. They say that Article 3 or 3 (new) hasn't violated the
23 principle of legality, and, secondly, that the same Article did
24 not violate the principle of equality before the law.
25 Regarding the principle of non-retroactivity, the situation is

1 very clear insofar as there is no statute of limitations. It is
2 subject to all laws that amended the timeframe. In other words,
3 when the ten-year time limit had not expired the extension of --
4 the renewal of Article 3 of the ECCC and Article 3 (new) of the
5 2004 law cannot violate the principle of non-retroactivity. As a
6 matter of fact, the extension of the timeline did not occur, as
7 the defence suggested, to aggravate the situation or to modify
8 the definition of those crimes. Article 7 of the European
9 Convention of Human Rights and 15 of the ICCPR are not applicable
10 to these crimes.

11 [11.14.10]

12 As a matter of fact, the crimes for which the accused are charged
13 before this Chamber are exactly the same as those for which they
14 were punishable between 1975 and 1979. This fact is not
15 contested. These national crimes existed not only in the 1956
16 Penal Code, but they were also considered as felonies according
17 to the general principles of law recognized by all nations.
18 The international Judges of this Chamber have confirmed that the
19 statute of limitations could be extended before its expiry by an
20 explicit law and that this would be compatible with international
21 fair trial norms applicable before the Chamber. That is pursuant
22 to Article 15 of the ICCPR at paragraphs 43 to 47 of your
23 decision of July 2010. Furthermore, the statute of limitations
24 does not affect the crime itself or the sentence. It is a
25 manifest part of the procedural rules regarding the conduct of

1 proceedings. It is therefore a procedural as opposed to a
2 substantive rule.
3 [11.15.35]
4 Regarding the principle of equality before the law, the extension
5 of the statute of limitations does not create any inequality
6 before the law, according to Article 26 of the ICCPR, because the
7 principle of prolongation is in line with all norms of
8 international law. In other words, the adoption of the ECCC Law
9 and the prolongation of the time limit for the statutory
10 limitations does not affect the situation of the accused. The
11 principles are based on reasonable and objective grounds and the
12 accused can be prosecuted for the same crimes under the law.
13 Insofar as any individual who fulfils the requirements of
14 personal, temporal, subject matter jurisdiction, the suspects
15 identified by the prosecutor can be charged and it is, therefore,
16 not a question of unfair treatment as the defence has claimed.
17 Quite on the contrary, there is a fundamental principle that
18 underpins international criminal law and it is that those
19 responsible for serious violations of human rights and war crimes
20 must be brought to justice before the Court. It doesn't matter
21 whether according to the issue of personal jurisdiction, or those
22 responsible, or the fact that these people constitute a small
23 number of people. It doesn't matter.
24 Honourable Judges, would like to proceed by addressing the
25 submissions of the defence in its joint response of the 17th of

1 June, paragraph 10. Defence stated that the 1956 Penal Code
2 remained in force between 1979 and 1991, and that it was not
3 applied because it was not abrogated. The legislative decree of
4 15th of April 1980 of the Democratic Republic of Kampuchea
5 focuses on crimes relating to crime of treachery, rape, murder
6 and physical assault, or crimes against property. According to
7 defence this decree co-existed with the 1956 Penal Code.
8 (11.18.35]
9 This interpretation is not reasonable and we call on the Chamber
10 to consider this legislative decree very attentively, and the
11 reference is D288/6.9/9.4 and you would observe that there is no
12 doubt as to the intentions of those who drafted that law. It is
13 a revolutionary law that was adopted in an emergency situation,
14 but it is a complete law which covers all aspects of the crimes
15 and the aspects of criminal law.
16 Most of these crimes are understood as treachery to the
17 revolution. It indicates that the revolutionary council which
18 adopted the law was fully aware of it. And you'll also note that
19 this law is retroactive, according to Article 12, which applies
20 to all the crimes -- all of them -- that were committed from the
21 7th of January 1979. There is no reference to other crimes
22 contained in the 1956 Penal Code; as such at least if the 1956
23 Penal Code had not been officially abrogated, we can assert
24 unequivocally that it was certainly suspended after the 7th of
25 January 1979. And its context also shows that with regard to

48

1 this interpretation there was change of power after the
2 revolution, a change of constitution, an adoption of certain
3 laws, but broke with the situation of the Khmer Rouge regime. So
4 these decrees were imperfect.

5 I would like you to look at Article 92 of the June 1981
6 Constitution that says that:

7 "All the legislative decrees and decisions of the Revolutionary
8 People's Council lend credibility and force of law to this law."

9 The consequences of the observation that the 1956 Code was
10 suspended or abrogated throughout the period from 1979 to 1991
11 are essential. Neither in the legislative decree or the 1982
12 decree regarding the organization of courts and persecutions --
13 the reference is E51/7/3.1.1, and this is available in Khmer --
14 made the decrees regarding the establishment of the People's
15 Supreme Court in 1985-1987, would you find any procedural
16 provisions regarding any statutes of limitations.

17 [11.21.54]

18 To our knowledge there is no statute of limitations applicable
19 between the 7th of January 1979 and the time when the provisions
20 of the 10th of September 1992 code regarding the judicial system,
21 criminal law, and criminal procedure applicable in Cambodia
22 during the transitional period, prepared with the assistance of
23 UNTAC.

24 Article 30 of these provisions of the UNTAC code establishes or
25 restores the deadline for application of the statute of

1 limitations, which is three and ten years. This is the reality;
2 nothing, therefore, justifies that the authorities, in general
3 prosecutions or the revolutionary courts during the period of
4 Democratic Kampuchea, carried out investigations or prosecuted
5 people during the period of the Khmer Rouge because these
6 timeframes it did not exist.

7 As the defence claimed, the expiry on the 6th of January 1989 of
8 the statute of limitations as it's claimed is not false. So we
9 cannot impose that on the Judges regarding to the situation from
10 1979 to 1992, whereas the decrees and applicable laws were not
11 time barred.

12 The very first possible date for the statute of limitations in
13 regard to national crimes coming into effect is that of Article
14 30 of the UNTAC code of September 1992, and if I am not wrong it
15 went into effect two months after it was adopted, and this brings
16 us to November 1992.

17 [11.23.55]

18 Since the time limit for the statute of limitations hadn't
19 started running and, therefore, could not have expired, according
20 to Article 3 of the ECCC Law which increased the timeframe to 30
21 years for national crimes, Article 3 of the ECCC Law did not
22 violate the principle of legality and, therefore, has no
23 incidence on the situation of the accused who have been charged
24 with national crimes.

25 In the second part -- and this is in the alternative -- if the

50

1 Chamber is not satisfied that no time limit or statute of
2 limitations was applicable between 1979 and 1992, we'd therefore
3 invite the Chamber to look at a series of principles of law and
4 factual circumstances that are likely to lead you to a finding
5 that the statute of limitations did not start to run at least up
6 to 1993, and this is for reasons that have been presented by my
7 colleague.

8 First of all, there was no functional court, and, secondly, there
9 was a situation of war, and thirdly, the war was waged by the
10 accused themselves.

11 The principles of law and the criteria applicable have been
12 determined, essentially, by Western law. Western countries have
13 never witnessed the exceptional situation as that which obtained
14 in Cambodia after generally 1979 because of the situation of war.
15 [11.25.45]

16 Cambodia was a country in ashes. It had been bled dry, and
17 ravaged by war and the DK regime. Most intellectuals had been
18 either massacred or had died in enslavement; they were in refugee
19 camps, and a quarter of the population had been amputated.

20 The priority of the new leaders appears to have been to stabilize
21 power and to reconstruct a country and not to devote themselves
22 through justice. As Westerners we should be humble enough to
23 consider this situation as it was, and consider the facts and the
24 law. The only example is that of a judicial system which is
25 completely destroyed. And I would like to talk of the doctrine

1 of inability to act.
2 Contra non valentem agere nulla court praescriptio, which means
3 prescription doesn't run against whoever is unable to act.
4 Without naming it explicitly, it is pursuant to this principle
5 that all the Judges of the Pre-Trial Chamber and your Chamber
6 held that any investigations or prosecutions during the DK regime
7 was rendered impossible in the absence of a functional judicial
8 system. And this transpires from paragraphs 14, 17, and 29 of
9 your decision, and paragraph 285 of the decision of April issued
10 by the Pre-Trial Chamber.
11 In the same paragraph the Pre-Trial Chamber also pointed out,
12 rightly, that if the goal of the statute of limitations is to
13 provide a timeframe during which criminal prosecutions can occur,
14 this would presuppose that the judicial institutions function
15 effectively.
16 Insofar as the judicial system and its decisions that made it up
17 function effectively as from January the 7th, 1979, is that the
18 case? It's not a question of mixing up a functional, operational
19 judicial system, or a system that is ideal or perfect. And these
20 are the words that the defence put in our mouths in their joint
21 reply to paragraph 5.
22 [11.28.30]
23 Our position is that a judicial system that is put in place
24 should satisfy a number of minimum criteria for it to be
25 considered functional. These criteria, according to us, should

52

1 be appreciated in concrete terms and not solely on the basis of
2 the legislative arsenal that existed at the time. It is
3 important that the Court should be able to address the issues in
4 the case file, to gather evidence, to hear prosecution and
5 defence witnesses who testify without fear of reprisals.

6 A tribunal that functions implies not acting arbitrarily, or
7 acting with bias. Without these guarantees we cannot talk of a
8 functional court, pursuant to the principle *contra non valentem*.
9 The system put in place by the DK, or the People's Republic of
10 Kampuchea, which persisted with some fundamental reforms from
11 1992 to 1993, is not only a system which was not functional, but
12 it did not provide any minimum guarantees for it to be considered
13 functional. We cannot -- it reminds us of the mock trial of Pol
14 Pot and Ieng Sary in 1979 on which the parties made submissions
15 on Monday. The Chamber will also observe that in the documents
16 provided the corpus of international legal norms was incomplete
17 at the time.

18 It is important to compare the Constitution and the laws in force
19 with those adopted in 1992. My colleague said, and I will sum
20 up, that before the reforms of 1992 and 1993 the judicial system
21 and the courts provide no guarantees, neither for the defence or
22 for the victims. There were no courts of appeals. They were
23 deemed unnecessary. Judgments were reviewed by the Ministry of
24 Justice, and arrests were made without any credible judicial
25 basis. Evidence was not collected, neither before nor after

53

1 arrest, with the exception of only a few. This is the harsh
2 reality, these are the objective facts that many authors and
3 analysts have described in the publications that we have attached
4 and referenced in our submissions.

5 [11:31.24]

6 In such a system it's not a matter of knowing whether a
7 particular tribunal or a people's tribunal would have
8 individually been able to conduct investigations or suspend a
9 statute of limitations, but consider the system in its entirety
10 as well as its components, and to ask the question as to whether
11 or not the minimal conditions and guarantees for a proper
12 functioning judicial system were truly met.

13 The defence teams have shown their capability by pointing out
14 that certain Cambodian Judges of the ECCC had occupied official
15 judicial functions during the 1980s. In fact, the Co-Prosecutors
16 agree by saying that it is precisely the Cambodian Judges who are
17 in the best position to assess the judicial system that prevailed
18 in Cambodia between 1979 and 1993, especially since they
19 experienced, in successive order, the state of justice under the
20 regime of the People's Republic of Kampuchea; the judicial system
21 under the Kingdom of Cambodia that was established with the
22 assistance of UNTAC.

23 And in light of this fact we believe that all Cambodian Judges
24 who have made a finding on this issue as to whether or not there
25 was in existence a functional judicial system between 1979 and

1 1993, they did so each time with courage, and they did so each
2 time with objectivity.

3 [11.33.05]

4 The defence also submits that the Constitution of the People's
5 Republic of Kampuchea in 1979 -- or, rather, the Constitution of
6 June 1981 proves the existence of a functional judicial system.
7 Now, with respect to the 1981 Constitution, we invite the Chamber
8 to compare this version of the constitution with the 1993
9 Constitution and we make the two following points.

10 Firstly, the preamble of the 1981 Constitution contains this
11 sentence, or rather makes reference to "the Pol Pot, Ieng Sary,
12 Khieu Samphan clique who had become lackeys of the expansionists
13 and hegemonist leaders of Peking". This is not the language of a
14 classic constitution and it only gives an idea of the nature of
15 the judicial system established during that period.

16 This also reminds us of the observations that have been made
17 about the Pol Pot, Ieng Sary trial that was held in 1979, it was
18 rather a political trial held to reaffirm the power in place
19 amidst war and which is bereft of any will to establish
20 functional justice.

21 [11.34.30]

22 The second point is this: where the 1993 Constitution
23 establishes a clear separation of powers and independent judicial
24 power under the authority of a Supreme Court and the Supreme
25 Council, it does not invest this power in professional judges to

1 adjudicate. This is in contrast to the 1981 Constitution and in
2 fact, Articles 79 to 86 are very vague and are silent on the
3 separation of powers, on the hierarchy of courts, and does not
4 reference the existence of the people's tribunals or military
5 tribunals in Article 80. It simply mentions the presence of
6 those who assisted the Judges and does not make any reference to
7 defence rights. In fact, the very few guarantees that are set
8 out in this Constitution refer to administrative matters, which
9 are simply not substantiated in fact.

10 [11.35.40]

11 As you have said, a period of war can toll or postpone the start
12 of a statute of limitations. Several national and international
13 practices established that the state of guerre may interrupt the
14 functioning of a judicial system which necessarily engenders the
15 suspension of the statute of limitations. At the national level
16 this has been the case for Germany between 1933 and 1945, and
17 there are judicial decisions in this respect that emanate from
18 the United States, France, and elsewhere in Europe.

19 At the international level there is the principle of the
20 suspension of the statute of limitations for citizens who are
21 nationals of two powers or in war. Cambodia enters this
22 scenario. However, in reality as of 1998 the name had simply
23 changed. It was not a war between two powers, otherwise the
24 United Nations would not have considered as legitimate leaders of
25 Democratic Kampuchea and denounced Vietnam as the occupying

1 power.

2 In addition to a judicial apparatus that was not functional, any
3 investigation or prosecution would have been manifestly
4 obstructed by war and by partial occupation of Cambodia. There
5 was absolute impossibility to arrest the accused, or even to
6 summon them as witnesses. The priority at the time was to wage
7 war, this is certain.

8 As my colleague has already stated to you, aside the absence of
9 functioning tribunals in a situation of war, there is also a
10 third legal ground that justifies the postponement of the start
11 of the statute of limitations. It is the principle that is
12 summarized by the legal maxim that no one is heard when alleging
13 their own fault.

14 [11.38.25]

15 Because of this principle, the statute of limitations cannot be
16 invoked by the accused. The Pre-Trial Chamber has already
17 emphasized this in paragraph 286. It has been alleged that the
18 accused are partially responsible for the facts that the judicial
19 system at the time was unable to carry out investigations and
20 prosecutions during the period of January 1979 to September 1993.
21 We believe that they had destroyed the judicial system as well as
22 all of its components between 1975 and 1979, and this, as a
23 consequence, had a heavy incidence and impact on the entire
24 system of Cambodia during the ten years following the fact, and
25 perhaps even to this day. Secondly, the accused persons are also

57

1 partially for the war that had obstructed prosecution from 1979
2 up until their surrender.

3 For the Co-Prosecutors, it is unacceptable that by reasons for
4 which they themselves are responsible, that is they had
5 obstructed prosecution, that they should be able to reap benefit
6 from this. And what benefit this is, that is impunity of
7 national crimes.

8 Mr. President, Your Honourable Judges, this brings me to my
9 conclusion. I ask you declare yourselves as having jurisdiction
10 over the charges that have been made against the accused, charges
11 stemming from national crimes of homicide, torture and religious
12 persecution, because there was no statute of limitations between
13 1979 and 1992. And I remind you that this is a matter of
14 procedure and in the alternative, I also ask you to find that
15 under all objective criteria, the Cambodian judicial system was
16 incapable of conducting investigations and launching prosecutions
17 during the period that followed the fall of Democratic Kampuchea
18 up until, at the very least, 1993.

19 [11.40.55]

20 Subsequently, the 2001 Establishment Law under provision 3
21 extends the statute of limitations. On that I end, Mr.
22 President, Your Honourable Judges, and I thank you.

23 MR. PRESIDENT:

24 Thank you, Mr. Co-Prosecutor. Next we proceed to the civil party
25 lead co-lawyers for the response to the observation by the

1 defence counsel.

2 MR. PICH ANG:

3 Mr. President, Your Honours, the civil party co-lawyers would
4 like to divide the time allocated by the Chamber to Mr. Lor
5 Chunthy, Mr. Kim Mengkhy and Mrs. Chet Vanly, and I myself, Pich
6 Ang, to make the response.

7 MR. PRESIDENT:

8 The Chamber have taken your note, and now it is floor for the
9 counsel for the civil party, Mr. Lor Chunthy.

10 [11.42.40]

11 MR. LOR CHUNTHY:

12 Good morning, Mr. President, good morning Your Honours. I am
13 representing the civil parties, and I will be here addressing the
14 topic of preliminary objections as indicated by the Chamber.

15 I would be touching upon the context of Cambodia and the
16 situation after 1979, of course, in the aftermath of the collapse
17 of the Democratic Kampuchea, and in what context was Cambodia in.
18 And I will also be presenting the observation concerning how
19 Cambodian people were returning to their villages or to other
20 locations after they had been evacuated during the regime.

21 [11.44.00]

22 When people returned home after the ordeal, there was huge
23 shortcoming, and there was a government at that time established
24 under the People's Republic of Kampuchea. That government was
25 started, and that the human resources were also installed, and

1 everything started from scratch at that time, even the general
2 administration system was reinstalled from the very beginning.
3 We then proceed to the new period, the period in which several
4 laws were adopted, in the state of Cambodia of 1989. When the
5 State of Cambodia was created, the country was governed by the
6 socialism ideology, and that the country's infrastructures did
7 not prosper significantly. And now it leads to the question how
8 such statute of limitations could be applied.

9 [11.45.55]

10 In 1991 to 1993, it is a new turn. Cambodia came to a new turn,
11 as a new Constitution proclaimed the country State of Cambodia,
12 and at that time Cambodia was campaigning for true peace for the
13 people of Cambodia, who were hungry for it. And the election was
14 in place.

15 After the general elections, the question remains whether such
16 statute of limitations could be applied. The answer is that the
17 civil war was still in place, and the question is what was the
18 civil war for? And between whom the civil war was staged
19 against, for example. And we also note that the Khmer Rouge at
20 that time boycotted the general election. After the election,
21 the civil war was staged, and because of this civil war the
22 judicial function was not properly in place, because it was
23 hampered by this war phenomenon.

24 I would like now, with talk about the implication, the
25 consequence of the Democratic Kampuchea and the impact on the

60

1 Cambodian society as a whole. Human resources had been fully or
2 significantly destroyed. The government had to restore human
3 resources. And when I am talking about human resources, we refer
4 to how people were sent to get better education in other
5 countries, socialist countries like in Russia, in Vietnam.

6 [11.48.20]

7 After human resources have already been trained and guarded, it
8 was possible for the government to proceed with other important
9 tasks, for example, creating a judicial justice system for
10 Cambodian people, and for those whose loved one perished during
11 the Khmer Rouge regime. And that the ECCC was eventually
12 established.

13 The Khmer Rouge regime destroyed all kinds of infrastructures,
14 including the human resources. According to this submission, we
15 find that the statute of limitation as presented by the defence
16 counsel shall not be applied during that time, because there were
17 shortcoming of resources and the judicial system was not properly
18 functional, and such court system remain dysfunctional until 1993
19 when the election was conducted, organised, and even early years
20 after that election we still experience civil war, and that the
21 judicial system was not really in proper function, only until
22 1998 and that concludes my submission.

23 [11.50.15]

24 MR. KARNAVAS:

25 Mr. President, with the deepest respect for my colleagues, I

61

1 don't wish to interrupt. However, what we're hearing is more of
2 a testimonial, and something similar to either an opening or
3 testifying from counsel, and I understand a certain need to bring
4 out some facts as part of a narrative. But here we are dealing
5 with issues of law, and not testimonials, as to how the systems,
6 or how Cambodia was. Now is the time to present -- if they have
7 evidence, they could have done that in their motions, but I think
8 that we need to keep the discussion on the level of law, and not
9 the experiences of the individuals that lived throughout this
10 period.

11 And so I would be asking the Trial Chamber to caution everyone,
12 including the defence, to stick to the law. Thank you.

13 [11.51.45]

14 MR. PRESIDENT:

15 We would like now to proceed to the next counsel for civil party.
16 The lawyer who already accredited for representing the civil
17 parties, and we will enter with the counsel before lunch break.

18 MR. KIM MENGKHY:

19 Mr. President, Your Honours, I also thank you for the observation
20 of the defence counsel for Ieng Sary. In my capacity as the
21 counsel for the civil parties, these preliminary objections could
22 never be made without any reference to the facts at issue so that
23 the parties to the proceeding can be well-informed of them. The
24 co-lawyer for the civil party would like to respond with regard
25 to the preliminary objection concerning the domestic offences

1 within or under the 1956 Penal Code.

2 [11.53.10]

3 First of all, the civil party co-lawyers are convinced that the
4 1956 Penal Code exists and applicable during 1975 through 1979.

5 And this statute of limitations is still valid before the ECCC as
6 already stipulated under Article 3 of the ECCC Law. And the ECCC
7 has reasonable grounds for extending this statute of limitation
8 as indicated in its law. From 1975 to 1979, roughly 3 million
9 people, including judges, prosecutors, lawyers, intellectuals and
10 other people had been killed or executed.

11 And during that regime, people who could escape such ordeal,
12 including children, have seen their rights deprived of, and they
13 had to live in the condition of the prison without war. In the
14 decision, the order by the Co-Investigating Judges finding is
15 that crimes against humanity, of genocide for example, or
16 homicide and religious persecution, in 1956 Penal Code are
17 applicable before this Tribunal.

18 [11.55.15]

19 I would like to also submit that the statute of limitation that
20 is extended by Article 3 is the procedural law, not substantive
21 one. And I believe that this extension of the statute of
22 limitations does not violate the non-retroactivity of criminal
23 law under Constitution, even the Constitutional Council already
24 stated that the statute of limitation extended under Article 3 of
25 the ECCC law does not violate the Constitution.

1 The extension of statute of limitations also guarantees the
2 equality of arms and principle of justice for everyone. The
3 suspension of statute of limitations from 1975 to 1993 was done
4 and it was not only aimed to focus on the senior leaders of the
5 Khmer Rouge leader, but such suspension was also done for the
6 purpose of seeking justice for the victims of the Khmer Rouge
7 regime, so that there are proper procedures in place to bring
8 about the national reconciliation between the victims and the low
9 level former Khmer Rouge soldiers.

10 [11.57.00]

11 According to a survey conducted by the University of California
12 Berkeley, the survey finds that the most priority is not justice
13 but economy and health issue. I draw your attention to this
14 particular survey is to just reflect that victims have been very
15 concerned with their economy, and also their health condition,
16 and that although they would like justice to be done to them, but
17 for the period from 1979 to 1993 it was impossible for them to
18 ask for justice to be done because they were so hungry, and they
19 were reduced to be thinking only of their stomach.

20 On top of that, during the State of Cambodia, the Khmer Rouge
21 still occupied large parts of Cambodian territory, and they were
22 also member of the Supreme National Council. And for that
23 reason, there was no prosecution against them. That's why the
24 statute of limitations extended to cover the crimes of those who
25 committed the crimes during the Democratic Kampuchea is intended

64

1 to secure the rights to justice and to the truth.

2 [11.59.00]

3 The co-lawyer for the civil party would like to also reaffirm our
4 position to support the facts and law as they are reiterated by
5 prosecutors and the national judges in case file 001, that the
6 statute of limitation was interrupted during the period where
7 there was no proper functioning of the court system. And that no
8 court would be able to prosecute the accused persons.

9 National judges in case file 001 indicated that there was, until
10 to date, no parallel measures being in place to secure the
11 prosecution of the accused persons because the statute of
12 limitations were interrupted. This idea was also actually
13 supported by the defence counsel. The counsel for the civil
14 party note that the victims have the rights to reparations,
15 remedy, that they have suffered from the destruction and the
16 suffering they endure during the Democratic Kampuchea.

17 [12.00.50]

18 The spirit of the establishment of the Penal Code of 1956 is to
19 prevent crimes from happening, and also to punish people who
20 commit crimes, and also to seek justice for the victims. In the
21 case of Alfredo Kuti (?phonetic), the American court ruled that
22 even though the statute of limitations ran out, the justifiable
23 suspension, or extension of statute of limitation is warranted
24 because the regime of Argentina, the dictator, the authoritarian
25 regime of Argentina could not restore the judicial system to

65

1 bring justice for the victim. And in 1979, or to 1989, Cambodia
2 was a socialist country ruled by the People's Republic of
3 Kampuchea.
4 And under socialism there was a notion that the state control the
5 party governs, so all properties, belongings belong to the state,
6 and it is the party who governs the country. Even there was a
7 court at that time, any decision of the court would not be
8 subject to any judicial review because the party fully controlled
9 the country.

10 During the negotiation, the Paris Peace Accord agreement, it is
11 also another reason that tell us about how the judicial system
12 back then was not really properly functional. In reality, the
13 trials of Ieng Sary in 1979 by the People's Revolutionary
14 Tribunal, the rights of the victims and the accused themselves
15 were not guaranteed, because the trials was not conducted
16 properly. The equality of arms was not really preserved. And
17 justice was not done for the victims, in particular.

18 [12.04.00]

19 As I already indicated, the civil party lawyers see that the
20 judicial system of Cambodia was not properly in place to allow
21 prosecutors or investigators to conduct proper investigation or
22 prosecutions of crimes between 1979 to 1993. As indicated in the
23 decision on the appeal by defence by Ieng Sary against the
24 Closing Order, the suspension of the statute of limitation during
25 the time when the judicial system was not functional was also

66

1 appropriate, because it is really justifiable to make sure that
2 the victims can seek reparations and remedy for the crimes, for
3 the damages caused to them during the regime.
4 From 1975 to 1993, no Cambodian law, or no circumstance allowed
5 civil parties who were victims or relatives of the victim seek
6 reparation or collective reparations as indicated here under the
7 ECCC Law and the Internal Rules. The suspension of statute of
8 limitations from 1975 to 1993 was intended to ensure reparations
9 for the victims, and it is pursuant to the 1956 Penal Code and
10 also pursuant to the ECCC Law.
11 The civil party co-lawyer also supports the decision by the
12 Pre-Trial Chamber that the statute of limitations with regard to
13 national crimes start to run from the 24th of January 1993, the
14 date when the Constitution was promulgated, and the date when the
15 powers of the executive, legislative and judiciary bodies were
16 separated.
17 [12.07.00]
18 Article 3 new of the ECCC Law was enacted with regard to the
19 extension of statute of limitations to cover the prosecution of
20 national crimes. The evolution of victims rights can be seen in
21 Barrio Atos (phonetic) case versus Peru. The InterAmerican Court
22 ruled that the court would not really accept any pardon or
23 amnesty, or any matter of statute of limitations that barred the
24 court from prosecuting people who commit heinous crimes.
25 So we can also conclude that the extension of statute of

67

1 limitation is applicable before this Chamber because it is done
2 for the purpose of finding justice for everyone concerned.
3 Statute of limitations as extended under ECCC Law is a special
4 statute of limitations. This Court is a special court, created
5 by a special law. That's why ECCC is not bound to interpret the
6 matter of statute of limitations bound by national law. ECCC has
7 power to prosecute anyone who committed crimes under 1956 Penal
8 Code, and the crimes committed between 1975, the 17th of April,
9 through the 6th of January 1979, including homicide, torture and
10 religious persecution.

11 [12.09.35]

12 According to these arguments, the statute of limitations is
13 extended to be consistent with the rights of the parties
14 concerned, and the extension of statute of limitation rule is the
15 special rule that overrides other relevant provisions.

16 In the decision of the Pre-Trial Chamber on the appeal by the
17 defence team of Ieng Sary against the Closing Order, also
18 indicates the issue concerning the statute of limitation, and
19 that it is reasonably, or justifiably, extended before the
20 Chamber with respect to the individuals and the time. And
21 recently the civil party lawyers support and are grateful to the
22 Pre-Trial Chamber for making a final decision concerning the
23 acceptance of a few more hundreds of civil parties in their
24 decision.

25 [12.11.20]

68

1 And I would like to quote paragraph 35 of that order as follows:

2 ?According to Rule 21 of the Internal Rules, the Pre-Trial

3 Chamber is obliged to ensure that the proceedings before the ECCC

4 are fair, and everyone shall be treated equally the same, and the

5 fundamental principle of the ECCC as stipulated under Rule 21 of

6 the Internal Rules requires that law shall be interpreted for the

7 purpose of protecting the rights of all parties concerned.?

8 The co-lawyer for the civil parties is fully aware that any

9 interpretation, or the interpretation by the Pre-Trial Chamber

10 does not bind the Trial Chamber. However, the co-lawyer for the

11 civil party hopes that the Trial Chamber will also interpret the

12 fundamental rule concerning the statute of limitations, and it's

13 extension, for the purpose of protecting or preserving the rights

14 of the parties and also to maintain the equal rights of the

15 parties.

16 [12.13.10]

17 As mentioned about the civil party co-lawyer would request that

18 the Trial Chamber, the extension of statute of limitations is

19 reasonable and applicable to ensure fairness, and to ensure that

20 national reconciliation if carried out properly, and to make sure

21 that victims receive proper reparation.

22 Finally, on behalf of the civil party, and as victims of the

23 Democratic Kampuchea, civil party co-lawyer would like to request

24 respectfully that the Trial Chamber set aside all the arguments

25 and observations made by the defence counsel with regard to the

69

1 preliminary objections concerning the statute of limitations
2 under 1956 Cambodian Penal Code.

3 MR. PRESIDENT:

4 Thank you, counsel. It is now an appropriate time for an
5 adjournment. The Chamber will take the adjournment from now
6 until 1.30.

7 Parties are also now advised to come back to the courtroom by
8 1.30. Security personnel are now instructed to bring the accused
9 person, Mr. Khieu Samphan and Mrs. Ieng Thirith to the holding
10 cell, and return them to the courtroom by 1.30.

11 (Judges exit courtroom)

12 (Court recesses from 1215H to 1337H)

13 (Judges enter courtroom)

14 MR. PRESIDENT:

15 Please be seated. The Chamber is now back in session. Before
16 the adjournment for lunch, the floor was given to the civil lead
17 co-lawyers to respond, and in the morning we heard the response
18 from two civil party lawyers.

19 For this afternoon session, we will proceed again, however there
20 are certain circumstances that we would like to inform the
21 parties. The Chamber would like to inform all the counsels that
22 in the circumstances where a number of the lawyers, like in the
23 civil parties groups, need to make their presentations, they have
24 to make sure that there is no repetition. You have to allocate
25 amongst yourselves to stand and make the presentations, but the

70

1 numbers shall be two, the maximum, and I remind you to follow
2 this instruction.

3 [13.40.15]

4 So please, once again, make sure not to repeat what has been said
5 by your colleague already, or what has been already in the
6 written pleadings that you already submitted. The floor is now
7 given to the civil party lawyers. Judge Lavergne, you may
8 proceed.

9 JUDGE LAVERGNE:

10 Yes, just a clarification, because I am not sure what you said
11 was clearly translated, Mr. President. The Judges are concerned
12 about the fact that some representations may be repetitive. When
13 many lawyers have to speak on the same subject, it would be good
14 to avoid any repetition, and it would also be good that only two
15 lawyers should speak, and this is to ensure that we work
16 efficiently. We are addressing this directive to all the
17 parties.

18 MR. PRESIDENT:

19 Counsel, you may now proceed.

20 [13.41.35]

21 MS. CHET VANLY:

22 Good afternoon, Your Honours. Good afternoon everyone. My name
23 is Chet Vanly, civil party lawyer. I would like to
24 wholeheartedly express our support to the arguments raised by the
25 Co-Prosecutors against the accused that, one, a fair judicial

71

1 system only existed in the mid-nineties; two, the civil war in
2 Cambodia is an obstacle to prosecute the offenders in a fair
3 trial; three, the obstruction by the accused to be prosecuted,
4 and then also on the existence of the ECCC law.

5 I would like to express my three points as the civil party
6 lawyers in relation to the expiries of the statute of
7 limitations. One is the equality before the law. Based on the
8 arguments raised by the defence counsel, they want the
9 perpetrator not to be prosecuted based on the expiry of the
10 (inaudible) according to the Penal Code of 1956, but the question
11 is will there be real justice if there is no one responsible for
12 it. If the victims did not be treated equally before the law as
13 declare that everybody is equal before the law, that is the
14 equality to be treated fairly before the law. That is the
15 constitutional law as well as the international law.

16 [13.43.35]

17 However, here, the victims are not treated equally both during
18 the Democratic Kampuchea period and during the present time. The
19 ECCC Law shall response to the suffering of the victims of the
20 entire Cambodian society who have been waiting in silence that
21 one day the perpetrators shall be fairly prosecuted.

22 Your Honours, I would like to raise the issue of inequality of
23 the treatments that the accused shall be responsible for the
24 victims during their power. No Cambodian citizens who has not
25 lost their beloved family members during the period. After the

72

1 collapse of the regime, the victims always stick to their view
2 that they do not revenge with another revenge, and they tried not
3 to take revenge for such suffering. The harms suffered by
4 millions of Cambodian people including my clients who were
5 killed, tortured, imprisoned, and other ill-treatments which are
6 the actual facts in providing the testimony to the Court, even if
7 the existence of the victims recognised by the ECCC does not
8 respond equally to the total number of the entire victims.
9 Every Cambodian citizen suffered. And they are waiting for this
10 Court, because they understand that the ECCC will shed light of
11 justice for them to compensate physically, emotionally and
12 materially, that they have lost 30 years ago. The question is
13 why the four accused were not tried during the time they were in
14 power? The answer is that everybody can understand that of
15 course they would not be allowed to be arrested and prosecuted,
16 in the case of Saddam Hussein. And here, for the Gaddafi, who
17 has been issued an arrest warrant by ICC, whether he is willing
18 to be arrested? The experience in the international criminal
19 tribunal indicates that those who are responsible for the crimes
20 they committed, they were only prosecuted after they lost their
21 power. And this is what is been doing here at the ECCC. The
22 prosecution of the four accused responds to a fair society that
23 you can commit the crimes but you will not be escaped from
24 prosecution.
25 [13.46.45]

1 Number two, the justice and the responsibility of the offenders.
2 The offenders shall be responsible, based on the justice that
3 both national and international societies want, and to what level
4 that is they shall be treated equally. On the contrary, the
5 instability in Cambodia, as well as the arguments raised by the
6 Co-Prosecutor cannot provide justice to the victims. Justice is
7 not only for the accused, but also needs to be awarded to the
8 victims.
9 For that reason, social justice, that criminal law can be
10 afforded to a party effectively is the determination of those who
11 are responsible for the crimes. This is the reasons why Article
12 3 of the ECCC Law extended the time limit of the domestic crimes
13 under the 1956 Penal Code to an additional 30 years in addition
14 to the ten years period existed previously.
15 [13.47.50]
16 In addition, regarding the effect of Article 3 of the ECCC, on
17 the 12th February 2001 (sic), the Constitutional Council of
18 Cambodia also interpreted that this article is constitutional.
19 Therefore, Article 3 of the ECCC Law, which extends the time
20 period of the crimes in violation of the 1956 Penal Code, is just
21 to facilitate the procedure to empower the ECCC to exercise its
22 jurisdiction over the offence and the perpetrators, and it does
23 not effect any substance of the Cambodian criminal law.
24 In addition, the implementation of Article 3 of the ECCC Law is
25 the contribution to the development of the criminal

74

1 responsibility, national and international, in particular the
2 bringing to trial of those senior leaders of Democratic Kampuchea
3 is requisite participation and contribution of the ECCC to the
4 criminal law, national and international. If the ECCC pay
5 attention to those who are responsible for the crimes rather than
6 to the time limit of the offence means this is the balance before
7 the law for both the accused and the victims.

8 [13.49.30]

9 On the contrary, if the accused, by the virtue of the time limit
10 of the offence, then there shall be no one responsible for the
11 crimes, and equality only exists in theory. To conclude, if your
12 Chamber allows the expiry of the time limit for the criminal
13 offence, then justice cannot be served to the victims. No one
14 will be responsible for the offence. Therefore, the prosecution
15 of the accused, who are the senior leaders, is the only fair
16 means for a legitimate society, and to mend the psychological
17 wounds of the victims.

18 Thank you.

19 MR. PRESIDENT:

20 Mr. Pich Ang, you may proceed.

21 [13.50.30]

22 MR. PICH ANG:

23 Mr. President, Your Honours, and everyone in and around the
24 courtroom. I am the lead co-lawyer representing civil parties.
25 My submission will be very brief. It will be made in a duration

1 of seven minutes.

2 My observation will also be made in response to observation made
3 by counsel Sa Sovan, who indicated that the statute of limitation
4 has already run out and there should be no prosecution beyond what
5 the time limit already indicated in the statute of limitations.

6 I would like to submit that the statute of limitations is very
7 important. And the limitation itself shall be set for a
8 significant period of time to prevent crimes from happening
9 again, and also to serve the interests for the victims who
10 suffered from the crimes that committed.

11 [13.52.05]

12 And of course, statute of limitations may run out, and if the
13 competent authority has failed to implement, to carry any
14 prosecutorial tasks during the given time, because the authority
15 itself has been, or has omitted to prosecute the accused, or the
16 offenders. It is really important that the Court issue a
17 judgment, the judgment which serves the interests of both the
18 victims and the accused, and the extension of statute of
19 limitation is necessary and appropriate.

20 Statute of limitations shall run out only when, for example,
21 after the accused person has been convicted and he or she remains
22 at large, and after that time he or she, if the statute of
23 limitations lapse, he or she shall not be prosecuted. But in
24 this particular case, the accused persons have been well known,
25 and we have already been familiar already that they have never

76

1 been regretful, they never say sorry for the crimes they could
2 have committed.

3 And the statute of limitation may lapse for example if the
4 evidence has been destroyed, or because time has passed and that
5 people's memory is poor, but when it comes to the case before
6 this tribunal, evidence is well collected, and it is really
7 important to find justice for the victims, the survivors of the
8 regime.

9 [13.54.45]

10 The Constitutional Council already ruled that the extension of
11 the statute of limitations, as my colleague already indicated, is
12 constitutional. And there was no prosecution so far against the
13 accused person during the past, and I would not like to repeat
14 this as my colleague has already indicated clearly, and since the
15 evidence has already been well collected, and that the accused
16 person's well known, and the statute of limitations can be
17 extended.

18 And we need to find out who is actually behind the heinous crimes
19 committed during the Democratic Kampuchea.

20 MR. PRESIDENT:

21 Could you please hold on a moment.

22 Counsel Pich Ang, you may now proceed.

23 MR. PICH ANG:

24 The extension of the statute of limitations before this tribunal
25 is appropriate and justifiable. I would like to submit, as well,

77

1 that the Trial Chamber can apply this statute of limitations.

2 Thank you.

3 [13.56.45]

4 MR. PRESIDENT:

5 Thank you, counsel, for the oral submissions. We would like now
6 to proceed to the defence counsel for any reply if they would
7 wish to do so.

8 MR. KARNAVAS:

9 Good afternoon, Mr. President, good afternoon, Your Honours, and
10 good afternoon to everyone in and around the courtroom. I do
11 have a reply, and because there were so many different arguments,
12 some overlapped, it will not be sort of a classic reply, but
13 rather I will try to touch upon the block issues that were
14 raised, and hopefully get through it all.

15 First, I would like to begin by addressing some of the very
16 passionate rhetorical speeches that we heard, primarily from the
17 civil parties, and we wish to convey the following. We agree
18 that this is a special court, created by special law. And we all
19 are in agreement that fairness should be for all, and that the
20 law should be interpreted to ensure that all parties benefit
21 equally under the law, although we do recognise and stress that
22 some parties have different rights than others. But all should
23 enjoy equal protection under the law.

24 [13.58.30]

25 We disagree that victims and civil parties should benefit,

78

1 because if the law goes against them, then there is no
2 reparations, there is no justice to them. We're not suggesting
3 that they should not benefit, that they don't have reasons to be
4 concerned, but what we are saying is that being a victim, in and
5 of itself, is not a justifiable reason not to apply the law,
6 however inconvenient the result may be.

7 And I also want to stress that what we're doing here today, and
8 in the past few days, and perhaps in the past, in the following
9 few days, we're trying to figure out the contours of the law as
10 it exists and should be applied before this tribunal, because
11 this is a special court, created by special law, and that's what
12 we're doing. We're trying to do our jobs to ensure that we know
13 what the law is before we go forward. We're not trying to deny
14 anybody anyone's right. But we are trying to figure out where
15 the contours of the law is, and we hope that everyone understands
16 that, and appreciates the reasons why we, in particular, the Ieng
17 Sary defence, have filed, I could easily say an unprecedented
18 amount of written pleadings in this case.

19 It is not for the purposes of a rupture strategy, and I mention
20 that because I believe that word came from the civil parties, not
21 today but yesterday or the day before. That is not our
22 intention.

23 [14.00.30]

24 Now moving on to the reply itself. As I understand it, one of
25 the reasons, or justifications I should say, that is being

79

1 presented by the prosecution and the civil parties is that the
2 court system was not functioning, and they gave a variety of
3 reasons, such as the DK destroyed the judicial system, and
4 targeted lawyers and judges. After 1979 there were only decree
5 laws, mostly focusing on betraying the revolution, drafters were
6 former teachers, not legal professionals. No right of legal
7 representation of one's choice, no right of appeal, no supreme
8 court until 1985. There was no Bar Association, and so on and so
9 forth.

10 Now, part of this information we received, of course, in my
11 opinion, comes very close to testifying. There may be something
12 in their submissions to justify these assertions, but I do think
13 it is dangerous for a prosecutor to suggest that you Judges, who
14 have lived through that period, you know best, rule based on your
15 experience. That is inappropriate. Why? It's inappropriate
16 because you must decide this case based on the evidence, the
17 evidence that comes through the witnesses, or through documents
18 that have been admitted.

19 And while you may have special experiences, and special
20 knowledge, if indeed that's going to be used in make a decision,
21 one that needs to be shared to all, what that knowledge is, and
22 what your opinion may be, or the facts may be as you understand
23 them, and put them on the record, and do be subjected to
24 confrontation. Now, I am not suggesting that the Judges be
25 cross-examined, but what I am saying, that it is inappropriate to

80

1 say, Judges, you know what it was like, there's no need to really
2 move onto that issue, look into that issue. That's for the -
3 those are facts.

4 I was here in 1994, 95, 96. I trained lawyers, and I was engaged
5 in a court reform project, where I went around the country, met
6 with judges, and had trainings. That does not give me the right
7 to give evidence as to what I believe the state of the legal
8 system was, or the capacity of the courts of Cambodia was. That
9 would make me a witness. So I urge you not to rule based on your
10 personal experiences, but based on the facts and the evidence.

11 [14.03.35]

12 Now, the very first decree in the RK was decree number one, which
13 established the tribunal that convicted Mr. Pol Pot and Mr. Ieng
14 Sary. We talked about that yesterday, I'm not going to belabour
15 the point. But thereafter, we have records, and we attempted to
16 introduce some of those records from the courts, to show that
17 trials were being conducted. The prosecution would have you
18 believe, and the civil parties, and there is some room for
19 flexibility on their part, that there was no functioning
20 judiciary, in Cambodia, at least functioning in a sense that you
21 could say that the rule of law was being applied to, from 91, 92,
22 and I believe it was 96. These were the years.

23 So as late as 1996, Cambodia did not have a functioning
24 judiciary, and of course part of it was because of the war.
25 Yesterday, we mentioned a document that was presented by the

81

1 prosecution, that was used by the prosecution in order to
2 establish a point, to clarify a matter. And they referred to
3 Decree number 28, Council of State, People's Republic of
4 Cambodia.
5 [14.05.10]
6 You will recall yesterday we were discussing about the word
7 pardon and amnesty, what, the variations. And so they wave this
8 document, this was the document presented last Friday, and
9 they're using this document as proof as to what, how you should
10 interpret that word, what is actually means. Well, if there was
11 no functioning judiciary, and nothing was functioning, and
12 nothing was proper, and nothing is credible, up until 1996, how
13 can they on the same hand turn to a document, when it suits them,
14 which is 1988, and say, see, this is proof. Accept this.
15 We are - - thus far, prosecution has not, and the civil parties,
16 have not presented any credible evidence that there was
17 absolutely no judiciary, and nothing could have been done. And
18 we submit that that's an error.
19 With respect to the conditions in Cambodia at the time, during
20 this period, up until 1996, first we, let me complement the
21 gentleman on the prosecution side which described all of the
22 reasons why the pardon was necessary. And he even used the Prime
23 Ministers' strategy, which was the win-win strategy. And at this
24 point in time, because I don't wish to repeat the gentleman's
25 remarks as far as the conditions, the war, the reasoning, all the

82

1 reasoning behind the amnesty and pardon, why they were necessary,
2 I simply wish to adopt those positions at this point in time for
3 our previous argument concerning why the royal pardon and amnesty
4 were important and necessary.

5 Now, one other point on the judiciary. The gentleman said that,
6 well, the judges were carrying out their jobs with courage and
7 objectivity. Yet at the same time, they would have us believe
8 that not a single case that was being held throughout this time,
9 not a single trial was a credible one. And we submit that if
10 that were the case, where has the UN, or the NGOs been, to
11 criticise all of the conduct of that particular government, the
12 founders of which, yesterday, according to the daily news, were
13 celebrating the 60th anniversary of the founding of the CPP.

14 We have no evidence. It is merely an assertion coming from them.
15 But if they were acting with courage and objectivity, then
16 obviously courts were functioning. And judge cannot be objective
17 if he's not independent. A court cannot be impartial if it is
18 not independent. Was it a perfect situation? No. But if you
19 pick up the newspapers and you read the reports on Cambodia
20 today, you hear the same refrain. Political interference, lack
21 of independence, and so on. Not just here in Cambodia, but
22 everywhere else around the world.

23 [14.08.50]

24 But does that mean that the judiciary isn't functioning to the
25 point where you could launch an investigation? The prosecution

83

1 indicated that the 1956 Penal Code was not in force at the time.
2 And he stated his reasons. Here's our reply. We submit that the
3 1956 Code was still applicable, because it had not been repealed
4 at that time. And it matters not whether the 1956 Penal Code was
5 in force at any time after 1979. The law that must be applied,
6 and I think we are all in agreement on this one, is the law that
7 existed at the time when the crimes were committed, albeit with
8 some qualifications based on the Establishment Law, some of which
9 we have been challenging.

10 Now the Constitutional Council considered whether extending the
11 statute of limitations contained in the 1956 Code would violate
12 the Constitution. Now they made their findings, but they made it
13 based on this 1956 Code, which means that it was applicable at
14 the time, and that's the code that you need to look to.

15 [14.10.20]

16 A brief remark regarding the Constitutional Council. When I gave
17 my opening remarks today, I've indicated that we differ. We find
18 that the decision made by the Constitutional Council is not a
19 correct one. However, we recognise that this Trial Chamber, and
20 this institution, has no authority over the Constitutional
21 Council, and it cannot overturn one of its decisions. And just
22 as I argued yesterday about the power of law, and how we must
23 apply it all the time, equally, not matter what the situation may
24 be, we find ourselves in the same situation here today.

25 And we say, yes, we are in agreement. That was the decision. We

84

1 do, however, submit that there may be an opportunity for you to
2 revisit the issue without necessarily finding that they acted
3 contrary to the Constitution. So let me begin by arguing -- I'm
4 going to touch upon, I won't take too much time, Your Honours.
5 Article 3 new of the National Crimes (inaudible), okay? This is
6 what we're going to be talking about. Now, they extended the
7 statute of limitations for homicide, torture and religious
8 persecution under the 1956 Code only, when those crimes are
9 charged in the ECCC, and we're indicated that this violates the
10 equal treatment enshrined in Article 31 of the Cambodian
11 Constitution, Article 3 of the Cambodian criminal procedure,
12 Article 7 of the Universal Declaration of Human Rights, Articles
13 14(1) and 26 of the International Covenant on Civil and Political
14 Rights.

15 [14.12.30]

16 We maintain, rightly or wrongly, and you will make that decision,
17 that the Constitutional Council does not appear to have
18 considered this issue of equal treatment when it pronounced
19 Article 3 new in accordance with the Cambodian Constitution. The
20 Constitutional Council's error in failing to consider the
21 Establishment Law's constitutionality in light of the requirement
22 of equal treatment before the law does not mean, does not mean
23 that the ECCC may simply apply Article 3 new. And that's where
24 we're hinging our argument.
25 Granted, it's a very narrow argument, but this is what lawyers

85

1 are doing when they're trying to define the contours of the law.
2 As a Cambodian court, the ECCC is bound by the Constitutional
3 Council's determination that the Establishment Law is
4 constitutional. We're all in agreement on that. However, the
5 ECCC is also bound to respect and uphold all provisions of the
6 Cambodian Constitution, Cambodian laws, and international human
7 rights conventions to which Cambodia is a party.
8 And there lies the friction, there lies the rub, and that's why
9 we're here making this argument today, Your Honours. Not because
10 we're trying to deny anybody of their rights, but because of
11 this.
12 [14.14.20]
13 Article 3 new violates Mr. Ieng Sary's right to equal treatment
14 because he could be charged with crimes that a similarly situated
15 Cambodian accused, in a Cambodian court, would not otherwise
16 face. That's why we maintain that there is a lack of equal
17 protection. The Pre-Trial Chamber found, in paragraphs 289 to
18 291 of the decision of our appeal against the Closing Order that
19 this argument concerning equal treatment "amounts to challenging
20 the ECCC's limited personal and temporal jurisdiction", and that
21 it must determine whether the ECCC's limited jurisdiction is out
22 of compliance with the obligations of equal treatment. This is
23 what the Pre-Trial Chamber, how they interpreted our argument,
24 and what the task was before them.
25 The Pre-Trial Chamber found that extraordinary or special courts

1 with limited jurisdictions are not, by their nature, in violation
2 of the right to equal protection enshrined in the Establishment
3 Law. The Pre-Trial Chamber turned the issue into whether the
4 creation of the Court with special jurisdiction is a violation of
5 equal treatment. We maintain that this is not the issue. We are
6 not arguing, we are not arguing that Cambodia could not create a
7 special court. If we had felt that that was the case, I can
8 assure you, we would have filed a written submission,
9 undoubtedly. And that would've probably been the first one.
10 We have submitted that this Court may not apply different
11 substantive laws than every other court in Cambodia, and that's
12 our position. The Pre-Trial Chamber found that the ECCC ensures
13 compliance with the fair trial requirements of Article 14 of the
14 International Covenant on Civil and Political Rights because fair
15 trial guarantees have been set out in the Establishment Law in
16 the Internal Rules. And yes, we acknowledge that. And we have
17 not argued that these guarantees are not set out in the
18 Establishment Law in the Internal Rules.
19 What we are asserting, that these rights exist -- while they may
20 exist in law, that in and of itself is a completely different
21 matter from whether the rights are being respected. It's a
22 rather nuanced argument, and again, to clarify points, because I
23 don't wish anyone, whether on the Bench or in the audience, to
24 misunderstand the purpose of our filings. Our purpose of our
25 filings is to ensure that the Trial Chamber has all the necessary

87

1 tools before it before we commence the taking of the evidence.
2 That we all understand what the laws are.
3 Since these issues are issues of first impression, for this
4 particular tribunal, we have availed ourselves to the laws that
5 allow us to make these submissions and challenges. We are
6 grateful that the laws provide that opportunity. It may seem at
7 times that we overstep our bounds by continually filing
8 submissions. We do not do so to disrupt, we do so because we
9 feel that there are areas in the laws that need to be
10 well-defined, and these issues are extremely complex.
11 And again, let me extend my gratitude to the Trial Chamber for
12 affording us this opportunity to be heard on these matters, and
13 we endeavour never to abuse the discretion that you have granted
14 us in making these oral arguments. Thank you very much.

15 [14.18.50]

16 MR. PRESIDENT:

17 Thank you, counsel. We note that counsel Phat Pouv Seang wishes
18 to say something.

19 MR. PHAT POUV SEANG:

20 Good afternoon, Your Honours, Mr. President, and the Court. I am
21 Phat Pouv Seang, the national co-lawyer for Ieng Thirith. I
22 would like to respond to the observations made by civil party
23 lawyers and the prosecutors concerning the statute of
24 limitations. I have observed that the civil party lawyers refer
25 to the expression of justice. Of course justice shall be equally

1 treated for every party, the victims and the accused. So since
2 justice is much needed by everyone, then we need to really refer
3 to law as the core principle for finding this justice.
4 The statute of limitations lapsed, and the civil party lawyers
5 and the prosecutors indicated that since the court was not
6 functional at that time, no judges, no lawyer, then such statute
7 of limitations shall be extended. I think it is not really
8 correct to do that, because with reference to the Penal Code of
9 1956, the statute of limitations for a crime is slated for end
10 years, and after ten year lapse, it lapses. And this crime
11 happens immediately, and the statute of limitations shall start
12 to run from 1979, and that by 1989 it's already run out.
13 The ECCC should really look at the responsibilities of the
14 individual rather than looking into the statute of limitations.
15 This is as what indicated by the civil party lawyers and the
16 prosecutors. And counsel Pich Ang already indicated that the
17 term of statute of limitations. Now I would like to draw your
18 attention to 1992 when UNTAC came to Cambodia. At that time
19 there was a law, transitional criminal law, and so far as I
20 remember, the final provision states that all provisions that are
21 contradictory to these rules shall be abrogated.
22 So if such matter has already been abrogated by UNTAC law, why
23 should we really review this. In 2004 the Law on the
24 Establishment of the ECCC was in place, and that the statute of
25 limitations has been extended to additional 30 years. It means

1 that the previous statute of limitations has already run out. I
2 would not like to interpret the decision by the Constitutional
3 Council, but look, in this particular situation the previous
4 statute of limitations of the crimes already lapsed, and that the
5 new or the extension of such a limitation was installed.

6 [14.23.45]

7 From 1979 to 1993, as indicated by civil party lawyers and the
8 prosecutors, of course there were a shortage of resources, not
9 enough lawyers, prosecutors or judges. Intellectuals died, and
10 they really made use of teachers to help the court. And it is
11 really what we could do, of course, at that time, you know, we
12 had to love what we had, and that was the ability, that's what we
13 could do back then. And the decree law was actually issued by
14 the State Council.

15 At that time, in the Constitution of the People's Republic of
16 Kampuchea, the State Council was the permanent member of the
17 Assembly, so during that time, the member really issued or
18 adopted this decree law, and this decree law must be applicable,
19 and no one could not really say that it was inapplicable, because
20 at that time, our country was the socialist state. And in 1980
21 there was another decree law which was decree law number two with
22 relation to criminal cases to be applied in Cambodia.

23 In 1982, the law on the functioning of the trial court was
24 established to prosecute crimes, including robberies, and most
25 importantly, crimes concerning the betrayal of the revolution.

90

1 We had the court. No one could say there was no functional court
2 at that time. The court was in place, and people who were found
3 guilty and sentenced to death was given seven days to appeal such
4 a decision. And these provisions, the capital punishment
5 provision were there, and we -- or I can conclude that of course
6 there was a court, a functioning court, whether that court was up
7 to the international standard or not, I think it is still being a
8 matter for further research and discussion.

9 And if we look at the Constitution of 1981, and have it compared
10 with the Constitution of 1993, I think it is really inappropriate
11 to compare the two constitutions, because it's like comparing a
12 palm tree to a human being, because at that time, when we just
13 emerged from the war and the destruction and it was the first
14 constitution in place that be applied. It doesn't matter what
15 kind of law being in place, it was already applied and enacted by
16 the State Council who was the permanent member of the Assembly.

17 And also our country created several courts and laws and
18 regulations, and again, people were prosecuted or convicted, or
19 sentenced to death, and they were executed at Kambuol (?phonetic)
20 for example, so really had functional court. In 1979, we have a
21 council for people, to save people from the war, and that the
22 laws also were in place. I think without such laws and
23 provision, country would really be plunge into chaotic
24 situations. I was there, and I witnessed everything, and I am
25 very precise when it comes to the existence of the proper

91

1 judicial system in Cambodia back then.

2 If we look at the retroactivity issue. If the statute of
3 limitations has run out, and it is extended, and of course people
4 need to really apply the principle of retroactivity of the crime,
5 but I think since the statute of limitations has run out, we
6 shall not be looking into trying the crimes that already has its
7 statute of limitations lapsed.

8 MR. PRESIDENT:

9 We have a technical issue. The Internet is not working, and the
10 IT technicians need to work on that. Also it is appropriate for
11 us to take a short adjournment. We shall take a 20 minutes break
12 and we shall resume at ten to three.

13 (Judges exit courtroom)

14 (Court adjourns from 1437H to 1452H)

15 (Judges enter courtroom)

16 MR. PRESIDENT:

17 Please be seated. The Chamber is now back in session.
18 Before we proceed to the next item of the agenda the Chamber
19 would like to inform the parties as follows: the parties are
20 advised that when the discussion concerning the witnesses,
21 expert, and civil party list begins, they should bear in mind
22 that until a specific decision is made no witness, expert, or
23 civil party has as yet been rejected. They are also asked to
24 limit their comments as far as possible to those witnesses,
25 experts, and civil parties whose names have been included in the

1 tentative list, and to recall that this list is for the first
2 phases of the trial.
3 [14.55.30]
4 Next we proceed to the next item concerning the initial
5 specification of reparations sought pursuant to Internal Rule --
6 under the Internal Rule 23 quinquies (b). Under the Internal
7 Rules as amended, the civil party lead co-lawyers may seek two
8 distinctive avenues of reparation. If they choose, they may seek
9 reparation in the form of a civil claim against the accused.
10 This was the sole form of reparation available to civil parties
11 in case 001 before the ECCC, and it has been retained under the
12 present rules.
13 As clarified in the verdict in case 001 against Kaing Guek Eav
14 alias Duch, these awards are granted against an accused if he or
15 she is convicted, and enforced, where necessary, by ordinary
16 Cambodian courts.
17 Should this avenue be considered unlikely to result in meaningful
18 reparation for victims, the revised rules now permit the civil
19 party lead co-lawyers to instead propose reparations initiatives
20 which can then be facilitated by the Victim Support Section via
21 project management.
22 These initiatives do not result in enforceable claims against the
23 accused. Instead the success or otherwise of these initiatives
24 will depend on the ability of the victim's support section to
25 obtain sufficient funding and support of each initiative and to

1 oversee their successful implementation.
2 Reparations under either model before the ECCC are collective and
3 moral; that is, essentially symbolic in character. Neither
4 avenue envisages direct financial compensation to individual
5 civil parties. This is impracticable in view of the exceedingly
6 large number of individual victims and the unlikelihood that
7 significant funds could be found to satisfy any more than a small
8 proportion of such individual claims.

9 [14.59.17]

10 As indicated at the trial management meeting and subsequently in
11 the agenda for the initial hearing, the lead co-lawyers had been
12 granted an opportunity to provide initial specifications of the
13 substance of the reparations awards which they intend to seek
14 within the final claim for collective and moral reparation
15 pursuant to Rule 23 quinquies 3(b).

16 The civil party lead co-lawyers have been allocated to one hour
17 for this purpose.

18 The Trial Chamber is aware that all admissibility appeals
19 regarding individual civil parties have been rendered. The early
20 indications provided by the civil party lead co-lawyers as to the
21 nature of their reparations claim, provided important early
22 indications to the Trial Chamber. It is recognized that the
23 particulars of the award sought may evolve over time.

24 Now it is opportunity for the lead co-lawyers to proceed.

25 MR. PICH ANG:

94

1 Good afternoon, Mr. President. Good afternoon, Your Honours.
2 Good afternoon, venerable monks, and the general public in the
3 main courtroom, as well as those overseas. The lead co-lawyer,
4 pursuant to the Internal Rules, shall raise the initial
5 specifications of the reparation awards that we intend to seek
6 during the final part of the hearing.

7 I, Pich Ang, the international lead co-lawyers, and we have Ms.
8 Elisabeth Simonneau-Fort, will make our presentation regarding
9 the reparation awards that we intend to seek and we will allocate
10 the times amongst ourselves. After my presentation then my
11 colleague will make her presentation within this one-hour period.
12 [15.02.26]

13 To start with, in regards to the reparations awards, the
14 acknowledgement of the crimes or the violations of human rights
15 at the national and international levels is a major concern.
16 Victims actively participate in seeking out the truth and
17 justice. The victims, within the context of the ECCC, request to
18 be civil parties, some to be the complainants and some to be
19 witnesses.

20 For those who apply to be civil parties have their intention to
21 seek the truth and justice and to seek reparation awards for the
22 victims as well as for the society as a whole. Although not on
23 every occasion the request shall be accepted, at least certain
24 awards shall be given to the civil parties, and that would also
25 benefit the victims in general, and would mend their heart. In

1 fact, the awards that they receive cannot repair their suffering
2 caused by the harm, at least it contributes to help them to heal
3 their psychological wound, to make their feeling better
4 gradually, and that is the right of the victims to receive an
5 appropriate solution due to the violations of their fundamental
6 rights.

7 During the leadership of the three years, eight months period the
8 leaders and those who had senior positions who are allegedly
9 involved in the crimes committed which caused to the loss of a
10 huge number of innocent lives, and that's a serious violation of
11 both national and international law.

12 [15.05.15]

13 The Kingdom of Cambodia with the support from the United Nations
14 established the ECCC which is a court within the domestic
15 judiciary in order to prosecute the crimes committed during such
16 period. And it is also responsible in providing the reparation
17 awards to the victims. And what are the legal basis for these
18 reparation awards?

19 Within the context of this Court, as for the international
20 justice, it is understood that the awards are all the measures to
21 repair to the harms done, suffered by the victims and the harms
22 caused the suffering and as a consequence of a crime. National
23 standards ensure their rights to be result for the reparation for
24 the victims for all the offences which affects their interests
25 and their right. The rights to receive this reparation is done

1 through the judiciary system.

2 The Constitution of the Kingdom of Cambodia, Article 31, states

3 that the Cambodia acknowledge and respects the right as

4 stipulated in the United Nations rights, the Universal

5 Declarations of Human Rights, and other conventions related to

6 the human rights, the rights of women and children. We all have

7 the obligations to respect their right, with no prejudice to the

8 race, religions, political tendencies, for example. Article 39

9 of the Constitution states about the rights of the public to

10 request for the reparations of any violations committed by a

11 state institution or officer through the judiciary system.

12 In addition, the Code of Criminal Procedure 2007 clearly states

13 about the right and intention of the request for reparations

14 within the criminal offence. The Code of Criminal Procedure,

15 which was promulgated in 2007, states the right of any individual

16 which has been violated, they have the rights to request to the

17 Court to abolish such violations or to provide a reward to them.

18 And also in Article 10, the right involved the individual

19 includes the rights which -- the rights to life, the rights to

20 health, and they're honoured.

21 [15.08.20]

22 The ECCC here we also have Rule 80 bis regarding the Initial

23 Hearing, which states in paragraph 4, that:

24 "The Chamber may require the lead co-lawyers to provide the

25 initial specification of the collective and moral award that we

1 intend to seek in the final claim according to Rule 23 quinquies
2 3(b) of the Internal Rules. The Chamber shall require the lead
3 co-lawyers to provide the specification of the reparation awards.
4 Point 5 of the Rule it states:
5 "The final claim for collective and moral reparation may deviate
6 from the initial specification where necessary, but should, in
7 any case, specify both the substance and the mode of
8 implementation of each award."
9 Rule 23 quinquies 3(b) in relation to the final claim shall
10 require for additional information, and for each claim the
11 Chamber may order that they also be borne by the accused, and
12 recognize that a specific project appropriately gives effect to
13 the awards sought by the lead co-lawyers and may be implemented.
14 Such projects shall have been designed or identified in
15 cooperation with the Victim Support Section and have secured
16 sufficient external funding.
17 [15.10.22]
18 This is what stated in the Internal Rules and that can be -- that
19 is applicable within the ECCC. Also, the international
20 provisions states to such effect, and for further details I would
21 like to give the floor to my colleague to provide the details.
22 MS. SIMONNEAU-FORT:
23 What are the provisions of international law regarding the law on
24 reparations? The right to reparations is recognized
25 international law by conventions, some U.N. organizations, and

1 the United Nations human rights protection system. We can refer
2 particularly to the Universal Declaration of Human Rights, a
3 fundamental source of the instruments and jurisprudence relating
4 to the issue of reparations. The document provides that all are
5 entitled to reparations before courts for violations of his or
6 her rights, recognized by the law.

7 And then we have Article 23(a) of the ICCPR of 1966. It provides
8 that states that are signatories of that covenant commit
9 themselves to recognize that all persons whose rights are
10 violated will have recourse, even when those violations were
11 committed by persons acting in an official capacity. All persons
12 who are victims of arrest or illegal detention are entitled to
13 reparations.

14 Then regarding human rights violations, crimes committed against
15 citizens, and the recognition of the harm suffered or likely to
16 be suffered, in 1985 the United Nations General Assembly adopted
17 a document entitled, "Declaration of Basic Principles of Justice
18 Relating to Victims of Crimes and Victims of Abuse of Power."
19 This Declaration lays out fundamental principles and are
20 supporting governments and the international community in their
21 efforts to ensure that justice is done and that victims of crimes
22 and victims of abuse of power are compensated, and making sure
23 that they have access to justice, restitution, and compensation.

24 [15.13.32]

25 The Declaration stipulates that it is not possible to obtain

1 complete reparation from the perpetrators of the crimes, and the
2 states themselves have to shoulder the financial costs:

3 "Victims who have endured bodily injury, or physical or mental
4 injury following serious criminal acts and (b) families, and
5 particularly persons who are dependants of deceased persons, or
6 who are mentally incapacitated following the crimes of which they
7 are victims..."

8 And lastly this Declaration encourages:

9 "The establishment, the strengthening, and expansion of national
10 funds for compensation of victims."

11 And it states:

12 "Depending on the needs, it would be proper to establish other
13 funds and compensation mechanisms, particularly in cases where
14 the states whose victims -- the states -- that are the states of
15 the victims are not in a position to obtain compensation."

16 It is proper with reference to victims of international
17 humanitarian law and victims of human rights according to the
18 principles defined by Von Boven and Bassiouni on the one hand and
19 Joint. United Nations General Assembly adopted, on the 21st of
20 March 2006, a resolution relating to:

21 [15.15.20]

22 "Fundamental principles and directives regarding the rights to
23 recourse and reparations for victims of grave violations of
24 international humanitarian law and serious violations of human
25 rights."

1 These fundamental principles adopt a perspective that places
2 victims at the very forefront and sets out in detail the
3 procedure for the award of victims to award of reparations that
4 are, "effective, rapid, and adequate to victims", and this is
5 proportionate to the gravity of the violations or the prejudice.
6 Besides, Principles 15 to 18 recall the objectives of the
7 reparations which are aimed at ensuring that victims obtain full
8 and effective reparations. The type of reparations that are
9 described and detailed in Principles 19 to 23 are as follows, and
10 I quote:
11 "Restitution, compensation, rehabilitation, satisfaction, and,
12 lastly, the guarantee that those crimes will not be repeated."
13 I would now like to focus on international jurisprudence and talk
14 about the nature of the reparations. The ECCC Internal Rules
15 provide that the request for reparations will be filed in two
16 phases, what is of interest to us today is the first phase.
17 Regarding this first phase, Rule 80 bis only demands that the
18 specifications should be an estimate, that we will provide
19 initial specification of the substance of the awards, without
20 specifying the form nor the exact contents of the request, for
21 purposes of comparison. Neither Cambodian law, nor the practice
22 of ad hoc tribunals, nor that of the Inter-American Court of
23 Human Rights makes provision for such a two-tier procedure.
24 Before the International Criminal Court, according to the rules
25 of procedure and evidence, applications for reparations do not

101

1 have to be comprehensive. All they need to contain is a request
2 for compensation, a request for rehabilitation, or reparations,
3 on the order forms. It is therefore difficult to rely on
4 international jurisprudence to specify the outlines and initial
5 specifications of the nature of reparations.
6 [15.18.45]
7 Perhaps only the interstate complaints mechanism of the European
8 Court of Human Rights can shed some light on these notions
9 regarding initial specifications of the nature of reparations.
10 As such, the European Court of Human Rights demanded that states
11 provide "the outlines of what would be fair and satisfactory".
12 Like the civil parties before the ECCC the petitioner before the
13 European Human Rights Court has to provide some indications of
14 the reparations requested. In the case of *Georgie v. Russia* the
15 initial specifications of the government invited the court to
16 "award fair and satisfactory reparations that would be tantamount
17 to compensation, reparation, damages, restitution in integrum,
18 cost and expenses, and all other measures that are likely to
19 compensate the victims for all material and psychological harm
20 suffered on account of the violations of the present procedures."
21 It is therefore in this context of jurisprudence which is still
22 embryonic that the co-lawyers of the civil parties are presenting
23 before this Chamber the initial specifications of the nature of
24 the reparations required.
25 I would like to stop here and focus on civil parties and the

1 notion of civil parties because there can't be any reparations
2 without civil parties, and in this regard I would like to say a
3 few words.

4 The Internal Rules of the ECCC, relying on the Cambodian Penal
5 Code, which is based on French civil law, has introduced the
6 notion of civil parties in its trials. Rule 23(1)(b) specifies
7 that "Civil party participation is aimed at seeking collective
8 and moral reparations in accordance with Rule 23 quinquies."

9 [15.21.25]

10 The presence of civil parties at hearings cannot be considered as
11 a measure aimed at ensuring that victims participate in the
12 proceedings by expressing within a strictly circumscribed
13 framework via anger, anxiety and pain. Nothing stops them from
14 doing so, from expressing such phenomena while contributing to
15 bring the truth to light, but this is not enough in defining the
16 role of a civil party.

17 The civil party is not a guest attending trials to please the
18 victims as if they were being offered some kind of gratification,
19 some kind of reparation. A civil party is not only an
20 opportunity to give victims an opportunity to be associated to
21 the trial. All criminal proceedings that are open to civil
22 parties are not designed to meet the victims' benevolent needs.
23 Civil parties are not invited guests. They have a right that is
24 recognized and defined in national and international legal norms.
25 It is a right that is on an equal footing with other participants

1 in the trial. It is therefore well-founded before the criminal
2 proceedings, before the ECCC, which is subject to international
3 jurisprudence.

4 Civil parties working with the prosecutor have the rights of all
5 parties. They can request documents. They can express their
6 points of view in oral submissions and written submissions. And
7 particularly in the case of civil parties they can seek
8 reparations.

9 The Internal Rules when they refer to the rights of civil parties
10 to equality of arms also concern the civil parties as well as
11 other parties. The civil parties who are involved in the acts in
12 question, they endured those acts, and in the face of the accused
13 they are victims of the violations and this is obviously one of
14 the key issues. Without civil parties the crimes wouldn't exist.
15 Civil parties are therefore more than victims. They are
16 therefore protagonists in the trials. So their points of view
17 are unique and their contributions are crucial. They are
18 entitled to seek reparations but they have to wait to make sure
19 that guilt is established.

20 [15.24.32]

21 Because the civil party was party to the facts it is in a
22 position to contribute to the ascertainment of the truth, thus
23 its first objective is to ascertain the truth as well as to
24 establish the guilt that makes this person a victim.

25 The second objective of the civil party is reparation.

104

1 Reparation was enshrined as a right, and including the request
2 for reparation in a criminal trial is allowing a link to exist
3 between this reparation and the acts that are prosecuted. It is
4 providing its full meaning to the right to reparation. It also
5 means giving meaning to the sentence, and the link between the
6 civil party and the sentence is the gravity of the facts.
7 Treating reparation separately from a criminal tribunal is
8 removing part of reality from both of these elements. Requesting
9 reparation as a result of the criminal trial, after having
10 participated as a party is the result of a judicial and juridical
11 process which implies a victim, a guilty person, harm and
12 reparation.

13 Now I will let my colleague continue.

14 MR. PRESIDENT:

15 Please turn on your microphone.

16 MR. PICH ANG:

17 The Internal Rule requires for the crimes to the result of the
18 acts in and related to the civil parties the civil party
19 applicants need to show that the direct cost of the acts or
20 crimes alleged against the accused that they are the direct --
21 they directly suffered physically, emotionally, or materially, in
22 order to be eligible to seek reparations, and there needs to be a
23 link between the award claimed and the harm suffered, and it also
24 needs to be related to the facts.

25 [15.27.15]

1 The existence of the harm and its connection to the facts under
2 the scope of the investigation is shown through the result of the
3 investigation by the Co-Investigating Judges. They asserted that
4 all the complainants provide sufficient evidence that they
5 directly suffered harms as the cause of those crimes.

6 The relation between the facts and the harm caused were also
7 identified by the Co-Investigating Judges. The Co-Investigating
8 Judges said that after reviewing all the information submitted by
9 the civil party applicants, there is sufficient information that
10 the harm caused is a result of the acts under the judicial
11 investigation as stipulated in the supplementary introductory
12 submission by the Co-Prosecutors.

13 Those who seek moral and correlative reparations according to the
14 Internal Rules means that the Chamber can decide on the awards
15 for the civil parties only. The consultation with the civil
16 parties shall be done and during such process the civil party
17 indicate the awards that they seek through their lawyers, and
18 then the lawyers submit that to the lead co-lawyers and we
19 combine all those requests for the awards after discussing with
20 all the lawyers.

21 [15.29.10]

22 And when we receive the decision of the Pre-Trial Chamber
23 recently, that is on the 24th of June 2011, we also received the
24 newly recognized civil parties totalling 1,728 and it is
25 necessary for us to consult with the newly recognized civil

106

1 parties in order to ensure that they can express their desires
2 for the reparation of what they seek, and then we will collect
3 and gather all those requests in order to make a joint request to
4 the Trial Chamber to be recognized for those awards request.
5 The awards will be only given to the civil parties. However, it
6 also can benefit the victims and the Cambodian citizens. And
7 such reparation awards cannot be for any individual civil party,
8 it is collective. It is for the consolidated group and it's a
9 response to the needs of those members of the consolidated group;
10 for example, for the victims who are Vietnamese ethnicity or
11 those who are the victims who are monks, or who are Cham
12 ethnicity.

13 The Internal Rules states about the effect that the convicted
14 person shall be bound for all the awards through the requests by
15 the lead co-lawyers. The lead co-lawyers will also consult with
16 the civil party lawyers after their consultation with their
17 clients.

18 In working with the Victim Support Section, we're actively
19 collaborating together to collect the requests and opinions by
20 the lawyers and by the other NGO's and we continue to study in
21 order to form tangible projects that can be accepted.

22 The reparation award intended to be sought by the lead co-lawyers
23 are based on the projects that will be formulated by the Victim
24 Support Section after going through various stages of discussion
25 so that it can be appropriate.

1 After the discussion with the civil party lawyers it is shown
2 that there are four major forms of awards, one is related to the
3 memorial, two, it is related to the rehabilitation, three, it is
4 related to the compilation of documents and education and number
5 four, other awards.

6 [15.32.45]

7 At the same time, pursuant to Rule 80 bis of the Internal Rule,
8 with instruction from the Trial Chamber, on the contents of the
9 reparation awards, the civil party lawyers will submit such an
10 initial request pursuant to the instructions of the Trial
11 Chamber.

12 In Chapter 4 that I just mentioned, the details include the
13 memorial and the remembrance. The civil parties would like to
14 request the recognition of a day to remember, that is a
15 remembrance day, and it has not been decided yet. It could be
16 the day that becomes an official public holiday or could be a day
17 of remembrance to remember the genocide at the international
18 level.

19 There is also a request for the establishment of a stupa and a
20 memorial site where appropriate and there should be stupas where
21 other observers of various religions could come and pay respect
22 regardless of their origins of the religion. There is no
23 specification as to the numbers of the stupas to be designated.
24 The civil parties also intend to request for the preservation of
25 the killing sites. It is important that we need to study in

1 details which sites are considered to be the sites where a major
2 number of people were executed.

3 In the second chapter that is in relation to the rehabilitation,
4 there are two sub-points; that is the establishment of a
5 framework, the psychological project, and services where those
6 people can receive such treatment free of charge, and there shall
7 be various other centres to provide such services.

8 [15.36.00]

9 And number two, that is also in relation to the rehabilitation,
10 there shall be a consultation program where the victims could
11 consult among themselves in order to minimize their psychological
12 suffering when they meet one another so that they can relieve the
13 suffering that they have been endured for so long.

14 Regarding the compilation of document and education there are
15 three subpoints. There should be educational programme in which
16 there should be education about the history of the Democratic
17 Kampuchea and some parts of the programme have already been
18 implemented.

19 Two, there is a request for the establishment of a centre which
20 is partly a museum and an archive or a library where people can
21 go and visit. The size of the centre is dependent on the
22 affordability and the location. And there is also a request for
23 a large museum where historical books shall be compiled in
24 relation to the history of the Khmer Rouge, and that museum shall
25 be established in Phnom Penh.

1 Another point that is request for the compilation of the list of
2 victims, and finally, in relation to this type of the award that
3 I received from civil parties through the civil party lawyers,
4 which we have not discussed in details yet due to its complexity,
5 is that there is a project dealing with provision of citizenship
6 to those Vietnamese victims, and there is an educational project
7 for children -- all the children of those who were born as a
8 result of forced marriages during the Khmer Rouge regime.
9 There is also a project to establish a trust fund, and there is
10 also a request to establish that trust fund in order to pay for
11 those reparation awards. There is also a request for the
12 dissemination of the judgment in case 002 so that the public can
13 understand it.

14 [15.39.30]

15 These are all the projects that have been raised and consulted
16 amongst the civil party lawyers and the lead co-lawyers after the
17 consultation with the civil parties. And in fact there shall be
18 further discussions with the newly recognized civil parties, that
19 is the 1,728 new civil parties recognized by the Pre-Trial
20 Chamber. Therefore, it is likely that the initial specifications
21 of the awards may change.

22 I would like now to give the floor again to my colleague to make
23 the final presentations regarding the initial specifications of
24 the reparation awards.

25 Thank you, Your Honour.

110

1 MS. SIMONNEAU-FORT:

2 Yes, simply I would ask for a few moments to retain your
3 attention, and also I would like to present a few ideas to think
4 about.

5 We have presented to you our first indications on the nature of
6 the reparations that we are seeking, and we were subject to very
7 few obligations at this stage so therefore we have the
8 possibility of modifying our requests and adding in, and it's
9 obvious that we will be obliged to do so because we are
10 representing extra civil parties, many of them, that we must
11 consult with, and also because we are facing obligations in terms
12 of the elaboration of these reparation measures.

13 [15.41.35]

14 This leads me to say that if we were in a position to present you
15 the first indications without many obligations, we had to follow
16 many stricter obligations from the Internal Rules, requirements
17 that we could call extraordinary and exceptionally demanding
18 because we are asked either to turn against the accused, or to
19 draft projects on our own that are specific of which
20 specificities we will have to underscore and to provide
21 sufficient clarification under implementation mode, and finally
22 to provide the guarantee that there will be sufficient financing
23 to back these projects.

24 And such demands are unique in international and national courts
25 and they might represent quasi-sanctions for the civil parties.

111

1 They might even represent a potential obstacle to the right to
2 reparation and the civil party lawyers will make sure that this
3 does not happen.

4 Another one of my thoughts is that when we will have gone, when
5 the Court will close and when its work of justice will be
6 completed, what will remain here is the sanction, if there is a
7 sentence, and of course the reparations. And the civil party
8 co-lead lawyers as well as the civil party lawyers, would like to
9 underscore again the symbolic and legal importance of these
10 judicial reparations that represent a fundamental right that the
11 civil parties may not be deprived of.

12 And their scope, and the scope and the obligations involved in a
13 verdict seem obvious, and provide judicial reparations their full
14 value that cannot be equated with the lesser value but however
15 important of non-judicial measures which by definition are not
16 linked to the verdict. And the choice of a trial imposes that
17 each party's right be respected and that the principles be
18 respected as well.

19 [15.44.15]

20 And I would like in order to close this subject today to tell you
21 that we're respectfully requesting you to take note of these
22 first indications on the nature of the reparations we intend to
23 seek, but especially we would like to entrust the Chamber to
24 implement the reparations as a right and not as an obligation.

25 MR. PRESIDENT:

112

1 Thank you, lead co-lawyers, for your presentation.

2 Do any of the other parties have any observations to make at this
3 point regarding the presentation made by the lead co-lawyers?

4 You may take the floor if you have.

5 I observe there is no points to be raised by any other parties.

6 Today's agenda regarding the oral arguments and their
7 presentations seem to be appropriate for the time being for
8 today. We therefore adjourn for today's hearing and we shall
9 resume tomorrow morning starting from 9 a.m. This is the
10 information for all the concerned parties and the public.

11 Security officials you are instructed to bring the three accused
12 back to the detention facility and bring the four accused back to
13 this courtroom before 9 a.m. tomorrow.

14 THE GREFFIER:

15 All rise.

16 (Court adjourns at 1545H)

17

18

19

20

21

22

23

24

25