



**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

Supreme Court Chamber

**TRANSCRIPT OF APPEAL PROCEEDINGS - KAING GUEK EAV "DUCH"**

**PUBLIC**

Case File N° 001/18-07-2007-ECCC/SC

30 March 2011, 0858H

Proceedings

<b>ឯកសារដើម</b>
<b>ORIGINAL/ORIGINAL</b>
ថ្ងៃ ខែ ឆ្នាំ (Date): 06-Apr-2011, 12:59
CMS/CFO: Uch Arun

Before the Judges: KONG Srim, Presiding  
 Motoo NOGUCHI  
 SOM Sereyvuth  
 Agnieszka KLONOWIECKA-MILART  
 SIN Rith  
 Chandra Nihal JAYASINGHE  
 YA Narin  
 MONG Monichariya (Reserve)  
 Florence MUMBA (Reserve)

Lawyers for the Civil Parties:  
 TY Srinna  
 MOCH Sovannary  
 HONG Kimsuon  
 KIM Mengkhy  
 Karim KHAN  
 Silke STUDZINSKY  
 Martine JACQUIN  
 Elizabeth RABESANDRATANA

Greffiers/Legal Officers:

SEA Mao  
 Christopher RYAN  
 PHAN Thoeun

For Court Management Section:

UCH Arun

For the Office of the Co-Prosecutors:

CHEA Leang  
 Andrew CAYLEY

The Accused: KAING Guek Eav

Lawyer for the Accused:

KAR Savuth  
 KANG Ritheary

*Extraordinary Chambers in the Courts of Cambodia  
Supreme Court Chamber - Appeal*

*Case No. 001/18-07-2007-ECCC/SC  
KAING GUEK EAV  
30/3/2011*

**List of Speakers:**

Language used unless specified otherwise in the transcript

<b>Speaker</b>	<b>Language</b>
MR. CANNONE	French
MR. HONG KIMSUON	Khmer
MS. JACQUIN	French
MR. KANG Ritheary	Khmer
MR. KAR Savuth	Khmer
MR. KHAN	English
MR. KIM MENGKHY	Khmer
JUDGE MILART	English
MS. MOCH SOVANNARY	Khmer
MS. STUDZINSKY	English
THE ACCUSED (Kaing Guek Eav alias Duch)	Khmer
THE PRESIDENT (KONG Srim, Presiding)	Khmer
MS. TY SRINNA	Khmer
JUDGE YA Narin	Khmer

1

1 (Judges enter courtroom)

2 MR. PRESIDENT:

3 Please be seated. The Supreme Court Chamber is now in session.

4 Today we will hear the appeal hearing by the civil parties. The

5 Greffier, can you report on the presence of the parties?

6 SEA MAO:

7 Good morning, Mr. President. Today all parties are present.

8 However, two counsels for civil parties are absent, Alain Werner

9 and Mrs. Elisabeth Rabesandratana for groups 1 and 3

10 respectively. The individual civil parties totally in eight, Him

11 Mom, Ly Hor, Phoak Khan, Morn Sothea, Chum Sitha, Chum Sirath, Im

12 Sunthy, and Phuong Sunthary. Thank you, Mr. President.

13 MR. PRESIDENT:

14 Can you clarify again, I think there is a signal from the civil

15 parties counsel.

16 SEA MAO:

17 My apologies, Your Honour. Mrs. Elisabeth Rabesandratana, I

18 didn't see her before.

19 MR. PRESIDENT:

20 I would like now to give the floor to the co-rapporteur Judges on

21 the reparations for civil parties.

22 JUDGE YA NARIN.

23 Thank you, Mr. President. Following is the co-rapporteur's

24 report on the reparations for civil parties.

25 By way of reparation the Trial Chamber ordered the compilation of

2

1 all statements of apology and acknowledgements of responsibility  
2 made by Kaing Guek Eav during the course of the trial, and  
3 ordered that the compilation be posted.  
4 Certain civil parties were rejected by the Trial Chamber  
5 Judgment. The twenty four civil party applications were based on  
6 one or more of the following reasons, as follows. The civil  
7 party applicants who claims to be the direct victims of crimes  
8 committed by Kaing Guek Eav alias Duch at S-21 or S-24 could not  
9 present appropriate evidence. B, the civil party applicants who  
10 claim to be victims whose close relatives suffered at S-21 did  
11 not supply sufficient or appropriate evidence to support for the  
12 crimes committed by Kaing Guek Eav alias Duch. And civil party  
13 applicants who showed kinship or special bond in relation to  
14 immediate victims of S-21 or S-24.  
15 [9.03.35]  
16 The claims for reparations by groups 1, 2 and 3, totaling 23,  
17 raise arguments in their brief. There are four reasons to reject  
18 the rejections by the Trial Chamber Judgment.  
19 The Trial Chamber erred in law by giving inadequate and  
20 insufficient reasoning in dealing with the civil party  
21 applications, during and after the trial. B, the Trial Chamber  
22 erred in law in determining the civil parties status by applying  
23 a strict standard. Cambodia, the Trial Chamber erred in law by a  
24 standard for the determination of civil party status which is not  
25 stipulated in the ECCC Law or the Internal Rules. They erred on

3

1 the civil party applications who are not victims of S-21 or S-24  
2 or whose relatives are not the direct victims of S-21 or S-24 or  
3 failed to show the kinship or special bond with the direct  
4 victims. D. Civil party group 1 argued that the Trial Chamber  
5 interfered with the seeking for justice without telling in  
6 advance the civil party applicants the standard applied in making  
7 the decision on the civil party status.

8 Civil parties in groups 1, 2 and 3 made a submission to file  
9 additional material to the Supreme Court Chamber. The Supreme  
10 Court Chamber accepted those submissions.

11 There is no response filed before the Supreme Court Chamber for  
12 those submissions.

13 During this appeal hearing civil party groups 1, 2 and 3 are  
14 invited to present specific proposals to the requested  
15 disposition of the Judgment, the facts and the law and their  
16 expectation from the Trial Chamber's Judgment.

17 In relation to reparations, the Trial Chamber ordered the  
18 compilation and the statements of apology and acknowledgements of  
19 responsibility made by Kaing Guek Eav during the course of the  
20 trial, and ordered that the compilation be posted on the ECCC's  
21 official website within 14 days of the date of the trial Judgment  
22 becoming final.

23 Additionally, the Trial Chamber granted the joint claim by all  
24 civil party groups to include the names of civil parties and  
25 their relatives who died at S-21 in the trial Judgment. The

4

1 Trial Chamber rejected all other civil party claims for  
2 reparations.

3 The claims for reparations at trial included: A, compilation and  
4 dissemination of comments of the civil parties on the Accused's  
5 apologies; B, an order that the Accused write a letter to the  
6 Royal Government of Cambodia requesting a State apology, and that  
7 part of the S-21 and Choeng Ek entrance fees be used for  
8 reparations; C, installation of memorials in S-21 and Choeng Ek,  
9 the transformation of Prey Sar as a memorial site, naming 17  
10 public buildings with victims' names and ceremonies, as well as  
11 paid visits for civil parties to memorial sites; D, provision of  
12 medical treatment and psychological services for Civil Parties;  
13 and E, production and dissemination of audio and video material  
14 about the trial, as well as educational measures.

15 Civil party appellants from Group 1 seek the acknowledgment of  
16 their status as victims and civil parties as a form of  
17 reparation. Civil parties group 1 is not appealing the Trial  
18 Chamber's rejection of its other claims for reparations.

19 [9.09.00]

20 Civil parties group 2 appeals the Trial Chamber's rejection of  
21 its claims for reparations on the following grounds: A, the Trial  
22 Chamber erred in law by giving inadequate and insufficient  
23 reasoning in dealing with the claims for reparations, in  
24 particular by not linking the Court's analysis with the specific  
25 respective requests; B, the Trial Chamber erred in law by

1 requiring the civil parties' claims to be specified to a degree  
2 not legally justified under the Internal Rules or international  
3 standards for satisfaction measures, such as the claim for the  
4 installation of memorials in S-21 and at Choeng Ek. The  
5 Appellants contend that the ultimate task of designing a just and  
6 equitable remedy for the injured party must lie with the Court;  
7 C, the Trial Chamber erred in law and in fact by not analysing or  
8 making any decisions on certain claims, such as the claim for the  
9 accused to write a letter to the Royal Government of Cambodia  
10 requesting a State apology or participation in the reparation  
11 process, the claim for paid visits for the victims to memorial  
12 sites, and the claim for naming public buildings on behalf of the  
13 victims; D, the Trial Chamber erred in law by incorrectly  
14 defining "collective and moral" reparations by assessing the  
15 claim relating to provision of medical treatment and  
16 psychological services as being outside the scope of available  
17 reparations; E, the Trial Chamber erred in law by requiring a  
18 link between the claims for medical care and educational measures  
19 and the crimes for which the accused was found responsible; and  
20 F, the Trial Chamber made an error of fact by rejecting certain  
21 claims even though they had been sufficiently detailed, such as  
22 the claim relating to the inclusion of the civil parties'  
23 comments on the accused's apologies or the claim for production  
24 and dissemination of the audio and video material about the  
25 trial.

6

1 Civil parties group 2 also appeals against the Trial Judgment on  
2 the basis that the Trial Chamber failed to include the name of a  
3 civil party's sister-in-law and her child in the Trial Judgment.  
4 Civil parties group 3 appeals the Trial Chamber's rejection of  
5 its claims for reparations on the following grounds: A, the Trial  
6 Chamber erred in law by misinterpreting Internal Rules 23(12)(b),  
7 which provides that reparations awards may take the form of an  
8 order to fund any non-profit activity or service that is intended  
9 for the benefit of victims; B, the Trial Chamber erred in law by  
10 failing to apply Article 39 of the ECCC Law dealing with property  
11 or money acquired unlawfully or by criminal conduct; C, the Trial  
12 Chamber erred in law by indicating that the civil parties' claims  
13 lacked sufficient specificity regarding estimated cost of  
14 memorials and their envisaged location; D, the Trial Chamber  
15 erred in law by failing to address the issue of establishing a  
16 trust fund to implement reparations; and E, the Trial Chamber  
17 erred in law by failing to recognise the link between the claims  
18 for medical care and educational measures and the crimes for  
19 which the accused was found responsible.

20 [9.13.35]

21 Neither the defence nor the Co-Prosecutors filed a written  
22 response to the appeal briefs of the three civil party groups.  
23 In the appeal hearing, the appellants from civil parties groups 2  
24 and 3 are invited to present specific proposals as to the  
25 requested disposition of the Judgment. Thank you.

7

1 MR. PRESIDENT:

2 I would like now to give the floor to the co-counsel for civil  
3 party group 1. Yesterday co-counsel for civil party group 1  
4 sought to submit additional evidence, and the Bench already  
5 received that evidence. Therefore when you are on your feet,  
6 please make your submission regarding the new evidence that you  
7 submitted yesterday. Thank you.

8 MR. KHAN:

9 Mr. President, Your Honours. My name is Karim Khan, and together  
10 with Srinna Ty to my left, we represent civil party group 1.  
11 Your Honours, in the forty minutes or so that has been set aside  
12 for our submissions, we will divide the time more or less  
13 equally.

14 [9.15.25]

15 After some introductory comments and background, setting out the  
16 broad complains put forward by civil party group 1, and  
17 identifying the errors that we say infect the learned Trial  
18 Chamber's findings on this issue, my co-counsel with then go into  
19 some of the facts, the evidence actually that was adduced at  
20 trial, that we say was sufficient for those civil parties to  
21 remain properly recognised throughout the proceedings.

22 And in the course of that aspect of the submissions my learned  
23 friend will also deal with the new evidence that has come to  
24 light since the completion of the trial. Your Honour, we are  
25 most grateful for the summary provided by the Judge rapporteurs,

8

1 and it's quite correct that the appeal of civil party group 1  
2 does not embrace the issue of reparations.  
3 However, if the grounds put forward by the other civil parties  
4 are successful, it is of course only right and just that the  
5 civil parties represented by myself will benefit, should benefit,  
6 from the reparations that are awarded. Of course, being  
7 collective and moral, it's not going to be a very significant  
8 issue, but I thought it be prudent to make that clear from the  
9 start.

10 [9.17.30]

11 Your Honours, when looking at the thrust of the grounds of appeal  
12 put forward, it's my respectful submission that the Bench and all  
13 parties need to stand back and look actually at what has  
14 happened. After enduring months of trial, after doing everything  
15 that has been required of them, filling in the forms correctly,  
16 contacting the intermediary, the Documentation Centre of  
17 Cambodia, instructing counsel, giving instructions to counsel,  
18 coming to Court, three individuals giving evidence before the  
19 Trial Chamber themselves, producing whatever has been asked for.  
20 Coming with high hopes and expectations.

21 On the day of the Judgment, for the very first time, they were  
22 told that the civil party status that had been granted them  
23 months previously had been revoked. For a court founded upon the  
24 highest principles of justice, a court which is enjoined by dint  
25 of rule 21 to ensure legal certainty and transparency of

9

1 proceedings that is required by virtue of 21(c) to keep victims  
2 informed, and their rights protected, this was most unpalatable.  
3 It was a shock, and there should be no confusion. It has caused  
4 distress to individuals that we say have already been traumatised  
5 once by the actions of the accused, of the convicted person Duch.  
6 [9.20.15]

7 Your Honours should not lose sight of that reality when deciding  
8 the grounds of appeal put forward. Your Honour, there is nothing  
9 at all, in our submission, in the practice direction on victim  
10 participation, nothing in the Chamber's decisions on civil party  
11 participation, nothing in the Internal Rules at all that would  
12 give the civil parties cause to believe that there was a  
13 two-pronged test, there were two hurdles that had to be overcome.  
14 One to be admitted as civil parties, and then one, at the end, so  
15 that that civil party status be not revoked.

16 It is our submission that the Trial Chamber erred in creating  
17 such a divided approach to the issue of civil party recognition,  
18 and they did so contrary to the clear language and purpose of  
19 civil party participation, and in particular rule 100 of the  
20 Internal Rules.

21 [9.21.50]

22 The various standards that have been -- if one does not say  
23 conjured up, one can say formulated by the Trial Chamber do not  
24 have a basis, in our submission, in international law. The  
25 authorities relied upon, from the ICC, are inapposite. They take

10

1 it out of context. One example, the Coney(??), and the  
2 Uganda(??) case cited, they deal with situations when an  
3 investigation has been authorised, not cases that are actually  
4 before the Court that deal with individuals.  
5 And they deal with pre-trial matters, rather than matters that  
6 Your Honours have to determine, that were before trial chamber  
7 judges, a much more advanced stage of proceedings. The findings  
8 in the Judgment, Your Honours, requiring the civil parties to  
9 provide documentary proof that they were related to direct  
10 victims, has no basis in comparative jurisprudence. It is rather  
11 contrary, indeed, in our submission, to the general tenor of  
12 international law which does not require corroboration. An  
13 accused can be convicted on the testimony of an individual if the  
14 Bench, as finders of fact and law, are persuaded that that  
15 witness is speaking the truth.

16 And yet, when it comes to civil parties, this requirement for  
17 corroboration has been imported. In an environment, and in a  
18 country, and in an historical background, where the objective  
19 evidence shows that records have been -- are incomplete, and I'll  
20 refer in due course to reference to a small passage from Nic  
21 Dunlop's book that was referred to at trial, that brings that  
22 reality into very stark relief.

23 [9.24.20]

24 So the requirement of corroboration is also without basis, as is  
25 this new, wholly new, articulated standard, that when it comes to

11

1 indirect victims, the civil parties must substantiate special  
2 bonds of affection or dependency, and that has led to at least  
3 two of our civil parties, Joshua Rothschild and Jeffrey James,  
4 who Mr. Duch himself did not challenge, being denied their  
5 acknowledgement as civil parties at the eleventh hour of  
6 proceedings.

7 Your Honours, the rules are quite clear, and it's the rules that  
8 Your Honours must apply when deciding whether or not the Trial  
9 Chamber fell into error or misapplied their discretion to admit  
10 evidence and make findings.

11 [9.25.50]

12 Your Honours, on 17 February 2009, right at the beginning of this  
13 process, the Trial Chamber was quite clear that the civil parties  
14 had been admitted. Two of the civil parties, Ly Hor and Him Mom  
15 were confirmed as civil parties at that hearing. And Your  
16 Honours, it couldn't be clearer, in our respectful submission,  
17 when the Trial Chamber also said, and I quote, having carefully  
18 received each one of the latest applications, and having applied  
19 a prima facie standard of proof for the existence, for the  
20 criteria, for the evaluation of the civil party applicant, and  
21 having heard the comments from the other parties, declared that  
22 the civil parties who did not have interim recognition were  
23 admitted.

24 So Your Honours, civil parties, and lawyers for civil parties,  
25 and the public, the families of civil parties should be able to

12

1 rely upon a finding by a Trial Chamber that they had been  
2 admitted as civil parties. And this is not simply a cosmetic  
3 exercise that didn't have consequences. Civil party  
4 participation triggers many rights, and those rights were given  
5 to our civil parties, all nine of them that had their hopes  
6 dashed at the last moment, had their expectations shattered.

7 [9.27.45]

8 And I've mentioned before, they came to Court throughout this  
9 process, diligently, at considerable expense, and Your Honours  
10 for a Court that is created in large part to give some closure,  
11 not just to seek to mete out some accountability for the crimes  
12 that befell the people of Cambodia and other individuals in a  
13 dark period of its history, but a Court that is also aiming to  
14 give proper rights to victims, this is a lamentable state of  
15 affairs.

16 Because these individuals have not just mechanically come to  
17 Court during that trial process, but in giving the instructions,  
18 in giving their accounts, in reliving the trauma of their  
19 suffering and their pain to the intermediary, to legal counsel,  
20 and then to the Court, they have relived what has caused them  
21 very great distress.

22 [9.29.00]

23 And Your Honours, the rules must be interpreted, in our  
24 respectful submission, in a broad and expansive manner that seeks  
25 to have regard to the rights of civil parties. Particularly so

13

1 in a case like this where none of these nine that have been  
2 excluded really point or provide incriminatory evidence of Duch  
3 himself. Not at all. They give evidence to describe the trauma  
4 and suffering that has befallen them, and Your Honour that's  
5 another factor in our respectful submission that should be given  
6 some weight.

7 Your Honours, what is most unfortunate is that in August 2009 the  
8 civil parties started hearing murmurings from the defence in  
9 relation to some of these civil parties. Now, leaving aside, for  
10 the moment, the fact that the defence did not challenge Joshua  
11 Rothschild, Jeffrey James or Him Mom, and yet these three that  
12 were not challenged have been excluded, have had their civil  
13 party status revoked -- leaving that aside, the civil parties  
14 filed on 7 August, an application, quite diligently, with the  
15 Trial Chamber.

16 Your Honour, that application, a request to establish the status  
17 of Ly Hor as a survivor of S-21, and authenticity of documents as  
18 a matter of record, was simply swept under the carpet by the  
19 Trial Chamber. It was not ruled upon, even in the Judgment.  
20 Even as of today. That application by the civil parties has not  
21 been ruled upon. The evidence put in has not been ruled upon.  
22 All that the Trial Chamber did is give a cursory footnote,  
23 without dealing with the merits of the application.

24 [9.31.30]

25 Your Honours, the civil party did not rest there, because on 13

14

1 August 2009, it filed another motion to establish the nature of  
2 the relationship between the four civil parties of group 1 and  
3 the direct victims of S-21. And shortly afterwards, on 3  
4 September, it filed a motion to provide exhibits and support of  
5 five civil parties of group 1. And finally on 10 November, in  
6 our final submissions, in our written brief, we again put  
7 submissions forward on this issue.

8 Now, Your Honours, an obvious way where the Trial Chamber fell  
9 into error was their fundamental misapprehension of rule 100(1)1.  
10 They seem to view that this rule gave them the authority to make  
11 a decision on revoking the status of civil party applicants at  
12 the end of the case. Well, Your Honours, for the reasons in our  
13 appeal notice, that's clearly a fallacy. That's clearly wrong.  
14 Rule 100(1) quite clearly deals with reparations. The whole  
15 focus of that rule deals with reparations. There's nothing in  
16 that rule at all, in our respectful submission, that gives the  
17 authority to the Trial Chamber to reconsider its own previous  
18 finding.

19 [9.33.15]

20 Now, Your Honours, there's two aspects there. In our appeal  
21 brief, we do refer to the fact that the Trial Chamber themselves,  
22 in response to an application by civil party group 3, said there  
23 was no express provision in the rules for them to grant motions  
24 for reconsideration. And yet if the Trial Chamber then arrogates  
25 themselves the right to reconsider, we say there must be a basis.

15

1 It is not the case of civil party group 1 that the Trial Chamber  
2 is hamstrung, it is handcuffed, it is fettered from reconsidering  
3 the status of a civil party that has been submitted. But there  
4 needs to be a change of circumstance for them to do so.

5 If evidence comes out, for example, that a witness, a civil party  
6 has lied, has fabricated, has concocted, something of that  
7 nature, of course, the Trial Chamber has inherent power to do  
8 justice, and can reconsider the status afforded to that civil  
9 party, but that's not applicable to this case. There has been no  
10 change of circumstance from the time these civil parties, all  
11 nine of them, were led to believe that they had proper status,  
12 that they were recognised, and the revocation at the time of the  
13 Judgment.

14 [9.34.50]

15 Your Honours, we rest on the grounds put forward in our brief as  
16 far as that.

17 Your Honours, we also go on to consider the possibility of rule  
18 23(4), and we say quite clearly that if there was rule at all  
19 that would have declared civil parties inadmissible, that's the  
20 only hinge that the Trial Chamber could have hung their decision  
21 upon. But they couldn't do so, they couldn't do so, because that  
22 provision -- it's very clear that that decision has to be made at  
23 the beginning of proceedings. And Your Honours I refer to our  
24 submissions generally, at page 9 of our brief.

25 Now, Your Honours, in deciding this issue, of course, the old

16

1 rules apply. But the fact that the status of civil parties must  
2 be decided at the outset is common sense, it's not rocket  
3 science. And the fact that this is the correct way of proceeding  
4 is borne out by looking at the new rule 23bis, which requires  
5 that it's the Co-Investigating Judges themselves who, on the  
6 balance of probabilities, will decide whether or not civil  
7 parties are admitted.

8 [9.36.15]

9 So Your Honours, leaving behind the standard for the time being,  
10 what is clear is that the status of civil parties is to be  
11 determined at the outset, and there is nothing in the statutory  
12 provisions before this Court that allows the Judges, without some  
13 reason, simply to revoke that, as I said, without a change of  
14 circumstance.

15 Your Honours, if the intent was otherwise, one would expect the  
16 draftsmen in the Internal Rules to have made that provision quite  
17 clear. The fact that there is no provision is relevant, in our  
18 submission.

19 [9.37.05]

20 Your Honours, what's clear is that in making the initial  
21 determination under rule 23(5), the Judges were satisfied that  
22 the applications that they accepted contained sufficient  
23 information to allow for verification of their compliance with  
24 the Internal Rules. Your Honours, there's a lot that can be  
25 said, but we do rely upon the submissions in our final brief. In

17

1 determining what action should be taken at this point, in the  
2 event that the Judges have fallen into error, we say that  
3 automatically their status as civil parties should be reinstated  
4 to them.

5 Your Honours, if you are not with us on that, for the reasons  
6 that will be given by my learned friend in a moment, we say that  
7 based on the evidence before the Trial Chamber, as well as the  
8 additional evidence that has come to light since, there is more  
9 than adequate evidence for any reasonable trial chamber to have  
10 been satisfied that the civil party status that had been granted  
11 at the outset of the trial in case file number 1 had been  
12 properly granted, and there were no grounds at all to revoke it.  
13 Your Honours, I think that's all I have time to say at the  
14 moment. It may be that during the questions and in the response  
15 some additional elaboration can be given. Your Honours, with  
16 your leave, I pass to my co-counsel.

17 [9.39.20]

18 MS TY SRINNA:

19 Good morning, Mr. President, Your Honours, Judges of the Supreme  
20 Court Chamber, and everyone in and outside the courtroom. My  
21 name is Ty Srinna, I am representing civil party group 1. I will  
22 be making my submission, in brief, as follows.

23 Regarding our appeal, my co-counsel Mr. Karim Khan has already  
24 made in details regarding the legal issues, and that the Trial  
25 Chamber erred in determining the status of the civil parties.

18

1 They erred by doing more than the scope of law allowed by them to  
2 manoeuvre. Regarding our nine clients, we have observed that the  
3 deprivation of their rights as civil party has harmed the fair  
4 judgment they deserve.

5 And the Trial Chamber requested that the civil parties present  
6 evidence to answer to the standard the Trial Chamber said, but  
7 the requirement is too high for the civil parties to meet. We  
8 therefore would request that the materials requested by the civil  
9 parties and counsel be reconsidered. At the meantime, I would  
10 like to also touch upon the piece of evidence that is admissible  
11 regarding each of our client and it is put before the Supreme  
12 Court Chamber for consideration.

13 Ly Hor was heard, but his status was rejected because there has  
14 not been -- because the Trial Chamber could not really identify  
15 the status, or establish the relation of Ly Hor to the S-21  
16 prisoners list, and that it is really difficult to identify his  
17 identity since his name when registered at S-21 was not Ly Hor.  
18 And my client already indicated very clearly during the hearings  
19 concerning the clarification on his identification.

20 [9.42.45]

21 He indicated clearly that Ly Hor and Ear Hor was the same person.  
22 However, given that he has submitted more documents, the Trial  
23 Chamber still rejected his application. On 11 March 2011 he has  
24 submitted new piece of evidence. I may refer Your Honours to the  
25 thumbprints he has made on the piece of document under ERN

19

1 00279930 in Khmer. And he also submits new piece of document  
2 concerning his background, historical background, so that the  
3 Chamber can use as the ground for deliberation.

4 And I would like to submit these documents to the Chamber now,  
5 and we would apologise for not being able to submit it before as  
6 the translation was pending. But now the translation is already  
7 complete, we would like this document to be admitted.

8 [9.44.25]

9 (no interpretation)

10 As to Him Mom, the Trial Chamber rejected to the status of the  
11 civil party status because the Chamber held that she failed to  
12 establish the connection between her and her brother who was the  
13 victim at S-21. Him Mom really revealed the truth that she could  
14 identify the photo of the victim as her real brother, however the  
15 Trial Chamber was not convinced. And Him Mom also added further  
16 information in relation to the identification of the victim, who  
17 was her brother. And she made it clear in this two pieces of  
18 document made by her sibling as well, Sung Ming (phonetic) who  
19 shed light on this photo by saying that this photo was actually  
20 the brother of Him Mom.

21 And this photo has also been indicated by another person who also  
22 detained at the same detention facility, and that he recognised  
23 him very well. I therefore would like the Chamber to consider  
24 these new pieces of evidence concerning the proof of  
25 identification of my client as well.

20

1 [9.46.50]

2 Client number 3, client Norng Sarath. Norng Sarath's uncle and  
3 cousin were detained at S-21. Both uncle and cousin were  
4 detained at S-21. And he can also prove that these people were  
5 genuinely detained at S-21 and they were there, his relatives.

6 MR. PRESIDENT:

7 Counsel, could you please also refer your document and  
8 particularly ERN number so that they can be well recorded.

9 [9.48.00]

10 MS TY SRINNA:

11 Mr. President, I may refer to the dates of the document because I  
12 can recall the date when I submitted the document but not the ERN  
13 number. I actually can do that if Your Honours allow.

14 Norng Sarath can identify his uncle.

15 MR. PRESIDENT:

16 Are these documents old documents or new documents to be  
17 submitted?

18 MS TY SRINNA:

19 These documents have already been submitted before the Chamber.  
20 They were submitted on 25 March 2011.

21 MR. PRESIDENT:

22 Of course, and they are already submitted before the Chamber.  
23 Could you please refer us to those ERN numbers.

24 MS TY SRINNA:

25 One of the documents has been copied from Zylab, and without ERN

21

1 number, and if I really obtain this ERN number I will also keep  
2 the Chamber informed. These new pieces of evidence were  
3 submitted on 25 March 2011.

4 Norng Sorng(phonetic), who is the sister of Norng Sarath, wrote  
5 this piece of document proving that the people who were detained  
6 at S-21 security centre were his relatives. We may refer to ERN  
7 number 00657012 or F2/5.9. These documents were extracted from  
8 Zylab.

9 [9.51.00]

10 There is another piece of document concerning Norng Saruoth, who  
11 is Norng Sarath's uncle, and Sor Sarath(phonetic) who was his  
12 cousin. This document can shed light on the relationship between  
13 Norng Sarath and Norng Saruoth and Norng Soang. The document  
14 itself can also identify the roles of Norng Sarath during the  
15 Khmer Rouge regime. He worked for the military in Prey Veng  
16 province.

17 So we would like the Supreme Court Chamber to kindly consider  
18 these documents. Thiev Neab is another client. Thiev Neab was  
19 rejected by the Trial Chamber because there was no proper  
20 document proving the kinship between the civil party applicant  
21 and S-21 prisoners. We would like the Supreme Court Chamber to  
22 also consider this, although Thiev Neab does not have any  
23 relatives left to testify, to prove this, but Thiev Neab 's  
24 testimony can really prove that she is a genuine civil party.

25 [9.52.50]

22

1 She said that her husband was part of the Khmer Rouge military,  
2 and who attacked Phnom Penh on 17 April 1975. Later on he was  
3 promoted to another post, stationed at Psar Thmei, and later he  
4 was promoted to be the cadre of Division 770. She said that the  
5 arrest of her husband was made to the north of Psar Thmei in  
6 1978. He was arrested by three cadres in a jeep, and as Your  
7 Honours and parties to the proceedings have already been  
8 familiar, this fact is very consistent with the situation at S-21  
9 during the Democratic Kampuchea regime.  
10 It means that the arrest was made in Phnom Penh, so of course the  
11 person obtained rank or senior position during the Khmer Rouge  
12 regime he could have been arrested and it is true that these  
13 people could never be sent further than the vicinity of Phnom  
14 Penh to be detained. That is why we would like Your Honours to  
15 please consider this case.

16 [9.54.50]

17 Nget Uy is another client. His father's name is Prak Pat, and  
18 his status was rejected on the same ground as the other civil  
19 party applicants stated earlier. However, this client has  
20 consistent factual story. He said he was the former cadre of  
21 Division1, stationed in Phnom Penh. The arrest and the  
22 disappearance of this person had occurred here in Phnom Penh.  
23 Regarding another two clients, the foreign clients have already  
24 been well indicated by my co-counsel and I would not like to  
25 touch upon it again.

23

1 I would like to proceed to Lim Yon. This applicant was rejected  
2 because there was no clear indication of kinship to the prisons  
3 at S-21. However, I would like Your Honours to consider the  
4 information under ERN 00280701. In his civil party application  
5 form, in the information he put in that form indicates clearly  
6 that his relative who was detained at S-21 was arrested and  
7 detained and he was informed of the information of the detention  
8 of his sibling through a security guard, who tipped him off.  
9 And this information was informed to him in good faith, and after  
10 the collapse of the DK regime he conducted a fact-finding mission  
11 to find his whereabouts.

12 [9.57.45]

13 MR. PRESIDENT:

14 Counsel Ty Srinna, your time is already over, but if you would  
15 like to proceed please be very brief.

16 MS TY SRINNA:

17 Thank you, Mr. President, I will be very brief.

18 In regards to the document showing kinship, I would like to  
19 submit that during the Democratic Kampuchea the Trial Chamber as  
20 well as parties to the proceedings in case 001 acknowledge that  
21 the existence was 30 years ago, so all those relevant documents,  
22 as well as the documents of many of the innocent peoples were  
23 destroyed. These are the reasons causing difficulty for my client  
24 to locate additional evidence.

25 In addition, the destruction to the documents belonging to my

24

1 client during Democratic Kampuchea, all Cambodian people as well  
2 as all the victims knew that all the documents were confiscated  
3 by the Democratic Kampuchea and most of them were burned. And  
4 sometimes they burned the documents themselves in order to avoid  
5 being arrested by the Khmer Rouge. Those who had in their  
6 possession the documents were only the Democratic Kampuchea and  
7 the Communist Party of Kampuchea, who controlled and maintained  
8 those documents for their management.

9 [9.59.55]

10 This also illustrates the fact that my client, as well as all  
11 civil party applicants face huge difficulties in having the  
12 document proving their kinship or relationship, and I would like  
13 Your Honours to consider this factor seriously. Another main  
14 point in relation to the documents related to S-21. In S-21 in  
15 1978 there was a chaotic situation in which registration of many  
16 prisoners could not be registered in the books, as a number of  
17 influx of prisoners were sent to S-21. And that caused the loss  
18 of certain documents. And it is also found that certain  
19 documents of S-21 were destroyed as raised by my colleague Karim  
20 Khan in relation to the statement of Nic Dunlop, who stated that  
21 certain documents were used by the people to wrap their cake.  
22 Some documents were also lost, and that is consistent with the  
23 statement of the father of the civil party Im Sunthy who said  
24 that she found her father's document identity when she caught the  
25 palm cake, palm sugar from a lady. The document was wrapped for

25

1 the cake. And that happened after the fall of the Democratic  
2 Kampuchea. It is also my observation, Your Honour, that the  
3 Trial Chamber failed to consider the facts that are consistent  
4 with the facts of each of my client as well as for other civil  
5 party applicants.

6 [10.02.20]

7 For that reason I would like to urge Your Honour to consider the  
8 consistency in all these cases in facts, so that they can be  
9 admitted and recognised as civil parties. Another point, Your  
10 Honour, is that the Trial Chamber, in its Judgment, relied on the  
11 testimony of the accused.

12 MR. PRESIDENT:

13 The time is now running out for you.

14 MS TY SRINNA:

15 I would like to close now then, Mr. President. Thank you.

16 MR. PRESIDENT:

17 I would like to open the floor now to Judges of the Bench, if you  
18 have any question.

19 JUDGE MILART:

20 Thank you, Mr. President. One remark regarding the evidence  
21 discussed by the counsel. This Chamber has already admitted this  
22 evidence, and we will be just asking other parties in their  
23 responses to the submission by the civil party group 1 to comment  
24 on this evidence. And now since this is the time for our  
25 question, I would like to pose one regarding the admissibility of

26

1 the civil party claims and the standard of proof, the issue  
2 raised by counsel Khan.

3 [10.04.30]

4 I would like to start by saying that we are here fully, we  
5 understand and are sympathetic regarding the disappointment and  
6 frustration on the part of persons whose claims were found to be  
7 inadmissible in the Judgment. However, it's upon this Court to  
8 determine whether, if there were expectation raised, whose  
9 responsibility was it to manage those expectations, starting with  
10 the accurate information of the law, and to what extent it was  
11 upon the Court to do so, and to what extent the parties  
12 represented by the counsel could have been expected to foresee  
13 the consequences of the law.

14 And in this question I refer the counsel to article 12(1) of the  
15 agreement that makes reference to Cambodian criminal procedure as  
16 controlling all matters unless they are not sufficiently  
17 addressed, or inconsistent with international standards. And the  
18 question specifically pertains the application of the code of  
19 criminal procedure of Cambodia, which has been in force since  
20 2007. And this code rather clearly seems to pronounce the  
21 two-phase deciding on the civil party claims.

22 [10.06.17]

23 It's also consistent with what it is found in most civil law  
24 civil action arrangement, where there is this two-phase deciding  
25 with a prima facia standard to accepting the law suit, and then

27

1 preponderance of evidence in the face of adjudicating. So taking  
2 this general framework for civil actions into account it would  
3 seem that there is always a risk that the plaintiff may be found  
4 lacking active legitimacy only in the face of the adjudication.  
5 And let me quickly refer you to article 355 of the CPC of  
6 Cambodia, which says, and I quote, in second sentence, and I  
7 quote: "The Court shall determine the admissibility of the civil  
8 party application and also decide on the claims of the civil  
9 party against the accused and civil defendants." End of  
10 citation. It's about the deciding in the Judgment.

11 [10.07.20]

12 So -- and maybe let me also quickly move to the other issue, of  
13 the standard of proof. I refer the counsel to article 13 of the  
14 code of criminal procedure, which happens to be nearly identical  
15 with our Internal Rule, which says that a civil action can be  
16 brought by the victim of an offence. In order to be compensated  
17 the injury must be a direct consequence of an offence, there must  
18 be personal damage that actually occurred and exists in the  
19 present time; and injury can be damage to property or physical or  
20 psychological damage. And as I say, our Internal Rule mirrors  
21 this language.

22 Now when we examine the record, it showed that the wording about  
23 the harm or injury needing to be shown as direct consequence of  
24 the offence was specifically used by Judge Lavergne during the  
25 status conference with the parties in the presence of all counsel

28

1 for civil parties. So in the light of these provisions that are  
2 found in the code of procedure, if the applicants could comment  
3 where still lay the cause of this not being the sufficient notice  
4 for them, on both the issue of two-tier review and on the  
5 standard of proof that resulted in this, what you yourself said  
6 was a shock and disappointment for the victims of the regime.

7 Thank you.

8 MR. KHAN:

9 Your Honour, I am most grateful. These questions, I think, will  
10 be common to the various civil parties. Would you care for an  
11 answer now or after you've heard from the other civil parties.  
12 What would be more convenient to Your Honour?

13 JUDGE MILART:

14 At your convenience, as long as the answer is given.

15 MR. KHAN:

16 Well, Your Honour, the simplest starting point is to look what  
17 the Trial Chamber referred to. They didn't refer to any of those  
18 provisions. They based their revocation of civil party status on  
19 rule 100, and the primary submission of the appellants, civil  
20 party group 1, is that that provision does not entitle the Judges  
21 to do that which they did. It did not entitle them to revoke  
22 civil party status. So that's the starting point, when one is  
23 seeking to look and discern whether or not the Trial Chamber fell  
24 into error.

25 They did not cite any of the provisions that Your Honour cited.

29

1 Instead, they cited rule 100, and for the reasons given in our  
2 brief, what is patently clear is that rule 100 is dealing with  
3 reparations, not revocation of a status that was granted some  
4 months previous. So Your Honour, that's my simple answer at the  
5 moment. It may be that, with your leave, after the submissions  
6 of the other civil parties, if the question is raised again, I  
7 may seek the Court's permission to stand and address it in more  
8 detail.

9 JUDGE MILART:

10 Thank you very much, counsel. If the later time the issue could  
11 be revisited, would be grateful, especially with a view to the  
12 fact that they cited this provision only in the Judgment, but the  
13 provisions of the code were there since 2007. So the question of  
14 foreseeability during the trial -- we are not saying that the  
15 Judgment is -- we are not discussing now whether the Judgment is  
16 properly reasoned with this respect, but since we are looking at  
17 the foreseeability of the legal framework and the fairness  
18 issues, I would expect comments on how clear was the legal  
19 framework during the trial when there was the opportunity to  
20 present the evidence and to discuss the standard of proof. Thank  
21 you very much.

22 MR. KHAN:

23 Your Honour, just briefly, there are of course essential  
24 differences between the code of criminal procedure and the  
25 Internal Rules. I mean, an obvious example, one of many, is rule

30

1 23. The proceedings here must be fair and adversarial. That's  
2 maybe one of several unique aspects of the proceedings before  
3 this Court. What is clear is that the Judges, when they  
4 mentioned that civil party status had been granted, simply said  
5 that it had been granted. There was no caveat at all attached,  
6 and one would expect that if things were as simple as all that,  
7 if it was very clear that that caveat would have been mentioned  
8 at some stage of the proceedings, one would have expected it at  
9 the initial hearing, but if not in the many months afterwards.  
10 [10.13.15]  
11 If that had been the expectation, I think the shock was not only  
12 from those of us that are guests in this land, but it was also a  
13 surprise to experienced Cambodian lawyers, and certainly we refer  
14 in our appeal brief to the surprise that was mentioned by the  
15 media in Cambodia, including those journalists who report on  
16 court proceedings. Your Honour, all of those aspects taken  
17 together may cast some light on the issue of foreseeability. It  
18 was a surprise, it was a shock.  
19 One option, of course, was that it was rather over confident  
20 legal advice. Of course it's a possibility, that we gave to our  
21 clients. The other possibility, of course, is that everybody in  
22 this courtroom and in the public of Cambodia, Cambodian lawyers  
23 and internationals were all of one mind, that the rules were not  
24 meant to operate this way. And in determining this issue I go  
25 back to rule 23, the terms of rule 23, and the terms of rule 100,

31

1 and in my respectful submission, that exposes, with a degree of  
2 clarity, the error of the Trial Chamber in their Judgment on this  
3 issue.

4 [10.14.45]

5 MS. TY SRINNA:

6 Mr. President, with your permission I would like to add to what  
7 my colleague has just said in response to the question raised by  
8 Judge Milart in relation to article 335 of the CPC. I would also  
9 like Your Honours to review that article 355, rather, and I would  
10 like to draw the distinction. The practice of the ECCC is  
11 distinct to the practice at the domestic court. In the domestic  
12 judicial setting there is no initial hearing to be conducted.  
13 So the ECCC we have the initial hearing, and the procedures in  
14 the initial hearing is stated in the third revision of the  
15 Internal Rules. In the initial hearing, the Trial Chamber shall  
16 consider the admissibility of the civil party applications, so  
17 they have to review and examine all the relevant documents. And  
18 that is my response, Your Honour, in relation to the article 355  
19 of the CPC.

20 MR. PRESIDENT:

21 It is now appropriate to have a break for 20 minutes and we shall  
22 return at 20 to 11. Security official, you are now instructed  
23 to take the accused back to the waiting room.

24 (Judges exit courtroom)

25 (Court adjourns from 1017H to 10.47H)

32

1 (Judges enter courtroom)

2 MR. PRESIDENT:

3 Today Court is now back in session. In regards to the submission  
4 by civil party group 1 counsel for additional material, there is  
5 the certification by the Deputy Chief of Police in Phnom Touch on  
6 the background of Ly Hor dated 26 March 2011. The Chamber  
7 accepted to receive the document for examination and if any other  
8 party would like to respond to that, you may stand now.

9 Otherwise we will proceed.

10 Counsel for civil party group 2 are invited now to make your  
11 presentation.

12 MR. HONG KIMSUON:

13 Thank you, Mr. President, Your Honours, and my learned colleagues  
14 in this courtroom, and Cambodian people who are watching,  
15 observing the proceedings here and outside the courtroom. My  
16 name is Hong Kimsuon, counsel for the civil party group 2 and  
17 together with Ms. Silke Studzinsky, I represent group 2 of the  
18 civil parties. Due to our very limited time, we will focus only  
19 on the main arguments in two of our three appeals. I will start  
20 with the discussion of the appeal against the decision of the  
21 Trial Chamber not to admit the civil party applications of five  
22 of our clients. My international colleague will elaborate on the  
23 grounds of the appeal against the Chamber's rejection of the  
24 reparation requests.

25 [10.50.35]

1 On 26 July 2010, the day of the announcement of the Judgment,  
2 after nearly all civil parties and applicants had exercised full  
3 participation rights throughout the entire of case 001  
4 proceedings, the names of the admissible applicants were read out  
5 in a broadcasted and public session. On this day, five of our  
6 clients, upon hearing that their names had not been read out,  
7 learnt about the Chamber's rejection of their civil party  
8 applications. For these participants, this was a devastating  
9 moment, which led to an effective re-traumatising of these  
10 victims. On this occasion, it was not only those whose  
11 applications were rejected who suffered, but also the admitted  
12 civil parties, who suffered in solidarity.

13 It can only be inferred that the Trial Chamber's failure to make  
14 admissibility decisions at the beginning of Case 001 proceedings  
15 was due to the public pressure to commence the hearing as soon as  
16 possible. Without making final determinations on admissibility,  
17 the Trial Chamber granted these persons either 'interim civil  
18 party status' or started to refer to them as 'civil parties'. In  
19 this way, the Trial Chamber allowed all 90 civil parties and  
20 applicants to fully participate. Without any proper explanations  
21 as to the meaning of "interim status" or "civil parties", it  
22 outright misled these persons, for the entire proceedings, to  
23 believe that they had full status, along with the entitlement of  
24 full participation, granted to them.

25 During the course of the trial, all civil party applicants were

1 treated equally to admitted civil parties. Through their lawyers,  
2 they submitted motions, made requests, and questioned witnesses,  
3 experts and civil parties. In fact, our client Ms. Nam Mon  
4 testified as a civil party without being required to give an oath  
5 and also questioned the accused personally. The applicants were  
6 present in the court room and took part in regular monthly  
7 meetings with their lawyers in order to get updated, informed and  
8 involved with the trial. Because of the degree of participation  
9 they were entitled to, these individuals felt like fully admitted  
10 civil parties.

11 [10.53.55]

12 Importantly, they were, during the whole trial, referred to as  
13 'civil parties' instead of 'applicants'. Our clients took on a  
14 prominent position in their communities and made frequent visits  
15 to Phnom Penh, revered by their communities because of their  
16 apparent 'civil party' status. They had every right to believe  
17 that they would not, at the end of the trial, be deprived of the  
18 rights and entitlements attached to civil party participation,  
19 including rights to reparations.

20 At the Judgment in case 001, our clients were rejected for three  
21 main reasons: one, non-compliance with the standard of proof;  
22 two, lack of proof of special bond of affection; and three  
23 credibility. Ms. Nam Mon: rejected for lack of proof that the  
24 photographs submitted actually depict the relatives of the  
25 applicant in the absence of any other evidence and alleged

35

1 inconsistencies in her testimony. Two, Ms. Chhay Kan alias Leang  
2 Kan: no proof that the photograph of the detainee is her nephew  
3 Nhem Chheuy. Three, Ms. Hong Savath: failure to submit a  
4 photograph of her uncle, who she claims to having seen at S-21,  
5 nor any other documentary evidence as proof of her uncle's  
6 detention. Additionally, the Trial Chamber rejected her  
7 application for lack of evidence of any "special bonds of  
8 affection". Four, Mr. Chhoem Sitha: rejected because a bond of  
9 affection was not proved. Five, Ms. Nheb Kimsrea: rejected  
10 because she was born after the death of her uncle, aunt and five  
11 of her cousins, and did not prove a special bond of affection.  
12 [10.56.00]

13 In our appeal we demonstrate that the Trial Chamber erred in both  
14 fact and law when it rejected our clients. By doing this the  
15 Chamber invalidated the Judgment.

16 I will now highlight the main grounds of this appeal. The first  
17 ground of Appeal applies to all of our five clients and  
18 challenges the Trial Chamber's rejection decision as being based  
19 on a violation of Internal Rules 21(1), 21(1)(a), 21(1)(c),  
20 23(3), 23(4), 83(1) and 100 of the Internal Rules of the ECCC.  
21 The Trial Chamber applied a two step process: first, the  
22 applicants were granted 'interim status' which went as far as  
23 being referred to as "admitted civil parties". The Chamber then  
24 decided, for a second time, on the admissibility of all  
25 applicants, within the Judgment itself.

1 The Chamber was of the opinion that it had the right to make  
2 admissibility decisions only on a prima facie basis, at the  
3 beginning, and to review and decide on all applications on their  
4 merits at the end of the trial. The Trial Chamber derived this  
5 opinion from Rule 100, which arguably, only stated that the  
6 decision about the civil party claims will be issued in the  
7 judgment. Internal Rule 100 (Revision 3) stipulated that the  
8 Trial Chamber "shall rule in the judgment on the admissibility  
9 and the substance of such claims against the accused". However,  
10 we submit that the Internal Rules were clear with regard to the  
11 admissibility process and did not provide for a two-step process  
12 such as this.

13 [10.58.25]

14 Although the relevant Internal Rules did not clearly determine  
15 when the decision on the civil party admissibility has to be  
16 carried out, this is clearly derived from the fact that only  
17 'civil parties' can perform full participation rights. Upon this  
18 basis, it is our submission that the respective body, either  
19 Co-Investigating Judges or Trial Chamber, has to decide on civil  
20 party admissibility as soon as possible in order to enable the  
21 victim to properly and meaningful exercise his or her  
22 participation rights as a civil party.

23 If what was envisaged by the drafters of the Internal Rules is a  
24 two-step process, such as what the Trial Chamber took, the  
25 Internal Rules would have clearly outlined such a process. But

1 the Internal Rules were silent on this, and merely stated that  
2 the Trial Chamber has to consider any application at the initial  
3 hearing which, in our submission, should be read as deciding on  
4 the admissibility.

5 [10.59.45]

6 Furthermore, a two-step process cannot be envisaged by the  
7 Internal Rules as it would exclude the applicants from appealing  
8 the reparation order, because only civil parties are permitted to  
9 appeal the reparation order and applicants cannot.

10 There is a further basis for why a two-step process was never  
11 envisaged by the Internal Rules. Simply put, it is a matter of  
12 procedural fairness that applicants who successfully appeal an  
13 admissibility rejection decision must also be able to appeal any  
14 corresponding rejection of their reparations claims. In this  
15 case, the deadline to appeal against the reparation order expired  
16 after a final decision on the rejection order could be issued by  
17 the Supreme Court Chamber. In other words an applicant whose  
18 application is rejected within the Judgment and who is determined  
19 to be admissible upon appeal would be deprived of the opportunity  
20 to appeal the reparation order.

21 [11.01.10]

22 This clearly demonstrates that a second decision on the  
23 admissibility within the judgment would be against the interests  
24 of justice, leaving the applicants without a legal remedy and  
25 violating their right to procedural fairness. Importantly, all

1 exercise of civil party legal and procedural rights, including  
2 the giving of testimony without taking an oath, would be  
3 retroactively invalidated.

4 Our second ground of appeal concerns our clients Ms. Leang Kan,  
5 Ms. Hong Savath and Ms. Nam Mon whose applications were rejected  
6 by applying an incorrect standard of proof, contrary to Internal  
7 Rule 23(5). In our appeal we have demonstrated in detail that the  
8 Internal Rules require only the submission of "sufficient  
9 information to allow verification of the compliance with the  
10 Internal Rules". As the Rules do not mention further requirements  
11 guidance must be sought from other international and regional  
12 Tribunals and Courts.

13 [11.02.25]

14 The result is that in general on the international level a low  
15 threshold is required. The statement of an applicant is  
16 sufficient if it is intrinsically coherent, conclusive and  
17 corroborating with general available information, if any. We  
18 submit that the statement of Ms. Leang Kan in which she describes  
19 how she discovered the photograph of her nephew in Tuol Sleng  
20 museum which was accompanied by strong and overwhelming emotions,  
21 is sufficient proof that the person on the photograph is her  
22 nephew, and, in addition, that there were strong bonds of  
23 affection between herself and her nephew. Her statement is  
24 intrinsically coherent and conclusive.

25 Moreover, the submitted photograph documents the discovery

1 process in Tuol Sleng museum. In addition, a corroborating  
2 statement of her elder sister Ms. Chhay Nhem confirms that this  
3 photograph shows her nephew, whom Ms. Leang Kan raised as her own  
4 son. It was not foreseeable to her that the Trial Chamber would  
5 question her statement, on its face, that the person on this  
6 photograph is her nephew. It was therefore only feasible for her  
7 to submit the confirming statement at the point of the appeal.

8 [11.04.00]

9 Our client Ms. Hong Savath submitted a clear and coherent  
10 statement that the submitted photograph, found in Tuol Sleng  
11 museum, shows her uncle which was in addition confirmed by the  
12 brother of the direct victim. There is no doubt that this  
13 photograph was taken in S-21, discovered in Tuol Sleng museum,  
14 and that the depicted person is the uncle of our client. Given  
15 that the identity of the person depicted in the photo was  
16 confirmed as her uncle, the required standard of proof for  
17 determining that our client complies with the Internal Rules  
18 having demonstrated that the threshold is met -- it is the fact  
19 of that family relationship that is the basis for her personal  
20 mental harm, which she has suffered as a direct consequence of a  
21 crime within the jurisdiction.

22 During the trial, Ms. Hong Savath already filed the statement of  
23 Mr. You Hong, who confirmed that Mr. Loek Sreng was her uncle.  
24 The submitted photograph was confirmed by his written statement,  
25 as being a photo of her uncle. Our client also confirmed that

40

1 she had a bond of affection with him. In the absence of any  
2 guidance, she could not have known that the Trial Chamber would,  
3 in particular, challenge the fact that her uncle was detained at  
4 S-21. Therefore, it was only after knowing this from the Judgment  
5 that she was able to submit a further confirming statement from  
6 Mr. You Hong who elaborated on the identity of the person in the  
7 photograph and the bond of affection between our client and that  
8 person in the photo.

9 [11.06.05]

10 Ms. Nam Mon's statement that she was first working as a medic at  
11 S-21 and subsequently imprisoned. I would like to inform the  
12 Chamber that medic here is not like the doctor here this day.  
13 Anyone who distributed medicines to prisoners would be called a  
14 medic. She was imprisoned there along with other members of her  
15 family, is coherent and corroborates with other evidence.  
16 Although the statement was firstly disclosed during the trial  
17 hearing it does not create any doubts on the truthfulness of its  
18 contents, as she could explain, in person, why she was not able  
19 to reveal her story at the beginning, emphasizing that she  
20 expected reprisals from others. Therefore, her statement is  
21 intrinsically coherent.  
22 Further, it meets the standard of required proof because the  
23 statement, together with the submitted photographs of her family  
24 members, which were discovered at Tuol Sleng museum, was further  
25 corroborated by a statement from the commune chief who identified

41

1 the person shown on one of the submitted photographs as the  
2 father of Ms. Nam Mon. The supplementary statement, confirming  
3 this information, was not available at trial because it was not  
4 foreseeable to our client that the Trial Chamber would hold her  
5 statement, that this photograph of her father was found in Tuol  
6 Sleng, as insufficient. She hopes that the second statement will  
7 adequately confirm these matters.

8 [11.08.05]

9 Further, we challenge the rejection of three of our clients for  
10 the ground of lack of proof of a 'kinship' and a 'special bond of  
11 affection' as a violation of Internal Rule 23(2). This  
12 requirement is neither based on the Internal Rules, nor on the  
13 Cambodian code. Although 'kinship' and a 'special bond of  
14 affection' can be considered as a strong indicator for the  
15 requirement of 'personal harm as a direct consequence of the  
16 crime' it is not a requirement according to the Internal Rules.  
17 Ms. Nheb Kimsrea, born in 1978 and after the death of her uncle  
18 and his family, has shown that she suffered personal and direct  
19 harm because of the death of her uncle. Although she did not know  
20 the direct victim, she is confronted every day with the suffering  
21 of her elderly father who suffers because of his brother's death.  
22 Belonging to the second generation, she is the only family member  
23 who can represent the family before the ECCC. It was not  
24 foreseeable to her that the Trial Chamber would not accept her  
25 statement by itself, to prove a special bond of affection with

42

1 her uncle. This led to her filing a supplementary statement with  
2 this appeal to confirm the close relationship between herself and  
3 her uncle's family.

4 [11.09.50]

5 Ms. Hong Savath can demonstrate through her statement that it was  
6 her uncle who died in S-21. By a confirmation letter provided by  
7 the brother of the direct victim, her close relationship with her  
8 uncle is confirmed.

9 Mr. Chhoem Sitha has shown in his application that he has  
10 suffered harm because of the death of his nephew who was together  
11 with him in Division 310, and ultimately, killed like many others  
12 from this division at S-21. Mr. Chhoem Sitha submitted, in  
13 accordance with the requirements of the Internal Rules, that he  
14 personally suffered harm as a direct consequence of the death of  
15 his nephew. Only after the judgment did he learn that the Trial  
16 Chamber required, beyond his statement, a special proof of the  
17 bond of affection between himself and his nephew. Therefore, he  
18 submitted, with this appeal, a statement from his elder sister,  
19 who was able to confirm that he grew up with his nephew and that  
20 they both joined the Khmer Rouge together and establish his  
21 strong bond of affection with the direct victim in this way.

22 [11.11.20]

23 As we have clearly argued that the Trial Chamber violated the  
24 Internal Rules, both procedurally and substantively, when  
25 rejecting these persons' civil party applications, we therefore

43

1 ask that the Supreme Court Chamber overturn the rejection of our  
2 clients and admit them as civil parties.

3 With your leave, Your Honours, I would like to share the floor  
4 with my international colleague Ms. Silke Studzinsky. Thank you  
5 very much, Your Honours.

6 [11.12.30]

7 MS. STUDZINSKY:

8 Good morning Your Honours, colleagues, ladies and gentlemen and  
9 members of the public in attendance at this hearing today. Today  
10 will be a memorable day, as our appearance before the Supreme  
11 Court Chamber marks the last appearance for civil party lawyers  
12 as fully independent attorneys, acting directly for, and in the  
13 best interests of our individual clients. In future, civil party  
14 lawyers no longer have direct appearance rights and access to  
15 this Court and will need to rely on the capacity and good will of  
16 the Lead Civil Party Co-Lawyers who are now mandated to represent  
17 all our clients as one "consolidated group".

18 I will continue with a summary of the reasons in our appeal  
19 against the Trial Chamber's reparation order.

20 As a preliminary remark, it is worth it to mention that the  
21 Internal Rules governing the proceedings provided only for  
22 'collective and moral' reparations for civil parties. This  
23 deviated from the applicable national criminal procedure code  
24 according to which individual financial compensation for the  
25 civil party, born by the convicted person, is the standard. There

1 is no precedent in any other criminal court or tribunal where  
2 reparations for civil parties are provided for, albeit limited to  
3 collective and moral reparations. This feature, at the ECCC, is  
4 unique.

5 [11.13.50]

6 The term 'collective and moral' reparations to be born by the  
7 convicted person has never been defined in the Internal Rules or  
8 otherwise. This lack of a definition has left civil party  
9 applicants, the intermediary NGOs that assisted applicants  
10 complete their Victim Information Forms, and their lawyers,  
11 without any guidance as to what 'collective and moral'  
12 reparations could be. This uncertainty has resulted in civil  
13 party applicants continuing to be unsure, to this day, of what  
14 types of reparations they could claim.

15 Noteworthy to mention is that since the beginning, all Accused  
16 persons were held out as being indigent by a simple statement by  
17 the Defence Support Section. No corroborating evidence was  
18 provided and no further investigations into their financial  
19 affairs were conducted by this court. Civil party lawyers  
20 requested for financial investigation into the assets of the  
21 Accused in case 2, but the demand was rejected by the  
22 Co-Investigating Judges, alleging that investigating the accused'  
23 assets is beyond their mandate. The Pre-Trial Chamber rejected  
24 the appeal of the civil parties as inadmissible and ruled that  
25 the ECCC is not vested with the power to investigate the

45

1 financial situation, or to preserve, freeze or seize any assets  
2 of the accused.

3 [11.15.22]

4 Nearly all reparation requests that were brought before the Trial  
5 Chamber were rejected. The only reparations granted were the mere  
6 inclusion of the names of the civil parties and their  
7 relationship to the immediate victims into the Judgment, the  
8 publication of the final Judgment on the website of the Court and  
9 a compilation of the apologies of the accused made during the  
10 trial.

11 The publication of the Judgment was nothing more than what the  
12 court was otherwise obliged to do for the public, and the  
13 compilation of apologies is completely meaningless since the  
14 accused demanded his acquittal at the end of the closing  
15 statements and our request to include civil party statements  
16 about the apologies into the compilation was rejected.

17 [11.16.13]

18 This outcome was very disappointing for civil parties and  
19 applicants alike. Since the Trial Chamber formulated that the  
20 main purpose of civil party action is to seek reparations, the  
21 outcome of the Case 001 judgment rendered civil party action  
22 essentially meaningless, and ultimately, unsatisfactory. In  
23 retrospect, considering the judicial outcomes, it now appears  
24 that the numerous discussions with our clients, facilitated by  
25 the intermediary NGOs, to identify civil parties' needs in the

46

1 framework of moral and collective reparations, yielded no fruit,  
2 and was therefore an ineffectual exercise.

3 Beyond the combined and very general request for reparations  
4 submitted by all civil party groups, Group 2 filed nine very  
5 specific requests. Our submissions address only the rejection of  
6 the very specific and concrete requests of our clients, and the  
7 Trial Chamber's rejection of the inclusion of comments on the  
8 apologetic statements contained in the joint reparation request.

9 [11.17.25]

10 As my colleague submitted earlier, the civil party applicants who  
11 were deemed inadmissible at the end of the case 001 judgment  
12 should have a right to appeal the reparations order in the event  
13 that their admissibility appeals are successful before this  
14 Chamber. This is a procedural loophole, and if these clients  
15 were excluded from appealing the reparations order pending a  
16 final admissibility determination by the Supreme Court Chamber,  
17 they would effectively be completely deprived of any legal remedy  
18 on the reparations question.

19 If their admissibility appeals were successful, an inability to  
20 appeal the reparations order for these clients, would amount to a  
21 miscarriage of justice. Therefore, this appeal concerning the  
22 reparations issue is also conducted on behalf of our clients  
23 whose applications were deemed inadmissible.

24 [11.18.20]

25 As a preliminary remark, we submit that an internationally

47

1 recognized state obligation exists to remedy an internationally  
2 wrongful act to the fullest extent possible. Although the ECCC  
3 has no jurisdiction to order reparations to be borne by the  
4 Cambodian government, the Court is not prevented from issuing  
5 reparation orders against the accused which might require  
6 assistance from the Government to be implemented. These measures  
7 consist of non-pecuniary and administrative support rather than a  
8 financial contribution and are not to be understood as punishment  
9 of the government. This is derived from the general duty of a  
10 state towards its population, the people it serves.

11 The second preliminary remark refers to our observation that the  
12 Trial Chamber obviously considered the indigence of the Accused  
13 to be an obstacle to any reparation requests which have a  
14 financial ramification. We note that the indigence of an accused  
15 cannot have any effect on the issuance of the reparation order.

16 It is possible that the accused is in the possession of assets  
17 that remain undiscovered because no financial investigations were  
18 conducted, and further, it is possible that the accused may be  
19 not indigent in the future. For example, the convicted person  
20 could write and sell his autobiography or contribute to a film  
21 titled: "The Last Executioner".

22 [11.20.00]

23 I proceed to the first and common ground of appeal which is the  
24 violation of the fundamental principle of procedural fairness and  
25 the right to a reasoned decision. This ground applies to all the

1 reparation requests we have submitted. The Trial Chamber,  
2 summarised in bullet points, the 36 requests of all civil parties  
3 and applicants on three pages in the Judgment and analyzed all  
4 these requests in a little more than a further three pages. By  
5 itself, the extent of the reasoning for the rejection of the  
6 reparation requests demonstrates that there was little  
7 consideration from the Trial Chamber on this point.  
8 Furthermore, we observe that the Trial Chamber abstracted the  
9 requests and grouped several requests under different sections,  
10 but failed to point out which request the Chamber wanted to  
11 address in relation to which respective paragraph. For this  
12 reason, the appellants were not able, in all cases, to identify  
13 which reasons refers to which specific request - rather, this had  
14 to be guessed. For the same reason, and relevant to these  
15 proceedings, we find it difficult to see how the Supreme Court  
16 Chamber could conduct a proper appellate review of the reasons  
17 for the rejection of the reparation requests. The Trial  
18 Chamber's reasoning is clearly deficient.  
19 The extent of reasoning must at least identify with sufficient  
20 clarity which facts the Chamber found to be relevant in coming to  
21 its conclusion. In failing to do this, the Trial Chamber violated  
22 the fundamental right of the appellants to a reasoned decision.  
23 Further to this common ground of appeal, I now move on to discuss  
24 the main requests, the findings of the Trial Chamber, if any, and  
25 the respective errors in law and/or facts on which it erroneously

1 based its decision.

2 The first request: The Trial Chamber removed from the reparation  
3 request concerning a compilation and dissemination of the  
4 apologies of the accused, the specific request to include the  
5 comments of the civil parties and applicants on these statements  
6 which was, in turn, only granted with regard to the accused's  
7 apologetic statements. The reason the Trial Chamber gave for  
8 rejecting this claim was, firstly, that such statements are  
9 distinct from the accused person's statements and secondly, that  
10 the content of the statements of the civil parties and applicants  
11 were not specified. The first ground is logical.

12 [11.22.40]

13 However, the second reason, if applied similarly to the  
14 statements of the accused person, contradicts the Trial Chamber's  
15 decision in granting the publication of the apologetic statements  
16 of the accused, given that, on the same reasoning, his statements  
17 cannot be said to be any more "specific" than the Civil Parties'  
18 statements. The given reasons are deficient because there is  
19 either no comprehensible reason provided or the reasons  
20 contradict the part of the request which the Trial Chamber  
21 granted. We submit that this is a violation of Internal Rule  
22 21(1)(a) and (c).

23 The second request: We requested that the Trial Chamber order the  
24 Accused to write an open letter to the Royal Government of  
25 Cambodia requesting an official, serious, genuine and truthful

1 apology. The Trial Chamber did not examine this request at all.  
2 This failure constitutes a violation of Internal Rule 100 which  
3 stipulates that the Chamber has to decide on civil party claims  
4 in the Judgment. At the same time this failure comprises an error  
5 of fact.  
6 Amongst the analysis within the Judgment, there is a section with  
7 the heading "requests for measures by the Royal Cambodian  
8 Government", arguing that these requests fall outside the  
9 jurisdiction of the Trial Chamber. It further states that "the  
10 issuance of official statements of apology fall exclusively  
11 within national governmental prerogatives, which the ECCC has no  
12 competence to compel".  
13 [11.24.20]  
14 We submit that the Trial Chamber overlooked and ignored that the  
15 request was not for the issuance of an order to the Government,  
16 but simply to order the accused to write a letter. It is hard to  
17 understand how and why the Trial Chamber could misunderstand the  
18 clear and plain wording of this request.  
19 Third and fourth requests: the civil parties asked for the  
20 installation of memorials in Tuol Sleng museum and Choeng Ek, and  
21 to have Prey Sar transformed into a memorial site. The requested  
22 buildings were described in detail with regard to the size,  
23 material, exact location and the minimum content of the engraving  
24 of text. With regard to Prey Sar it was requested that the civil  
25 parties decide on the site design by holding an international

51

1 architectural competition.

2 The Trial Chamber rejected these requests under the heading  
3 "Requests for the construction of pagodas and other memorials".

4 MR. PRESIDENT:

5 Counsel Silke, could you please slow down a little bit. Thank  
6 you.

7 MS STUDZINSKY:

8 Okay. The Trial Chamber has rejected our requests for the reason  
9 that it "lacks sufficient specificity regarding the exact number  
10 of memorials sought and their nature, envisaged location, or  
11 estimated costs." Further, the Trial Chamber listed some examples  
12 on what it expected to be brought before it, such as building  
13 permits, the necessary administrative authorizations, and the  
14 consent of the owner of the site." We submit that the Trial  
15 Chamber violated Internal Rule 21 (1)(a) and (c) and 23, and  
16 further, based its decision on an error of fact.

17 [11.26.30]

18 The fairness of the proceedings requires a reasonable threshold  
19 for any reparation request that can be met by the civil parties  
20 who are without any assistance or resources. By setting the  
21 threshold that high, the Trial Chamber in fact hindered the right  
22 of civil parties to claim reparations. In addition, that  
23 threshold of specificity is not backed by the Internal Rules as  
24 the Rules are silent on the standard of the claims. The Trial  
25 Chamber did not provide any guidance in advance. Shifting the

1 burden on the civil parties by requiring that they file a cost  
2 plan exceeds their means. Furthermore, the Trial Chamber fails to  
3 differentiate between the domestic standard applied in relation  
4 to claims for pecuniary damage and the standard for claims for  
5 satisfaction measures. The latter are much more difficult to  
6 quantify without expertise and judicial assistance.

7 [11.27.35]

8 In addition, the Trial Chamber completely ignored the particulars  
9 detailed in the structure of the memorials to be built, that were  
10 submitted. Since the standard of specificity is not defined in  
11 the Internal Rules, guidance must be sought at the international  
12 level. In our appeal we have extensively discussed the practice  
13 of other international and regional courts (mainly human rights  
14 courts) - with a finding that the requested measures by victims  
15 are accepted when they are described in general terms.

16 For example the Inter-American Court of Human Rights found  
17 creative ways to address the needs and injuries of victims by  
18 ordering similar awards as what has been requested before the  
19 ECCC, and applying a very low standard of specificity. Its orders  
20 against States are drafted rather generally, for example,  
21 "building a memorial in a specific region related to the victims"  
22 or name a "well-known street or square in honor of the victim".

23 [11.28.50]

24 The International Criminal Court has not yet reached the  
25 reparation stage in its first case but the onus placed on victims

1 with regard to specificity is not excessive, and the ICC allows  
2 more flexibility in determining the scope and form of  
3 reparations.  
4 Therefore, the surprisingly high level of specificity required by  
5 the Trial Chamber, without any advance guidance, and without  
6 providing necessary resources, violates the fundamental principal  
7 of procedural fairness. At the same time, the Trial Chamber has  
8 erred in fact as it disregards or ignores our detailed  
9 description of the location, type, design and number of the  
10 buildings requested.  
11 [11.29.45]  
12 Our fifth request: In this request we asked for the civil parties  
13 to be funded for opportunities to visit the memorials three times  
14 per year, but the Trial Chamber did not consider this request at  
15 all and thus violated Internal Rule 100. In addition, this  
16 decision was based on an error of fact by ignoring the factual  
17 request.  
18 Our sixth request: Our clients requested medical treatment and  
19 psychological support, including transportation if necessary. The  
20 Trial Chamber rejected this claim on three grounds: first, such  
21 requests are not symbolic by their nature, second, they are  
22 designed to benefit a large number of individual victims, and  
23 third, are outside of the scope of available reparations because  
24 the Court can not impose obligations on the national healthcare  
25 authorities.

54

1 Obviously the Trial Chamber misunderstood this clear and plain  
2 request, which we submitted for only 17 civil parties and  
3 applicants. The claim was not directed at the Cambodian  
4 government.

5 [11.31.05]

6 The Trial Chamber erroneously based its decision on a  
7 misunderstanding of the term "collective and moral" as stipulated  
8 in Internal Rule 23(1)(b) and classified this request as  
9 "non-symbolic by its nature". If the Trial Chamber means that  
10 the fact that an individual benefits from a reparation should  
11 exclude the reparation from being classified as "collective and  
12 moral", we would submit that this interpretation would have the  
13 effect of excluding any reparation award. All rewards, including  
14 those deemed to be "collective", would, as a matter of course,  
15 benefit individuals in that collectivity.

16 We have sought guidance at the international level and in  
17 summary, the result found was that, first, "collective and moral"  
18 reparations also cost money to implement, and second, "collective  
19 and moral" reparations are to be distinguished only from  
20 individual financial awards. This means that anything beyond  
21 individual financial compensation can be subsumed under the  
22 category of "collective and moral" reparations.

23 [11.32.30]

24 By ignoring the breadth given to interpretation of "collective  
25 and moral" by international and regional courts, the Trial

1 Chamber excluded the availability of health care for civil  
2 parties and applicants. In our submission, this amounts to a  
3 legal and factual error.  
4 Our seventh request: in our seventh request we sought for the  
5 production and dissemination of audio and video material, and  
6 included a detailed description of the content of these  
7 materials, as well as the level of dissemination requested. It  
8 is not clear if the Trial Chamber fully decided on this request  
9 as we could only guess that it was subsumed under the section  
10 "Requests concerning publication of the Judgment and outreach".  
11 Even though our request specifies in detail the content of the  
12 distributed material, as well as describing the dissemination  
13 process, the Trial Chamber rejected this request because of its  
14 "lack of specificity" adding that the "precise nature of the  
15 measures sought and their costs are uncertain and accordingly not  
16 amenable to an award against Kaing Guek Eav."

17 [11.33.55]

18 By rejecting this claim the Trial Chamber violated Internal Rule  
19 21(1)(a) and (c) and thus the fundamental principle of procedural  
20 fairness to grant civil parties access to reparations. It is  
21 surprising that the Trial Chamber could misunderstand the nature  
22 of this request if it states that it is not amenable to an award  
23 against the accused. In fact, under the Internal Rules, the  
24 accused should have been convicted to bear the costs of the  
25 requested measures as the production, disseminating and

1 maintaining process costs money.  
2 In addition the required threshold of specificity is an  
3 unjustified burden on the shoulders of our clients who simply do  
4 not have the means to specify the costs of the production and  
5 dissemination process, as this would, for example, require  
6 obtaining quotes from engineers and other persons from the  
7 construction industry. The Trial Chamber uses this "lack of  
8 specificity" finding as a catch-all basis for its rejections and  
9 in doing so, violates an obligation to safeguard the rights of  
10 the civil parties by making collective and moral reparations  
11 possible and accessible to these parties.

12 [11.35.23]

13 Eighth request: Our 17 clients sought to name 17 public  
14 buildings, chosen by them with victims' names, and to combine  
15 this action with official broadcasts of ceremonies of which a  
16 recorded copy should be stored at Tuol Sleng museum, Choeng Ek  
17 and the requested new memorial site at Prey Sar. The Trial  
18 Chamber did not address this request at all. We assume that the  
19 Trial Chamber intended to include this claim under the section  
20 "Measures by the Government" in its Judgment, despite the fact  
21 that this heading does not correspond to this claim. As outlined  
22 at the beginning, the Trial Chamber is not prevented to issue a  
23 reparation order of which costs are to be born by the convicted  
24 person and which needs non-pecuniary and administrative  
25 assistance of the government.

1 Our ninth and last request: In this claim we asked for an order  
2 against Mr. Kaing Guek Eav to write an open letter to the Royal  
3 Government of Cambodia requesting part of the entrance fees of  
4 Tuol Sleng and Choeng Ek to be used as contribution for a  
5 reparations fund for the civil parties. In failing to deciding on  
6 this specific request, the Trial Chamber violated Internal Rule  
7 100 which requires a reasoned decision on the reparation claim.  
8 In the absence of clarity in the Reparation Order, we can only  
9 assume that the Trial Chamber intended to address this request  
10 either under the section "Requests for individual monetary awards  
11 or establishment of a fund" or under the section "Requests for  
12 measures by the Royal Government".  
13 Although the demand is clear and plain, the Trial Chamber  
14 completely misunderstood the claim, which sought only to have the  
15 accused person write an open letter to the Royal Government of  
16 Cambodia requesting to set aside one third of the entrance fees  
17 of Tuol Sleng museum and Choeng Ek to be used for the funding of  
18 requested reparations. This is clearly within the framework of  
19 collective and moral reparations.  
20 [11.37.52]  
21 To conclude, the Trial Chamber's narrow approach on the issue of  
22 reparations lacks creativity and is disappointing, degrading, and  
23 unsatisfactory for the civil parties and the applicants, who  
24 expected not much - but much more than they were ultimately  
25 granted. In light of the fact that the ECCC is the first

58

1 internationalised court which grants victims of mass crimes an  
2 entitlement to seek reparations through civil party action, this  
3 outcome has been simply unacceptable for our clients.

4 If the ECCC closes the door on any meaningful reparations for  
5 civil parties by taking a narrow statutory interpretation on the  
6 terms "moral and collective", and by requiring a level of  
7 specificity of claims that cannot practicably be expected of our  
8 clients, it has effectively denied civil parties access to  
9 reparations - that is, it has denied civil parties their  
10 substantive rights.

11 [11.39.07]

12 The decision of the Trial Chamber demonstrates that the ECCC has  
13 so far dismally failed to take its unique and distinct mandate on  
14 civil party action seriously and meaningfully. At the  
15 international level, it has wasted the opportunity to make the  
16 ECCC a future model for other international courts and tribunals  
17 dealing with mass crimes, by fully including civil parties'  
18 rights, including issuing reparation orders which are meaningful  
19 for the victims of serious, mass, and horrendous crimes.

20 In summary, even though all of the claims we submitted were as  
21 specific as possible, and within the framework of collective and  
22 moral reparations, nearly all of them were rejected through an  
23 error of the Internal Rules, or an error of fact.

24 [11.40.05]

25 We respectfully request that the Supreme Court Chamber remedy

59

1 this situation by declaring this appeal admissible, granting our  
2 clients civil party status, setting aside the Judgment on civil  
3 party claims, and granting all reparations requests in full.

4 I thank you for your attention. If I'm well informed there are  
5 some minutes left, right? If the Chamber agrees I would then go  
6 to respond to the invitation of the Chamber for a disposition,  
7 immediately.

8 MR. PRESIDENT:

9 Yes, you may proceed, counsel.

10 MS. STUDZINSKY:

11 We appreciate the invitation to assist Your Honours by proposing  
12 a concrete disposition that our clients would like to get granted  
13 in a Judgment. Our suggestions and application reflect first the  
14 unique reparation framework at this Court, the particularity of  
15 collective and moral reparations, the specific situation of civil  
16 parties who are victims of mass crimes, and fourth, the personal  
17 possibilities and capacities of our clients as individuals and as  
18 members of the collective of victims.

19 [11.42.05]

20 But before doing this, we would like to submit some preliminary  
21 remarks which should be taken into consideration by Your Honours.  
22 First, the Internal Rules and the applicable revision 3 give some  
23 examples of moral and collective awards, including the publish  
24 the Judgment in medias at the convicted person's expense, and to  
25 fund any non-profit activity or service for the benefit of

60

1 victims. We submit it is clear then that collective and moral  
2 reparations may and were envisaged to cost money.  
3 Second remark, in many other jurisdictions, a person who is  
4 convicted to pay an amount of money is allowed to borrow the  
5 money from family or other third persons, or to receive the money  
6 through other means. There is no legal obligation that the  
7 convicted person has to make reparations for his crime from his  
8 own pocket. Any previous determination of indigence shall not  
9 have an impact on the awards granted in judicial proceedings if  
10 they fall as required before the ECCC under the criteria of being  
11 collective and moral and are intended to be for the benefit of  
12 victims.

13 [11.43.40]

14 Co-lawyers for civil parties further note that neither the  
15 Internal Rules nor the agreement between the Royal Government of  
16 Cambodia nor the ECCC Law provide regulations on the  
17 implementation of reparations. Rule 113(1) of Revision 3 leaves  
18 the enforcement to the initiative civil party. Therefore,  
19 article 523 through 533 of the Cambodian criminal procedure code  
20 can further assist. Under national law, when implementing an  
21 order to pay any compensation to a civil party, the convicted  
22 person who does not pay can be ordered to imprisonment in lieu of  
23 payment.

24 This can put some pressure on the convicted person to endeavour  
25 to find the funds or at least part of it. After having served

61

1 the imprisonment in lieu of payment, he or she remains the debtor  
2 according to the Cambodian procedure code. Co-lawyers for civil  
3 party group 2 speak only for our 17 clients, therefore we request  
4 the Supreme Court Chamber to rule for these 17 civil parties as  
5 follows. Only one remark, I will leave this later to the Supreme  
6 Court Chamber exactly how I read it now.

7 [11.45.15]

8 Request to rule as follows: to convict the respondent to write  
9 two open letters to the Royal Government of Cambodia, first to  
10 request for an official, serious, genuine and truthful apology as  
11 successor state of the state of Democratic Kampuchea; second, to  
12 request for one third of the entrance fees of Tuol Sleng museum  
13 and Choeng Ek to be collected in a fund to serve for the  
14 implementation of the reparations awards.

15 To convict the respondent to pay for the costs of the following  
16 awards: compilation of the comments of civil parties and  
17 applicants on the apologetic statements made in the course of the  
18 proceedings by reviewing the transcripts of the proceedings.  
19 These statements must be included into the granted award on the  
20 compilation of apologetic statements of the respondent.

21 [11.46.25]

22 Second, two memorials placed in the courtyard of Tuol Sleng  
23 museum and at the left and right hand of the stupa at Choeng Ek.  
24 The memorials are stones of white marble, the names of all civil  
25 parties and their respective relationship to the named direct

1 victims have to be carved on the white stone with black  
2 lettering. The memorial stones shall include a summary and  
3 result of the first trial of the ECCC, not exceeding three  
4 hundred words. On tablets that are linked to the white stone  
5 shall be included the entry date into S-21, and/or the date of  
6 their death, and/or the reason for the imprisonment, and/or the  
7 location of their corpses.

8 Also some information regarding the character and life of the  
9 victims shall be included. The respective civil party shall  
10 determine the text that will not exceed two hundred words for  
11 each person or family. A photograph may be attached. The text  
12 shall be written in the working language of the Court, Khmer,  
13 English and French, and be provided also as audio.

14 [11.47.55]

15 Third, a stupa shall be built at Prey Sar which shall be  
16 transformed into a memorial site. The stupa shall be 35 metres  
17 height, and 20 metres by 20 metres in size. The interior room of  
18 the stupa shall be able to hold Buddhist ceremonies. An  
19 international architectural competition shall be held to propose  
20 memorial buildings which fulfill the requirements of  
21 memorialisation, religious ceremony and education. The civil  
22 parties select one of the proposals of the architectural  
23 competition by majority vote. The building shall accommodate, at  
24 a minimum, a permanent exhibition with explanations on the  
25 function and use of Prey Sar in accordance with the findings in

63

1 the final Judgment and scientific research.

2 The exhibition shall be in all working languages of the ECCC and  
3 available in audio as well. The role and responsibility of the  
4 accused shall be explained on tablets. The names of all civil  
5 parties of case 001 shall also appear on tablets, including texts  
6 describing the role that they played in the proceedings. The  
7 civil parties will edit the text.

8 [11.49.50]

9 All civil parties shall have the paid opportunity to visit all  
10 three sites three times per year for four days. If a civil party  
11 is not available, he or she can be replaced by an authorised  
12 person and accompanied by one person if necessary.

13 The civil parties shall have free access to medical treatment,  
14 medication and psychological support, including the necessary  
15 transportation. At least hundred hours film summary of the  
16 trial, ten written and audio final Judgments shall be produced  
17 and disseminated in one pagoda in each of their respective  
18 communes. Each civil party shall have the right to choose a  
19 public building, like a hospital or school, to be named on behalf  
20 of the victim for whom he/she represents. This process shall be  
21 accompanied by a commemorating official ceremony, including the  
22 production of information tablets about the victims' background  
23 and fate.

24 [11.51.20]

25 I would provide this disposition that we would submit to the

64

1 Supreme Court Chamber, to the greffiers, after the hearing of  
2 today. And we are then prepared for your questions.

3 MR. PRESIDENT:

4 It is now the opportunity for the Judges of the Bench to put  
5 questions to the counsel.

6 JUDGE YA NARIN:

7 I have a question concerning the status of the civil parties.

8 The question is whether the information obtained from S-21 is  
9 sufficient to prove the identity of the civil party status. For  
10 example, when applying to join as civil party.

11 MS. STUDZINSKY:

12 Thank you for your question. I'm not sure because -- it was my  
13 mistake, I was a little bit distracted, I got an information.  
14 Could you please repeat the essence of your question again, that  
15 I respond accordingly? Thank you.

16 JUDGE YA NARIN:

17 The question, again, is whether the information obtained from  
18 S-21 is sufficient to prove the identity of the victims. For  
19 example, the photograph that the civil party referred to in their  
20 application to joining as a civil party.

21 MS. STUDZINSKY:

22 Yes, thank you for your question. We submit that if our client  
23 finds a photograph in Tuol Sleng museum, which is a document  
24 found in S-21, which reflects, or is a photograph of one of the  
25 prisoners, and then recognises this photograph as the relative

65

1 then of course we submit that if there are no indications that  
2 this is an error or no mistake of the applicant, then we submit,  
3 yes, this is enough evidence of course to show that the applicant  
4 is the relative of the person in the photograph and identified  
5 the person.

6 JUDGE MILART:

7 Thank you. I will have two questions. One still refers to the  
8 proving of civil party legitimacy to act in the proceedings. I  
9 understand that there is an opposition against the test of  
10 special bonds and/or dependency. And my question is whether it  
11 is only based in that this test was not sufficiently communicated  
12 to the parties, because it's not borne out by the Internal Rules,  
13 nor was ever so put before the parties during the trial? Or do  
14 the appellants believe that the test is substantively wrong and  
15 inadequate to the proceedings before us.

16 [11.56.00]

17 The second question concerns reparations, and the proposals by  
18 civil party group 2, and let's assume that the role of the civil  
19 court is to adjudicate or court acting on civil action in  
20 criminal proceedings is to adjudicate on the law of civil nature  
21 disputes between the parties in a binding way, then the binding  
22 way would presuppose that the court's decision are at least  
23 theoretically enforceable, and we are not discussing here who,  
24 which body is responsible for carrying out the enforcement.

25 And I was wondering how the appellant foresee the enforcement of

66

1 a decision that would order the accused to fund certain activity,  
2 especially if such a project or activity would require placement  
3 of memorials on certain land, or intervention in the  
4 administrative domain such as naming buildings or streets. Thank  
5 you.

6 MS. STUDZINSKY:

7 Yes, thank you for your questions. I have first a question to the  
8 President. I see we are now at lunchtime. Should I respond  
9 directly, and we exceed a little bit?

10 MR. PRESIDENT:

11 You may go ahead.

12 MS. STUDZINSKY:

13 Your first question, I would like to respond as follows. We see  
14 the kinship and requirement of special bond of affection only as  
15 one of different possible indicators to show that the victim as  
16 it is outlined in the Internal Rules that a victim must show that  
17 he or she suffers psychological or other harm as a direct  
18 consequence of a crime, and at that time still a crime within the  
19 jurisdiction of this Court.

20 [11.58.37]

21 But I would describe it, in our submission, as a two-step  
22 argument. First, we say this was not communicated, therefore the  
23 civil party applicants were not aware to focus exactly on these  
24 indicators; secondly that then, within the appeal, we submitted  
25 for all our clients respective documents which show then for each

67

1 person where it was challenged that the special bond of affection  
2 exists.

3 So that we would like to ask you first that you come to the  
4 conclusion that this was not a threshold that was at least not  
5 communicated, and is only an interpretation of the rule, and an  
6 indicator, but secondly, finally, we complied with this  
7 requirement.

8 [11.59.35]

9 I would like to refer, then, the next response to your earlier  
10 questions to group 1 and I think it was to all groups at the end,  
11 with respect to article 355 of the Cambodian procedure code,  
12 which is similar, but only similar to rule 100 of the Internal  
13 Rules. And your question why this was then why were we taken by  
14 surprise when we heard that there is a second decision in the  
15 Judgment, because, you are right, the Cambodian procedure code is  
16 clear in this regard, but is different from the Internal Rules.

17 I would like to refer Your Honours to a decision which was issued  
18 by the Pre-Trial Chamber of this Court and which ruled as  
19 follows. I quote from this decision as follows. "The Internal  
20 Rules form a self-contained regime of procedural law related to  
21 the unique circumstances of the ECCC, made and agreed upon by the  
22 plenary of the ECCC. They do not stand in opposition to the CPC"  
23 - or the Cambodian procedure code - "But the focus of the ECCC  
24 differs substantially enough from the normal operation of  
25 Cambodian criminal courts to warrant a specialised system".

68

1 [12.01.22]

2 And now, Your Honours, there is the conclusion of the Pre-Trial  
3 Chamber then, and everybody, I think professionals here know this  
4 decision, but also for the public and to respond and refer to it,  
5 it continues to say: "Therefore, the Internal Rules constitute  
6 the primary instrument to which reference should be made in  
7 determining procedures before the ECCC. Where there is a  
8 difference between the procedures in the Internal Rules and the  
9 CPC, provisions of the CPC should only apply where a question  
10 arises which is not addressed by the Internal Rules."

11 And Your Honours, you know that we challenged this part of a  
12 decision, it was done in the Nuon Chea case, and only for the  
13 record I would like to give the document number, which is  
14 D.55/1/8, and the English ERN is 00219322 through 00219333. And  
15 then it is paragraphs 14 and 15 of this decision.

16 [12.03.00]

17 I think you know, perhaps, that we civil parties challenged this  
18 part of the decision, and our request for reconsideration was  
19 rejected by the same Court than the Pre-Trial Chamber, and the  
20 Pre-Trial Chamber upheld this decision. And therefore, to be  
21 brief, we took -- because there's no gap, the rules are clear in  
22 this regard, or were clear, in rule 100 -- stating that only on  
23 civil party claims the decision has to be done in the Judgment,  
24 and therefore we see this is a specific and as first-ranking  
25 source where we have to look, except where there is a gap. Which

69

1 is not the case.

2 I would like to proceed then, Mr. President, if you still agree,  
3 to this next question on reparation, and how to have an  
4 executable Judgment. We submit that, and I don't want to repeat  
5 what we have already said in our written appeal and today, but  
6 all of our requests are specific as it is necessary and possible  
7 to be submitted by the civil parties and applicants and without  
8 having these requirements that the Trial Chamber put on the civil  
9 parties.

10 [12.05.02]

11 I think that we ask the Supreme Court Chamber to go a new avenue,  
12 to put aside national jurisdictions, previous experiences,  
13 because we are here at the ECCC in complete new setting with  
14 regard to reparation. And as I said, the closest examples are  
15 given by the Inter-American Court which puts, of course there it  
16 is towards states, I know, but only to see how general, and  
17 however controlled by this Court, how general the ruling are or  
18 can be by this Court to remedy the injuries of the victims.  
19 Therefore I think that is how it is outlined. I would say that  
20 this is executable, specific enough, and then with regard to  
21 necessary, or in some cases necessary permits, for example the  
22 owner of the site or something, that the government has, in our  
23 opinion, a duty to the population, its population, to assist,  
24 because this is not a question of money, or not an improper  
25 approach to convict the government. This is a request for

70

1 assistance to the victims that deserve the assistance of the  
2 state that should look for their wellbeing.

3 [12.07.15]

4 So far my responses, or our responses, to your questions. Thank  
5 you.

6 JUDGE MILART:

7 Thank you, counsel.

8 MR. KHAN:

9 And Mr. President, with your leave, one submission in relation to  
10 Judge Milart's question on the standard put forward by the Trial  
11 Chamber of special bond of affection or dependency, it is the  
12 view of civil party group 1 that the is of course a notice issue,  
13 but we also take the position that that test that has been  
14 fashioned does not find support in any of the international  
15 jurisprudence that currently exists.

16 The Lubanga trial chamber, in the International Criminal Court  
17 says a broad interpretation should be given to the concept of  
18 family. Now, what the Trial Chamber in fact seem to have done,  
19 in fleshing out the concept of special bond of affection and  
20 dependency, is to have seen it through the prism of Cambodian  
21 culture, because what we have seen is that in effect the two  
22 instances where they found such a special bond of dependency,  
23 they seem to have required that the indirect victims resided with  
24 the deceased person.

25 [12.08.55]

71

1 And Your Honours, I refer you very briefly to page 28 of our  
2 brief, footnote 84, where at paragraph 650 of the Judgment the  
3 Trial Chamber refer to Toch Monin, who lost his cousin, and who  
4 resided with him previously, and also Sin Sinet. Now, when one  
5 is looking at the civil parties, tragically of course it wasn't a  
6 fate that it was only limited to Cambodian nationals.

7 Two of the civil parties I represent, Joshua Rothschild and  
8 Jeffrey James were the only surviving relatives, the only  
9 surviving relatives of their uncle, and they provided evidence  
10 that they had an exceptionally close link with their uncle. And  
11 they were in distress when they heard the news that he wasn't  
12 going to return. So Your Honours, when one is looking at the  
13 standard and how the Judges have applied it at the Trial Chamber,  
14 it is our respectful submission that the standard does not  
15 withstand scrutiny, is novel and not supported in law, and has  
16 been applied without consideration of other cultural mores,  
17 including the affect it had in relation to these two American  
18 nationals that are the two civil parties that I represent.

19 I am grateful.

20 MR. PRESIDENT:

21 The Court will take the lunch adjournment, and will be resumed by  
22 1.30 pm. The security personnel are now instructed to take the  
23 accused back to the detention facility and return him to the  
24 courtroom by that time.

25 (Judges exit courtroom)

72

1 (Court adjourns from 1210H to 1335H)

2 (Judges enter courtroom)

3 MR. PRESIDENT:

4 Please be seated. The Court is now back in session. We would  
5 like now to give the floor to co-lawyers for civil party group 3.

6 You are reminded that yesterday we received your additional brief  
7 on reparations, and that will be annexed for our examination.

8 The floor is now for you. Thank you.

9 [13.37.20]

10 MS. MOCH SOVANNARY:

11 Thank you, Mr. President. Good afternoon, Your Honours, good  
12 afternoon everyone. My name is Moch Sovannary, I'm a national  
13 lawyer for civil party group 3 with my colleague Kim Mengkhy and  
14 Martine Jacquin and Philippe Cannone. I would like now to  
15 provide my oral submissions for my client. I will only focus on  
16 the appeal on the section in particular on the Judgment in  
17 relation to the rejection of my eight civil party clients. The  
18 rest of the time will be shared with my other colleagues.

19 [13.38.28]

20 So far when I looked at my clients they have smiles on their face  
21 with the expectation that I convey their message to Your Honours.  
22 Before I give details of fact for each of my client on the  
23 mistake made by the Trial Chamber in its Judgment I would submit  
24 that Your Honours and everyone in the public gallery have seen my  
25 clients, the civil parties. They are victims, and they are here

1 today.

2 How many, and how do you know they face numerous obstacles to

3 break their silence to reveal the crimes committed upon them and

4 their victims which occurred more than 30 years ago at the

5 security centre at S-21 of the Khmer Rouge. How much courage

6 does it take them to stand here today before Your Honours to

7 participate in seeking the truth, to reveal what happened during

8 the regime, when almost the whole world enjoyed peace during the

9 time, enjoying the liberty, the respect, and the reunions with

10 their family the Cambodian people suffered under the regime.

11 [13.40.10]

12 The appeal today reveals the direct suffering, the torture and

13 the killings upon them, upon the relatives at S-21. Also when

14 humanity tries to survive to look after their families to earn a

15 living, they have to step back into the dark past, with the only

16 purpose is to break their silence to seek for the truth together

17 with Your Honours, and with this tribunal.

18 When the Trial Chamber required them to provide additional

19 materials to support their civil party applications, which were

20 beyond the standard accepted, they had to strive again to return

21 to the genocidal museum of Tuol Sleng. They had to enter each

22 building and room to examine the photos displayed. Even if they

23 have no identifications on some of those photos, they have to

24 walk from one board to another board, from one building to the

25 next.

74

1 How imagine you can be of the suffering and the depression upon  
2 them, upon their feeling when they return to that shocking place  
3 in order to seek for the evidence required. Even if some of them  
4 couldn't find an evidence that their relatives were arrested and  
5 tortured at this place, they did not give up the attempt, because  
6 they know that what they are doing is to seek for the truth,  
7 which is worse than anything else.

8 [13.42.20]

9 If you look at their physical strength they are pretty weak, but  
10 what make them strong is their feeling, that they hope this  
11 tribunal will find them the truth, and that they are considered  
12 as part of this society and respected. And the information that  
13 they are giving, and themselves are living documents with  
14 evidence of the regime.

15 Another observation regarding the challenge that my clients face  
16 in seeking additional evidence, we shall observe that all the  
17 documents at the Tuol Sleng museum, they are not complete  
18 documents. Some of the documents were destroyed or damaged  
19 during the regime or after. Even if those documents are the  
20 fundamental documents that the Co-Prosecutors compiled the  
21 witness list, they also acknowledge that the list is not a  
22 complete list, and we need to return to the historical culture  
23 the knowledge of the victims, and the documents that they had at  
24 the time.

25 [13.43.47]

75

1 I seek and urge Your Honours to consider the difficulties and  
2 challenges that they faced. I would also like to look at the  
3 individual client.  
4 Lay Chan is a victim who survived the S-21 prison. The Trial  
5 Chamber acknowledged that Mr. Lay Chan was arrested and detained,  
6 but they allege that there was no evidence that Ly Chan was  
7 detained at S-21. For that reason, he did not give up his hope,  
8 he tried to seek for additional evidence and we submitted this  
9 new evidence to Your Honours already. And I would seek  
10 permission from Your Honour to show his photo. It's F2/1.7,  
11 proving that there is a cell under the stair, and that photo was  
12 taken from the Tuol Sleng museum.  
13 [13.45.05]  
14 This photo is upside, can you turn it to the left? I submit this  
15 document to the Bench so that you can examine his status in his  
16 civil party application. And for Phaok Khan, another client, he  
17 claimed that he's a survivor of S-21, however the Trial Chamber  
18 rejected his status, that he did not have sufficient evidence to  
19 show that. We filed additional evidence in relation to his wife  
20 Pin Leap(phonetic), or Kim Leap(phonetic), who passed away at  
21 S-21. And I seek Mr. President's permission to show a document,  
22 F2/1.5.  
23 I repeat again. It's F2/1.5. This document is a photo of my  
24 client's wife who was killed at S-21. Another one is F2/1.6.  
25 This is a close-up photo of the photo that we just saw then.

76

1 There is no name attached to this photo, however there are  
2 countless photos displayed at the Tuol Sleng museum with no names  
3 or identification attached. However, from the first photo that I  
4 showed, this is the photo taken directly from the display at the  
5 Tuol Sleng museum.

6 [13.47.12]

7 I would also like to have another document displayed, regarding  
8 his uncle and his wife's uncle, who died at that prison. It's  
9 F2/1.1. And another one is F2/1.2. This is the photo of his  
10 aunt, and F2/1.3, that is the next photo, this is a photo of his  
11 uncle, and another photo, F2/1.4, is a close-up photo of that  
12 same board, taken from the Tuol Sleng museum. I would like to  
13 submit all these documents to Your Honours for your  
14 consideration.

15 I would like now to move on to another client, that is Mrs. So  
16 Saung, in relation to her uncle who was killed at S-21. The  
17 Trial Chamber rejected that the evidence is not attached to the  
18 identification, and that's for it was rejected, and the  
19 relationship of kinship was not shown as alleged by the Trial  
20 Chamber. I would like to submit that there are numerous photos  
21 and documents showing that those were the victims and they're  
22 related to my clients.

23 [13.49.10]

24 The Trial Chamber made a mistake in interpretation, the kinship  
25 or the special bond relationship. In Cambodian society, the word

77

1 'family' is much broader. It includes the aunt and the uncle in  
2 Cambodia, Cambodia family is living in a nuclear family. In one  
3 of the transcript of the psychiatrist Chhim Sotheara, the  
4 transcript dated 25 August 2009, at page 37 and 38, it reveals  
5 the special bond of affections in that testimony.  
6 So what else do you need to prove the truth? The suffering that  
7 they suffer. And how can you define the word family rather than  
8 what they have shown us. So I once again urge Your Honours to  
9 consider all these circumstances and the mistake made by the  
10 Trial Chamber in regard to my clients. Also in relation to the  
11 kinship, my client, Soem Pov, because of his in-laws killed at  
12 S-21. When a married woman, then they are tied by this bond. So  
13 if one is sick then you feel uncomfortable as well, so the  
14 feeling is shared, good or bad. And then the suffering is the  
15 same in this special sense.  
16 In regard to Khuon Sarin, another client, he was recognised by  
17 the Office of the Co-Prosecutors and his status was acknowledged  
18 on the first page of document D99. Later on the Trial Chamber  
19 considered the status again and rejected it, and for this reason  
20 I urged Your Honour to consider this mistake which is made by the  
21 Trial Chamber. In relation to my client, Ms. Chan Yoeurng, she  
22 lodged the application because of the death of her uncle from  
23 Preah Vihear province. There is no evidence showing her uncle's  
24 photo at Tuol Sleng, however the information that is provided by  
25 her is credible, and I urge Your Honours to examine it.

78

1 [1.52.30]

2 And Pann Pech, in her case, and in the case of Morn Sothea, he  
3 claimed that her aunt was an official working in the Philippines  
4 embassy during the time, and when, during the evacuation of Phnom  
5 Penh, she made the announcement that it was a dictatorial regime,  
6 and for that reason he was arrested. You know that all the  
7 intellectuals were arrested by the Khmer Rouge, supported by the  
8 evidence, even the intellectuals who lived abroad were appealed  
9 to return home and arrested by the Khmer Rouge. The evidence  
10 provided by my client is credible, even if there is no written  
11 proof to show such effect.

12 Evidence does not actually just mean the tangible evidence.

13 Evidence could derive also from the testimony of a credible  
14 witness in a criminal matter. Another document that Morn Sothea  
15 just provided to me, that's a photo of her mother at S-21, and a  
16 letter of affirmation of the kinship. I haven't translated this  
17 document because I just receive it, and I would urge Your Honours  
18 to accept it, and with your permission I would like to have it  
19 displayed on the screen.

20 [13.54.13]

21 MR. PRESIDENT:

22 Yes, you may proceed with the display of the photo.

23 Please turn on your microphone.

24 MS. MOCH SOVANNARY:

25 I'd like the photo to be displayed, and later on I will

79

1 distribute this document to the concerned parties.

2 Mr. President, with your permission, if it takes more time to  
3 make the photo, probably I will now proceed and we will show the  
4 photo later.

5 MR. PRESIDENT:

6 If the photo cannot be displayed, then it can be copied and  
7 distributed to the parties and you may proceed with your oral  
8 submission.

9 MS. MOCH SOVANNARY:

10 Thank you, Mr. President. I finish with what I want to say in  
11 relation to the documents and the materials with my clients, and  
12 I thank you very much for that, and I would like now to give the  
13 floor to my colleagues to make statements regarding the form of  
14 reparations.

15 MR. KIM MENGKHY:

16 Mr. President, Your Honours, and my learned colleagues here in  
17 this courtroom and the public outside the courtroom. On behalf  
18 of group 3, I am now making our submission in relation to the  
19 response regarding the details of the form of reparations. We  
20 would like to submit further document, F25 and annex concerning  
21 the detail of the form of reparations prepared by the Khsem Khsan  
22 Association, and we would like Your Honours to consider it.  
23 The points we would like to address before the Chamber is as  
24 follows. First, the moral reparations as envisaged by the  
25 Internal Rules is not sufficient. For example, like the writing

80

1 of the victims' names in the Judgment and the publication of the  
2 apologies of the accused on website. So far the victims feel  
3 that such apologies are not genuine, and that when the apologies  
4 or names published on the website is not acceptable by the  
5 victims and civil parties who by no means have access to such  
6 materials. It is meaningless.

7 [13.59.00]

8 Regarding the collective reparation, likewise the Chamber has  
9 entirely rejected the request by civil party group 3, and the  
10 Trial Chamber has found the accused guilty, but it has failed to  
11 compensate the victims, because the victims have received nothing  
12 in the form of reparations. We would like to also submit before  
13 the Supreme Court Chamber that the victims' association as I  
14 indicated, the Khsem Khsan Association, who is created by civil  
15 party group in case 001.

16 The association has been registered with the Ministry of Interior  
17 and also before the ECCC. The association has planned to build a  
18 place where names of civil parties can be written and installed.

19 With your leave, Your Honours, could you please instruct the  
20 court official to project some of the photos that we have already  
21 submitted in our submission and so that everyone can see them.

22 MR. PRESIDENT:

23 Mr. counsel you have already been quite familiar that our  
24 projector doesn't work properly. The photos can be projected  
25 from the computer but not from the projector, and we suggest that

81

1 you may proceed with your submission and that the photos can be  
2 copied and distributed to parties later.

3 [14.01.43]

4 MR. KIM MENGKHY:

5 Thank you, Mr. President. I would like to refer to document  
6 F25.1 under Khmer ERN 00657059, and under French ERN number  
7 00656527. Document number two, document F25.1, ERN 006570 -- 60.  
8 And French ERN number 00656528. I would like to state that the  
9 Khsem Khsan Association has not rejected any request by civil  
10 party groups, other civil party groups raised before the Trial  
11 Chamber. This plan has been proposed for the purpose of healing  
12 the wounds, the emotional and mental wounds suffered by the  
13 victims.

14 The same association has already requested that the names of  
15 victims be on a statute that where civil parties name are  
16 installed at the vicinity of Tuol Sleng prison, and those civil  
17 party lawyers victims, stemming from the confessions from all  
18 those victims, should be written and considered without any  
19 discrimination.

20 [14.03.35]

21 Another plan by the Khsem Khsan Association includes the design  
22 of the plan and that it is cost-effective, which the cost of  
23 roughly \$100,000. Khsem Khsan Association plan was supported by,  
24 or has been supported by UNESCO, because UNESCO would like to  
25 make sure that this location is preserved as the place to

82

1 commemorate the victims of the Khmer Rouge regime, and it's also  
2 supported by other international communities.  
3 This proposal actually is to bring about the national  
4 reconciliation, and also to make sure that it benefits younger  
5 generation Cambodians, or foreigners. Our clients are also  
6 members of the association, and they represent the common  
7 interests of victims, so the civil party lawyers group 3 would  
8 request that the Supreme Court Chamber considered this plan and  
9 include in its decision so that it can be materialised. Thank  
10 you very much, Your Honour.

11 [14.06.45]

12 MR. CANNONE:

13 Yes, Mr. President. Ladies and gentlemen, Your Honours,  
14 Co-Prosecutors, dear colleagues. My name is Philippe Cannone. I  
15 represent the interests of civil party group 3, and I will  
16 endeavour to not repeat what has already been submitted this  
17 morning. But your Chamber will seek to understand that  
18 necessarily, and I won't be able to avoid this, they will be  
19 overlapping with our observations.

20 In the context of the preparation of this trial, Your Honour  
21 Judge Milart requested the civil parties to specify further their  
22 expectations, and to provide the Chamber with a specific project  
23 for reparations, such as it wishes to see included in the  
24 appellate Judgment. We share the task with our Cambodian  
25 colleagues, counsel Kim Mengkhy has just provided you with

83

1 reparation schemes that are possible.

2 [14.08.30]

3 And at this moment, my role is to specify to you the reasons why  
4 we are so adamantly seeking full recognition of our rights. My  
5 role is also to explain to you why we feel a bit baffled by the  
6 way these proceedings have been governed. I will begin, Mr.  
7 President, Your Honours, with an observation. The text, the  
8 ground text, does not assist us much. It does not assist Your  
9 Honours either.

10 Rule 23 of the Internal Rules sets forth the principle of  
11 collective and symbolic reparations. It excludes any individual  
12 and financial reparations. We know this, we have accepted this  
13 principle, and it is now a given for us. We are told today that  
14 we must be creative in order to provide you with a specific  
15 project, and we are capable of being creative, we know how to be  
16 creative, our projects can even be ambitious, but our ambitions  
17 will stumble upon their limits very quickly. Our available  
18 means, simply put.

19 [14.10.40]

20 Who will take charge of the completion of our projects? We  
21 nourish great hopes, but we are empty handed. We are totally  
22 stripped. How will Your Honours manage once you draft your  
23 decision to define the final reparation scheme in a creative  
24 manner? Your limits are the same as ours, and furthermore, on  
25 whom falls the obligation to repair?

84

1 Mr. President, Your Honours, there is a problem, an issue that we  
2 must not hide from. The text has defined the context, a general  
3 context, but it is an empty context. They are what we may call a  
4 legal void, we must be realistic. We cannot dream. I am  
5 therefore going to try, in a modest way, to define three possible  
6 solutions.

7 [14.12.15]

8 The first one -- apologies. The 26 July 2010 Judgment found the  
9 accused guilty of crimes against humanity. Monday morning, at  
10 the opening of this appeal hearing, Mr. President recalled the  
11 full list of charges. The Co-Prosecutors, with great  
12 thoroughness, demonstrated that the victims enjoyed no mercy, and  
13 that they were subjected to unyielding brutality while they were  
14 particularly vulnerable. Under such conditions, the first  
15 expected reparation was naturally, dear colleagues, apologies.  
16 Forgiveness may have perhaps followed.

17 I was waiting for, I was hoping for a word of compassion, a  
18 glance of empathy, a cry of truth, an acknowledgement of  
19 responsibility. Such could have been the prerequisite of  
20 reconciliation, but nothing of that sort happened. I heard the  
21 accused speak for a few seconds before hiding behind an alleged  
22 issue of law, and disappearing behind the submissions of his  
23 counsel without even turning to his victims, without even looking  
24 at them.

25 [14.14.35]

85

1 I was apprised later of technical issues, purely legalistic  
2 issues, issues of interpretation of the rules of procedure, but  
3 at no moment did I hear anything about humanity. You will  
4 convince no one, my learned colleagues, about Duch's position as  
5 a simple executor. I find your attempt hopeless. But yes, I  
6 would have liked to hear, nonetheless, a few words of regret.  
7 The only words of comfort that you granted to us, but in a very  
8 grudging manner, told us that even if you wished to, you could  
9 not (indistinct) the atrocities that were committed. In law,  
10 since you claim to be practicing law, this is called minimum  
11 minimorum. The least of the least. This clearly reveals the  
12 place the victims have for you in this trial.  
13 I, however, heard the accused voice words of apology. At the  
14 very beginning of proceedings, before the Trial Chamber, that was  
15 a very long time ago. But where is Duch today? In which abyss  
16 has he vanished? Which dreadful logic has he decided to follow,  
17 refusing to admit his position as the main person responsible for  
18 the atrocities is tantamount to severing all ties with the  
19 victims, to annihilating them, to killing them.

20 [14.16.50]

21 MR. KAR SAVUTH:

22 Your Honours, civil party lawyers are allowed to only talk on the  
23 civil party status, and the civil party reparations. Civil party  
24 co-lawyer cannot really jump to the matter of guilt regarding my  
25 client, so should you, Mr. President, instruct him to do so.

86

1 MR. KANG RITHEARY:

2 I may wish to add that we already acknowledge that the crimes are  
3 heinous, and we would like the lawyer to be very cautious in his  
4 statement, because we do not want any statement which instigates  
5 the hatred among the Cambodian society. I am also a victim of  
6 the Khmer Rouge regime, and I am here to really represent my  
7 client and maintain the law, and please do not really instigate  
8 any public disorder in my country.

9 [14.18.05]

10 MR. PRESIDENT:

11 Counsel shall now be instructed to restrict only to the matter of  
12 reparations.

13 MR. CANNONE:

14 I apologise. I will of course restrict myself to the civil party  
15 applications and the reparations. I simply wish to tell my  
16 colleague that if he had had the courtesy for me to finish, he  
17 would have understood maybe that I am only requesting that the  
18 first mode of reparation be apologies, and that we have well  
19 understood that this mode of reparation was excluded to us. And  
20 I will not make any extra comments.

21 The second solution is the remembrance of the names. Must we  
22 consider that the victims' claims should be reduced to the  
23 acceptance of having their names in the Judgment as civil  
24 parties, and to the posting of this Judgment for a few days on  
25 the website of the ECCC. We believe, Mr. President, that no,

87

1 that should not be the case. When I explain to your Chamber why,  
2 when we allow victims to join as civil parties, this means that  
3 they become automatically, by full right, parties to the  
4 proceedings, and as of them, the inclusion of their name in the  
5 Judgment does not offer them any extra advantage.

6 [14.20.00]

7 It's not a form of reparation, it is just what is obvious. Very  
8 sincerely speaking, and without showing any inhibition before  
9 your Chamber, I would say that seeking this form of reparation as  
10 a major form of reparation led to great disappointment among the  
11 victims. Such a decision completely does away with the  
12 historical nature of this trial. This trial that was wished by  
13 Cambodia and by the international community. We all know it.  
14 This trial is historic at two levels: legal as well as human.  
15 Legally speaking, this is the first time that victims are  
16 authorised as civil parties, and I will not repeat what my  
17 esteemed colleague said to you this morning, this is a form of  
18 innovation and we know it very well, but your Court will also  
19 stand as an example. It's a laboratory, and I'm using this word  
20 laboratory in its noblest meaning. The ECCC are a forerunner of  
21 what international courts will be in the future with majority  
22 domestic component, but with international standards, and the  
23 co-existence of a double procedural system, civil and common law.

24 [14.22.05]

25 We are living today -- we are living through a change, and we are

88

1 witnessing the premises of this. I am not speaking about justice  
2 fiction, if I assert that in the future, the civil parties will  
3 be granted the right to true reparations, and the guilty ones  
4 will be obliged to repair, personally, institutionally, or  
5 politically, in an effective manner as well. This is our small  
6 contribution, if you prefer, and of course I'm not so naïve to  
7 believe that holding a trial for crimes against humanity will put  
8 an end forever to atrocities committed by a few mad men and  
9 torturers who have an army of immature soldiers under their  
10 command, who have been ideologically brainwashed. This would be  
11 a dream of course.

12 But I however believe that the fact of having offered a voice to  
13 the civil parties will lead to many changes. Nothing will be as  
14 before, under the condition that we pursue our goal to the end,  
15 and that we do not stop along the way, and that we create a new  
16 legal philosophy in terms of humanity, offering a voice to civil  
17 parties gave them back their dignity. It obliges the  
18 perpetrators of the crimes to consider them as human beings, and  
19 not as insects that we may smash.

20 [14.24.05]

21 The temptation has often been great to muzzle this voice, to gag  
22 those who have suffered. History has nonetheless showed us to  
23 which point of no return enslavement and humiliation may lead.  
24 Nothing is more terrific than the rebellion of the slave.  
25 Nothing is more awesome than the war waged by the humiliated.

1 Nothing is more unyielding than the reaction of those whose  
2 existence has been denied.  
3 Political power may suffer from this tendency of ostracising the  
4 oppressed, but not judicial power, because judicial power rests  
5 at a different level than revenge, and because judicial power can  
6 teach us very powerful lessons. Our claim, and my esteemed  
7 colleagues from the defence will guarantee you, our claim for  
8 reparation is a claim for appeasement. We appreciate it,  
9 Co-Prosecutors, the dignified modesty, but also the resolve with  
10 which you evoked the necessity to not abandon the Cambodian  
11 people. We fully support your position.

12 [14.25.45]

13 You were speaking about the sentence. As civil party lawyers, it  
14 is unauthorised for us to voice the slightest opinion on the  
15 quantum of the sentence, but yet as we claim reparations, you  
16 should be aware, Co-Prosecutors, you should be aware of how your  
17 words inspired great respect in us.

18 The Cambodian people deserve consideration. Our duty as lawyers  
19 would have been to accompany the victims, pro bono, until the  
20 very end of this trial, without fail, and without criticising  
21 such and such a Court which is trying, day after day, to help law  
22 grow.

23 You know, our words, our pleas will be forgotten. A plea is like  
24 an ice sculpture. Once it's made, it melts, it vanishes, but  
25 what will not vanish is the acknowledgement of a right to

90

1 reparation and acknowledgement of a reparations scheme, this will  
2 remain engraved, as in marble.

3 [14.27.24]

4 My Cambodian colleagues proposed to you a few possible schemes.  
5 Your Court will assess their limits and their feasibility. The  
6 fact that they are Cambodian grants them legitimacy. Their youth  
7 is far from a handicap, it offers them a view into the future,  
8 and in order to conclude -- and I will conclude in three minutes  
9 -- I will tell you that we're thinking a lot about this  
10 reparation scheme, and there's one of them that satisfies me  
11 today, greatly, it is that this trial, in the end, would have  
12 been broadcast.

13 The echo that it found in the media, nationally, or  
14 internationally, allowed people to know the facts, allowed the  
15 acknowledgement of the right to reparation, and when I see a  
16 publication announcing, let's say, a work of literature or a play  
17 or a film that is dedicated to this question, I say -- sorry for  
18 the use of this expression that I'm going to say, but -- that  
19 might be a little bit too extravagant, but I can say that we have  
20 won this trial. And when I see young people in schools, in high  
21 schools and universities participating, attending these  
22 proceedings, I see that we have conveyed a true message, we have  
23 conveyed a considerable message.

24 And I will finish in order to abide by the time that was given to  
25 me -- when, in November 2009 I was finishing my final statement

91

1 here before the Trial Chamber, I was saying that the voice of the  
2 civil parties might constitute a bridge, might make a link, a  
3 transition with this reconciliation that we are all seeking, and  
4 I am saying that this trial will stand out, it will give back to  
5 Cambodia its greatness, its glorious past and its honour.

6 And there is one passage that I like very much, and it's the  
7 preamble of your Constitution. Your Constitution speaks about  
8 Khmer civilisation, and qualifies it as such. It states that it  
9 radiates like a diamond. And I've dreamt, and I'm dreaming. I  
10 am dreaming that this diamond be endless.

11 So Mr. President, Your Honours of the Supreme Court Chamber, I am  
12 praying to you, in a prayer of trust. Please, give us the  
13 reparation that we are seeking, and for which we will answer all  
14 of the questions that you wish to put to us, but please, all of  
15 you, please let's not miss out on the truth, let's not miss out  
16 on history.

17 Thank you very much for your attention.

18 [14.31.35]

19 MR. PRESIDENT:

20 It is now an opportunity for the Judges of the Bench to put  
21 questions to civil party lawyers group 3.

22 JUDGE MILART:

23 Thank you, Mr. President. It's not easy to even ask questions  
24 after you, counsel. And it's close upon me to again go back to  
25 narrow details and technicalities. And the question that I would

1 like to ask is whether we are to understand from your last words,  
2 where you praise acknowledgement of reparation schemes, that you  
3 would suggest to this Chamber that it follow -- or seek to  
4 implement the innovatory idea that was only adopted in the rules  
5 revision 5 or 6 in the recognition of specific projects as the  
6 right form of reparation, even though, technically speaking, it  
7 wouldn't be applicable based on the language of the rules as  
8 such. Thank you.

9 MR. CANNONE:

10 Thank you, Your Honour. Forgive me for not seeming clear if that  
11 came across. I believe it is incumbent upon the Judges to define  
12 the forms of reparation. In my opinion, you cannot do so, you do  
13 not have this capacity, unfortunately. Most unfortunately. But  
14 the question that you did put to us in writing, and once again I  
15 do not wish to misinterpret your question, but you specifically  
16 put to us -- you invited us to present specific proposals to the  
17 disposition of the appeal Judgment, and if our application is  
18 accepted, to allow civil parties to speak on the form of  
19 reparation.

20 Now, we're all somewhat hindered, and hamstrung, but my answer to  
21 you is the following. Perhaps you do have the ability to  
22 determine and rule that all civil party groups and all civil  
23 parties who have been formerly admitted can be consulted by a  
24 landowner, because obviously you can't order a landowner to  
25 solicit the opinions of the civil parties, but perhaps you can

93

1 make the very strong recommendation to consult the civil parties,  
2 to build a memorial within the compound, along the same designs  
3 that my Cambodian colleague has specified.

4 [14.35.08]

5 It would be a memorial, it would be a stupa, and it would be a  
6 type of construction on which it would be possible to engrave the  
7 names of all victims and of all civil parties who have been  
8 admitted. That is our suggestion. Obviously that is one way for  
9 us to indirectly participate, it would be upon you to make the  
10 strong recommendation to another party.

11 Now this has caused great reflection, and it's been very  
12 difficult, but it is the best possibility that we have come up  
13 with. We could even suggest things like hours of operation or  
14 other practical modalities, but that wouldn't be so serious,  
15 therefore my suggestion is to provide indirect authorisation.

16 MR. PRESIDENT:

17 I also have a question for the co-lawyers for civil party group  
18 3. Just then you submitted to the Chamber that the Trial Chamber  
19 set a higher standard for the acknowledgement of the civil party  
20 status. For such a standard of recognition of civil parties  
21 within the national and international level, can you shed light  
22 on that to the Chamber?

23 MS. JACQUIN:

24 Thank you very much, Your Honour, and thank you for allowing me  
25 to present some of my remarks on this issue that ties in to the

94

1 issue of evidence. This question had already been addressed by  
2 Judge Milart. I have already shared with you my opinion on  
3 behalf of civil party group 3. Now if we were to refer to the  
4 founding text of the Extraordinary Chambers in the Courts of  
5 Cambodia we see that there in the agreements there aren't any  
6 dispositions on that matter, and it can be observed that under  
7 article 35 the law provides light on the issue of proof, namely  
8 inculpatory and exculpatory proof.

9 [14.37.45]

10 However, under article 87 of the Internal Rules, that I have  
11 already raised, deals with the operational parameters of this  
12 Tribunal and is very specific. It recalls that evidence -- the  
13 onus is on the Co-Prosecutors to present evidence, and the  
14 Chamber must have inward conviction. There must be adversarial  
15 proceedings, evidence must be presented at the hearing. It also  
16 allows for witnesses and experts to speak to the evidence, and it  
17 deems conducive to ascertaining the truth.

18 I believe that this system of admitting evidence rests on the  
19 principle of inward conviction, and this is not a legal principle  
20 that applies in all tribunals.

21 MR. PRESIDENT:

22 (No interpretation)

23 MS. JACQUIN:

24 As I was saying, Your Honour, this system of admitting evidence  
25 is applied in a certain number of national jurisdictions, however

1 it is not universal. There are a certain number of jurisdictions  
2 that do not apply the principle of inward conviction on the part  
3 of judges. They are guarded by principles of material evidence.  
4 However, there are jurisdictions in which even if judges do hold  
5 the inward conviction of a certain fact or evidence, they can  
6 only consider this in their determination as a material and  
7 formal piece of evidence.

8 This is not the system, these are not the principles that guide  
9 this particular jurisdiction. This system was developed and  
10 provided for in the Internal Rules, and in fact favours the  
11 accused. However, it is irrefutable that the rules governing the  
12 admission of evidence have to apply to all parties that are part  
13 of these proceedings. We submit that this is not fair.

14 [14.40.30]

15 A civil party is not just a victim, they are a participant in the  
16 proceedings, they enjoy all of the same rights. Why am I saying  
17 this, Mr. President? And I will be very brief. At the beginning  
18 of this trial, some three years ago in 2008, it was extremely  
19 difficult for an applicant to become a civil party within this  
20 jurisdiction. Today, it is taken for granted. It wasn't the  
21 case at the time.

22 My learned colleague across the way said very vehemently that he  
23 did hope for national reconciliation, and that our words would  
24 have an affect on public order. However, the rules were  
25 different at the time. For a victim to be civil party, a victim

96

1 had to be extremely courageous. Allow me to highlight the  
2 courage that it took for some people to apply, that is to emerge  
3 from anonymity to allow all to be aware of their identity.  
4 And this will explain why there are fewer civil parties, when  
5 there were more than 12,000 victims. It's not because the  
6 victims were unidentified. More than 12,000 victims perished at  
7 S-21, and we had to identify them one after another, and we have  
8 the list of victims, we have the photos, we have the confessions.

9 [14.42.20]

10 And like other international jurisdictions that try crimes  
11 against humanity, we were able to admit certain evidence. We are  
12 working in a very particular administrative structure. The  
13 victims were properly identified. Their facts were  
14 substantiated. They were photographed. Why, today, there are  
15 only 100 civil parties when there were 12,000 victims, and I'm  
16 not even referring or accounting for those who are not accounted  
17 for. Nothing can compare to the drama that they experienced, of  
18 those who lost their relatives at S-21.

19 There were many people who were not able to apply as civil  
20 parties or even were admissible. Why not? Out of fear. And yet  
21 they were threatened by no one. This is the fear that they had  
22 instilled in them, and that they carried with them. A fear that  
23 had existed since 1979.

24 [14.43.35]

25 Today, it is possible to talk about what happened during 1975 to

97

1 1979, this was not possible in 2006 or 2007. What I'm trying to  
2 say is that the position of certain victims to become civil  
3 parties was extremely difficult. They required considerable  
4 courage. Today, there is a much more formal and legal process  
5 that they can enjoy, and this again just highlights the courage  
6 that they demonstrated. This is exactly why I would ask you, Mr.  
7 President, Your Honours, to grant these victims, the civil  
8 parties, and apply the rules of evidence properly.

9 Again, I impress upon you the principle of inward conviction. If  
10 the civil parties were not admissible on their initial  
11 application, if they have no financial issue to draw from being a  
12 civil party, but yet they bore a considerable cost, their  
13 participation in this trial, then the minimum that they are  
14 granted is something that they need, that is they need true moral  
15 and effective reparation for all of the harm and prejudice that  
16 they were subjected to. This would be the proper outcome of a  
17 trial that has lasted for more than two years.

18 [14.45.15]

19 I see them everyday. They have been worn out by this trial.  
20 They are tired. And those who partook in these proceedings were  
21 told, at the very last hour, that they could not be admitted as  
22 civil parties because they were unable to substantiate a link of  
23 kinship. What would constitute a link of kinship? Will this be  
24 repaired by a publication of their name in the Judgment? No. It  
25 is that after the Judgment will certainly apply these rules of

98

1 evidence, as the only one component of the trial, and that they  
2 be applied in an equal manner for all parties.

3 Thank you, Your Honours, for your attention.

4 MS. MOCH SOVANNARY:

5 With Mr. President's permission, I would like to add to what my  
6 colleague has just raised. That is in relation to the form of  
7 reparations. Certain clients were rejected by the Trial Chamber  
8 due to the insufficiency in having the documents showing the  
9 kinship in relation to the victims at S-21. I would like to  
10 submit that when the documents are transferred to case 002 the  
11 Co-Investigating Judges recognise my clients as civil parties, as  
12 they are the victims suffering psychological harm for the harms  
13 committed upon their relatives. This is just one of the examples  
14 showing to Your Honour that the assessment and the application of  
15 rules are not the same at various stages of the proceedings.

16 [14.47.15]

17 During the investigation stage in the Office of the  
18 Co-Prosecutors, the rules seemed to be applied differently, and I  
19 would like to urge Your Honour to examine these proceedings as  
20 well. Thank you Mr. President.

21 MR. PRESIDENT:

22 I would like to invite the co-counsel for the accused to respond  
23 to the statement made by the co-lawyers for the civil parties in  
24 all three groups.

25 [14.47.48]

1 MR. KANG RITHEARY:

2 Thank you, Mr. President. Good afternoon, Your Honours. Good  
3 afternoon to everyone.

4 I would also like to apologise on behalf of my client as he  
5 apologise before for the actual families of the victims of S-21.  
6 My client Kaing Guek Eav alias Duch did not tell any lie  
7 regarding the crimes committed at S-21. He also condemned the  
8 Communist Party of Kampuchea for such implementation of the  
9 Party's policy.

10 Before I respond to the three civil parties groups I would like  
11 to put forward a question, that is: are they actually civil  
12 parties? After I heard the submissions from the three groups,  
13 the main sticking issue is that whether they are qualified as  
14 civil parties, and what standard is applied. Based on the  
15 international standard, that is the customary international  
16 standard, civil parties are not allowed in the proceedings, and  
17 no state where crimes committed, including Tokyo, Nuremberg,  
18 Yugoslavia, Rwanda and Sierra Leone to be liable for reparations  
19 to the victims, but here of course we accept your status because  
20 it is stated in the Internal Rules, 100 of the Internal Rules of  
21 the ECCC, regarding the decision on the reparations for civil  
22 parties, as well as in article 21 in the code of criminal  
23 procedure for the civil action against anyone who are liable to  
24 reparation, including the perpetrator or co-perpetrator of the  
25 crime, the instigator, the accomplice. They are all liable to

100

1 civil reparation payment.

2 [14.50.10]

3 On behalf of my client, I accept all the harm occurred at S-21 if  
4 Kaing Guek Eav alias Duch is found guilty. The second question  
5 is that who are liable to pay for the reparations? Based on  
6 article 21 of the code of criminal procedure, that is the third  
7 point, those individuals who are liable to compensation, and the  
8 third question is for the civil party group 3, that is the form  
9 and the means of reparation. What types of compensation or  
10 reparations that they are entitled?

11 So these are the three question, first regarding whether they are  
12 actual civil parties, and then, number two, who are liable to pay  
13 the reparations, and what forms of reparations.

14 For civil party group 1, I observed the lack of credible evidence  
15 to support their clients, that all the evidence shall be beyond  
16 reasonable doubt, based on the constitution and on the rules of  
17 evidence, and the civil parties, for their own interest, need to  
18 find those evidence and make sure the decision by the Judges are  
19 based on these absolute evidence that they are certain to be  
20 civil parties. The mentioning of the suffering or hardship or  
21 challenge in seeking the evidence does not put any weight on the  
22 definition of the evidence in relation to the civil parties  
23 during this particular proceeding.

24 [14.52.15]

25 Also I would like to take this opportunity just to mention that I

101

1 do not mean to dismiss any of civil parties because I myself, I'm  
2 sure I qualified as a civil party in the second case, and of  
3 course the 14 million Cambodian people are likely to be victims  
4 or to become civil parties for case 002. However, S-21 is a  
5 specific place.

6 Number two, based on international standard, you cannot just make  
7 a plain statement and then it becomes an evidence. I just receive  
8 a copy of the certification from the police post in Phnom  
9 Sroy(phonetic), number 142/11. This is given by the co-lawyers  
10 for civil party group 1. To me, I don't think this letter  
11 carries any weight to attach to the victims at S-21 with the  
12 civil party applicants in this case. Of course, I am sympathetic  
13 for the civil parties. And if they have sufficient evidence as  
14 you raised then I am obliged to acknowledge that status, but we  
15 have to abide by the rules, the rules set out by the law.

16 We cannot just rely on our emotion to make assessment on this  
17 evidence, and I think this document shall be dismissed for this  
18 reason. And I urge Your Honours to reject this document as well.

19 [14.54.10]

20 In response to the civil party group 2 regarding the evidence  
21 indicating the kinship, if they can be found that they are  
22 related to any of the victims at S-21, we need to look the law on  
23 marriage, or other 11 law, and those laws shall be submitted for  
24 the examination by the Chamber rather than relied on the emotion,  
25 raw emotion. The photos that were shown, and this one for

102

1 example, is this the photo taken at S-21, or it is from the  
2 residence of the applicant, or it is obtained from somewhere  
3 else? I would like to seek clarification on this before I  
4 respond.

5 MR. PRESIDENT:

6 The counsel, can you shed light on this one?

7 MS. MOCH SOVANNARY:

8 Thank you, Mr. President. My client gave this photo to me this  
9 morning, and I queried my client where the photo was taken. She  
10 said she copied it from the Tuol Sleng museum. That's why I  
11 sought the President's permission to show it on the screen, and I  
12 would like the entire Court to see whether it is obtained from  
13 the genocidal museum of Tuol Sleng or not. And if it is shown  
14 then everybody would be able to see it. With the President's  
15 permission, I would like again to show this photo on the screen.

16 [14.56.10]

17 MR. KANG RITHEARY:

18 Mr. President, I would like now to continue, I don't want to  
19 waste my time. Unfortunately that I received such a response  
20 from the counsel for the civil parties. I also tried to provide  
21 a clear identification to the source of the photo. Of course we  
22 do not hide or intend to hide any crimes occurred at S-21. If  
23 this photo is obtained from the residence of the civil party  
24 applicant, and if this photo is taken to match for identification  
25 at S-21's photo, then maybe we can make an assessment that this

103

1 is the same person.

2 I think this is the procedure that you need to do. I don't want  
3 to instruct my learned friend how to do her work. But if you  
4 just taken a photo with a hand, with a finger showing a photo  
5 there, don't you think it is inappropriate, or whether it is  
6 credible? I don't think so.

7 [14.57.30]

8 Civil party lawyers group 2 would like to request for reparation  
9 borne by the accused. Civil parties group 1 proposal is  
10 specific, requesting for the state to settle this compensation  
11 reparation, but group 2 seem to be rather confused when it comes  
12 to the person who is borne to settle this reparation because they  
13 refer to the accused and sometimes to the state. To the accused,  
14 for example, at a later date when he is able to pay for the  
15 reparation.

16 According to the penal code, there are three groups of people who  
17 shall be liable for the reparation. As I indicated, either the  
18 perpetrators and co-perpetrators in an offence, accessories and  
19 accomplices to an offence, or any other individuals who are  
20 liable to compensation. I would not wish to elaborate further on  
21 the form of reparations as Mr. Philippe Cannone indicated,  
22 because it is really the form which the Supreme Court Chamber  
23 Judges may consider.

24 [14.59.05]

25 Now I would like to respond collectively to the three groups'

104

1 proposal. The defence counsel would wish to challenge or rather  
2 would not wish to challenge any evidence concerning the identity.  
3 Of course we already stated very clearly to which evidence we  
4 challenge as indicated, but we would like to leave the rest of  
5 the issue dealt with by the discretion by the Supreme Court  
6 Chamber concerning the standard of proof regarding rule evidence.  
7 I would like not to really intervene or disrupt the proceedings,  
8 and that the Supreme Court Chamber is the final Chamber to decide  
9 on this.

10 Regarding Duch, as indicated in the submission that he was  
11 implementing the policy, the security policy by the CPK which  
12 given rise to the harms suffered by victims at S-21. Of course  
13 the accused has already made it clear that he has been remorseful  
14 to what happened at S-21, and it is very consistent with what  
15 counsel Cannone already indicated, that my client did not really  
16 apologise carelessly, he made it very genuinely.

17 [15.01.00]

18 And as the lawyers for the civil parties also included further  
19 that regarding the role of the accused, the accused actually did  
20 not really implement or the policy of the CPK with his own will.  
21 He operated under duress, and he did never seize any properties  
22 of the victims of S-21. Once again, may I refer you to rule 121  
23 of the penal code and rule 21 of the CPC and rule 87 of the  
24 Internal Rules of ECCC.

25 According to penal code article 21.3, paragraph number 3, which

1 is about any other individuals who are liable to compensation,  
2 the crimes committed during the Khmer Rouge regime were committed  
3 by the policy of the CPK itself, and the persons who really  
4 issued the orders which really make the victim suffer, then they  
5 are the individuals who are liable to compensation. When it  
6 comes to the Geneva Convention, 12 August 1949, this convention  
7 does not oblige an individual to pay individual reparations.

8 [15.13.30]

9 The crimes charged against my client is an international crime,  
10 and for that reason international law shall be implemented in  
11 relation to the reparations part. According to the Vienna -- I'm  
12 sorry, I have to read this in French -- according to the Vienna  
13 regulation concerning the succession state, article 2(b), (c) and  
14 (d), state that after the collapse of the DK regime, and up to  
15 date, the Royal Government of Cambodia is the state liable for  
16 the reparations for the victims suffered, but this is only when  
17 it is required by the law, and that if the state itself is the  
18 one who shall be liable for this compensation, not my client, it  
19 doesn't matter how many buildings or how high the buildings would  
20 be built or proposed, it is the responsibility of the state and  
21 that not of my client.

22 And such civil reparations shall only be made when the accused is  
23 found guilty. And the harm suffered by S-21 were harms from the  
24 policy of the CPK, not from the accused himself, and once again  
25 allow me to remind us that we should not really resort to using

106

1 the international customary law, because by seeking this law the  
2 civil party interests would be harmed.

3 [15.06.06]

4 Because the law, international customary law has not been  
5 enforced to consider reparation for the civil party, this is the  
6 only court in the world that has been established to encompass  
7 civil parties' participation and forms of reparations are also  
8 included. I would like to conclude my submission now, and with  
9 Your Honours' leave my colleague would like to add further.

10 MR. KAR SAVUTH:

11 Thank you, Mr. President. Good afternoon, Your Honours. May I  
12 know how much time left for me to make my oral submission?

13 MR. PRESIDENT:

14 Could you please proceed until 15 past 3.

15 [15.07.10]

16 MR. KAR SAVUTH:

17 Your Honours, first and foremost, I would like to address the  
18 civil party participation. From the Trial Chamber until this  
19 Supreme Court Chamber, my client Kaing Guek Eav alias Duch has  
20 been ready and warmly welcome civil parties if they have properly  
21 filed their applications to convince us that they are genuine  
22 victims. However, some of the applicants have filed their  
23 applications without significant or sufficient supporting  
24 documents. This led to the rejection of such application by the  
25 Court.

107

1 The Trial Chamber rejects some of the applications. I am  
2 convinced that the Trial Chamber has been correct in rejecting  
3 such applications. I would like to only touch upon just one  
4 example. For example, Madam Nam Mon, who has filed an  
5 application to join as a civil party, and during the trial  
6 proceedings I asked her when she was born she said she was born  
7 in 1960 or 70 or something, but in 1975 if her age was correct  
8 she would be only five years old. How could a five year old  
9 person become a medic at S-21 facility?  
10 And point number two, there were three medics at S-21 and one of  
11 them still survive, and when we brought him in to see whether he  
12 recognised Nam Mon, he said no, so how could we be convinced that  
13 Nam Mon could be the genuine applicant if even her would-be  
14 former colleague could never recognise her. So I think that's  
15 really the point I would wish to make.

16 [15.09.50]

17 Regarding the reparations. There were 12,270 victims died at  
18 S-21. And Duch did not make any arrest of these individuals  
19 without orders from the DK. I would really feel that if there is  
20 any piece of evidence proving that Duch himself ordered the  
21 arrest on his own, then we would not challenge any victim  
22 application or reparation at S-21, but the Court has already  
23 found that it is the Communist Party of Kampuchea who was the  
24 main culprit of these phenomenon, and that the CPK itself is  
25 liable for the compensation or reparation, not Duch, who was just

108

1 the Chairman of S-21, who was subjected to orders only.

2 I would like to end it now, since my co-counsel already addressed  
3 the significant points of it.

4 [15.11.20]

5 MR. PRESIDENT:

6 The Supreme Court Chamber is now adjourned for half an hour.

7 (Judges exit courtroom)

8 (Court adjourns from 1511H to 1542H)

9 (Judges enter courtroom)

10 MR. PRESIDENT:

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

12 It is now appropriate time for the response from the co-lawyers  
13 for civil party group 1, 2 and 3, and each group is allocated ten  
14 minutes time for your response to the co-defence counsel.

15 MS. TY SRINNA:

16 Thank you, Mr. President. I would like respond to question one  
17 of the questions regarding the weight of the document that we  
18 submitted this morning. I also have a question as to whether my  
19 learned counsel really studied the documents of my clients from  
20 the beginning. So I would like my learned colleagues to study  
21 the case file of my clients if they have time to do so.

22 Regarding the documents that I submitted this morning, and  
23 whether it has any weight to be considered by the Supreme Court  
24 Chamber, the response is that indeed it is.

25 MR. PRESIDENT:

109

1 Please provide identification of the document so that it can be  
2 in the record.

3 MS. TY SRINNA:

4 This is the document made by the police inspector in Mongkol  
5 Borei, number 142/011 by policeman Aum Sophai dated 26 March  
6 2011.

7 This document is valuable for this Chamber to consider and assess  
8 on my client whether Ly Hor and Ear Hor is one and same person.  
9 This is formal document made by the police inspector of Mongkol  
10 Borei district, where my client resides. This is an important  
11 document in addition to my client's claims, which were rejected  
12 by the Trial Chamber. This is an official document whose value  
13 can be accepted by Your Honours.

14 [15.46.15]

15 Also this letter is of a value for Your Honours' consideration is  
16 that there are certain facts containing in this letter which Your  
17 Honours can examine and make a comparison to the confession of my  
18 client at S-21. The confession is documented in E2/61.2. This  
19 document has its own characteristic to supplement the existing  
20 documents in the case file for this particular client, and I  
21 would like to urge the Supreme Court Chamber to accept this  
22 document for its value. Thank you.

23 [15.47.35]

24 MR. HONG KIMSUON:

25 With Your Honours' permission, I am representing civil party

110

1 group 2, I would like to make my observation in regards to the  
2 response by the defence team. My learned counsel, the accused's  
3 lawyer, that he mentioned in great deals and remind my learned  
4 colleague Mr. Cannone as well regarding his statement. However,  
5 his statement in relation to the special bond of affection or  
6 kinship as well as the law on family and marriage or the standard  
7 of rules of evidence, I can speak for my five clients who were  
8 rejected by the Trial Chamber.

9 If you assess the relationship of the kinship it would not be  
10 possible to make it very certain, it means you need to really dig  
11 out those graves, or to exhume those corpses in order to make  
12 such an assessment. When we come before this Court with the  
13 proceedings, do we have any forensic report on those corpses died  
14 at S-21 in order to show the kinship or the relationship? So  
15 then if this is not possible what would be the basis?

16 If the evidence is obtainable through S-21 or Tuol Sleng, then we  
17 need to obtain from that. And it is not up to the discretion of  
18 my learned counsel, it is up to the discretion of Your Honour to  
19 decide on the acceptability of such evidence. So I would like to  
20 make this clear to the public and as well as to my clients that  
21 they should not be scared and turned away by the statements made  
22 by my learned counsel, and whatever other standards of bondship  
23 or kinship that we shall obtain, or the conditions set out by the  
24 Trial Chamber regarding the strict standard.

25 [15.50.30]

111

1 Even for the international standard, this Court is also a hybrid  
2 tribunal, and evidence can be accepted based on the discretion of  
3 the Judges. Regarding the statement of my learned counsel Kar  
4 Savuth on my client Nam Mon, regarding whether she was born in  
5 '69 or '70, that is uncertain. So if you base on the rules of  
6 evidence in case of certainty or uncertainty then the benefit  
7 should be forward or given to my client.

8 [15.51.15]

9 MS STUDZINSKY:

10 I would like to respond briefly to the defence observation, but  
11 before I start I would like to address the defence counsel and I  
12 -- maybe you pay attention when I speak. The civil parties here  
13 in the courtroom and also in the public gallery are really very  
14 concerned about the behaviour of the defence counsel. One is  
15 shouting, and this was already raised during the trial, and the  
16 other one smiles. Please behave in dignity.

17 To the content of the defence submission, some few remarks. We  
18 observed that the submission again denies responsibility. How  
19 and why? Again, when we discuss the question of reparations, we  
20 observed that again, the responsibility and for the reparation is  
21 shifted to the CPK, is shifted to as it was called Angkar.

22 Again, the accused refuses to take also in this regard  
23 responsibility and to stand firsthand and according to the rules  
24 the one who has to bear and who has to stand and finally to pay  
25 for the reparations that we requested.

112

1 [15.53.25]

2 Beside of this, there is of course a state responsibility and for  
3 the successor state, of course, according to the basic  
4 principles, for victims of gross human rights violations, the  
5 obligation of the successor state to establish a national fund,  
6 if the author of the crimes is not able to pay the amount that is  
7 needed. And this is another question, and not the one that we  
8 are discussing here, because this would go here beyond what is  
9 granted and provided in the Internal Rules.

10 However, derived from this state responsibility is then the  
11 assistance that we request from the state, that means from the  
12 Royal Government of Cambodia.

13 My next point is the application of Ms. Nam Mon, and I already  
14 expected this, that the defence counsel will continue to object  
15 this application. One important information for you is that Ms.  
16 Nam Mon is recognised as a civil party in case 2 and on which  
17 grounds? Because of S-21. Next point with regard to Ms. Nam  
18 Mon, I understand why the accused is objecting, strongly  
19 objecting this application and this testimony of course, because  
20 Ms. Nam Mon testified about the personal acts of killing of the  
21 accused which he denied all the time, and she said as well that  
22 she was transferred after her imprisonment in S-21 to S-24.  
23 Another fact that the accused denied.

24 [15.56.00]

25 With regard to her birthdate, it was already clarified in the

113

1 hearing that she is born in 1960, and therefore there's no doubt  
2 that this ID document, identity card, could used -- based on the  
3 information given by relative, and is not in accordance with  
4 reality, but very typical when people cannot go, themselves, to  
5 produce these documents.

6 So finally I really understand but object of course the statement  
7 in this regard of the defence that was submitted with regard to  
8 Ms. Nam Mon. So I would stop here and give the floor then to my  
9 colleagues from group 3. Thank you very much.

10 [15.57.05]

11 MS. JACQUIN:

12 Your Honours, I'm going to answer these observations of my  
13 colleagues and in the interest of my civil party group I would  
14 like to bring up a few points to close this session. Also I'd  
15 like to remind the enormous hope of the civil parties in this  
16 trial, and to remind that for the civil parties, it is only  
17 Duch's sentence who is guilty for their suffering, either  
18 directly or to their family, that as long as Duch is not  
19 sentenced they will not be able to heal, they will not be able to  
20 come out of this terrible situation for them, and to separate  
21 themselves from their terrible memories.

22 I notice that on the part of a man who is asking for forgiveness  
23 and who converted to Christianity, today we're facing the second  
24 face of this character. A coward. A man who is denying his  
25 responsibilities, who is hiding in silence, and who is hiding,

114

1 and who is protecting himself behind his counsel. We also are  
2 even willing to forget his expression of regret at the beginning  
3 of these proceedings. Back then, of course, we doubted the  
4 sincerity of his regrets, and we wondered whether his only regret  
5 is to be detained.

6 But Duch did not stand by his words. The civil parties would  
7 have preferred hearing a man defending his political convictions  
8 of back then, even if these political convictions led to the  
9 tragedy that we all know, this would have been at least  
10 acceptable. This maybe would have allowed them to understand the  
11 justification of his acts. But not his current behaviour. He is  
12 hiding. This henchman is hiding.

13 Duch invented the refined methods of torture in the Khmer Rouge  
14 regime. He invented the hot method, the cold method. He  
15 deepened his methods. He wrote them out, even, in order to  
16 create a little book that may be transmitted to his staff and  
17 that may be put into practice. We are not facing, here, chance.  
18 We are facing methodology, in depth work, organised work, in a  
19 terrible, of course, horrible field of torture today.

20 So what does Duch wish to say to the civil parties when he faces  
21 them, and when he faces their families? What is he telling us?  
22 If he remains silent, Your Honours, it will only be your decision  
23 that respond to the civil parties' expectations, and the civil  
24 party groups symbolise many more people. We only have maybe 100  
25 civil parties, but they represent the expectations of an entire

115

1 people on the international decision on what these months of  
2 total horror that were experienced by the Cambodian people may  
3 amount to.

4 [16.00.15]

5 In this system, S-21 was the final result of this system.  
6 Because there was no innocence. There was no innocence in regard  
7 to imaginary charges, and any person who entered S-21 had to be  
8 executed by the mere fact that that person had stepped into the  
9 prison compound. S-21 is, for the civil parties, the living  
10 testimony of this memory. This is why the civil parties are  
11 insisting so much so that this place becomes inviolable, and this  
12 is what we are asking for you in different ways. We are asking  
13 for the creation of a wall of memory. We are asking for the  
14 creation of a stupa.

15 Regarding our group, we have become the spokespersons of the  
16 project of Khsem Khsan, the Khsem Khsan organisation that groups  
17 together practically 1,000 civil parties, which is the only  
18 victims' association existing today and who thought together on  
19 this project. This is why my colleague who did not have the  
20 possibility of presenting the document -- but now that the video  
21 system is now working, I would like to project this project so  
22 that this project may be known.

23 It's a simple project. It just represents creating a stupa at  
24 S-21 with the names of the victims, something that will make this  
25 place sacred, inviolable, and that will make it into a place of

116

1 the history of humanity, even if this history is painful. So if  
2 the video system is functioning, so that we could display the  
3 three photographs, I think this would be helpful. We already  
4 have the three photographs.

5 And I will conclude by saying that maybe within the provisions  
6 that are indeed quite restrictive, but maybe your decision might  
7 be an encouragement to foster morality. It is something that may  
8 be efficient and that might regarding this simple material  
9 problem of S-21 premises to provide to the S-21 victims this  
10 security that they are all waiting for, knowing that this place  
11 that will never be destroyed, and these are my submissions, so if  
12 we could just project the three photographs, that would be very  
13 helpful. Thank you.

14 [16.02.45]

15 MR. KIM MENGKHY:

16 Mr. President, with your leave, could the court official be  
17 directed to project the photos of this photo so that parties can  
18 also have a look at them, and at the same time the participants  
19 can also see it.

20 MR. PRESIDENT:

21 Counsel, you may now proceed with your submissions but the court  
22 official is already now directed to project the photos.

23 MR. KIM MENGKHY:

24 According to the project by Khsem Khsan Association, it is that  
25 the Khsem Khsan stupa, or memorial, be erected at the Tuol Sleng

117

1 museum. And as you see in this photo, it is the footprint which  
2 (indistinct) the Khsem Khsan stupa. Khsem Khsan means peaceful,  
3 and it is of course for the purpose of the victims to make sure  
4 that the dead souls rest in peace. And this stupa shall be for  
5 all humankind and for the victims. Could you please proceed to  
6 the next photo?

7 This second photo shows the image of the stupa designed by, or  
8 drawn by Mr. Vann Nath, and with the idea and consent from all  
9 the victims and civil parties within case file 001, and it has  
10 generated great support from the Cambodian community as well.  
11 And such stupa has been designed without any discrimination  
12 against any victims. Any victim's name can be written on the  
13 wall of this stupa, whether they are former cadre of the Khmer  
14 Rouge and anyone else executed at S-21, or anyone else who has  
15 suffered harm at S-21.

16 [16.05.40]

17 Finally, I would like to proceed to the next photo. Could you  
18 please, the court officer, project the third and last photo.  
19 This photo is a real image of, or snapshot of Tuol Sleng, and we  
20 have already studied the design to make sure that the stupa can  
21 be erected without jeopardising the beauty of the Tuol Sleng  
22 museum, and we therefore would like the Supreme Court Chamber to  
23 respectfully consider our project.

24 MR. PRESIDENT:

25 Without further comments from the parties, we would like now to

118

1 proceed to the defence counsel to make their final rebuttal  
2 presentation.

3 MR. KANG RITHEARY:

4 Mr. President, I will take only two minutes and to clear doubt by  
5 assertion by Mr. Hong Kimsuon, I actually am a professional  
6 lawyer, and my submission was based on evidence. The document  
7 that you showed us was about the residency of the person whose  
8 photo is in the picture, and this has nothing to do with the  
9 status of an individual.

10 MR. HONG KIMSUON:

11 No, I'm not really challenging this piece of document, but I'm  
12 challenging Mr. Kar Savuth's comment on Nam Mon.

13 MR. KANG RITHEARY:

14 I think it is now directed to counsel Ty Srinna, regarding your  
15 address to the defence counsel. I think it is not really the  
16 venue for such exchanges, because there would be a proper  
17 location for that, not before international colleagues. When it  
18 comes to the status of individual of course I already indicated  
19 it's really my genuine advice, I have done that in good faith,  
20 because we need authentication of that, and when it comes to the  
21 photo I really did advise in good faith, because if the photo was  
22 obtained from the residence of the victim, that photo has to be  
23 checked against the photo on the wall of S-21, and that it needs  
24 to be authenticated, and by doing so it is sure that the evidence  
25 has more weight and value, and that it will convince the Court.

119

1 I think this is nothing out of bad intention at all. Thank you.

2 MR. KAR SAVUTH:

3 Mr. President, Your Honours, nationals and international Judges  
4 and the Court. Finally, during this final session of the Supreme  
5 Court Chamber, the defence counsel for the accused would like to  
6 be allowed to make the following points.

7 [16.09.40]

8 There are instructions, one of the instruction regarding the  
9 investigation in criminal case has to be guided by first looking  
10 into the guilt of the person, of the accused, and that the  
11 accused shall only be liable for the crimes he committed in  
12 person, according to the penal code. However, the accused did  
13 not really carry the criminal conduct on his own, but through  
14 orders.

15 And number two, when considering the criminal conducts of the  
16 accused, and the causes of such criminal offences, one needs to  
17 really rely on the eventual evidence, for example, the  
18 circumstances of such crimes and that only the effective laws  
19 shall be relied upon. The Cambodian law states clearly the  
20 accused who has been charged with crimes shall be regarded  
21 innocent unless his guilt has been found by the court. And that  
22 presumption of innocence should be well maintained. We would  
23 like to refer you also to article 38 of the Constitution of  
24 Cambodia.

25 And we believe that by regarding this events we can conclude that

120

1 whether the person before this Court falls within the  
2 jurisdiction of the ECCC and whether the person has committed the  
3 crimes as set forth in the domestic and international laws. And  
4 whether such crime commission, the crime itself has been set  
5 forth in the law when the crimes were committed or not.

6 [16.12.12]

7 And only when the domestic law states that the law on the  
8 particular crimes existed, that the crimes can be punished. And  
9 any violation of such laws, for example the retroactivity, of the  
10 application of the retroactive effect of the law is a complete  
11 violation of the laws in general. Articles 1 and 2 of the ECCC  
12 Law states clearly that the Law has jurisdiction over individuals  
13 who were senior leaders and most responsible persons. It is now  
14 at the hands of the Supreme Court Chamber to reconsider these  
15 matters, in particular to prosecute persons under the Court's  
16 jurisdiction.

17 We are all familiar already that the general jurisdiction of a  
18 court of law includes personal, temporal, territorial and subject  
19 matter jurisdictions. And if the tribunal would wish to end  
20 impunity it shall consider the abovementioned jurisdictions.  
21 Because they are set forth and in articles 1 and 2 of the ECCC  
22 Law itself.

23 [16.14.14]

24 Next, the determination of the scope of the personal jurisdiction  
25 or the jurisdiction of the Court is very important here at this

121

1 tribunal, because it really has an effect on the rule of law or  
2 legitimacy of the Court itself. According to article 129 of the  
3 Constitution and the resolution of the United Nations Security  
4 Council resolution 1534 concerning the determination of the  
5 senior leaders status, and with regard to rule 11bis of the  
6 jurisprudence of Yugoslavia tribunal, the defence counsel is  
7 still in the position that the owner or the authors of the crimes  
8 committed at S-21 was not Duch. It was the CPK and the royal  
9 government of Democratic Kampuchea, and that Duch himself cannot  
10 be here to be responsible for the crimes other people committed.  
11 And also the other heads of prison centres, or security centres,  
12 195 security centres, were not prosecuted, even though they have  
13 committed heinous crimes by executing thousands of people. They  
14 were the same perpetrators, and they were falling outside the  
15 jurisdiction of this Court, and that only when the Court applied  
16 the same rules to everyone that it is fair.

17 [16.16.26]

18 And that the accused exercised his -- or committed the crimes  
19 under duress and orders from the DK government, and that the  
20 other prison chiefs also carried the same criminal conduct, but  
21 the Trial Chamber or the Chamber has not really prosecuted them  
22 like they are doing now to the accused. The number of prisoners  
23 killed at S-21 was less than 130,000. This means that the Court  
24 is only finding justice for one fraction of the population. It's  
25 amounting to only 1 per cent of the whole population if you

122

1 really stick to finding justice for the victims of S-21.  
2 Last but not least we would like the Chamber to regard Duch as  
3 the potential or key witness to testify against those senior  
4 leaders of the Khmer Rouge regime, and we would like the Supreme  
5 Court Chamber to set aside Judgment of the Trial Chamber and  
6 acquit the accused of all charges and release him, when the Court  
7 finds that Duch's situation is not that different from the  
8 situation of the chairmen of other security centres.  
9 S-21 chaired by Kaing Guek Eav, and other detention facilities  
10 chaired by the chairmen of those facilities, they should enjoy  
11 the same status. Thank you, Your Honours.

12 MR. PRESIDENT:

13 Mr. Kong Ritheary, would you wish to add further?

14 MR. KANG RITHEARY:

15 No sir.

16 [16.18.45]

17 MR. PRESIDENT:

18 Next, if the accused person would wish to make his personal  
19 statement, he may now have the floor. Could you please proceed  
20 to the dock.

21 (Accused is taken to the dock)

22 [16.19.45]

23 THE ACCUSED:

24 Good afternoon, Mr. President, Your Honours. I am very grateful  
25 to Your Honours for allowing me to make the final personal

123

1 statement.

2 My purpose here is to ask the Supreme Court Chamber to recognise  
3 and consider the personal jurisdiction over me. And I would like  
4 the Supreme Court Chamber to acknowledge that I am not falling  
5 within the personal jurisdiction of this Court. It is true that  
6 the senior leaders and the most responsible persons were others,  
7 not me.

8 First, according to the notion of senior leaders and most  
9 responsible persons, we refer to those who had the authority to  
10 design the line and to have it implemented. It's not me. The  
11 transcript on 31 March 2009, E1/6.1, starting from line 13, page  
12 53 to line 6 of page 58. There was a sketch concerning the  
13 final, or the last days of the Khmer Rouge regime. We would like  
14 to refer you to ERN 00294001 as evidence.

15 Such a determination is very consistent with China during the  
16 great Cultural Revolution. China determined four people as  
17 senior leaders and most responsible people, and they were  
18 universally recognised. During the French regime, according to  
19 their document, on page -- I would like to submit that if we  
20 determine that the Standing Committee are the senior leaders of  
21 the Khmer Rouge, and that those who had the decision to smash the  
22 enemy were those who were the most responsible people, this group  
23 of people were not me, because I do not fall under this category.  
24 There is another document in relation to the execution or the  
25 killing by DK. We would like to refer you to document E149/10,

124

1 ERN 00404785 through ERN 00404817. This document is also in the  
2 transcript E1/878 dated September 2009, ERN 004069 through  
3 004088. And regarding the framework of those who can make a  
4 decision to smash has already been shown in the decision by the  
5 CPK that everyone refers to as the document of 30 March 1976.  
6 The first paragraph of the document has been well used by the  
7 Co-Investigating Judges, and well quoted.  
8 [16.24.55]  
9 Paragraph 35 and 36 of the introductory submission, D99, can also  
10 be referred to as evidence. The Trial Chamber has used this same  
11 document, paragraphs 102 and 103 of the Judgment of 26 July  
12 2009(sic), document 188.  
13 I would like to reiterate that the grounds, the submission made  
14 by my defence counsel is based on this particular document, this  
15 document of 30 March 1976, paragraph 1. These are the reasons  
16 why we three of us would like to present before the Supreme Court  
17 Chamber that the leaders of the Democratic Kampuchea and those  
18 who were most responsible for the crimes are -- and of course it  
19 is for the purpose of finding justice for the Cambodian  
20 population all across Cambodia, and those who have suffered a  
21 great deal, and now let's just stick to the loss of lives. There  
22 could have been 1.7 to 1.8 million people who have perished  
23 during the regime, and their remains still scattered all across  
24 the nation.  
25 Next I would like to also elaborate further on the roles and

125

1 functions of S-21 and that of myself. S-21 was tasked, and I  
2 think I have already made it clear to the Chamber according to  
3 document E149/10, I still maintain my position that I recognise  
4 all the matters happened at S-21, because S-21 had no authority  
5 to cover other security centres.

6 [16.27.20]

7 S-21 characteristic was not unique, it was like the other  
8 security centre where tortures were employed. I would like to  
9 refer to you two pieces of evidence concerning the interrogation  
10 in the aftermath of case file 001 case. Document number 1, Chu  
11 Chet(phonetic) alias' wife was sent to Angkar, to Pol Pot,  
12 through K7, which was the central messenger office. This proves  
13 that people who were sent from the zone to the Party was not  
14 under the authority of S-21 but by the Secretary of the Party.  
15 Document number 2, it is about the annotation of the  
16 interrogators, who indicated that torture was employed. I  
17 already indicated to the Co-Investigating Judges that tortures  
18 were required and obliged to be carried out by all security  
19 centres across the nation. The record of my interview by the  
20 Co-Investigating Judges in case file 002 can also be referred to  
21 as evidence.

22 [16.29.05]

23 Now I would like to touch upon the right to smash. The right to  
24 smash was well respected or followed by me. For example, the  
25 interrogator assaulted my teacher by inserting a stick into her

126

1 vagina. I was very depressed, but my authority was only to  
2 report on the actual circumstances to my superior. I had no  
3 authority to request for any arrest, because arrest means smash.  
4 So if I did so, it means I would have violated the right I have  
5 been vested with.

6 I would like to also make it clear that the persons who violated  
7 such orders shall be smashed, without fail, for example in the  
8 case of Koy Thuon, In Lorn alias Nat. I would like to make it  
9 very clear that I survive the regime because I respectfully and  
10 strictly followed the orders.

11 In 1971 I was appointed as the chief of M-13 by the Party, and  
12 finally I would like to stress that Santebal tasks were carried  
13 out by me with hesitation. And it was carried out with  
14 hesitation since 1971. In 1973, when detainees at M-13 escaped  
15 the prisons, I asked Vorn Vet to punish me. After 17 April 1975  
16 I asked that I be transferred to industry section. After the  
17 Party removed Nat I asked that Chhay Kim Huor alias Hok be  
18 installed as the Chairman of S-21 when I remained as Deputy Head,  
19 but my pleas and requests were rejected because the principle and  
20 policy of the Party were very clear that whatever you were  
21 ordered to do, you had to do it. You had to do them. Otherwise  
22 you would end up being smashed.

23 [16.31.50]

24 Regarding the day to day operations at S-21, I was working under  
25 duress, I may say. I was under severe pressure from my

127

1 superiors. They called me through secret telephone conversation  
2 and also they called me to meet in person. In addition, the  
3 facts in regarding the reduce of all means during that regime was  
4 started from 20 July '71, the principles that I observe that  
5 whenever the people returned or entered the liberated zones, they  
6 would be considered enemies and need to be smashed.

7 I did not agree to that principle, and I spared some of them for  
8 production, and I strived to have some of them released, in fact  
9 certain number were released. Those who broke out in '73 were  
10 those people who I kept for production. Separately, in 1973, I  
11 was shocked of the arrest and killing in Amleang that was the  
12 support base for the Party since a long time ago. That was the  
13 purge by the southwest committee after their tracking and  
14 monitoring and leading the movement to do the purge themselves.

15 [16.33.45]

16 I reported this incident in my report to the Trial Chamber  
17 already. On 31 July 1957 (sic), rather, a cadre was arrested,  
18 and I was shocked because a patriot, who loved the country, who  
19 gave up everything for the nation and for the people were finally  
20 killed at S-21, that is the office under my supervision. After  
21 the arrest of Ng?t Hong, So Chea and So Yuok I was even more  
22 shocked, and fearful for my own life.

23 I was happy to leave and see the life next day, and then Vorn Vet  
24 and Chi Kim Huor were arrested, it had very negative impact upon  
25 my emotion. I was despaired and I could not concentrate on my

128

1 work. I was despaired when the Party gave instructions to remove  
2 those detainees to S-21 to be taken and smashed before 6 January  
3 1979.

4 Number 3. Your Honour, I would like to report on the spirit of  
5 my cooperation with the Court. My defence counsel already made  
6 such a statement on my cooperation with the Court, and I would  
7 like to submit that I faithfully cooperate with the Court and the  
8 national. Christophe Peschoux, who was the deputy director of  
9 the High Commission for Human Rights, interrogated me in a hotel  
10 in Battambang on 29 April 1999, to 4 May 1999, even though at the  
11 time I was disappointed with him that he did not cooperate with  
12 the local authorities.

13 [16.36.15]

14 I told him that the way you act was like you were a thief, and  
15 then with Peter Leuprecht the special rapporteur of the United  
16 Nations who interviewed me at the prison of the military court on  
17 27 November 2006. Then another journalist came to interview me  
18 again, and on 7 June 2007 with the Japanese media, and  
19 subsequently with media journalist. They all were permitted by  
20 the Ministry of Public Affairs.

21 The point is that all the crimes committed throughout Cambodia  
22 were the crimes of the Communist Party of Kampuchea with brother  
23 number one, Pol Pot, the Secretary; brother number two, Nuon  
24 Chea, the Deputy Secretary; and Chun Choern, alias Mok, was the  
25 Deputy Secretary. All were illustrated that those crimes were

129

1 perpetrated by them. And I reveal all that within a political  
2 setting under the leadership of those people who put the blame to  
3 the Vietnamese government.

4 And Mok, at the military prison, also still blame me on the  
5 Party's line. One day, brother number three, alias Mok, shouted  
6 that the Vietnamese already bought everyone's head, except one.  
7 And even today, brother number two, Nuon Chea, when he is here at  
8 the detention centre at the beginning, he reminded me of our true  
9 nature of patriotism, and subsequently, he tried to persuade me  
10 to strengthen my stand that all those crimes, even if they were  
11 committed, they were committed by individuals.

12 [16.38.45]

13 I would like now to present my stand to the Cambodian people.  
14 First, I still maintain my position of legally responsible for  
15 the victims suffered at S-21, and for psychological damage for  
16 the victims throughout the country. I still maintain my position  
17 to ask for forgiveness for the soul of the victims of 12,733  
18 people who lost their lives at S-21, and for the families of  
19 those victims to accept my apology and forgiveness.

20 Also, Cambodian people who are the former Khmer Rouge cadres or  
21 soldiers, or senior officers, they shall maintain a strong  
22 position to recognise that we joined the movement of struggle to  
23 liberate the country, however the Party's line was criminal,  
24 copied from those implemented in China by the four persons  
25 clique. The former cadres, or former soldiers, who were

130

1 instilled as a reflex of that policy for the country  
2 construction, that would be a different approach.

3 [16.40.45]

4 And I would like Your Honours to consider an approach that each  
5 Khmer Rouge cadre or individual who dare to sacrifice everything,  
6 even their lives, for their country, they cannot be avoided from  
7 the criminal Party line that we were under duress to implement  
8 their line. And if we carelessly implemented their line we would  
9 be beheaded. Under the pretext that we were opposing the Party.  
10 I strongly believe that the Supreme Court Chamber, with fair  
11 justice and consideration to seek the truth for the Cambodian  
12 people, for the victims, as well as for those who are former  
13 Khmer Rouge soldiers or cadres, in examining all these facts for  
14 the peaceful living on the Cambodian people.

15 [16.42.00]

16 And finally, I would like to bring to Your Honours' attention the  
17 revolution in China. The situation in China at that time was the  
18 source that brought about the existence in Cambodia during the  
19 '75 and '79 period. The great cultural movement existed from '66  
20 to '76. The four members clique were arrested, were tried for  
21 life, and then convicted for life imprisonment. Except Jiang  
22 Qing. In the beginning the person was sentenced for execution,  
23 but later on was reduced to life imprisonment.

24 In China, they still maintained the capital punishment until  
25 today. In 1979 Deng Xiao Ping made a speech in the memory of Liu

131

1 Shoaqi and the former combatants who lost their lives during the  
2 great cultural movement, and also to give impunity to all those  
3 people. Liu Shoaqi was also the person who was guilty, as  
4 defined in the French dictionary Le Petit Larousse 2008. You can  
5 find that Liu Shoaqi was also mentioned in that dictionary,  
6 starting with L.

7 [16.43.55]

8 Your Honours, for the sake of national reconciliation, amongst my  
9 people, I sought assistance from Dr. Chhim Sotheara whether I  
10 would be able to somehow heal the psychological wounds of my  
11 people.

12 In my conclusion, I would like to return to my basic principle  
13 and point, that I would like to urge Your Honours to decide and  
14 consider on the issue of personal jurisdiction that I do not fall  
15 within the jurisdiction. This is the principle that you should  
16 abide by in order to seek justice and truth for the Cambodian  
17 people, as well as for the former Khmer Rouge soldiers and  
18 cadres, especially the middle class who do not fall within the  
19 jurisdiction of this tribunal.

20 I am grateful, Your Honour.

21 [16.45.05]

22 MR. PRESIDENT:

23 The appeal hearing during these three days, from 28 to 30 March  
24 2011, has been conducted with the submissions by various parties,  
25 namely the Co-Prosecutors, the co-defence lawyers, the co-lawyers

*Extraordinary Chambers in the Courts of Cambodia  
Supreme Court Chamber - Appeal*

*Case No. 001/18-07-2007-ECCC/SC  
KAING GUEK EAV  
30/3/2011*

---

132

1 for all the three parties groups, and with the final rebuttal  
2 statement by the defence team, as well as the closing statements  
3 of the accused, Kaing Guek Eav alias Duch as we scheduled.

4 The Supreme Court Chamber therefore adjourns this hearing and the  
5 date of the announcement of the Judgment of the Supreme Court  
6 Chamber will be notified in due course.

7 The security officers, you are instructed to take the accused  
8 back to the detention centre. The Court is now adjourned.

9 (Judges exit courtroom)

10 (Court adjourns at 1646H)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25