ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

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

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

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

15 March 2012
Trial Day 37

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

The Accused: NUON Chea
IENG Sary
KHIEU Samphan

Lawyers for the Accused:

SON Arun
Michiel PESTMAN
Andrew IANUZZI
ANG Udom
Michael G. KARNAVAS
KONG Sam Onn
Anta GUISSÉ

Trial Chamber Greffiers/Legal Officers:

DUCH Phary
DAV Ansan
Natacha WEXELS-RISER

For the Office of the Co-Prosecutors:

SENG Bunkheang
CHAN Dararasmey
Salim NAKHJAVANI
Vincent DE WILDE D'ESTMAEL
Dale LYSAK
VENG Huot

Lawyers for the Civil Parties:

PICH Ang
Élisabeth SIMONNEAU-FORT
HONG Kimsuon
LOR Chunthy
CHET Vanly
SIN Soworn
VEN Pov

For Court Management Section:

KAUV Keoratanak

List of Speakers:

Language used unless specified otherwise in the transcript

Speaker	Language
MR. ABDULHAK	English
MR. ANG UDOM	Khmer
JUDGE CARTWRIGHT	English
MR. CHAN DARARASMEY	Khmer
MR. DE WILDE D'ESTMAEL	French
MR. IANUZZI	English
MR. KARNAVAS	English
MR. LYSAK	English
THE PRESIDENT (NIL NONN, Presiding)	Khmer
MR. PESTMAN	English
MR. PICH ANG	Khmer
MS. SIMONNEAU-FORT	French

Extraordinary Chambers in the Courts of Cambodia
Trial Chamber – Trial Day 37
Case No. 002/19-09-2007-ECCC/TC
15/03/2012

P R O C E E D I N G S

(Court opens at 0901H)

MR. PRESIDENT:

Please be seated. The Chamber is now in session.

Next we will hear the reply from the three defence teams to the responses by the Co-Prosecutors and the Lead Co-Lawyers.

Yesterday, the Chamber already informed the defence teams that all the three teams are allocated one hour, and the defence teams shall divide the time among themselves. Otherwise, the Chamber will allocate for them each 20 minutes.

Defence team for Nuon Chea, you will take the floor first.

[09.03.19]

MR. IANUZZI:

Thank you, Your Honour. Good morning, everyone.

I will move as quickly as possible this morning. I've agreed to donate the balance of our time to the Ieng Sary team, so I expect to take between 10 and 15 minutes, certainly, hopefully, not more than that.

So I'll begin. I have 10 points in total to make, two with respect to the remarks of the National Co-Prosecutor, two general points which he made at the start of his submissions on Tuesday.

First of all, we submit that all of the objections that we raised on Monday fall squarely under Rule 87, in particular, either Rule 87.3(a) relating to irrelevant or repetitious material or Rule 87.3(d) applying to evidence not allowed under the law.

Second point, with respect to the volume of materials submitted by the OCP, we simply submit that all parties, all parties as well as the Chamber, not just the Defence, are prejudiced by a flood of extraneous documentary material.

[09.04.21]

Moving on to the remarks of the International Co-Prosecutors, eight points.

My first point relates to the Severance Order. To be clear, we did not object on relevance grounds to the various topics catalogued by Mr. Abdulhak on Tuesday, rather. We, of course, accept that the Severance Order retains those topics that he mentioned.

Rather, we have only objected to those documents related to the implementation of policies other than the alleged population transfer Phases 1 and 2. Such documents are clearly irrelevant to the first mini trial.

And we stand by our clear endorsement of the Severance Order. It, indeed, remains the most sensible decision to emerge from the ECCC. However, its terms should not be circumvented through perhaps spatially attractive, although ultimately unconvincing, arguments regarding joint criminal enterprise.

[09.05.19]

While there very well may have been some inter-play of policies during the DK regime -- and here I'm making reference to one of the documents relied upon by the Prosecution, that was

D199/26/2.35, it does not follow that a detailed examination of the implementation of those policies is required as suggested by the large number of documents contained in the OCP's various annexes.

It is not enough -- it is simply not enough to merely invoke joint criminal enterprise as some kind of magic words, as prosecutors around the world tend to do when faced with challenges to the relevance of their proffered evidence. JCE is simply a mode of liability, one of many, I might add, and it is as broad or as limited as the terms of the particular indictment make it. And in this case, the Severance Order and the resulting modified indictment are clear.

We certainly do not wish, as submitted on Tuesday, to tie the Prosecution's hands in any way. Rather, we'd like to see the OCP liberated from the terms of its unmanageable Introductory Submission and the equally unwieldy Closing Order in its original state prior to the decisions made by the Severance Order.

[09.06.39]

Again, the key point here is that the Accused needs to know with maximum precision, size and scope of the case against him.

In this regard, Mr. Abdulhak noted on Tuesday that the Defence had not objected to the Prosecution's list of witnesses on the grounds of relevance similar to those that we raised on Monday. However, I would like to note that we have clearly and often objected to witness testimony in Court when it threatened to

stray into areas dealing with the implementation of policies not relevant to the first mini trial. And we will continue to do that.

Finally, on this point of the Severance Order, we certainly agree with the Prosecution that contextual elements -- contextual elements on a variety of matters may be relevant at various stages throughout the trial.

[09.07.36]

My second point relates to so-called acts and conducts of the Accused. Regarding the OCP submission on this principle that it applies only to written witness statements prepared in anticipation of legal proceedings, we find this position overly formalistic and ultimately unconvincing.

It has always been our position that we should not slavishly follow the rules of other tribunals; rather, we should look to the underlying rationales of such provisions and apply those -- that is, the rationales -- in a manner that is most protective of the rights of the Accused before this tribunal.

And in the case of ICTY Rule 92 bis referred by the prosecutors on Tuesday, the underlying rationale is, of course, the protection of the accused against serious issues of reliability associated with out of Court statements where the maker of such statements is not available for testimony and that the ICTY Appeals Chamber took pains to emphasize in the Galic Case that written statements prepared for the purposes of legal proceedings

are especially problematic. That does not exclude the possibility that other types of documents or statements are, by analogy, based on the same rationale, equally troubling. For example, un-sourced press statements or any number of statements made by individuals with motives adverse to the accused whether or not, as I've said, such statements were taken by investigators in anticipation of a trial.

[09.09.11]

In any case, we must acknowledge with approval, I should add, that the OCP has conceded that much, if not all, of its submitted documentary material is only of a corroborative nature. And we're grateful for that clarification, but we would be remiss not to belabour this point to a certain extent given our client's right to test evidence against him through, for example, confrontation of the makers of adverse statements.

I believe I've said more than enough on this point, so I'll simply invite the Chamber to closely review all of the material submitted by the OCP and, as it must, adopt an approach that is most protective of our client's fundamental rights.

[09.09.54]

On to my third point -- that is, reference to these proceedings as a mini trial -- Your Honours, we submit that there is nothing inappropriate or offensive about the use of that term. All of the parties, I believe, have used it at some point. Commentators and the press regularly use it.

If I'm not mistaken, members of the Chamber staff have used it. Indeed, yesterday morning, the national prosecutor used it; at least, that's what came through the English channel of my headset. So I think it's fair to say that "mini trial" has become the accepted shorthand version of Case 002/01, which obviously does not roll off the tongue. Simply, it is an accurate description of these proceedings which are clearly a miniature version of the trial that was originally contemplated.

[09.10.46]

It is our view that the OCP cannot seriously attempt to limit our use of language in this courtroom to such an extent. If and when we offend, the Chamber has proven ready and willing to slap our wrists.

Regarding torture-tainted material, my fourth point -- just a brief word on this. Of course, there are limited uses for torture-tainted evidence, and this is recognized by the CAT, and we have acknowledged that already. If a full briefing, if a full ventilation of the issues is required as suggested by the OCP, then we are more than happy to assist in that regard.

And just to clarify something that Mr. Lysak mentioned yesterday, we did not submit, we did not submit that all biographies were taken under torture. Rather, we stated -- and I'm quoting now from my notes from Monday -- that these documents, which were clearly made under torture, threat of torture or, in any event, under the type of inducement or coercion prohibited by Rule 21.3.

Therefore, they should be treated as confessions. And we simply stand by that submission.

[09.11.51]

In any case, based on its previous remarks on the issue, we have full faith and confidence in the Chamber that it will proceed in a manner consistent with the CAT and our client's rights, and we will deal with the probative value, if any, of any admitted material in due course.

My fifth point with respect to DC-Cam documents, contrary to the OCP's submission, the Defence has not given up this point. We have not given up the point. We have made our oral submissions at the last document hearing. We have followed up with further written ones. That's document E1/39.1/1, and we are now simply awaiting a decision of the Chamber.

[09.12.33]

However, I do accept my Belgian friend's assessment that the Defence efforts in this case are largely, if not completely, to use his words, futile.

My sixth point regarding witness names. As to the naming of potential witnesses in this case, a distinction must be made -- must be made, on the one hand, between disclosing the name of a scheduled witness whose testimony has been confirmed by the Chamber and where revelation of that fact would have some negative impact versus, on the other hand, the mere mention of the name of an individual who may have been proposed by a party.

Individuals have public roles beyond their participation, potential or otherwise, in this case, and their names will often be mentioned in passing as, I might add, the prosecutor did on Tuesday with respect to Dr. Kissinger.

[09.13.27]

We, of course, have called for his testimony in this case, and that is already a matter of public knowledge, but it does not follow from the mere fact that the Chamber has assigned Dr. Kissinger a pseudonym without actually assigning him for an appearance that the mere mention of his name is problematic. And this goes equally for individuals who may have been scheduled for testimony should their names be mentioned in such a way as to not reveal that fact.

So I repeat our call for Ouk Bunchhoeun, Im Chem, Meas Muth, Hor Namhong -- the call I made on Monday. And I note that by so doing, I'm revealing nothing, nothing about this Chamber's intentions with respect to the hearing of those witnesses. I'm simply stating that we would like to hear them, and that cannot be considered as something that should be kept from the public.

[09.14.21]

My seventh point, very, very briefly with respect to audio and video recordings, and this is simply in reply to something Mr. Lysak said yesterday.

I believe I corrected myself on Monday and I referred to the producers of such footage rather than the makers with respect to

the audio and video recordings of the Accused.

And finally, my eighth point as to the quality of the work accomplished by the OCIJ, I simply stand by my original submission that any reasonable observer of the investigation into Case 002 would conclude that that office, under its previous leadership, I might add, was a manifestly biased institution despite the presence in that office of certain capable staff members. Simply, the OCIJ's previous judicial scrutiny must be discounted in the manner we have suggested to date.

And I hope I haven't taken too much of your time. Unless Mr. Son Arun or my arrogant Dutch friend has anything further to add, I will cede the floor to Mr. Karnavas.

[09.15.34]

MR. PRESIDENT:

Thank you.

And next the floor is given to defence counsel for Ieng Sary.

MR. KARNAVAS:

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

I'll try to speak slowly even though I have a lot of ground to cover.

First, let me begin with where Mr. Lysak began yesterday. And we do, indeed, confess error with respect to two of the documents. The error is mine, and mine alone, in that one exhibit number is being used and then they're referring to ERN numbers that are

part and parcel of the same document or the same exhibit number that contains three different documents, or two different documents.

[09.16.43]

There's where the confusion lied with us. When I was collating the documents, I made this error and, therefore, I do extend my apologies to the Prosecution and we will endeavour to keep in mind that when a document has -- when more than one document has the same number that it is because of the way it was processed into the case file.

We don't think that this is a proper way of doing things. We think that it should have a separate case number -- exhibit number to avoid confusion, but as opposed to different ERN numbers or relying on the ERN numbers, but such is the case.

With respect to one document, IS 3.5, we do note that while it is a biography, it's listed as a biography, it also contains some photographs from DC-Cam. And again, that was part of the confusion. So we extend our apologies to the Prosecution and we certainly ask for the Trial Chamber's indulgence. We will endeavour in the future to be more vigilant and diligent.

[09.17.58]

That aside, Mr. Lysak gave a brilliant performance yesterday, testifying at one point, giving a closing argument at one point and then, in fact, inviting Your Honours to accept your findings of fact from Case 001 as proved facts in this case. And he did so

by saying, well, Your Honours, you know from having heard Duch that this is what happened. This is the way it is. And it gave the appearance that this is well beyond adjudicated facts.

You may recall, Your Honours, that we had some major concerns with the Trial Bench as it's presently constituted because it had heard the evidence in 001 and now it was going to re-hear the -- certain evidence for 002.

We filed submissions. In fact, the first submission was filed by the Ieng Thirith team and then we followed suit.

[09.19.08]

The Trial Chamber made its decision; and in doing so, we have been left with the impression -- and I believe it's a correct impression -- that the Trial Chamber will endeavour to give us a fresh trial and to hear the evidence anew as opposed to relying on evidence and where the Prosecution looks to the Trial Chamber and says, well, you know, Your Honours, since you've heard us from the first case that this is a proved fact. Why would you want to bother in listening to the Defence?

And that's what I got from Mr. Lysak yesterday, in not so many words, but, in fact, that's what he was doing. And I will explain in more detail later when I talk about transcripts of testimony.

Basically, the Prosecution's argument was, well, this is a civil law system -- low threshold of admissibility. You're professional Judges. The OCIJ -- the Office of the Co-Investigating Judges -- did an objective investigation and -- I concur with the Nuon Chea

team -- they were anything but objective.

I think Judge Lemonde made it quite clear he wanted inculpatory evidence, not exculpatory. We filed a motion to have him recused and dismissed. But we saw nothing in that investigation that demonstrates that they actually did an investigation. What they did was a validation of what the Prosecution had prepared in their -- initially for them.

[09.20.44]

And then when you have an employee of the Prosecution go on to work for the OCIJ, that shows you how much objectivity was involved in that case.

And in filing -- in making certain submissions, even the Co-Investigative Judges admitted that only they need to be objective, but their staff need not. Yet it is their staff that go out into the field. It is their staff that supposedly summarize accurately and correctly the statements.

[09.21.16]

And I have a news flash for everybody: we're not in France, where they have trained judicial officers, judicial police who know the procedure and everybody comes from the same culture, and the event occurred in an isolated area. So we have investigators from all over the world who have different practices, different habits and that's why we maintain that it is not objective and that's why you need to be vigilant, Your Honours.

The Prosecution argues, well, this is a JCE, it's an over-arching

JCE. Of course the Defence is trying to keep you from hearing certain evidence. We're trying to build a wall. We're trying to tie hands.

In fact, Your Honours, it was you, proprio motu, that decided to sever the cases. We made no application. We concurred with you, in fact.

[09.22.08]

In severing the case, I assume -- and I think that everyone in this courtroom would agree with me -- it wasn't done lightly. You thought about it and you took everybody's -- everyone -- all the parties' interests into consideration.

If the Trial Chamber intended to try the entire case or have all of the evidence of Case 002 pumped into, dragged into, snuck into, call it what you will, into 002/1--

[09.22.44]

Give me 10 extra minutes; I will slow down. Okay. Well, it's always worth negotiating.

My apologies, Your Honour. And I am getting a little bit exuberant, so I will try to slow down.

So let's begin, and I'll go slowly. Your Honours, I invite you to look at your Severance Order and, in particular, paragraphs 6, 7, and 8. And 8 in particular, though it is directed towards the civil parties, it is pertinent to all of us. And you state in this decision, or the Severance Order of 22 September 2011, in paragraph 8, that:

"The number of witnesses, experts and civil parties to be called by the Chamber will be limited to those whose proposed testimony is required for the first trial. Separation of proceedings will enable the Trial Chamber to issue a verdict following a shortened trial."

[09.24.07]

And that's what I want to focus on. You say "a shortened" - "a shortened trial". Safeguarding, safeguarding fundamental interests of victims and achieving meaningful and timely justice and the right of all Accused in 002. So you're balancing.

And I assume, Your Honours, when you limited the number of witnesses, your intention was to limit -- to limit the evidence that was directly related to 002/1.

The Prosecution says, "Well, gee, we made this annex for the entire case and we're working off that annex".

Suffice it to say, Your Honours, when you decided -- when you decided to sever, it was the Prosecution's duty and obligation to go through their annex and edit it. Did they? No. How do I say this? Yesterday, Mr. Lysak made some admissions. Here's a film or a video not relevant for 002/1, but okay, you can defer making a decision on that.

[09.25.31]

Why is it in, then, in any event?

We want to help the Trial Chamber in its endeavour based on its decision to sever the cases, to sever this case. Obviously, the

intention was not to cut off any part of the Closing Order. That wasn't the intention. But the intention was to have 002/1 as a self-contained trial that would be manageable. It cannot be manageable, Your Honours, we submit, if you're having documents that are dumped into the file, into your lap and you're being asked now to figure it all out.

[09.26.16]

The International Co-Prosecutor, two days ago, read from our own motion and quoted relevance. Let me go back to that, Your Honours. And this was in a filing that I made -- that we made on behalf of Mr. Ieng Sary, our objections to the admission of certain categories of documents, 6 September 2001, E114, paragraph 11. The pertinent part:

"Relevance has been defined as, quote, 'evidence that tends to prove or disprove a material issue, in other words, evidence is relevant if it is -- its effect is to make more or less probable the existence of any fact which is in issue, i.e. upon which guilt or innocence depends'." End of quote.

And then Judge Shahabuddeen, who is on the Appeals Chamber, then goes on and served at the ICTY for many, many years. He goes on to say -- quote:

"Evidence must be relevant, that is to say, it must tend to make credible a fact which has to be established at trial - [which has to be established at trial]. It is not relevant that alone suffices to exclude it."

[09.27.47]
Okay. So it has to be relevant.
So the International Co-Prosecutor says, well, clearly Mr. Ieng Sary has filed a motion and has objected to the -- to being here because he was pardoned and he got an amnesty. And why -- what's wrong with having this document?
Well, let me explain it so that we can all understand, and hopefully it will be understood on the part of the Prosecution. Why is this relevant to your case? Is this an issue?
Mr. Ieng Sary did, indeed, receive a pardon and an amnesty. That was never an issue. What the issue was, whether it's applicable and to what extent in this particular institution.
[09.28.28]
So is this relevant? No. Is it nice and useful to have in the case? Well, it may be nice, but is it useful? No. Why clog up that -- the file in this case with that useless information? So do I care or do we care if that piece of evidence is in? No. It means nothing to us, that particular piece of evidence. But I'm raising it as an example. Or, for instance, they have a report - a rogatory report that says we, the investigators X, Y, and Z went and oversaw the arrest of Mr. Ieng Sary or Nuon Chea, or what have you.
Why is that important? Is their arrest an issue in this case? No. But I ask you, why haven't they taken the time to sanitize their annex and to only proffer documents which are relevant to the

case?

We submit the reason they don't want to do that is they would like to have everything in from 002, and then, in -- use -- what they say -- well, it's useful for other things. This is contextual. And then, in the event that there is no case beyond this particular case -- because that's what they perceive, that's what they admit in their own writings -- then they would be able to use that for some other purposes.

We are saying: in order to have this case manageable, we have to have manageable amounts of information that are relevant to the case. No one is trying, and no one has ever tried, to prevent the Prosecution from putting on its case, if indeed it has a case, which it claims it does not because it says that it's the trial's case and that you are the ones that are driving the process.

[09.30.32]

Now, let me go on, Your Honours, to the next point about professional judges, because I think -- and I must confess, when I first went to the Hague back in 2001, and I heard this term "professional judges", I couldn't understand it -- seriously -- because I came from a country where our judges are professional. So it took me a while to figure it out, because I also saw judges who were diplomats and academics, and in my opinion, some of them are not necessarily professional, because they don't come from the profession of being in court, either as a prosecutor -- as a lawyer, having worked in the field -- but merely they're

classroom academics or diplomats that do something other than being professional judges. But, be that as it may, I guess the term means you're not lay people, that you can receive all of this evidence and somehow keep it separated -- what is admissible, what is not.

[09.31.35]

And so I thought I would invite Your Honours to a transcript from a recent case at the ICTY, because whenever it suits the Prosecution, they look to the ICTY as if that is the place where all the law comes from that we must use in this particular tribunal. And so I provided Your Honours with a copy of the transcript from the Haradinaj Case -- you should have it there. And I'm referring to the 18 October 2001 transcript in the Case of Prosecution vs. Ramush Haradinaj, and I'll spell it. R-a-m-u-s-h, last name Haradinaj, H-a-r-a-d-i-n-a-j. And the case number is IT-04-84bis-T -- capital T, for "trial". So, in this particular case, the Prosecution, Your Honours, is about to give opening statement, and they want to refer to certain books. I refer to page 224. And this is what Judge Moloto, who is from South Africa -- who is actually a judge and was a member of the bar since '78, and had practised law -- but was a judge in South Africa, and has been at the ICTY since 2005. This is what he has to say:

"Let me just make a general comment. I find the opening to verge on testifying and introducing exhibits which are not marked as

exhibits yet but which are documents that make an impression in the mind of the Chamber. And to the extent that […] this point there is now a dispute about the authenticity and the provenance, the relevance of the book that you are about to refer to, the Chamber feels constrained to apply the rules of admissibility before it allows you to continue talking about [it]."

[09.34.05]

Now I'm on page 225, line 1:

"You've got to [authenticate] it. You've got to bring in a witness to say he's the author of the book. All the requirements for admissibility. Because we -- the Chamber cannot accept that we hear what you are going to say only to throw the book out later. The book [may] be out, but the mind -- it's still in the mind. And the purpose for admissibility is to make sure that the mind of the Chamber is not coloured by what might turn out to be inadmissible."

[09.34.47]

Mr. Rogers, the prosecutor, then says, at some point -- same page, line 11 -- he invokes the usual mantra that we often hear in these international tribunals:

"Your Honours of course are professional Judges that are able -- well able to take away from your minds such things that may or may not in due course be ruled to be admissible. And for that reason, these documents and documents like it are normally permitted to be opened during the course…" And he goes on.

Now let's follow on, next page, page 226. This is what Judge Moloto now responds to this -- the mantra "you're professional judges". And now, on page 226, line 11 -- everyone has been copied, Your Honours, so everyone can follow along. And I apologize to those who cannot read English. This is the best we could do. I thought of this as an afterthought this morning and dug this up:

"Can I just make a few comments. First of all, I just want to say I accept that the Chamber is composed of professional Judges who are able to disabuse their minds of things that are irrelevant. However, it is also constituted of human beings, and you will realise that in the guide-lines that have been given, the whole question of MFI-ing documents is being forbidden precisely for that reason. If you are going to get one document you may be able to disabuse our minds…"

[09.36.49]

In order words, if there's only one document that you're admitting, we can set that aside. And now listen -- and this is the crux of our arguments, Your Honours:

"If we are going to get 150 - in our case, here, 500, or 5,000, or 50,000, but if we are going to get 150 -- it becomes pretty difficult, humanly impossible to do so, and therefore this Chamber intends to keep to a very bare minimum any documents that come in which may later have to be thrown out."

[09.37.30]

So, so much for professional judges being able to just absorb everything; here, we have a judge saying: Well, not so fast. And we say the same thing, Your Honours. We're not suggesting that you're not capable, but you're going to be inundated, and I propose that we first hear -- that some of these documents can come through the witnesses, and then later, if necessary, applications can be made. That's the preferred approach that has been used at the ICTY as far as I am concerned, and as far as I know.

With respect to rogatory -- we have -- my remarks concerning the rogatory letters -- the rogatory letters, yes. With respect to D91/30 -- here, for instance, you -- we have a summary from the investigators concerning what they learned from witness Lon Norin. He's testified, so I don't think I am divulging anything. Why is this necessary? He's testified. His testimony is the evidence. Why is this evidence? Does it -- is it used -- is it being proffered as a supplemental? But along with this, there is also another witness summary -- and, in fact, it's not only a summary, but it is well divided into evacuation of people from Phnom Penh, chain of command, the re-education of intellectuals, and so on and so forth. Is this witness scheduled to appear? If so, why do we need it in at this time?

[09.39.35]

If not, does this not amount to a statement, especially since the Prosecution is saying this was given under oath, and therefore,

it can come in -- we don't need to cross-examine this witness, you can accept everything that is being said in here because we say so. We submit -- no, not at this time. If the witness doesn't come in -- he's not scheduled to come in -- if the Prosecution thinks that they need this information in, because without this information they would not be able to prove their case, then they can make an appropriate submission in due time. But at this point, we say; it's premature. And that has been our approach all along. We're not trying to exclude, but we're saying there is a time for everything.

[09.40.23]

Now let me get to transcripts, Your Honour, because I think I might be running out of time, and this may take a little bit longer than I anticipated, because I do have, actually -- and I provided everyone, including Your Honours-- And my colleague informs me that perhaps I should have asked permission, before providing it to everyone and to yourselves, for leave to go into these documents. I apologize if leave should have been sought. We provided it to the Court early. Everybody's had these documents. And the reasons I'm using -- I'm referring to hard copies is because it's rather difficult to follow along sometimes.

Along with this transcript -- and this is a transcript from, again, the same case, same case number, different date, date 24 August 2001. I've also provided you with some of the rules of evidence from the ICTY, because they're being referenced in this

transcript. And for your convenience, Your Honours, should you wish to make reference to those rules, they're there for you to look at. That's all it was -- mere -- for mere convenience, so you don't have to look them up.

[09.41.47]

Now, in this particular case, the whole issue is whether a transcript of a witness, who happens to be in Court at the time, but refused to testify, who incidentally, and for disclosure purposes, was my client -- should his prior testimony, in another case, come in? And in this -- in what I have presented to you, from pages, Your Honours, 453 of the transcript, in this case, to 462, is part and parcel of an oral decision that was issued in this particular case. For time purposes, I will not read as much as I wanted to read, but I will give a summary of what had happened, which is -- can be gleaned from the pages that I have provided.

The witness came, managed to answer a couple of questions, and then refused to answer any more questions from the Prosecution. The Prosecution then asked the gentleman whether, in his previous testimony, he had been truthful and honest, the answers being yes.

[09.43.14]

The witness then indicated further that he no longer wished to testify -- or he was unable, actually, to testify -- for a variety of reasons. So, for all intents and purposes, the witness

was unavailable. Even though physically he was there, the evidence of which he had in his brain and was able to provide to the Court -- he was unwilling to share it. And therefore the Prosecution was stuck with having called a witness, not getting the testimony in, but then relying on the witness's prior statements and prior testimony that he had provided under oath. So that's the scenario.

And in this instance you will see, Your Honours -- because I'm running out of time -- that what the Court held -- and it goes through pains to explain the interplay of the various rules -- in this instance, effectively, the judge at the end allows the transcript to come in and allows the parties the opportunity to cross-examine. And at the end of the day, what happens is, the transcript does come in, and they're invoking various rules.

And because we have limited time, I will just go to page 459 and just read a couple of portions from here, going on to the next page. Because we're dealing with 92 -- rule 92 at the ICTR -- ICTY -- but in this case, they're talking about 92 ter. 92 ter is concerned with the mode in which a witness gives evidence whether entirely viva voce or whether his evidence, in chief, may be admitted in written form, if a witness is present in Court, available for cross-examination, and attests that the statement or transcript in question adequately reflects that the witness would say, if examined. In other words, rule 92 ter is not intended to replace the oral evidence of the witness.

And let me give some background. Because at the ICTY, you have cases that are related, such as, for instance, the Srebrenica Case; there have been four separate or five separate cases. The panels constitute of different trial Judges. You have a witness who testified in Case Number 1, that -- which would have been Krstic, then Blagojevic, the Popovic, then Tolimir. Usually, the witness comes in every single time, and begins to give evidence from the beginning. If the Prosecution or the party who's tendering the witness wishes to save time, because we work under time constraints, they may make an application under 92 ter which allows the prior statement or the testimony to serve as direct examination after having asked a few questions, such as; did you testify? Did you testify under oath? Were you truthful?

[09.46.47]

Maybe supplement a few questions. But the testimony comes in, and that becomes part of the Prosecution's evidence for this witness on direct examination. And it is based on that evidence that then the other party gets to cross-examine. That was the purpose of this rule. Here, in this Tribunal, we have different rules. Yes, it's a civil law, but we're really not in the civil law land anymore. We're sort of in in-between. We've crossed over enough -- in my opinion, not far enough -- but enough into the Anglo-Saxon adversarial system. No offence, Judge Lavergne. But I think we're in that part, okay? Your Honours have, for better or for worse, delegated some of your authorities to the parties.

Some of us welcome that, some of us find it a bit disconcerting. But the Prosecution, for instance, is entitled to lead. They're leading the witness on your behalf, in a sense.

[09.47.54]

Now, if we admit a statement or a transcript in, and the -- is the Prosecution willing to concede that this is their evidence for this witness for direct examination purposes? If that is the case, now we're definitely into adversarial mode. And this is why we have some problems. But more importantly, Your Honours, if the witness is coming to give evidence, let them give evidence. If the Prosecution wants to use portions of the evidence from the previous case as part of the testimony, fine. Then they should identify which portions for what reasons, so we know. And then they're not entitled to go into those areas -- that would be their direct examination. In doing so, Your Honours, however -- I must caution you that we have been asked; how much time do we want for Duch? Now, think about it. Because this is something that I -- at 3 o'clock this morning -- it was one of those eureka moments where I realized one of the problems.

[09.49.04]

You're asking us, Your Honours, how much time. His transcript from 001 comes in, in its entirety, basically, all of his statements; they come in. Then the Prosecution testifies. In the meantime, you're asking how much time. And if I say one or two hours, then that means in one or two hours I have to confront the

witness with not only what he says in Court in this case, but everything on 001. Because if I don't, the Prosecution will say, they did not challenge, they conceded. And as Mr. Lysak said yesterday, you all know it already. You're already decided on this issue. And there lies the problem.

And so I think, it's a -- we have a major problem. I suggest that -- and we submit, Your Honours -- that if a witness is coming, let's hear the witness's testimony. If we need to go into a part of their prior testimony, we can do so. Normally, as I've indicated, it's done only for confrontation or for rehabilitation. If it's a matter of saving time, then it should be a limited portion, it should be identified, we should know in advance so then the parties are noticed so they know exactly how to schedule their own examination of the witness. Is this part of the rules? No. Are we able to do this and safeguard everyone's rights? The answer to that is yes.

[09.50.35]

And I think that we can be creative enough so that we just don't throw everything in and say; well, sift it out later. But, rather, be very judicious in what we admit at this point in time.

And getting to transcripts, Your Honours -- one of the transcripts that is being proffered is that of Goldstone. Now, Judge Goldstone -- or Justice Goldstone, who is a Justice on the Supreme Court of South Africa who went on to become the prosecutor for the ICTY -- a lecturer, and most recently he was

involved on a commission concerning the events in Gaza -- and I won't go into that, but, be that as it may, he's testified here, in Duch, on matters that are utterly unrelated to this particular case. It has nothing to do with the case. I enjoyed reading his testimony. It might be relevant for some other purpose, down the road, maybe for the next -- another segment of the trial. But for 002/1, it's not relevant. So why is the Prosecution putting it in at this point in time?

[09.51.58]

And it can't be; well, it's for -- because it deals with the joint criminal enterprise. It has nothing to do with the joint criminal enterprise. And it's not just that. You have other -- you have other transcripts. You have transcripts of experts, or historians, such as Chandler, Nayan Chanda, okay? If these witnesses -- if these individuals -- if these individuals, let me correct myself -- if these individuals do not come in and testify, what they're asking you to do is accept their testimony. It's a -- and then, not only accept their testimony, but, in effect, are you not accepting all the facts that you have made on the basis of having heard their testimony from 001?

Your Honour, I may be out of time, so I might need a couple minutes to wrap up, so with your indulgence -- and I apologize, I should have asked this -- made this point earlier. But, here's the problem with us. If they don't come in to be confronted, then essentially we're stuck with their testimony. They say - they,

the Prosecution -- oh, they've been cross-examined, they have been cross-examined in another case. I see the shaking of the head, but if you look at their submissions, Your Honour, they're saying statements and transcripts should be treated alike.

[09.53.23]

And the statements taken by the OCIJ are under oath. Testimony is under oath. They've been cross-examined. That's what they've said in their submissions -- in their written submissions in the past, and that was the position I heard yesterday. And so -- but if a witness such as Chandler or -- a witness from 001 -- if he's coming in, why do you need his testimony from 001 at this point in time? Why is it relevant? Are we not getting ahead of ourselves? If the individual is called, he can be cross-examined or questioned, and, if necessary, you can refer to part of his testimony. If, for time purposes, we are unable to cover everything, because of time limitations, and a segment, a discrete segment of his testimony which does not go into acts and conducts of the Accused is necessary for the narrative, then they can -- the Prosecution, or the civil parties, or any one of us could seek leave to have that portion admitted.

[09.54.36]

Very targeted; it doesn't prejudice anyone, and everybody is on notice. And while the witness is here, if necessary, he can be cross-examined. If the witness becomes unavailable, as my witness did in the Haradinaj Case, then we can cross that bridge when we

get to it. We're not there yet. We're not there yet, Your Honours. And that's why our fundamental position -- so we are very, very clear, because yesterday I sat here -- I sat here patiently, and I wanted to object, but I did not object -- but I got the appearance as if we are some sort of dark force of trying to limit the existence of S-21. We're trying to exclude all of this testimony. We're trying to deny this and that. We're not. What we are about, and what we're submitting, Your Honours, is that, since you proprio motu decided to limit the scope of the first case for efficiency purposes, so you could have a quick or a speedy judgement, you cannot do so unless it is targeted. And so, be very judicious in how you accept the evidence at this point in time. I think these hearings -- and I can, and I will agree with the civil party yesterday -- I think these hearings have taken a life of their own. I think, initially, it was -- are these relevant, and to what extent are they -- you know, where are the provenance.

[09.56.25]

And now we're into trying to make argument about why the documents prove guilt. That's what was done yesterday. And so, Your Honours, take a very judicious approach. We're confident that if you look at all of the submissions that have been made, and if you look, in particular, to the transcripts from the oral decision that I've submitted from the Haradinaj Case, you will see that the answer lies there. No one needs to be prejudiced,

but we want to make sure that we have a targeted Trial that is manageable; that when it comes time to drafting the closing argument, we know exactly what is relevant. I think it's insufficient for the Prosecution to stand up and say; well, you can defer making a decision on this piece of evidence. They should have done that, and every single one -- in fact, what they should have done is sanitize their annex to say, this is only what we need.

[09.57.36]

And, lastly, let me make one other point as I sit down. When you look at the Prosecution's annex, Your Honour, it is virtually impossible to divine, in many instances, why a particular document is sought to be admitted. For instance -- you know, my client -- you know, the fact that he was reported that it got an amnesty -- I can't figure it out. I'm trying to get into their head -- I just can't -- can't figure it out. It's not readily available. Yesterday, Mr. Lysak, in making an offer of proof which turned into submissions and closing argument, attempted to do so. Perhaps -- perhaps -- had the prosecutor -- and this is not a criticism, but perhaps this is something that the Trial Chamber should consider. But had the prosecutor, in his annex, been a little bit more generous in the information as to why exactly -- not just "it refers to this paragraph, but kind of give a little narrative" -- a short paragraph, that would allow the parties to figure out what exactly they're driving at;

perhaps we would not be making overarching objections. We could make more targeted objections. It's not a criticism, but it's the nature of the beast.

[09.59.03]

In any event, let me end by thanking the Trial Chamber for extending my time and for being so patient in listening to my submissions this morning. Thank you very much.

MR. PRESIDENT:

Thank you, Counsel. We would like now to proceed to counsel for Khieu Samphan.

MR. KONG SAM ONN:

Thank you, Mr. President, Your Honours.

Having observed the response by the Co-Prosecutors, I would like to have a common reply to that, and my colleague will also share the floor by pinpointing to the specific elements of the reply to that argument.

[10.00.09]

First of all, I fully support the statements by both counsels for other co-accused with regard to the objection to the other documents put before the Chamber by the prosecutors.

Our position is that we did not object to every piece of document put before the Chamber by Co-Prosecutors, we only object any documents that deemed irrelevant or the documents that are not fit to be put before the Chamber at this moment in time or that can only be considered at a later date, because if the documents

that are relevant at another time put before the Chamber today, it creates some confusion.

I am of the opinion that the Co-Prosecutors' opinions are divided concerning the order by the Trial Chamber, document E124, concerning the severance of the case pursuant to Rule 89 ter. The severance of the cases -- or the procedures find that the documents put by the prosecutors are not relevant for the time being. It is a question indeed before this Chamber as to which particular provision is to be applied before this Chamber concerning the relevant documents to be put before the Chamber at this moment.

The prosecutors have focussed so far on the Closing Order by the Co-Investigating Judges rather than paying greater attention to the Severance Order issued by the Trial Chamber.

[10.03.02]

To that effect, substantial portions of the documents submitted by the prosecutors before this Chamber are irrelevant to the proceedings before us now. And I submit that since the documents proposed by the Co-Prosecutors are relevant to only the facts in the Closing Order, not the Severance Order, E124, we now should ask -- answer the question whether we are now referring to the merit of the Closing Order or the currently issued -- ordered by the Trial Chamber concerning the severance.

We submit that the Trial Chamber has its discretion to sever the case, and that we are not bound by the Closing Order; instead, we

shall refer to the Severance Order. We feel that we respect the discretion of the Trial Chamber and it is proper that the procedures are severed so that it can facilitate the flow of the trial proceedings.

We also would wish to know whether the documents put by the Co-Prosecutors are relevant to the effort to find the truth or not.

For the last two days, we have observed what the prosecutors submitted, and that their arguments is that the defence counsel is supposed to provide documents in their support and we -- document relevant to a video footage also quoted concerning Khieu Samphan's interview, and prosecutor indicated that no one knew who the interviewer could have been other than Khieu Samphan. [10.05.55]

By stating that, the prosecutors seem to have forgotten that they are bound by the burden of proof. It is not the defence counsel who shall be -- shall take this position, it is the Prosecution who shall prove the case beyond a reasonable doubt. For that reason, as long as the prosecutors have proved the case beyond a reasonable doubt, the defence counsel is not expected to shoulder this responsibility.

That is all from me, Your Honours. I would like to share the floor with my co-counsel.

MS. GUISSÉ:

Good morning, Mr. President. Good morning to this courtroom.

[10.07.09]

Bearing in mind the limitations of time, I shall be brief on the few points which call for clarification and I shall respond to the different themes that have been raised by the Co-Prosecutors, but I shall begin perhaps by stressing a point that was brought up by my learned colleague, namely, nobody has ever called into question the fact that you are professional judges who are capable of appreciating the probative value of documents that are before you.

But for me, the interest of the kind of exercise that we are undertaking these last few days is to make it possible for you, in the prodigious quantity of documents that is before you, to have some ability to sift and select. That, presumably, is the point of the entire exercise.

I would also point out, since in fact this reproach has been levelled in our direction from the other side of the room, both from the civil parties and the Co-Prosecutors, that on the Defence side we have a tendency to put forward the probative value of the documents rather than inadmissibility.

Here, I think, we have to come back to the basic texts because initially the National Co-Prosecutor was talking about importance of textual references, but Rule 87.3 of the Internal Rules do, of course, list a certain number of elements about the acceptability of documents, and I would draw your attention to 87.3(a) which talks about documents that are irrelevant.

[10.09.08]
We had, in fact, submitted objections under that text, but there's another paragraph here which is 87.3(c) which refers to documents -- or rather objections to admissibility in cases where the documents are unsuitable to prove the facts it purports to prove.
Now, this is very important because it is true that when you talk about documents that may be unsuitable to prove the facts they purport to prove, it's true that there's only a shade of nuance with probative value, but nevertheless this is down there in the Internal Rules and it is in terms of 87.3(c) that we did raise a certain number of objections.
[10.10.03]
Just to appreciate these two aspects, relevancy and whether or not the document proves the fact it is supposed to be proving, I think it is necessary to refer to the reasons being submitted before us by the Co-Prosecutors.
We referred to this in the introductory document on that list, E9/31, and in the columns in their annexes this appears as well because the way in which theses annexes are presented, you have a description, you have a reference, and then you have a final column where you are referred to the relevant part of the Closing Order to which the document refers. And quite clearly on our Defence side, of course we prepared our objections on the basis of what has been submitted by the Co-Prosecutors as being what

they wish to establish because that is how we will work out the question of admissibility in terms of Rule 87.3(c).

On the question of relevance, my learned colleagues here have, indeed, said that it's not a matter on the Defence side to try and curtail the scope of mini-trial number 1, it is, of course, in furtherance of a decision by your Chamber, the Severance Order itself of course, and also in your decision rejecting a call for a further review; which is E124/2.

[10.12.12]

The civil party co-lawyers also received an answer about the scope of the first mini-trial and you said in the annex exactly what aspects would be covered by this trial, and it is in terms of all of that that we have formulated our objections with respect to relevancy.

And, once again, I have to say that your decisions seem to run counter to what is being developed over the last few days by the Co-Prosecutors, and also it appears to run counter to their position in their annex descriptions as contained in the columns I mentioned just now, and where they stipulate which parts of the Closing Order their documents are relevant to and why they intend to present their documents.

[10.13.11]

Time is too short to go into detail, but I can say that there are at least 317 documents among all of the annexes that are absolutely not concerned by Mini-Trial Number 1 and the

paragraphs that you have selected in your decision E124/2. As my learned friend, Mr. Karnavas, has said, I seem to have heard is that the amount of slippage in the arguments of the Co-Prosecutors with respect to S-21. This does seem to be more a matter of pleading that we have heard but, more importantly, it has nothing to do with what was announced in document E9/31 or in the final column of the annexes on the reasons why the Co-Prosecutors intend to use these documents.

So now, today, we hear new arguments, fresh arguments, which seem to be much more substantive than anything else, and it does not detract in any way from the lack of relevance that we have singled out on our side of the Chamber.

A point raised by the civil parties and the Co-Prosecutors also relates to the scope of this mini-trial and how it could possibly be expanded; in which circumstances it might be preferable to hang onto the entirety of the documents that have been selected for this part of the trial.

[10.14.56]

Now, there's a methodological problem with this. In E172 on page 4, you said that for the moment you do not intend to -- this is page 4 in the French text, I'm afraid I don't have it in the other languages -- but this is where you reject the new request for extending the crime sites to the Co-Prosecutors -- for the Co-Prosecutors, and you say that you will inform the parties in due course of any possible modifications or amendments. And in

due course, well, if there is any need to amend the documents in terms of these whole and new scopes then, of course, there would be time as well to revise the list of documents that are relevant.

[10.15.57]

In E172, you responded to the application from the Co-Prosecutors and I am, of course, a co-lawyer for Khieu Samphan, but I have also worked in other international courts and this does bring me to say that judicial memory is an important theme, and I think that it is a pity that decisions on requests that have been publicly submitted are not given specific responses but rather paragraphs within submissions. And I find that for researchers and practitioners, it would be a great deal more useful to have real decisions.

I just say this in passing. Perhaps we'll have a chance to come back to it, but the judicial archives established by the ECCC does deserve something more substantive here.

On the question of originals and the reliability of the DC-Cam documents, now, we heard the statements made by witnesses Chhang Youk and Vanthan Dara, and I refer back to what they had said. But let me recall Mr. -- the Director's statement about archives in document E31.1, page 5, in which he said the documents from the National Archives were already photocopies. And so the question of originals and of how those documents actually reached the National Archives is still a completely open one and,

therefore, we should not make any assumptions about the absolute reliability of papers submitted by DC-Cam.

[10.17.55]

On another matter connected with documents concerning the acts and behaviour of the Accused, we are referred to E96/4 in which we gave a very detailed answer to all the references connected with the International Criminal Tribunals. I would also second what has just been said by my learned colleague, Mr. Karnavas, on this point.

Another point that I believe does deserve further elucidation is the question of new documents. On the Co-Prosecutors' side, it was said that the notion of new documents does not really correspond to what was indicated by the Chamber.

[10.18.51]

Well, on that, I refer to your memorandum E172/5, paragraph 7, in which you very clearly say that the new documents will be examined at a later date. The position of Khieu Samphan's defence was that we are talking about new documents in terms of not Rule 87.4, but Rule 80.3(d).

This, I think, is significant and it can be quite clearly justified because in our list, E109/1.1, as of page 21 we showed 34 new documents which were precisely excluded from the discussion by the Chamber in its memo in E172/5 because by discarding 10 documents that had already been discussed and putting 34 new ones listed by the Khieu Samphan -- on one side,

and the civil parties had also sent in a list of new documents in E109/2.3, and those new documents are not concerned here.

I would remind you that Annex 21, which is a compilation of new documents, is also part of those so-called new documents. I didn't choose the denomination, but they are new documents which the Chamber believes should be examined at a later stage.

Time is limited so I will not take up much more of your time.

[10.21.12]

In Annex 15, the International Co-Prosecutor, Mr. Abdulhak -- excuse me, I'm talking too close to the microphone -- Annex 15 about the maps and so forth. We were told, interestingly, that we did not -- we were not going to object to all of the documents and that we had to be somewhat selective.

That argument seems to me a little bit out of order, since precisely the point of these hearings is to talk annex by annex about our objections in a general way and that it was not necessary for proper administration of justice to go through all of the documents one by one.

I think that particular point is important. It is necessary that we clearly state that we are quoting examples to illustrate a general question.

[10.22.21]

On Annex 16, we come to the question of the video, D313.9R and 10R and 11R. My colleague referred to this briefly. I personally did find the way that my client was pinpointed on this was

somewhat inelegant.

On the Defence side, we're not attempting to deny that it was Mr. Khieu Samphan's face that was appearing the screen, we were trying to say that we didn't know in what particular condition this was happening, and nor did the Co-Prosecutors for that matter, did not know where the video came from, in what sort of circumstances it was made, who was asking Mr. Khieu Samphan the questions. And since the document is only in Khmer -- and that is one of our objections -- we didn't really know the precise register of the language in which the interview was taking place. There had been a montage and it was clipped and cut and put together.

So what we weren't trying to say was this is not Mr. Khieu Samphan, we were talking about these other aspects rather.

[10.23.42]

Annex 17, the International Co-Prosecutor, Mr. De Wilde, raised an apparent contradiction. He said that we were objecting to certain international communications when we responded on the French archives, and he even said that on our own list of documents we ourselves had listed documents from the French Foreign Ministry archives.

I should point out, as Mr. Karnavas also has, that we proposed our list of documents that was connected with the witnesses that we wanted to have heard in this Chamber, and I draw your attention to our list of documents, E9/29.2 and E109/1.1, and

more specifically statements by TCW-56 -- TCW-56 (sic), in document E9/11.2, in which we make it clear that this witness will refer to the archives of the French Foreign Ministry that have been available since 1975.

[10.25.15]

So, once again, for Khieu Samphan's defence the idea was to present documents that were connected with the testimony of somebody we wanted to have heard in this Chamber. This is a slightly different approach, and it's true that presenting the documents before the witness is even come; well, that's another way of doing it.

Mr. Karnavas has experience before other courts of this kind of issue, and I would have thought it was more interesting for everybody in the role that this hearing has, which is to defend our clients. It's more interesting to give you the proper elements to judge them properly.

And when I took the floor to present objections, I was saying the idea is not to set off with huge amount of documents that you have to sort out yourselves, but to give yourself the evidentiary basis for you to proceed with your duty of judging the Accused.

That brings me to a close. I think you've given me some extra time, so I'm particularly grateful for that. Thank you very much.

MR. PRESIDENT:

Thank you, Counsel.

I think it is now an appropriate time for adjournment.

[10.26.41]

MS. GUISSÉ:

Just one point, Mr. President, on the question of the witness for the French Foreign Ministry; it's TCW-156. I'm saying this for the purposes of the transcript so that it's accurate -- TCW-156. Thank you very much, sir.

MR. PRESIDENT:

Thank you, Counsel.

Since it is now an appropriate time for the adjournment, we will adjourn for 20 minutes.

[10.27.10]

Counsel for Ieng Sary, you may proceed.

MR. ANG UDOM:

Thank you, Mr. President, Your Honours. Due to health concern--

MR. PRESIDENT:

Counsels for Khieu Samphan, could you please stop chatting while another counsel is on his feet because we hear the background noise into the mic.

MR. ANG UDOM:

I may repeat. Your Honours, my client has experienced lumbago and he also complained of his -- the pain in his leg. For that reasons -- for those reasons, he asks that he be excused from this courtroom and be allowed to observe the proceeding from his holding cell.

MR. PRESIDENT:

We have noted the request by Ieng Sary through his counsel that he be excused from this courtroom and that he asked to be allowed to observe the proceedings from his holding cell due to his health concern that he cannot remain seated in this courtroom. [10.28.48]

The Chamber, therefore, grants such request -- the request that has been made through his counsels. Ieng Sary is now allowed to observe the proceeding from the holding cell.

Counsels are now instructed to bring forward the waiver signed or given thumbprint by the accused person.

The AV officers are now instructed to make sure that the holding cell is linked to the audio-visual equipment so that the Accused can observe the proceeding.

And security personnel are instructed to bring the Accused downstairs.

The Court is adjourned.

(Court recesses from 1029H to 1048H)

MR. PRESIDENT:

Please be seated. The Chamber is now in session.

Next, the Chamber will hear the request by defence counsel for Nuon Chea concerning the proceedings of next week in relation to hearings of Nuon Chea. And there is also a possibility that the Chamber will also hear testimony of Kaing Guek Eav, alias Duch.

This afternoon, the Chamber intends to conclude all -- the Chamber plans to finish within this week, and it is unlikely that

we will move on to Monday to cover our last item to be discussed today. So the Chamber advises to all parties to limit their times to be used to address the remaining one issue.

Yesterday, the defence counsel for Nuon Chea indicated that he would need between 10 to 15 minutes to make his suggestion or request. So the Chamber will now hand over to defence counsel for Nuon Chea and the maximum time is 15 minutes. You may now proceed, Counsel.

[10.51.06]

MR. PESTMAN:

Thank you very much, Your Honour.

Am I wrong to assume that there are two topics left today to discuss?

First of all, the one I would like to raise now, which is related to Duch's testimony in the afternoon -- or during the afternoons of next week's sessions.

And the second topic would be the hearing of Ben Kiernan via video-link. I assume that that's going to be discussed this afternoon. Am I correct?

Okay. I can -- I understand. My assumption is correct.

Well, then I will briefly say a few words about the somewhat alarming suggestion which was made, I believe two days ago, that Duch will be heard next week in the afternoon.

[10.52.02]

First of all, just to make it clear, Duch is an important witness

to our client. He's one of the very few, if not the only one who may be able to give evidence -- direct evidence -- incriminating our client. But we wish to emphasize that he has very little to say, as far as we understand, which is relevant for the first mini-trial. The scope of the first mini-trial is limited and it certainly doesn't cover S-21, the internal purges of the Communist Party which took place after 1975. He knows very little as far as I am aware, very little of the evacuation of Phnom Penh. I understand he was not here in April 1975, and he can say very little about the subsequent movement of the population in 1975 and 1976. At best he can offer hearsay evidence -- hearsay evidence -- which, in addition, may be tainted by torture.

[10.53.26]

Having said that, he remains an important witness and that leads to the inevitable question: What will happen when Your Honours decide to hear him -- or start hearing him on Monday afternoon. As you know, our client has so far, always, waived his right to be present in the afternoon, and we continued without him hearing witnesses. But this witness is different, and we cannot exclude the possibility -- there is a serious possibility -- that he will want to be present when Duch testifies, and that he will not waive his right to be present.

And I assume that I do not have to explain to Your Honours that Nuon Chea has that right to be present when Duch is being

questioned, and he has the right to confront -- directly confront -- witnesses -- certainly witness -- which are of some importance, like Duch.

[10.54.34]

I can refer to the Internal Rules, Rule 81, the establishment law of this institution, the various international human rights instruments, CCPR, Article 14, the Cambodian criminal code, Article 297 -- they all contain this basic right that an accused has to confront a witness in person. And this right would be violated -- his right to confront a witness, to challenge the testimony -- that will be violated if Your Honours, next Monday, decide to hear Duch while our client is unable to attend, or better, actively participate in these proceedings.

The famous -- or infamous -- holding cells are not the magical solution. I would like to stress that. And my colleague, Michael Karnavas, said a little bit about this yesterday. And in addition to that I would like to say that there are basically three reasons why the holding cell, established by this Court, downstairs, are not a solution to the problems I just mentioned.

[10.55.59]

Although there is the possibility to follow the trial via video-link -- which I used to call "telly" -- downstairs, that does not necessarily mean that my client is effectively participating. If you look at -- if one looks at Rule 81, section 5, one sees, first of all, that the client's consent -- or the

Accused's consent is a necessary condition for continuing with the hearing while the Accused is in the holding cell. As I said, there is a serious possibility that my client will not give that permission.

And then, another reason why the holding cell is not a solution is that there is no substantial delay -- at least, not yet. Nuon Chea's wish to be present in court can be easily accommodated by changing the schedule and moving Duch to the morning, when my client is generally able to actively participate in the proceedings, and less important witnesses can be heard in the afternoon, as had been the case so far.

[10.57.15]

If other witnesses are heard -- less important witnesses are heard, our client intends to continue waiving his right to be present.

And third, importantly, even in the holding cell -- or I should say, especially in the holding cell -- our client will not be able to actively participate in these proceedings. And that's a requirement of the Rule 81.5. Nuon Chea is transferred to the holding cell, not because he wants, or intends to follow the proceedings from downstairs, my client is transferred to the holding cell, every time he goes there, because he is no longer able to do so, whether here or downstairs. And when my client is not feeling well, he cannot participate effectively in these proceedings.

You may remember that, in the beginning, some weeks ago, we would inform the Court about our client's condition, and we told you, several times, that our client had fallen asleep downstairs. I can assure you, that is what usually happens when he goes to the holding cell.

[10.58.37]

Asleep, I don't have to explain, he is no longer actively participating in those procedures.

We stopped informing Your Honours about this -- about our client's condition downstairs -- but you must believe me when I say that you can safely assume that, as a rule, our client's mental or health condition, when downstairs, is such that he can no longer meaningfully participate in these hearings, whether there is a television or a video-link or not, whether he's able to call us on the telephone or not.

There's one important decision which deals with this very specific topic, and that is the decision of the Appeals Chamber of the ICTY in Stanisic.

If Your Honours like, I can provide you later with the details of this decision, but it is a decision which was rendered on the 16th of May 2008, and it dealt exactly with this issue. The Trial Chamber, in that case, had established a video-link with the detention centre where Stanisic was able to follow the proceedings which were taking place in a different location. The Appeals Chamber said -- or annulled the decision of the Trial

Chamber -- and said that the Trial Chamber had to revise that decision for three important reasons.

[11.00.19]

First of all, the Trial Chamber had not given Stanisic's right -- the accused's right -- to be present at trial sufficient weight. They hadn't taken that sufficiently into consideration.

Also, the Appeals Chamber said that the Trial Chamber should have looked for reasonable alternatives to the video-link. And, they said they should have postponed the beginning of the trial for an additional three to six months in order to allow Stanisic to recover and to see whether he was able to come to court after that particular period. This three to six months period was not considered a substantial disruption of the proceedings by the Appeals Chamber.

[11.01.16]

And finally, the Appeals Chamber ruled -- and we claim that is important as well, and it is something that you should do as well -- that the Trial Chamber should have investigated whether the accused, Stanisic, was actually able to effectively participate from the detention unit when he was physically or mentally unwell to come to Court. That fact suggested that he was also unable to participate while in the detention centre. And the Trial Chamber should have investigated that. And that is something we would like you to do as well.

[11.02.00]

To conclude, there is a serious risk that our client, Nuon Chea, will not be able to be in court in the afternoon next week and in the weeks after that. He's unfit to follow the procedures in court, especially when being interrogated in the morning, as is your intention. That is a very exhausting experience for our client.

And my request is simple: take this into consideration when you make the schedule for next week and the weeks after that. And our suggestion is -- but I am sure there are other solutions to this particular problem, but our suggestion would be that we simply start with Duch in the morning, and that we finish hearing Duch as a witness, and that we then hear our client, so that he can fully exercise his right to be present at trial and to confront this particular witness. Thank you very much.

[11.03.21]

MR. PRESIDENT:

Thank you.

Yes, the International Co-Prosecutor, you may proceed.

MR. LYSAK:

Thank you, Mr. President. I will try to be fairly brief, here.

First, counsel -- I just -- I believe I just heard counsel suggest that it was only a few days ago that he became aware that Duch was going to testify next week. If that's what he asserted, that is, of course, incorrect.

A schedule was announced around the time of the last break three

weeks ago -- some three weeks ago -- explaining the intent to hear the Accused in the morning and witnesses in the afternoon starting with Duch. I am not sure why counsel felt the need to make assertions about Duch's relevant testimony to this case. Suffice it to say that, this is a witness that will have relevant things regarding historical background and most importantly, to the upcoming segment of this trial which the Accused and their counsel continue to ignore in their comments, which is how the regime was structured: what were the organizations; what authority did different organizations have; and how did the communications and reporting work. So there are many issues that Duch will be able to testify to. But those are all not directly in the issue that is before you right now, which is the assertion that some right of the Accused would be violated by hearing Duch in the afternoon.

[11.05.20]

And there is, of course, no question here about the Accused's right. They do have the right to participate in the trial. They have the right to confront witnesses, but the Defence have gotten ahead of themselves here. The issue is whether Nuon Chea is fit to participate in this trial in the morning and afternoon. And we had extensive hearings on this issue last year. The Court asked an expert to conduct examinations, who found that Nuon Chea was fit. There has been nothing that has happened. There is no medical evidence to establish that Nuon Chea is unfit to

participate in these proceedings.

[11.06.12]

In fact, to the contrary, it is very clear, from what has happened in this trial to date, that he is fit and able to participate. I note that, certainly it is good -- a good thing that the option has been available -- made available to the Accused to go down to the holding cell and participate there if they choose, and if they choose to follow that procedure. We think that is a good procedure. But that is not the same thing as a determination that the Accused are unfit to participate in these proceedings.

Nuon Chea is fit. There have been extensive hearings, and there is no medical evidence or other reason to believe that he is not able to continue participating in these proceedings. In fact, the Trial Chamber will undoubtedly remember that there have been a number of days where the Accused has participated in Court in both the morning and afternoon, in one occasion testifying in both the morning and afternoon; in another occasion, testifying in the morning and being present in the afternoon for hearings of witnesses, and even questioning one of the witness Long Norin, himself.

[11.07.36]

So there is simply no reason for the Court, at this point, to have -- to make a determination -- or there is no basis for the Court to determine at this point that Nuon Chea is unfit to

participate in the afternoon.
We may get -- If things change, our position, here, is that we proceed, and unless and until we arrive at a situation where an accused is too sick to participate and a medical doctor certifies that, then we will deal with that, if we arrive at that point. But it would be very disruptive to the schedule of this Court for everyone to have been planning and preparing for next week's proceedings to be Nuon Chea in the morning, and Duch in the afternoon, for now to suddenly change that schedule. And unless and until we arrive at a point where an accused is unable to participate in the proceedings and that is certified by a medical doctor, this is not an issue that we need -- that we should be making last minute changes to the schedule upon.
[11.08.55]
So our suggestion is that we proceed as planned, and the Accused-- Certainly we have doctors around here. If we reach that point, we will deal with it.
And in terms of the holding cells, that is an option for the Accused. If Nuon Chea wishes to participate in this Courtroom, he has that right to do so. If he wishes to participate in the holding cell, there is a procedure for him to do it that way, if he is more comfortable in the afternoons. But that is their choice and is subject, of course, to the waivers and procedure. But let's not confuse the issue here. Nuon Chea does have the right -- nobody is stopping Nuon Chea from being present in this

courtroom while Duch is here. And until a medical doctor certifies that he is unable to do so, we should proceed as planned. Thank you.

MR. PESTMAN:

If I may very briefly--

[11.10.00]

MR. PRESIDENT:

And how about the Lead Co-Lawyers?

MR. PICH ANG:

Good morning, Mr. President, Your Honours. The Lead Co-Lawyers have heard what the defence counsel for Nuon Chea has said and what the prosecutors have said.

We are of the view that we support the -- or, what the prosecutors have said. It is appropriate that Mr. Nuon Chea has been examined medically that he is fit to participate in the Court and he can also exercise his right to participate in the Court proceedings from the holding cell, where telephone is equipped through which he can communicate with his counsel. He still can put questions to Duch through that means. Besides, he can participate in the morning session and if he is unable to be present in the afternoon session because he is not able to concentrate -- if he is not able to do so and if the Chamber allows that Mr. Nuon Chea can do so -- are we going to adopt this practice for other witnesses when it comes to similar requests?

[11.12.34]

So the Lead Co-Lawyers submit that we follow the same procedures as we have usually done.

MR. PRESIDENT:

The floor is now handed over to defence counsel for Nuon Chea to reply to the responses made by the prosecutor and the Lead Co-Lawyers.

MR. PESTMAN:

Thank you. I'm sorry I jumped up after the Prosecution had finished. I forgot about the existence of the civil parties for a moment.

[11.13.10]

Just to be absolutely clear, we are not asking this Court to declare our client unfit to stand trial. We don't take that position. What we're asking you is to take into consideration that there is a serious possibility that in the afternoon our client will not be mentally able or physically able to continue actively participating in the procedure in this particular case in the examination of an important witness.

All we were trying to do here is give you and the other parties an advanced warning. What we want to avoid is unnecessary delays in the schedule. If you stick to this schedule the original intention to hear Duch in the afternoon, I predict that there will be problems and that sooner or later, whether a doctor is consulted or not, we will have to adjourn the hearing because our client will probably not waive his right to be present. We will

not give the usual letter showing that our client does not object to you continue without him being present in Court. Thank you.

[11.14.35]

MR. PRESIDENT:

Yes, Mr. Karnavas.

MR. KARNAVAS:

Thank you, Mr. President and You Honours, for allowing me this brief opportunity to also weigh in on this matter.

By practice, during the opening statements and then just a few days ago, when we had indicated that Mr. Ieng Sary was incapable of being here and was willing to waive his presence, the Trial Chamber indicated that this was a significant segment of the proceedings and therefore, had to be present.

[11.15.06]

So the Trial Chamber by its own decisions have, in a sense, recognized that there are instances and there are differences between being physically in Court and being in the holding cell while one can participate. I couldn't help but, sort of, think back of the opening statements and the height of hypocrisy today for the Prosecution to stand up and say; well they can participate down there yet Mr. Cayley had indicated how on God's -- in God's name -- I think that was the quote -- how in God's name can he take instructions from his client if he's down there. He has to be in Court.

So, in opening statements, the Prosecution is saying they have to

be here. The civil parties were saying they have to be here. We were saying he is physically unfit; he is willing to waive the presence. So there is some sort of hypocrisy here.

Now, let me just go back to some jurisprudence that has already been before the Trial Chamber in different context but nonetheless, deal with this issue. It is very clear that being physically present is not the same as being mentally present. Physically present is not the same as mental presence. So you can have an accused here but if they are unable to mentally follow along, either because they are in pain or because simply they're fatigued, then it is not the same.

[11.16.53]

And, in fact, we have cited in the past a German case or a case that came from the European Commission on Human Rights. It's the Mielke vs. Germany which was ruled -- its HR30047/96, dated 25 November, 1996. We've also -- have cited for you in the past Prosecutor vs. Strugar from the ICTY, IT-01-42-T -- "Decision Re: the Defence Motion to Terminate Proceedings", 26 May 2004. And, of course, there is the Stanford vs. U.K. -- United Kingdom -- that's European Court of Human Rights 16757/90, 23 February 1994. And I should note that in the past this particular Tribunal -- and this is -- jurisprudence that -- it was actually invoked by none other than Judge Lamont when we were moving to recuse him -- has referred to, made reference and used jurisprudence of the European Court on Human Rights.

[11.18.22]
So I'm citing authority that has already been accepted and used by all parties, the Prosecution, the Defence, including Judge Lamont when he hired a British barrister to defend him -- Mr. Emerson.
The -- in Strugar, the Court indicated -- held that the requirement of presence in proceedings "appears to be to ensure the presence of an accused person who is capable of assisting the Tribunal in the presentation of his or her defence".
According to the Human Rights Committee, fair trial rights - quote -- "are not respected where the accused is unable to properly instruct his legal representatives".
Now, the Prosecution says, well, there is no evidence.
Well, first of all, the Prosecution misdirects the Trial Chamber because there was never a submission that Mr. Nuon Chea is "unfit" - quote, unquote.
The submission is that due to his age, if he were to testify in the morning, he is so fatigued in the afternoon that he cannot assist whether he is in Court here or in the holding cell. In the Stanisic Case - Stanisic, who is being tried at the moment -- he was the head of the Intelligence Services for Yugoslavia and then for Serbia, had physical problems -- medical problems that is -- they tried to get around that by placing a video - video-link from his holding cell. And there the jurisprudence was such that, that is insufficient.

[11.20.27]
If there wasn't a distinction, Your Honours, between being in Court and being down in the holding cell, why, I ask rhetorically, then, are the Accused required to sign a waiver? It is one thing to sign a waiver and so the person -- the Accused can go back to his actual cell, his cell where there is nothing. If, indeed, there is no difference then, first of all, none of the Accused should have to be forced to be here irrespective of the importance of the proceedings; and, secondly, they should be able to come and go as they wish without having to furnish explanations of health and then to actually waive.
The waiver means that they're -- they're willing to allow the proceedings to continue in their absence whether they're able to follow or not. They're willing to allow the proceedings to continue. That's the essence of the waiver but it is a fundamental right, and a right that cannot be qualified to suggest that you can waive this right to participate in Court. It is insufficient to say they can be down in the holding cell when they don't want to be in the holding cell, they want to be here, they want to be fresh, they want to be able to look and observe the witness, they want the witness to be looking at them or to have the ability.
And in this instance -- and this may occur in other instances -- the Accused is insisting on being present. To put the witness through the paces of an examination -- to exhaust him in a sense

-- and then say and now we're either going to force you to be here, whether you like it or not, or you can go down there where you're going to be asleep and this way somehow we're affording you your rights, I submit, Your Honours, is a charade.

[11.22.50]

I submit that this would be a disservice to this institution and to the legacy of this particular institution. What has been proposed -- what has been proposed -- and I'll be -- I'll admit that perhaps it could have been proffered slightly earlier, but what has been proposed is that there are alternatives; that effectively we're guard against any delays and would protect everyone's interest, whether it be the civil parties, the Prosecution or the rights of the Accused.

[11.23.29]

Duch can testify morning and afternoon. Nuon Chea has not said: Well, I can't listen to it in the afternoon. It may come to the point where that is the case as well. It is his right to say that. And so -- but until that point, Nuon Chea is not saying: I'm not competent, find an excuse to delay, to obstruct. What he is saying is: Give me the opportunity to have the presence of mind so I can follow the proceedings, so I can give you instructions, so at some point I will be able to be of some meaningful use to you.

If Nuon Chea is sleeping in the afternoon while Duch is giving testimony, unless he's provided with Khmer translations of the

transcripts, and given the opportunity to go through those transcripts and absorb those transcripts, how has he participated? Better yet, how is he able to instruct his client on details by the very same admissions by the Prosecution of all the information that Duch has because he's a very important --

MR. PRESIDENT:

It seems that counsel is using a lot of time. I'm not sure how much time you will need, because yesterday you took the floor once. The Chamber may give you the floor today again, but you should be brief because we still have other issues to be finished today -- that each party has up to 90 minutes. So we may finish up to 5 o'clock today. We are -- we endeavour to finish this issue today, so please be brief, Counsel.

[11.25.28]

MR. KARNAVAS:

Mr. President, one minute, and I apologize.

But by the very -- but the Prosecution admits that Duch is an important witness. I was confused also at the beginning at some of the remarks by my learned colleague on this end regarding Duch, but the Prosecution has indicated that he is a vital witness. And, yes, to the - is the answer to the civil parties. If there are critical witnesses and where the Accused feel that they need to be present in the courtroom to assist their defence, it is their right. This case is not just about the civil parties and the victims. It's not just for the Prosecution. This also is

about those who are being tried -- they have rights.
[11.26.14]
You, Your Honours, are of course -- have to run this case but you do so in taking into consideration everyone's rights and in doing so we submit that what has been proposed by the defence of Nuon Chea is an appropriate and reasonable measure. It will not delay. If we follow what the Prosecution is suggesting we will come across delays almost from Monday.
And so I think this is one instance, Your Honours, where we need to be somewhat flexible. And in the future, perhaps parties should inform the Trial Chamber in advance -- well in advance -- when these sorts of situations -- so that the Trial Chamber can accommodate by making sure that there are available witnesses to fill in the gaps.
I apologize for taking longer but I appreciate the opportunity to be heard. Thank you very, very much, Mr. President and Your Honours.
MR. PRESIDENT:
Can the prosecutor be very, very brief? The Chamber is well informed and will be able to deliberate on the issue.
[11.27.43]
MR. LYSAK:
Thank you, Mr. President. I will be extremely brief.
I am not sure whether counsel didn't understand my statement or just have chosen to ignore our position, but let it be clear:

this decision needs to be based on evidence, evidence from a doctor.

Counsel likes to complain about people testifying -- lawyers testifying in the Court. Is the evidence going to be -- upon which this decision is going to be based, the assertions of counsel that Mr. Nuon Chea is asleep and unable to participate in the afternoon when medical doctors have made contrary determinations?

And I would simply refer back to the last medical report which is document E62/3/13 by a Professor Campbell in which he notes that Nuon Chea had scored 30 out of 30 on a mini mental-state examination, which I believe, he testified was prevalent to the capacity of a 25 year old.

It is very clear from these proceedings, so far, that Nuon Chea's mental condition remains almost razor sharp. And until there is medical evidence for reason for us to have a basis to determine that he is unable to participate in the afternoons, this is a premature issue. That is simply our position.

(Judges deliberate)

[11.36.47]

MR. PRESIDENT:

I would like to hand over to Judge Sylvia Cartwright to clarify a few points concerning the hearing that will be conducted next week, in particular concerning the testimonies of the accused person and Mr. Kaing Guek Eav, alias Duch. Judge Cartwright, you

may now proceed.

[11.37.17]

JUDGE CARTWRIGHT:

Thank you, President. The Trial Chamber has just deliberated briefly on some alternative proposals and wishes to ask for the relevant parties' immediate reaction please.

The first is this. Although it is the procedure that an accused is questioned first, the Trial Chamber wishes to hear the reaction of, particularly, Nuon Chea's defence to the suggestion that we hear the testimony of Duch morning and afternoon until it is concluded before the accused Nuon Chea is questioned.

The second matter that we wish to seek immediate reaction on is whether it would assist if, during the course of Nuon Chea's testimony, he was entitled to ask for more short breaks to allow him to rest.

[11.38.50]

Now, I am not suggesting -- or the Trial Chamber is not suggesting that we change the usual procedures of morning, lunch and afternoon adjournments, but as the need arises, if counsel would wish to ask for more breaks. So those are two matters, they are not necessarily associated, but they are two matters that the President seeks your immediate reaction to.

First, counsel for Nuon Chea.

MR. PESTMAN:

Thank you very much. The first question was whether it would help

to start with Duch in the morning and the afternoon.
I think the answer is yes, we will. It's much less tiring for my client to sit and listen than to -- behind me -- than sit there and answer questions, although I cannot guarantee that he will last the entire day, of course. So -- but it will definitely help. It will be a big step forwards.
[11.39.53]
The second question, I would have to discuss with my client. I can do that in the -- during the afternoon break, and I can inform the Trial Chamber as soon as we resume this afternoon. I don't know whether that will be a solution to the problem.
JUDGE CARTWRIGHT:
Well, I -- we don't want lengthy submissions on this topic.
MR. PESTMAN:
No.
JUDGE CARTWRIGHT:
It is a practical suggestion. So no more than one minute -- "yes or no" -- in the afternoon, please. And, indeed, you probably don't even need to respond to it, because the Trial Chamber has indicated that it would be prepared to consider--
MR. PESTMAN:
Yes.
JUDGE CARTWRIGHT:
--such applications. They would have to be with some basis, of course -- made with some basis.

MR. PESTMAN:

Okay.

[11.40.44]

JUDGE CARTWRIGHT:

Does Ieng Sary's defence team wish to comment?

MR. KARNAVAS:

Your Honour, you indicated relevance, and that's why -- suffice it to say, I'm in agreement with what the Nuon Chea team has indicated.

JUDGE CARTWRIGHT:

The Co-Prosecutors?

MR. LYSAK:

Thank you, Your Honour. Our position would be that, certainly, the alternative you've suggested, which is Duch testifying in the morning and afternoon continually, is certainly preferable to the -- what was proposed by the Nuon Chea team, which was to have Duch in the morning, and then switch to other witnesses.

So, if the Trial Chamber is going to choose between those two options, we certainly would prefer the proposal that Duch testify mornings and afternoons.

(Judges deliberate)

[11.42.22]

MR. PRESIDENT:

Thank you. I think we have got enough ground for our decision concerning how we conduct the following proceedings.

Next, we would like to proceed to another item of agenda, which is classified into two. First, the request for Co-Prosecutor to hear testimony of Ben Kiernan through video-link. And another item is about the objection -- rather, the request by Ieng Sary on the application for additional documents from the expert. We would like to have these two matters discussed at the same time -- the two matters I have just indicated.

We would like now to proceed to the Co-Prosecutors to raise -- or, to show their objections to these requests for additional documents from the expert, and that -- the civil party lawyers will also be allocated some time. Both party -- both the prosecutors and the Lead Co-Lawyers will have 90 minutes exclusively. May the Chamber know whether Prosecutors and Lead Co-Lawyers discussed concerning the allocation of the 90 minutes given to them?

MR. CHAN DARARASMEY:

Thank you, Mr. President, Your Honours. I would like to submit the position of the Co-Prosecutors concerning the testimony of witness TCE-38.

MR. PRESIDENT:

Please advise the Court with regard to the allocation of 90 minutes first, before you proceed to your submission.

[11.45.14]

Indeed, we just want to know how this time is allocated. We need to be well-advised because we want to make sure time is

well-managed in the afternoon session.

MR. CHAN DARARASMEY:

Thank you, Mr. President. The prosecutor will need 60 minutes, and the remaining time will be allocated to the Lead Co-Lawyers.

MR. PRESIDENT:

You may proceed.

MR. CHAN DARASMEY:

I would like to repeat that we are now to respond to the arguments concerning the testimony of TCE-38.

[11.46.01]

Your Honours, in his memorandum dated the 2nd of March 2005 -- 12, rather -- E172/5, at paragraph 6, the President directed that the parties submit oral argument concerning the use of video-link technology to hear the evidence of the Trial Chamber expert TCE-38 and to address objections by the Defence.

Together with my colleague, Mr. Vincent de Wilde, the Prosecution will speak for approximately 60 minutes, and the Lead Co-Lawyers for the civil parties will address the Chamber for the remaining 30 minutes of the allocated time.

At the outset, Your Honours, it is important to reaffirm the legal basis on which the Co-Prosecutors have made contact with TCE-38, and provided their report to the Chamber and the parties on his availability and recommendations for the timing and modalities of his appearance, E166/1. In Trial proceedings before the ECCC, it is a fundamental principle that all witnesses are

witnesses of the Chamber -- not witnesses called by all for any party to the proceedings. By memorandum dated 6 February 2012, E166, the Chamber confirmed its intention to call TCE-38 at Trial and directed the Co-Prosecutors to contact TCE-38 for the limited purpose of determining its availability and assisting the Chamber in planning and scheduling.

[11.48.14]

Acting on the delegated authority of the Chamber, the Co-Prosecutors have contacted TCE-38 and placed all correspondence with this expert on file, with WESU, as directed by the Chamber.

As TCE-38 is a witness of this Chamber, the issue before you today is whether the Chamber should exercise its discretion conferred by Internal Rule 26.1 to allow TCE-38 to give evidence by video-link rather than in person. According to this provision, the Trial Chamber may authorize the use of video technology where it is impossible for a witness to give evidence in person. In exercising its discretion, the Chamber must be satisfied that the video-link will permit the witness to be interviewed contemporaneously by the Bench and the parties, and that the use of video-link would not cause serious prejudice to, or be inconsistent with the rights of the co-accused.

[11.47.57]

However, the Co-Prosecutors, in common with all the parties, would certainly have preferred to hear TCE-38 in person. The

information received, however, from TCE-38 and included in the Co-Prosecutors' written notice to the parties, E166/1, indicates that his professional engagements would preclude his appearance in person during the course of this year. The Co-Prosecutors subsequently requested TCE-38 to clarify the extent of his professional engagements, and after some delay, TCE-38 provided details of his research, teaching, and administrative commitments, and the Co-Prosecutors have filed these particulars with WESU as directed. It is apparent that appearance by video-link remains the sole practicable means of hearing the testimony of TCE-38 during the course of the current Trial segment. On this basis, the Co-Prosecutors recommended the use of video-link to the Chamber, and the parties in their written report. In considering whether to allow TCE-38 to appear via video-link, the Chamber must assess whether the elements of Rule 26.1 have been met. In this regard, the Co-Prosecutors make three submissions before Your Honours today.

[11.51.47]

Firstly, Rule 26.1 does not impose a burden on the Co-Prosecutors to demonstrate that it is impossible for a witness to give evidence in person. Rather, the Chamber, which is the judicial organ calling the witness, must be satisfied that the elements of Rule 26.1 are met.

Secondly, using video-link technology will allow the live or contemporaneous questioning of witness by the parties and the

Bench.

Thirdly, using video-link technology in no sense violates the rights of the Accused.

Your Honours, before addressing these submissions, I would like to make some preliminary observations of the applicable law -- namely, Rule 26.1 and the procedural rules and practice of other international criminal jurisdictions in accordance with Article 33 new of the ECCC Law.

[11.53.00]

Preliminary observations on the applicable law: Your Honours, as I indicated in my introductory remarks, the use of video technology for the purposes of giving evidence before the Chamber -- or the ECCC -- is regulated by Rule 26.1 of the Internal Rules. Rule 26.1 gives the Trial Chamber discretion to permit the use of video technology, provided that the following three elements are satisfied: first, it is not possible for the witness to testify in person; second, the video-link enables the witness to be interviewed by the Bench and the parties at the same time as giving testimony -- in other words, questioning is live or contemporaneous; and, third, using video technology is not seriously prejudicial to or inconsistent with the rights of the Defence -- in this case, the rights of the co-accused.

The position before other international criminal tribunals: Similar to the ECCC, Trial Chambers of other international criminal courts have discretion to authorize witnesses to give

evidence via video-link. Such requests are not uncommon, and the ICTY in particular has considerable case law on this matter. In our submission, the position taken by these courts when dealing with the request for the use of video-links may be of some assistance to the Chamber in determining the issue before Your Honours today.

[11.55.02]

As such, before turning to the more substantive elements of my submission, I shall, with the Court's permission, now briefly outline in turn the approach of the ICTR, ICTY and the ICC.

The ad-hoc tribunals: The ICTR and ICTY permit the use of video-link testimony where, a) the witness is unable or has good reasons to be unwilling to give evidence in person, and b) the witness's testimony is sufficiently important to make it unfair to the requesting party to proceed without it. ICTR Legal Basis Rule 54 RPE grants the Chamber discretion to issue such orders as may be necessary for the conduct of the proceedings. The combined effect of these Rules is that Trial Chambers have the discretion to hear testimonies via video-link.

[11.56.34]

Despite having formulated similar criteria for the purposes of determining whether video-link testimony is permissible in practice, the two ad-hoc tribunals -- the ICTR and ICTY, have adopted very different approaches to the use of video-link testimony. The Co-Prosecutors must respectfully disagree with the

submissions of the defence of Ieng Sary in this regard. Please see E166/1/1, at paragraph 19 (unintelligible).

On the other hand, the ICTR has consistently held that the use of video technology is an exceptional measure which may only be granted where legitimate reasons, based on proper documentation, have been put before the Chamber.

By comparing the ICTY, in recognition of the need to expedite trial proceedings, has, over time, adopted a more flexible approach. The original requirement that video-link technology would be permitted only in exceptional circumstances has been abandoned. A new rule was introduced which, subject to the satisfaction of the elements outlined above, permits Trial Chambers to allow the use of video-link testimony whenever it is the interest of justice to do so. The ICTY has also clarified the evidentiary value of video-link testimony. The original rule, formulated in Prosecutor vs. Tadic, cited by the defence for Ieng Sary at paragraph 20 of their submission, E166/1/1, provided that evidence given by video-link carried less weight than evidence given directly in court.

[11.58.54]

The ICTY position has since changed significantly. In its more recent case law, including decisions in Hadzihasanovic, from 2004, and Lukic, from 2009, the ICTY has maintained that evidence given by video-link had as much probative value as evidence given in person. Even prior to these decisions, Judge Richard May and

Marieke Wierda, experts on the law of evidence in international criminal proceedings, observed that video-link testimony was comparatively common at the ICTY.

The International Criminal Court. Turning now to the ICC, Article 69.2 of the Rome Statute provides that, whilst the testimony of a witness must be given in person, the Trial Chamber may, nonetheless, permit the use of video-link testimony, in accordance with the provisions of the statute and the rules of procedure and evidence.

[12.00.20]

In the exercise of its discretion, the Trial Chamber need only satisfy itself that: a) the rights of the Accused to examine or have examined the witnesses against him or her are respected; and b) the use of video-link testimony will enable the witness to be examined by the prosecutor, the Defence, and the Chamber itself at the time that the witness testifies.

Rule 67 of the ICC Rules of Procedure and Evidence. Your Honours, the formulation of the ICC rule is substantially similar to Internal Rule 26.1, further demonstrating the trend towards open support and flexible approach to the use of video-link technology in international criminal tribunals.

Last but not least, Your Honours, I would like to submit that Your Honour refer to Rule 26.1, which is a very important rule.

Thank you very much. That's all from me. And thank you, Your Honours.

MR. PRESIDENT:

The Chamber would like to hear from you concerning the objection to the request by counsel concerning the additional document obtained from the expert before his testimony.

MR. DE WILDE D'ESTMAEL:

Thank you very much, Mr. President. In fact, my colleague has just completed his section.

[12.02.34]

I'm in a position to speak on the possibility of hearing the witness through video-link. However, I do see the time, and I defer to you as to whether or not you wish to take the lunch break at this point.

MR. PRESIDENT:

Indeed, the Chamber will hear your arguments until 15 past 12, because we endeavour to ensure that the proceedings are concluded by the end of the day.

MR. DE WILDE D'ESTMAEL:

Thank you very much. I just want to specify that we will not be lengthy on our response to the Defence's request concerning documents.

I'll begin by concluding my section on the issue of video-link. And logically speaking, it would be wise to hear the Defence's reply before responding. Therefore, first and foremost, up until 12.15 and then following the lunch break, we will expand on the possibility of hearing this testimony via video-link. It is the

opinion of the Co-Prosecutors -- and I'll elaborate on what has already been said to date -- the Co-Prosecutors, before the ECCC, do not bear the onus of establishing whether or not a witness is unavailable to appear in person, simply because we do not operate within a system that is derived from common law. Nor are we what is called at the ICTY the "requesting party" in soliciting recourse to video-link or videoconference in order to hear the expert testimony.

We are of the view that it falls upon the Chamber to consider the entirety of information it can avail itself of, information that has been provided to you by the Co-Prosecutors, at the request of the Chamber, in order for Your Honours to exercise your discretionary power in full conformity with Internal Rule 26.1. [12.05.04]

Based on this discretionary and decisional authority, it falls upon you to consider whether or not it is possible for an expert to appear in person, in full conformity with Rule 26.1. The defence for Ieng Sary has applied an extensively broad interpretation of this rule, and argues that the Co-Prosecutors are obliged, under this rule to establish and deduce good reason to justify the unavailability of the testimony of expert TCE-38. They contend this in paragraph 16 of their document, E166/1.1 (sic).

We object to this interpretation, and believe that there is absolutely nothing whatsoever in Rule 26.1 that imposes such an

obligation upon the Co-Prosecutors. As we have already stated, before international ad-hoc tribunals, a requesting party that wishes to use videoconference or video-link means -- must bear the onus of demonstrating that it is impossible for a witness or an expert to appear and also to make explicit the valid reasons why such a summoning is not possible. This burden is not imposed on the Co-Prosecutors before the ECCC in the case before us. The Co-Prosecutors have simply formulated recommendations and have adhered strictly to the directives contained in document E166 that was issued by the Chamber.

On this subject, I wish to make a specification which, I believe, is of significant importance, although it may be a matter of semantics.

In its memorandum, the Chamber issued E172/5, on the 2nd of March, 2012, where it is said in paragraph 6 that the Chamber has been seized of the request of the Co-Prosecutors. At the risk of splitting hairs, the term as used by the Chamber - quote, unquote -- "request" to the mind of the Co-Prosecutors, does not accurately reflect the mandate that was given by the Chamber to the Co-Prosecutors as stipulated in memorandum E166 issued on the 6th of February 2012, which, I will recall, states that "the Co-Prosecutors will report back to the Chamber within three weeks of the present date with recommendations for the timing and modalities of the hearing of these experts".

[12.08.15]

And, therefore, we simply contacted these individuals to see if they were available and to see if they could, indeed, be heard as experts. We have abided by this instruction in its entirety, and, therefore, we have also addressed recommendations, which we entitled, simply, as "Notice to the Chamber". You will see in this notice -- that is referenced under E166/1 -- we have gone to great pains to not talk about the request or an application. But in each paragraph, if not each sentence, have used the word "recommendations". Because we are not a requesting party, we are simply exercising the role of an intermediary party that has been conferred by the Chamber. This was conferred and bestowed by Your Honourable Judges for the Co-Prosecutors to carry out.

We are reiterating this because it is absolutely necessary that we would prefer, just like the Defence, the civil parties, and Your Honours, that Professor Ben Kiernan be heard in person rather than by means of videoconference. Nevertheless, over the course of these proceedings, it is the Chamber that will decide on which witnesses will be heard in the ascertainment of the truth and according to the modalities and parameters that it deems as the most appropriate.

[12.10.01]

The witnesses and experts are not chosen by the parties, but they are chosen by the Chamber. It is based on our proposals. These choices are yours alone. This is a fundamental difference in terms of procedural matters and, in fact, the ECCC shares this

characteristic with the International Criminal Court and not with other ad hoc international tribunals.

As such, the Co-Prosecutors believe that there's nothing in Rule 26.1 that places the burden on the Co-Prosecutors to prove that TCE-38, Mr. Ben Kiernan, is unavailable or unable to testify in person. On the contrary, it is incumbent upon this very Chamber to determine whether or not the use of video-link is justified based on its own assessment of the reasons and justifications that have been put forward by the expert witness who has been proposed.

[12.11.28]

University professor Ben Kiernan has already informed the Chamber through exchanges between the Co-Prosecutors and provided information that was received in communications received by the Co-Prosecutors and that were consistently shared with the Witness and Expert Support Unit, which I will henceforth refer to as WESU. This was in full accordance with the Chamber's requirement to proceed in the interests of preserving transparency.

It is because of his professional obligations that Mr. Ben Kiernan is unable to come testify in person in Cambodia in 2012 but that he is available to appear in 2013. The Co-Prosecutors have stressed to the expert that he provide a very detailed and written response to the Chamber justifying his unavailability to testify in person in 2012. Some time later, he did effectively provide a list of all of his professional engagements.

[12.12.50]
Once again, it falls upon the Chamber, and not the Co-Prosecutors, to decide whether or not it wishes to produce before this Chamber the reasons that were provided by Professor Ben Kiernan. If this is the case, we can go ahead and read this document or file it with the greffier.
Mr. Ben Kiernan also notified the Co-Prosecutors that he would be available to provide testimony via videoconference at the end of March or at the start of April or mid-April. He also specified that he would be available at the start of March 2012.
In light of the information that has been provided recently by the proposed expert witness, Mr. Ben Kiernan, as well as the subsequent exchanges with WESU, it is up to the Chamber to review whether or not the summoning of TCE-38 is still possible and at what point in time.
[12.14.10]
Nevertheless, the use of video-link or videoconference at this stage is the only means possible to guarantee a deposition within a timely manner, as has been stipulated in our recommendations. For pragmatic reasons, the reality is simply that video-link or nothing are the only options before us.
Obviously, this is subject to your assessment of whether or not the legal criteria have been satisfied.
As I see the clock, Mr. President, would you like me to continue or would you like me to pause in my interventions at this point?

MR. PRESIDENT:

It is actually over time for us to adjourn. Besides, the DVD is also running out, so we will adjourn our hearing for lunch break and we will resume at 1.30.

Yes, please, Counsel.

[12.15.28]

MR. KARNAVAS:

Just very briefly, Your Honour, because there may be some impression left by the Trial Chamber that the information that the Prosecution has from the direct contact it has with Ben Kiernan that was turned over to the WESU was actually provided to the parties. We have never received any of it.

On March 9th, not only do we file -- make a submission, but also we sent a letter to the senior legal officer requesting an order from the Chambers to direct the Prosecution to provide that. The prosecutor was copied.

We have not received anything from the senior legal officer, so in effect, if I am to make credible submissions because the word "transparency" was used, I should be entitled to have that information as to what exactly Ben Kiernan said as to why he cannot come for the year 2012 when he knew back in 2011 that he was being called as a witness.

[12.16.29]

So, during the lunch break, Your Honours, we would ask that you direct WESU to turn over that information to us so I can see and

process that into my presentation this afternoon. I think it's only fair. It's called equality of arms.

I don't see how the Prosecution is prejudiced. I can only suspect that there was -- there might have been an impression that WESU would have turned it over to us as well. But this information has not -- I repeat, has not been shared with the Defence.

Thank you.

MR. PRESIDENT:

Yes, Counsel.

MR. PESTMAN:

Yes. I would just like to ask, on behalf of my client, permission to stay downstairs after the break and join Ieng Sary in the holding cells.

I've prepared the appropriate waivers, which I will hand over if requested.

[12.17.40]

MR. PRESIDENT:

Having heard Nuon Chea's request made through his counsel -- that is, to continue to participate in the afternoon proceedings from the holding cell through audio-visual means by waiving his presence in the courtroom -- the Chamber grants the request and directs the defence counsel to submit to the Chamber the waiver with the signature or thumbprints of the Accused.

The AV Unit is now instructed to live the proceedings to the holding cells, downstairs.

Security guards are instructed to bring the two accused persons to the holding cells and bring the accused Khieu Samphan to the court at 1.30.

The Court is now adjourned.

(Court recesses from 1218H to 1342H)

MR. PRESIDENT:

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

Next we would like to proceed to the International Co-Prosecutor to present their arguments concerning their proposal or request. This time is allocated for the prosecutor to respond to the motion by the counsel concerning the additional document. By giving parties some time to reply, then we will take 15 minutes from the Co-Prosecutor's time and 10 minutes from the Lead Co-Lawyers dedicated for the reply session.

[13.44.19]

MR. DE WILDE D'ESTMAEL:

I thank you, Mr. President. I would now like to make my second point with respect to the importance of the testimony of Mr. Ben Kiernan.

Mr. Ben Kiernan was proposed as a witness by the Co-Prosecutors. His name is on the list of potential witnesses, civil parties, and experts that was drawn pursuant to Rule 80 and is filed in our document E9/4.2. We have made very explicit the specific reasons as to why his deposition would be so important. We have done so over three pages in document E9/13.1 under the heading

"Treatment of Specific Groups" numbered P250.

[13.45.18]

This expert is a leading light in the world of academia. He has studied extensively the history of Cambodia and has published many articles and books relative to the period of Democratic Kampuchea, and we have mentioned him in our written submissions. And he also had a very important role in the collection of original documents, including minutes of the meetings of the Standing Committee or the Tram Kak archives.

In the framework of the first trial in this first stage of Case File 002, this expert may shed significant light on all of the relevant paragraphs of the Closing Order.

[13.46.16]

The defence of Nuon Chea has already considered this very same expert as amongst those who would be absolutely indispensable in advancing their case. I would refer you to document E93/9, paragraph 7, which should be read concurrently with its Annex, E93/9.1 from A23 onwards.

The Nuon Chea defence had stated clearly before this Chamber that they intend to submit documents before this Chamber through this expert, and you will find these statements in the records of the English transcript for the hearings of 16th of January 2012, page 38, lines 18 to 2 (sic), and Khmer ERN 00768553. The statement is also contained in document E131/1/12.

[13.47.40]

Moreover, the defence for Khieu Samphan has also identified Mr. Kiernan as one of the individuals who was involved in the obtention of documents from DC-Cam. They stated, moreover -- and I quote: "That it is imperative to have this individual summoned and all those who had participated in obtaining such documents." These statements can be found in the transcripts of the hearings of 16th of January 2012, page 123, lines 24 to 25. Obviously, the Co-Prosecutors were not alone in requesting that this expert be heard by the Chamber.

My next point concerns the fact that using video-link technology would allow for simultaneous examination of TCE-38 and satisfies all of the requirements of Rule 26.1.

We believe that the Chamber and parties will encounter no difficulties through the use of video-link in receiving testimony and meets the requirements of Rule 26.1. As my esteemed colleague has already pointed out, such a practice is commonplace in other ad hoc tribunals where the same obligations apply.

[13.49.22]

We would submit that perhaps 20 years ago the use of such technology would have presented certain technological and logistical challenges. However, those challenges have been lessened considerably as the era of information technology has advanced. Today, such an arrangement has become commonplace and has improved significantly in terms of quality of sound and image resolution.

The defence for Ieng Sary contends that such a testimony given through video-link is not achievable and would perhaps waste the time of this Chamber. This is stated in E166/1/1.

The Chamber may, perhaps, consult the audio-visual section, but we believe that a video-link can be established with a major city in the United States, as there is the necessary broadband, and that such difficulties will be significantly reduced compared to what was experienced to the video-link with -- for another witness in Pailin.

A video-link is not to be used if it's seriously prejudicial to or inconsistent with defence rights, but the only way this could come up is in terms of the right of every expert to confront a witness. There is a guarantee in the agreement and under Article 35 of the law.

[13.51.38]

The Ieng Sary defence says, in paragraph 25 of its response, that to authorize an expert to testify through a video-link would be harmful to their client's right to be confronted with the expert, Ben Kiernan, on the basis of a decision that was handed down by the U.S. Courts in 1992, which says that "video-link technology is simply no substitute for live examination of a witness. Video link testimony does not allow the Chamber or the parties the opportunity to observe and assess the witness's appearance, attitude, behaviour and demeanour to the same extent as live, in-court testimony" -- end of quote.

Well, I would say various things about that.

First, the decision quoted by the Defence emanates from a national jurisdiction in a very particular context. It's that of the United States.

Secondly, the decision goes back to 1992 and videoconferencing technologies were just beginning in those days, and now things have improved a great deal, both in terms of image and sound. And we can now have in one room the entire context and room in which the expert is testifying. We can see the facial expressions and the gestures. And the expert himself or herself can see the courtroom in the same manner. You can see if the expert is consulting notes, for example, in which case they could be requested to be submitted.

Third point, although American law seems to be in favour of the confrontation of witnesses in the physical presence of the Accused, we believe that it is certainly not the position adopted by this Chamber, nor the one that would be required under international law procedures.

As you will certainly remember, this Chamber used videoconferencing several times during Case Number 1, especially for hearing witnesses who were in France and in the United States, such as Richard Goldstone and Stephane Hessel, and civil party Ou Savrith.

[13.54.15]

Pragmatic account was taken of the professional needs and

availability of all of these people. The video-links were good and they didn't delay procedures, if I remember correctly, and the Chamber also rejected a request from Defence to go to the United States and in France and to end up with the witnesses appearing in the videoconference.

That's to be found in the 29th of June 2009 transcription, on page 7 in English, ERN in French 0034576 - 76, and in Khmer 00347835 to 36.

And in those hearings, we -- in these hearings, rather, we have already heard a witness, Long Norin, speaking through video-link. The conditions were not ideal, but we do believe that, contrary to what the Ieng Sary defence has said, it was essentially to do with the health of the witness and a certain reticence to testify, which might have slowed things down if, indeed, it did.

[13.55.40]

In the case of video-links, it's not so much prejudice that may be in question, but, rather, a certain degree of inconvenience both for the parties and all people participating in the trial. And the Defence, like the other parties, is on a strictly equal footing.

If you look at jurisprudence from the ICTY and the European Court of Human Rights, you will see that the use of this technology for hearing a witness is entirely legal, which in no way breaches the rights of the Accused.

The Trial Chamber of the ICTY, which was asked to hand down a

decision on testifying through videoconferences in terms of the respective rights of the defence, has always said -- and I quote: [13.56.39]

"Videoconferencing is, in actual fact, merely an extension of the Trial Chamber to the location of the witness. The accused is, therefore, neither denied his right to confront the witness nor does he lose materially from the fact of the physical absence of the witness. It cannot, therefore, be said with any justification that testimony given by video-link conferencing is a violation of the right of the accused to confront the witness. Article 21.4(e) is in no sense violated."

This is a decision taken in the Delalic Case, IT-96-21 of the 28th of May 1998, in paragraph 15.

And there's another case that I could quote to you, and I do indeed quote:

"Videoconferencing, therefore, respects the right of the accused to cross-examine and directly confront Prosecution witnesses while observing their reactions and allows the Chamber to assess the credibility and reliability of the testimony in the same manner as for a witness in the courtroom."

[13.57.55]

That's Prosecutor vs. Gotovina, dossier IT0690T dated 26th of February 2009, in paragraph 18.

Now, the Defence cannot claim not to be aware of this jurisprudence and you will see that in all of these decisions we

are talking about accusation witnesses who are authorized to be heard by video-links. These are not experts, and I think there is a difference between witnesses and experts and here we're, therefore, in a different context.

We're talking about not an expert of the Co-Prosecutors, but an expert called by the Chamber.

And so the Ieng Sary defence argument whereby testifying through videoconferences will be a breach of the rights of the Accused to question or confront the expert has no legal foundation. There's no prejudice and certainly not serious prejudice or inconsistency with rights under Rule 26.1 of the Internal Rules whereby such a technique could be simply excluded.

[13.59.24]

The European Court of Human Rights has handed down a similar kind of thinking concerning the presumed violations of the right to question witnesses guaranteed under Article 6.3(d) of the European Convention on Human Rights -- and I quote here:

"Although the court judged that, in principle, the evidence should be produced in the presence of the accused, the right to question a witness has not, nonetheless, been interpreted as guaranteeing the accused the right to be in the same room as the other person. Under the Convention, [it is --] the important thing is that the accused should enjoy adequate opportunity to contest the testimony and to ask the producers of that testimony about it. The Court expressly recognized that the testimony via

videoconferencing is not, as such, incompatible with Article 6."
[14.00.36]
To say that being present through video-link is in some way violating the right of the accused to question a witness or his right to be present at his own trial seems to be an erroneous interpretation of the law. All of the Accused and their counsels have adequate possibilities to contest the deposition and to question the expert, Ben Kiernan, as indeed is their right. The videoconferencing techniques make it possible, even if the expert is not in the same room, to have what you could call a face-to-face confrontation even if this is through cameras. But the image quality certainly does make it possible.
The final concern raised by the Ieng Sary defence in their request in paragraph 29 that testifying through videoconference from a third country falls outside the territorial scope of the Chamber.
[14.01.43]
As we said, videoconferencing has been done from the United States and France in Case Number 1, and it seems to us that WESU is accustomed to asking the states concerned if requests connected with legal assistance are necessary. That's their role, and indeed they play it.
As in Case Number 1, we do not anticipate any particular difficulty from the United States authorities. We are also quite sure that WESU and the Chamber are well able -- are in a

position, rather, to agree that the organization of a videoconference with the United States can be organized in acceptable and transparent ways for all of the parties, including the making of oaths in the place where the videoconference takes place and so forth.

Now, given the fact that Mr. Ben Kiernan is not particularly available to travel and testify in personam within a reasonable period of time but, on the other hand, he is available to testify via video-link, then the legal provisions do make it possible to exercise its own discretion if it believes that the justifying comments submitted by the expert do, in fact, warrant such a technique.

[14.03.16]

Since time is short, we are asking the Chamber if it would like to hear this witness at the beginning of April and that a decision be taken quickly so that the parties and the expert can get ready and make the necessary arrangements.

The Chamber, as we have suggest, could ask the parties to submit the list of subjects that they want to ask the expert about and communicate those subjects to the experts and all parties could submit, at least provisionally, a list of documents that they hope to discuss when the expert testifies.

This expert, in fact, has written so much that I think that it would be more effective if he were warned in advance about the themes and subjects and, indeed, what he has written when it

comes to putting the questions to him.

[14.04.20]

We also hope that in the Chamber's decision it will be stipulated if and when the prosecutor's office has been discharged of its duty to contact this expert.

Now, briefly, let me respond to the request that has been put forward on the subject of the documents to be produced by the expert.

I believe that, in our memorandum E172/3 of the 27th of February 2012, we were fairly clear, but the Defence has asked for Professor Ben Kiernan to remit a certain number of documents and, in fact, they've asked for a very large number of documents to be submitted before he makes a deposition. These include 10 publications and then all documents that have been drafted by Professor Kiernan that may concern Case File Number 2 and which has not yet been submitted to the Court, including all of his handwritten notes and all of his recordings.

[14.05.46]

We ask that this request be rejected. It is not sufficiently justified or well grounded, it is excessive and it's vague. It lacks diligence, and international jurisprudence does not substantiate a request of that kind.

The Defence doesn't explain why the documents requested are relevant, why it is absolutely crucial to the defence of their client, nor why 20 or 30 years afterwards, after the expert has

written several books on the Khmer Rouge, the Defence is still entitled to demand these documents or handwritten papers. The ad hoc tribunals' jurisprudence runs counter to this sort of request. We're not talking about an expert who has been given a mission by the Chamber to conduct a study on one of the Accused, where the objective is to produce a report to the Chamber as the outcome of the mission. In the case of Ben Kiernan, we're talking about something completely different.

If it was an expert mandated by the Chamber, then perhaps the Defence would be warranted in requiring the documents on the basis of which the report had been drafted. Even on that point, jurisprudence is mixed. But Professor Ben Kiernan is somebody who has been recognized as an expert because he has already written dozens of books, articles or publications on Cambodia. He has not been asked by the Chamber to write yet another report.

[14.07.34]

There is no kind of jurisprudence that would require an individual of this kind to produce a whole set of documents, handwritten notes and recordings which relate to his university work that was conducted well before he was summoned to appear. Needless to say, of course, in practical terms this would be highly problematic. We don't even know if the expert has conserved all of his archives and is able to collect them all together and send them in to the Chamber, so that request comes much too late in the day.

[14.08.12]
The Defence knows since October, according to memorandum E131/1, that the Chamber intends to hear this expert and now the Defence seems to be asking the Chamber and the expert to come to its assistance as soon as possible and to submit a speedy response. And the request has been submitted very shortly before the expert might be required to testify. To require all of these archives from Ben Kiernan, who has been working on this subject for about 40 years, is disproportionate -- is really rather strange coming from the Defence which, for the whole week, has said unceasingly that there are too many papers in the files.
Apart from the 10 publications which are mentioned by the Defence and of which the relevance is not entirely proven, the Defence does not specify what subjects in Case Number 2 they are interested in in Ben Kiernan's archives so that he can have at least some idea of what he's got to look for.
[14.09.32]
So the Defence's request has manifestly to be discarded because it is poorly substantiated.
The expert is being asked to do a job which, in fact, the Defence itself should have done many months ago. That is not acceptable.
Thank you very much to the Bench for hearing me out, and I now imagine that the civil parties may wish to take the floor. Thank you.
MR. PRESIDENT:

Thank you.

Now the floor is handed over to the Lead Co-Lawyers.

The prosecutors have already incorporated the two issues together, and I suggest the Lead Co-Lawyers do the same thing.

MS. SIMONNEAU-FORT:

Thank you very much, Mr. President, Your Honours. Good morning -- good afternoon, rather, everyone.

[14.10.36]

I'll make my comments very brief, and I will certainly limit myself to the time that has been allotted. With respect to this proposed expert -- as the Co-Prosecutor has just pointed out, he is an expert who has been proposed by the Chamber, and not just by the Co-Prosecutors. This is because we are working within the context of an adversarial debate. I'd also like to talk about Rule 26.1 of the ECCC Internal Rules. This rule does not stipulate that the deposition of a witness or an expert must take place in person, and if it is impossible, then the Chamber may authorize the use of video-link technology. This is very clear in both French and English versions of the Internal Rules. The rule says: "The testimony of a witness or expert during a judicial hearing shall be given whenever possible."

This is a legal rule, like any other legal rule, which is drafted with the utmost care and precision. This means that there is no high degree of requirement in terms of establishing whether a person can be heard in person.

[14.12.05]
I think, on the contrary, this rule provides significant leeway to the Chamber to assess a particular situation in which it is not possible to hear an expert at an in-court -- in court. A distinction must be drawn between the hearing of an expert and a witness. An expert is not a witness. It is a person who provides theoretical information -- is a professional who has reviewed and studied very specific topics. They are researchers and, by this professional status, have -- are able to take -- review their work with a certain level of hindsight. All of these elements are entirely compatible with the testimony arranged through video-link. And this is not required of a witness. A witness is much more involved, by definition, in the actual facts being examined. The presence of a witness is, perhaps, more important in court because, during questioning and examination, there is an emotional and factual dimension that is absent in the testimony of a witness - or, of an expert.
[14.13.53]
After having reviewed the document submissions that were produced by the defence for Ieng Sary -- I've not been able to go through all 59 examples of jurisprudence, but I believe that their citations refer mainly to witnesses, and not experts. Obviously this would be based upon the Chamber's evaluation, pursuant to Rule 26.1.
Furthermore, this distinction between witnesses and experts must

be very present in the minds of judges when considering whether or not an expert is able or unable to testify. Once again, this cannot be judged similarly for both witnesses and experts. Rule 26.1 does not create any such requirement. The proposed expert, Ben Kiernan, has provided reasons as to why he is unable to travel to Cambodia, and I believe it is because of his professional engagements and obligations, which can be considered as serious reasons. And this does not, in my view, prevent him from being heard via video-link.

[14.15.35]

With respect to some of the conditions imposed by Rule 26.1, such technologies -- of video-link technology -- should not be used if they would be seriously prejudicial to, or inconsistent with, defence rights. I'm of the view that it is up to the Defence to provide evidence as to how a serious prejudice has been caused, or how it is inconsistent with defence rights. Video link provides immediate presence and connection to the expert during the cross-examination, and, obviously, it would enable confrontation with the person. It is up to the Defence to establish how, despite this, there would be serious prejudice to the rights of the Accused, and I do not recall reading in any of their written submissions discussion on this particular topic. I would also add that, with respect to the hearing of witness Long Norin, no arguments were raised with respect to any serious prejudicial effect to rights or inconsistency with such rights.

As for the opportunity to hear Mr. Ben Kiernan, I subscribe to the arguments put before you by the Co-Prosecutor. I believe it's very important that he be heard via video-link.

Mr. Ben Kiernan is one of the leading researchers on the issue. He has travelled to Cambodia, and he's been studying the topic of the Democratic Kampuchea regime for many years. He is a prominent specialist who has been working extensively for many, many years to analyze the Democratic Kampuchea regime, and he has carried out very specific research projects concerned with specific segments of the population. And through such work, he has been able to conduct general research on the issues that are relevant to Case 002/1. We have insisted on the need to proceed with the testimony of Mr. Ben Kiernan. Obviously he cannot be replaced or substituted by another expert, and obviously, for that reason, he must be heard.

[14.18.16]

Lastly, with respect to documents that are being requested by the Ieng Sary defence team, and that must serve as a supplement or complement to the work of Mr. Ben Kiernan, may I make a general observation based on common sense? I do not believe that the Chamber can force Mr. Ben Kiernan to produce handwritten notes, nor can it decide that his testimony can only be heard on the condition that he present such handwritten documents. I would be keen to hear the arguments of the Ieng Sary defence team with respect to that.

That concludes my remarks, Mr. President, Your Honours. I'm rather surprised to hear the Ieng Sary defence team request that Mr. Ben Kiernan bring forward a variety of evidence -- a variety of documents and elements, including his handwritten notes from 30 years ago. It is incumbent upon the Defence. It is their responsibility to establish why. Two days ago, they had contested two of our proposed documents that are referenced in appropriate form. They referenced Ben Kiernan. Such a request is not justified, and I join the Co-Prosecutor in asking that you dismiss such a request. Thank you, Your Honours.

MR. PRESIDENT:

Thank you.

It is now appropriate to take a short break. We will adjourn for 20 minutes and resume after that.

The Court is now adjourned.

(Court recesses from 1420H to 1448H)

MR. PRESIDENT:

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

Before we hand over to the defence counsels, the Chamber would like to inform the parties on the decision by the Chamber concerning the amendment to the scheduling for next week hearing. Having seized of the request by Nuon Chea defence team and having noted the observations made by other parties, the Chamber has decided to set the schedule for next week as follows: first, on Monday, Nuon Chea will be questioned, and there will be no

hearing in the afternoon session on that Monday; and on Tuesday, the Chamber will hear the accused person – rather, Kaing Guek Eav alias Duch the whole day; and on Wednesday, there will be no session in the afternoon; and on Thursday, Kaing Guek Eav alias Duch will be questioned the whole day. The Chamber would like to inform parties that the scheduling is flexible and it is meant for the purpose of the next week hearing only. It is not a blanket order.

[14.50.26]

If counsels know that they would like to raise any concerns with regard to the scheduling, counsels are advised -- or parties are advised to inform the Chamber as soon as possible.

And for this afternoon session, defence counsels will have 90 minutes to make their observation. For that reason, the afternoon session will be extended a little bit to entertain the time for the Defence.

We have already informed the General Service Section and the court officials to ensure that transportation is ready in place to transfer staff back into town after the late session.

And to be more precise, I would like to hand over to Judge Sylvia Cartwright to add something else if she would wish to add.

JUDGE CARTWRIGHT:

Thank you, President. The Trial Chamber has a further comment to make on another matter.

The Co-Prosecutors and the defence team for Nuon Chea have raised

the use of the term "mini-trial" during Case 002. The Trial Chamber agrees with the prosecutors that the use of the term is inappropriate in a courtroom, where precise, appropriate, and unemotional language is of great importance to all parties and for the dignity of the proceedings.

[14.52.50]

The term is inaccurate if it implies an assessment of the length of Case 002/001. It also suggests, inaccurately, that the charges against the Accused and the impact of the alleged crimes on the victims are not serious.

That is the comment that the Trial Chamber wishes to make on this topic. Thank you, President.

MR. PRESIDENT:

Thank you, Judge Cartwright.

We would like now to hand over to counsels for the accused persons to respond to the observations made already by parties concerning the request for additional documents from Mr. Ben Kiernan and the matter that already discussed earlier.

The three defence teams have 90 minutes. If they have not shared or divided the times among their team or have not discussed this, then we presume that each team will have 30 minutes for these pleadings.

So we would like to begin with Ieng Sary's counsels first.

MR. KARNAVAS:

Thank you, Mr. President. Thank you, Your Honours. And good

afternoon to everyone in and around the courtroom.
I have spoken with my colleagues. I will be using up the lion share of the time, although I do believe that we may be able to finish as usually around 4 o'clock. I will try to be as efficient as possible.
With that, I should note that a few moments ago I was provided with the material, the exchanges between the Prosecution and Mr. Kiernan, and I regret if I will -- if I'm going to be less than articulate or eloquent in my presentation due to not having sufficient time to look over this material. So, if I'm less than eloquent in my arguments, that is one of the reasons, but let's see how it goes.
[14.55.46]
First, Your Honours, let me address the last point, that is the point concerning our request for additional information, and I think that -- I could deal with that in about five minutes or less.
In preparation for Professor Kiernan, and as was noted earlier, he has written extensively, and as we consulted others who are equally knowledgeable about that period of time and the events, it dawned on us that was -- that there may be additional information that we would need.
Some of the material that we requested we only learned of, or heard about I should say, at about the time that we made the request. It was, to be honest with the Trial Chamber, an

afterthought as we were asking for this to also ask for notes and what have you, in part because in reviewing his books it is very clear that often statements are made or assertions are made or conclusions are drawn and no witnesses are cited, no authority is cited. So it was for that reason.

Handwritten notes. Where the Prosecution has argued that at least one of the journalists that's scheduled to be here and testify kept notes and in fact those notes are on the case file. We made a request. We believed it was an honest request and we left it up to Your Honours to decide, once if and when we get anything from Mr. Kiernan, as to what any of it might be relevant to use in court.

What shocks us is the Prosecution's attitude shared by – or I should say echoed, because no matter what the Prosecution says, the civil parties argue, so they're actually one party as far as we know -- that there was this immediate visceral reaction, and they begin to make excuses for Dr. Kiernan when they haven't even bothered to ask him.

[14.58.22]

May we suggest, Your Honours, that there is no harm in asking Dr. Kiernan, for instance with the academic articles, if he has copies of them and would he be willing to share them. Can the Court force him to turn it over? Of course not. Are we asking the Court to force him? No, but we would ask -- we made a request so that request could be passed on to Dr. Kiernan to see whether he

would be willing to share this information with us so we could be better prepared for our examination of him.

[14.59.01]

Is it late in the day? Well, it would appear to be rather late in the day, we can see that, but when you consider all that there is in this case file and all the reading that we have been doing, and now that we are at the trial stage, in addition to all the legal issues that we had to deal with, it is not until you begin really preparing for a witness and actually going through all the material and focussing on the witness that things appear and ideas begin to shape. And it's at that time that you may find that perhaps you may need some additional information.

[14.59.45]

I come from a jurisdiction where it doesn't hurt to ask. Now the Trial Chamber can simply say, I'm sorry, we're not going to bother asking him, or you might decide that it may be worth to ask Dr. Kiernan.

So I leave it to your discretion to determine what, if anything, from the list of material that we requested should be asked from Dr. Kiernan; whether he has it and if so whether he would be willing to share it.

If the Trial Chamber deems the request outrageous, then you're free to say so. If you think that it's not necessary, you are free to say so as well. And whether we were diligent or not diligent, we do know and we do agree that the gentleman has

written quite a bit and is considered one of the leading experts. So that's all I have to say with respect to that submission, Your Honours.

So now let me focus on why Dr. Kiernan should not appear by video-link, unless there are any questions from the Bench concerning the first issue. Seeing no questions from the Bench, now let me go into the issue about the video-link.

[15.01.09]

Over a month ago, Dr. Kiernan was contacted, pursuant to the court's directions, by Mr. Cayley, and there have been an exchange of not just emails but also it appears telephone conversations. And in one conversation, in fact, there were notations that were sent back to Dr. Kiernan to -- sort of like minutes of a meeting to make sure that there was an agreement as to what was said.

So that is the material that I received today. And it appears that from the very beginning, at least from the very first exchange back in February, at face value, Mr. Cayley, in his letter to Professor Kiernan -- this is on 13 February -- notes that it is his understanding from the representative from the Witness Section that he is not available to come to Cambodia for 2012, but that he might be available to testify by video-link in February, early March and mid-April -- or mid-April.

Then, in the fourth paragraph of this letter, he indicates -- Mr. Cayley, that is: "I think it might be helpful if we could talk

[via conference –] by videoconference this week". So they have this conversation. And at some point, which is almost a month later -- I believe it's March 8th -- we finally get something from Professor Kiernan where he notes the various activities or functions that he's carrying out.

Now, had I had this information beforehand I would have done my due diligence. I would have put somebody to go to Yale, someone from the United States or through the internet, to actually find out exactly how much of this is true, accurate and complete.

[15.03.23]

I don't take at face value anything that the gentleman says simply because his name is Kiernan. I wouldn't do that with any other witness; I won't do this with him.

We do note, and we noted -- we learned earlier from Google that he teaches a couple of classes. That's what's on the Yale website. The teaching schedule for the summer is already online and Dr. Kiernan does not appear to have any teaching obligations during that period, though we do know that professors who are of this calibre have other general obligations in addition to publishing and supervising the committee work.

[15.04.20]

So we do understand that he is busy, but what we do note that there's not a single date describing when these events are taking place and to why he is not available for the entire 2012.

Now, had I been privy to have a conversation with Professor

Kiernan, along with the prosecutor, I would have asked him specific dates; can you please break it down, tell us what is -- when is spring break, what are you doing this summer; to break it down so we have some more idea.

Merely, what we have is a laundry list. And keep in mind that professors have students; they have assistants who teach for them and fill in their classes. Those who are doing their PhD's are not being supervised on a daily basis, they are normally told to go out, research, write and come back, and you have a one-on-one on occasion and they usually tend to be, at least in the United States, teaching assistants.

And as far as committee's go, one can absent themselves from a committee or participate via video-link from a foreign country if it's necessary. And nowadays you can even do it by Skype, on telephone, at no costs.

[15.05.43]

So, from this, we don't see how it is that the gentleman is unavailable completely. Keep in mind that we were informed in October 2011 that the gentleman would be appearing in court. He's a Prosecution witness, and I'm going to get to that. They say now he's a Court witness, but really he's a Prosecution witness. He is an advocate for the Prosecution and for the civil parties. And the Prosecution could not have but consulted with him during the investing -- during the investigative process before the matter was turned over to the OCIJ either directly or

indirectly. There are staff working in the Prosecution's office that have a long association, although albeit now bitter association or bitter relations with Dr. Kiernan. In fact, I'm speaking about Mr. Etcheson, who used to be there at Yale and has worked with Dr. Kiernan, who's also worked with DC-Cam.

So to say now that he is an objective witness, or not even a witness, he's just some academic who is coming here and is going to be objective and, therefore, there's no need to worry about it, we say, no that is not the case.

[15.07.03]

He is a witness for the Prosecution, and they may say there is no prejudice to the rights of the Accused. Well, there's no prejudice to them, yes, because he is such an advocate; he can be on automatic and just answer any question and every question for them without any reticence. But when it comes to the Defence, usually it's quite different because at the Defence side he is going to be asked to provide authority for much of what he has written or, at least, some of what he has written.

[15.07.45]

We have identified approximately 50 topics -- 50 topics -- which the Prosecution wishes to question this gentleman on at one point or another. But you may say, Your Honours, well, we've limited this case to only 002/01.

Well, yes, you've limited it. However, what has the Prosecution done in and it continues to do and will be able to do throughout

this trial. They will say this is for contextual purposes, Your Honour, and then they stray into other areas. And so, when you look at everything that they've asked this witness to testify on, they are not minor issues. It is every single topic, every significant issue that involves this case.

[15.08.38]

And to merely say that he's an objective individual, that there is no prejudice, is simply nonsense. He is a terribly important witness and that's why we insist that he come here.

Going back to what I was saying earlier, he was contacted back in 2011, unless -- unless the Prosecution put him on his list without even contacting him. They must have contacted him at some point to see whether he would be willing to testify or not. If not the Prosecution, the Trial Chamber would have contacted him through one of your legal officers. Otherwise, why would you be notifying us back in October that he's on the list?

Then you will note, Your Honours, and you will recall that in January I asked whether Kiernan had been summoned. Now, I didn't ask it because I was just curious. Rumour has it that he's very reticent to come here. That -- it's not that because he's got the schedule, but rather he does not want to come here and be confronted in person.

And so we say at this point in time with respect to "Who is Kiernan?" He's a Prosecution witness, he's a terribly important witness in this case, not just for the Prosecution, but for us

and for you, and for the civil parties and, therefore, he has to come.

[15.10.05]

This knee-jerk reaction to say, gee, he's giving us a long list of activities and now he's totally unavailable, but he may -- he may -- be available in 2013. Well, let me address that.

If you may be available in 2013, he's got about 10 months or nine months to get his calendar cleared up so he can identify when in 2013 he can come and give evidence.

Now, you may say that evidence may be out of order. And I say you're professional judges; usually, you would want your evidence to come in in a particular narrative because the poor jury, the lay person, the non-professional judge, may have difficulty in following the narrative of the evidence as it's coming in.

But you, Your Honours, you're professional and you know the case, and it matters not whether he testifies in 2012 or January or February of 2013. And so to say, and for the Prosecution to stand up and say, it's either 2012 by video-link or nothing; that, again, is nonsense. And it's not midnight for Mr. Kiernan. There are other options. The question is: Is he willing to come here, not whether he's able to come here? And I suggest it is the former and not the latter.

Let's look at some of the jurisprudence.

Your Honours, today -- today -- we submitted an annex containing something in the neighbourhood of 72 cases; 39 from the ICTY, 29

from the ICTR, two from the Special Court of Sierra Leone, and two from the ICC.

[15.12.08]

This annex does not contain all of the cases; it's a representation of the cases. We've submitted -- we've checked and chosen the cases and were able to put this together on a very short notice. You have cases where they allowed video-link and cases where video-link was denied. So we try to be balanced.

Now, coming from the Defence, since we are a party, I'm making this as a disclaimer. It's coming from us. It doesn't have all the cases. We have a short -- a limited period of time, we did the best we could, and we looked at -- these are various jurisdictions.

And with that, let me add one other point, when it comes to the ICTY and ICTR. Whenever you see a case, Your Honours, that it says the ICTR Appeals Court we're talking about the ICTY Appeals Court. It is the same, the same judges, so we're not talking about two different entities.

When it comes to the Trial Chambers, that's different, but I think that we should not dismiss cases from the ICTR because they have been more stringent both at the trial level and at the appeals, but especially at the trial level, in making sure that witnesses actually appear.

[15.13.31]

I'm told to slow down and I will do so as ordered by my

colleague.

So I will discuss just a few cases, but first, Your Honours, as you well know that on 9 March 2012 we filed written submissions and we titled them "A Response". We titled them "A Response" because, when we looked at what the Prosecution had filed as notice, we saw that as a request, and in fact Your Honours have labelled this matter as having been seized with a request from the Prosecution.

Now, I don't want to go into whether they actually are the moving party or not the moving party. Be that as it may, what we are suggesting here is that we filed written submissions outlining what we believe the law is. We did so in good faith. We think it tracks the law. We think it will help you and guide you through this process, and we certainly are grateful to this -- for this opportunity to go even further than the written submissions.

[15.14.54]

I should also note, when the written submissions were made back on the 9 March, we were unaware of the material that we just received, although the Prosecution was aware of it. However, given the instructions from the Trial Chamber they were not in a position to disclose that material, and so we're not shifting any blame or we're not complaining but rather just mentioning that. So, if our response somehow does not dovetail the facts as we know them today, it's for those reasons. So it's not that we were misrepresenting the Court at the time that we made these filings.

Now, the law has evolved somewhat at the ICTY. Tadic, as we know, was a very first case, and at the time the rules did not really provide much of guidance. Later on, a rule was put in place, rule 81 bis of the ICTY Rules of Procedure -- and this is 12 July 2007, and it states: "At a request of a party or proprio motu, a judge or a chamber may order, if consistent with the interest of justice, that proceedings be conducted by way of video-link conference."

[15.16.31]

Then, in Stanisic, it seems to have set certain criteria. Stanisic vs. Simatovic -- I'm sorry, Stanisic and Simatovic -- that's S-t-a-n-i-s-i-c and, Simatovic, S-i-m-a-t-o-v-i-c -- but it's all in the written pleadings, Your Honours. And I'm referring to actually paragraph 21 of E166/1/1. And here is what it said:

"i. The witness must be unable or have good reasons to be unwilling to come to the Tribunal.

"ii. The witness's testimony must be sufficiently important to make it unfair to the requesting party to proceed without it."

I'm going to focus on that a little bit as well.

"iii. The accused must not be prejudiced in the exercise of his or her right to confront the witness."

We submit, at least those of us who come from an adversarial system and do engage in the process called cross-examination, which may not necessarily be that important in the civil law

system because the judge does all the questioning and then more or less allows the parties to follow-up. And the role of the defence lawyer, at least in the classical French system, is -- with no disrespect to my colleagues, my understanding is to be brilliant at giving closing arguments. But at that point, it's rather late in the game because all of the questioning is done by the judges.

In the system that we have adopted here which is a hybrid system, and we have crossed into, as I've indicated earlier this morning, into some aspects of the adversarial system because you are allowing the Prosecution to lead, to go forward with the questioning of a witness and allowing the parties on the other side to actually ask leading questions, which is the hallmark -- the hallmark -- of cross-examination.

For those of us who are experiencing that in that system in these techniques which we are using here in this Court, we know that control of the witness is terribly important. One controls the witness by being able to look at the witness square in the eye, proximity, and also it is our belief that it is terribly important for the judges to also see how the witness is behaving as being cross-examined.

[15.19.20]

In the instant case, what are we being asked to do? We're asked that Dr. Kiernan at 9 o'clock at night after a very busy schedule of meetings, of teaching, of committee work, you've got to eat

once at some point, maybe breakfast, maybe even dinner. I don't know his family, but I'm sure that at 9 o'clock I know that I'm exhausted for any intellectual debate. And that's what we're asking this gentleman.

[15.20.01]

So at 9 o'clock he's going to be at every night there until midnight, and it is our respectful submission that this is not fair. Not to the witness but to us because the witness can easily say, I'm too tired, I don't wish to answer that question, and that would be it. There would be no way of coercing the witness to actually be there.

And if he's that busy, he's going to be exhausted at 9 o'clock at night, and how can he possibly be cross-examined without being cross at the cross-examiners, even if they are polite to him because after all we would be challenging his academic work.

So we do submit that it does prejudice us, and I'll discuss one particular case.

Is this witness's testimony, you know, so sufficiently important to make it unfair to the requesting party to proceed without it? Well, recall. The Prosecution admits that they put him on their list, and so when -- and then they mention the Nuon Chea -- but it is the Prosecution that is going forward. They're the ones that drafted the Introductory Submission, and now they're the ones that are willing to throw in the towel without making any efforts to bring the gentleman over here.

[15.21.28]
But is there no-one else on earth, or no-one else that we are aware of, either in Cambodia or elsewhere, that can fill the shoes of this gentleman to the limited topics of -- or the first part of the Case 002 -- that is, 002/1?
If you look at, Your Honours, the Introductory Submission -- I invite your close scrutiny and attention -- go to footnote 1, cite 1; at the very beginning, we have "Etcheson". Here he's been an analyst. He's been analysing all of these documents, albeit he doesn't speak Khmer -- I think we all know that -- but he's been analysing the documents forever. He's testified before. He drafted the Introductory Submission.
[15.22.24]
Is he not capable of covering the topics limited -- limited to this particular trial that you have identified for this particular witness, not the ones that the Prosecution wishes. So are they prejudiced, and would the Trial Chamber be prejudiced, or anyone else be prejudiced, if another witness -- doesn't have to be Etcheson, it can be someone else -- comes in to discuss those issues while we wait for 2013 to have Professor Kiernan come here when his schedule allows it.
Where is the prejudice? As I've indicated before, you are professional judges and need not worry about the narrative coming in in a particular fashion. And let me go back to that for one second.

Usually, in a typical case, in a common-law typical case at least, judges come in not knowing a whole lot of the facts. The jury knows absolutely nothing.

Here, we're in the civil law system where the Judges have read the entire file, have selected and are selecting, and so it's not as if somehow you're going to miss the narrative of the Prosecution's case if this gentleman doesn't come on 2012 and comes in on 2013 instead.

[15.24.03]

So I think that is not really much of an argument. In fact, I would dare say it is what they call a red herring: to throw you off the path. It is a deliberate technique to get you to think in other directions, that if we don't have this gentleman then the case falls apart.

In the International Criminal Tribunal for Rwanda, in one particular case they also identified some criteria, and I'm going to spell this case because their names are terribly difficult to pronounce, and I am somewhat challenged.

[15.24.44]

It's N-z-a-b-o-n-i-m-a-n-a, and it's -- I'm referring to the case on paragraph 22 of E166/1/1; and it says: "Such…" This is a quote, basically:

"Such criteria include an assessment of (a) the importance of the evidence; […] the inability or unwillingness of the witness to travel to Arusha; and […] whether a good reason has been adduced

for that inability and unwillingness. The party making the request bears the burden of proof to demonstrate that the conditions set out above have been met."

Hearing testimony via video-link is an exceptional measure -- I underscore "exceptional measure" -- granted only upon sound and legitimate justifications based on proper documentation.

And this decision, Your Honours, was -- if I'm not mistaken -- in March 9th, 2011.

So the argument that somehow, you know, the technology has advanced so much that you don't have to worry, it's the same thing, here you have clearly a decision from a court, a sister court often cited by the Prosecution, which sets out what it believes to be the criteria.

Now, the defence in that case had requested that an expert witness testify by video-link from the United States or The Hague due to security reasons.

It was denied, okay, because -- in that they found that the allegations were extremely serious, the security reasons, but it nonetheless denied the request for video-link testimony as it was not convinced that the expert -- expert -- witness's circumstances were exceptional and because the Trial Chamber received no documentation supporting the claim -- the claimed security concerns.

[15.27.22]

So this is an expert. They're talking about exceptional

circumstances, and I think when we're talking about experts, Your Honours, and witnesses, there are different types of witnesses. They may be someone who comes in as a character witness; he may not be that important. They may be an expert witness who -- such as Goldstone, who's going to be testifying about something that is not really much in dispute, or maybe for a particular discrete purpose such as going to sentencing or the gravity of the matter, or what have you. But when you're talking about an expert of Kiernan's calibre and what they expect, that's something different.

Now, there's another case which I think I want to spend a couple of moments on.

This is from the ICTR Appeals Chamber, and as I've noted this is the same Appeals Chamber, these are the same judges at the ICTY; they just put on a different hat. Sometimes they go down to Arusha to listen to the arguments; sometimes the arguments may be held in The Hague. But it's the same judges, although they're looking at decisions that were taken by different courts, one at The Hague and the other in Arusha.

In this case, I'll spell the name again: it's Z-i-g-i-r-a-y-i-r-a-z-o (sic). And I'm referring to paragraph 27, Your Honours, of E166/1/1.

So in this case, the testimony was taken by a video-link and it was found that it had violated the fundamental due process rights at the trial level.

[15.29.35]
The Trial Chamber moved the seat of the proceedings from Arusha to The Hague to hear the person's -- to hear in person the testimony of this important Prosecution witness. So in other words, the accused was in Arusha, the judges and others went to The Hague. So the accused is watching it by a video-link as would be done over here.
And I will submit that it doesn't make a difference whether we're only speaking about the Accused and/or the lawyers who are representing the Accused, the rights belong to the Accused.
The Trial Chamber moved the seat of the proceedings, as I've indicated, because of the importance of, quote, "the proper assessment of an important prosecution witness" --quote, "the proper assessment of an important prosecution witness". In other words, the judges wanted to properly assess the witness. They could have sat there in The - in Arusha, and the witness could have testified from The Hague. Instead, the judges wanted to properly assess.
[15.30.58]
The Appeals Chamber held that it was a violation of the gentleman's -- I'm not pronouncing his name to avoid any confusion -- a violation of the gentleman's right to be tried in his presence, finding that although this right was not absolute it's restriction was unwarranted and excessive under the circumstance.

And the Appeals Chamber excluded the testimony of the witness taken in this manner, finding that it prejudiced the gentleman's rights. So I point this out, Your Honours.

Now, of course, there are lots of different cases; some that say you haven't provided sufficient evidence, some that say, yes, that's enough.

You'll see from our annex we tried to guide you. If we had more time, we would have provided more -- we would have provided all of the jurisprudence to date.

Now, I understand that we operate under different rules in the ICTY and the ICTR, and the Prosecution as well as the civil parties go to this rule that we have here, but I suggest that even when you -- even when you read the rule, which you cannot do so without also taking into consideration the Cambodian Constitution, the establishment law and all the rights that are accorded to the Accused, in particular, those that are set out in the International Covenant on Civil and Political Rights, we submit when you look at that and you look at the decisions and you look at the rules that are coming out of the ICTY and the ICTR, there is little difference, if any.

[15.32.54]

Obviously you have the discretion. The Prosecution will argue that it is not their wish for the gentleman to come here. He is your witness and because he is your witness, it's up to you to demonstrate.

Well, I submit, that's going about it the wrong way because if that were the case, the Prosecution could simply say, "We'll leave it to your discretion. It's your witness, you decide whether there's sufficient evidence." Rather, they are advocating, they're advocating for the witness not to come here and appear in court.

Due to the scheduling and so that we can properly finish on time, I'm going to wrap it up, Your Honours. I don't think that I need to belabour the point. I could wax -- perhaps not eloquently -- but for the next hour, but I see no point to it.

We submitted our witness submissions; you have the annex; you have the law before; you're all wise, and we leave it to your discretion.

However, we must submit -- we must submit -- that it is not the same to suggest that he can testify from there and, if that is the case, if you decide, well, he's a busy professor, he's a big name, you know, he's on this history department and he sits on a particular chair of that department that's rather important, he's got all these students, so let's give him a break.

[15.34.36]

We would suggest in that case, give us a break. Let us, if we so choose to be there, to cross-examine him in person. There's nothing that would prevent that from the rules. Why can't the parties not be there to confront this gentleman at 9 o'clock at night until midnight.

Presumably, the testimony will take place in a court of law or someplace. Presumably, you will have UN employees over there or somebody from the court who's going to be there to monitor the situation and to assist. So there's no need or there's no -- there's nothing to fear that somehow we're going to disrupt Professor Kiernan's equilibrium other than our mere presence being there, so I don't see why that could not be looked upon as alternative.

[15.35.30]

Another alternative could be that he gives his Prosecution evidence by video-link and in 2013 he complete the rest of his evidence here, in court, so we can cross-examine him.

I don't have a problem with that, as long as the confrontation occurs in here, in Cambodia -- in Cambodia -- in this courtroom. That's -- is the best possible solution.

Now, you may say, "Well, nice try, but we're not going to give you any -- either one of those two. We're going to just go ahead with a video-link." We would submit then that at the very minimum you have to discount his testimony because the jurisprudence is rather clear that it should have less weight. And we submit that that is -- that should be the case.

But from what we have seen today -- and I apologize for not being able to do -- to be more diligent although we're going to jump on this and look and see if there's anything that we need to bring to your further attention -- but we submit just having a laundry

list of things -- or long list -- easy for the translations -- of items that one does, I can fill two or three pages. It doesn't mean that I cannot find three days in my schedule to travel someplace to testify.

[15.37.03]

So with that in mind, Your Honours, I think that Kiernan has to come. He hasn't provided any compelling reasons why he cannot make it over here. There is no reason why somebody else cannot fill his position. There's no reason why we need to rush. He's very important to the Prosecution; he's going to be testifying about the entire case of 002. Such a witness cannot and should not dictate to this Trial Chamber if -- the terms or -- and conditions of their testimony. They should appear here.

He's worked here in Cambodia. He has family here in Cambodia -- or former family here in Cambodia. He has friends. He knows the area. It's safe, and there's no reason why he cannot come and give evidence. Thank you.

[15.38.06]

MR. PRESIDENT:

Next we proceed to counsels for Nuon Chea.

MR. PESTMAN:

Thank you very much, Mr. President. I'll be very brief.

I think most of the grounds, if not all the ground and arguments, were covered by the counsel for Ieng Sary very efficiently.

I just want to stress that for us and for my client Ben Kiernan

is a very important witness. He's not marginal, he's very important, and we tend to rely upon his statement, the statement to which, hopefully, he's going to give in court in our case at our closing arguments.

We are disappointed by his apparent lack of enthusiasm to appear in court. I really don't understand why. He doesn't seem to realize the importance of his presence here in court, and I wonder whether the Prosecution have -- hasn't done enough to convince him of his importance, of the importance of appearing in court.

[15.39.15]

In any case, I don't see why he should not be called in 2013 if he really is not available in 2012, something I'm not convinced of yet. But if he really cannot make it to Cambodia in 2012, then I'd rather have him in court in 2013 than via video-link in New Hampshire next week or next month.

In the alternative, the suggestion made by the defence for Ieng Sary, we would like to support that as well. If he really is unable to come to Cambodia, then we take the position that somebody from the Defence from our team should be allowed to go there to cross-examine him in the same location that would enable him, or this person to much more effectively assess his demeanour, his reactions, and eventually also his credibility as a witness. So, we fully support everything that has been said by the Ieng Sary defence team.

Thank you very much.

MR. PRESIDENT:

Counsel for Khieu Samphan, you may now proceed.

[15.40.43]

MS. GUISSÉ:

Thank you, Mr. President. I will not take up much of your time either.

Of course, in the Khieu Samphan defence team we support the request that, if Mr. Ben Kiernan is to testify for us, that he should do it within the Chamber in a hearing here. It's a solemn event and when you have an expert witness, it's very important for the person to be present. Everybody in this room has significant professional obligations, and I think our national experience does show us that when we are summoned before a court, and more particularly an international one, you can tell your employers and your colleagues that it is going to be necessary to be absent for a few days in order to attend and contribute to the work of an international court. It works nationally and it is even more true for an international one.

[15.42.11]

Like my colleagues, I am somewhat puzzled by the apparent unavailability for an entire year of an individual who is presented by the Co-Prosecutors and the civil parties as an expert who has worked for more than 40 years on such a significant issue as Cambodia and the events that have marked its

history, and when you are the international court designated to examine these facts, the individual concerned does not find the time to attend to its needs.

The Prosecution told us that the videoconference would be adequate, and that in Case Number 1, two experts were heard in this fashion. Well, you were here, Your Honours, in Case Number 1, and so I don't need to tell you that in that case Stephane Hessel was talking about the question of the pardon, and Mr. Goldstein was talking about the importance of an accused recognizing blame and responsibility. So these were limited issues.

[15.43.41]

The announcement by the Co-Prosecutors of the range of themes to be studied shows that Mr. Ben Kiernan cannot be put on the same plane as these other witnesses, and clearly, there are going to be a great many questions on academic issues certainly, but on factual ones as well, because there are a certain number of documents that we have referred to in this courtroom on which Mr. Ben Kiernan will have factual explanations to provide to the Chamber. And in purely material terms, documents, videos, getting documents onto the screen, and so on, for the benefit for the whole courtroom, all of these are very practical, down-to-earth things which are going to have to be arranged.

Then there is also -- staying on a practical note -- the question of the time-lag and, yes, we are living in a modern world with

all sorts of technologies, but there are also difficulties that do impose themselves and this videoconference will not be simple. It's not without difficulties of a practical kind. And I know that in Case Number 1 you did, in fact, encounter such difficulties when the video-links were set up.

[15.45.20]

When you add all this together, I do believe that it is worth insisting a little bit with Mr. Kiernan and ask him if he cannot find the time. And I would remind you that this is an international Bench with a very specific mandate. I talked about the solemnity of the hearing, and I believe that it is very important that this should take place in Cambodia and Mr. Kiernan is an expert, yes, but a witness, too. And in terms of the way that you intend to evaluate his credibility and the scope of his statements, his physical presence here, in the hearing, is paramount.

If you do plan in terms of a video-link, I would ask, like the other teams have, that a member of the Khieu Samphan team can be there when it happens, so as to make sure that the procedure is done properly and that everything is done in the strictest respect for the rights of the Defence.

Thank you, Mr. President.

[15.46.32]

MR. PRESIDENT:

National Counsel for Khieu Samphan, you may now proceed.

MR. KONG SAM ONN:

Thank you, Mr. President. I would like to add a little bit on top of what my colleague just indicated concerning the importance of Mr. Ben Kiernan.

His presence before this Chamber is very important for the judicial proceedings here. I cannot see any reason why Mr. Ben Kiernan has rejected to be present in person in this Court. We have obtained some documents from the Co-Prosecutor concerning their grounds in which they argue that it is not important to have Mr. Ben Kiernan present in person in this courtroom, and that his testimony can be done through video-link instead.

[15.48.00]

And I can see that if we think that he has other commitments that he cannot be present before this Chamber, we are afraid that other witnesses may also have these grounds to reject such appearance before the Chamber. And I agree that someone else can be called to be in his place at work, I mean. But here, he cannot be replaced by another witness, because his testimony is very important.

If we look into his skills, expertise in history and international criminal law, and genocide context, he is a person of good knowledge with regard to these fields. In light of that, it is very important, indeed, that he comes here to give the testimony directly and in person.

So, we feel that there is a need to see him here, and there is no

reason he should evade the direct participation in the proceedings due to his busy schedule.

According to Rule 26 concerning the video-link, indeed, this rule states that such video-link cannot take place if it is prejudicial, or if indeed it would be seriously prejudicial to, or inconsistent with Defence rights. I would like to offer -- touch upon the issue of how the Defence rights are affected.

[15.50.55]

Mr. Ben Kiernan has conducted researches concerning genocide, and Mr. Karnavas has already indicated that there are more than 50 articles that Mr. Ben Kiernan has written so far concerning this particular topic. To me, I feel that he has written more than 100 articles -- or rather, nearly 100 -- and both -- those articles have been analyzed, and he concluded that the Democratic Kampuchea regime is a regime where genocide takes place.

For that reason, we feel that Mr. Ben Kiernan should be present here to be cross-examined directly.

Thank you very much Mr. President and Your Honours.

[15.52.06]

MR. PRESIDENT:

Next, we proceed to the next matter, and the floor will be handed over to the Co-Prosecutors and civil party Lead Co-Lawyers. You have 20 minutes, and you may divide the time among yourselves.

We would like now to proceed to the Co-Prosecutors first, if they would wish to respond -- rather, to reply to the observations by

the counsels for the accused person.

MR. CHAN DARARASMEY:

Thank you Mr. President. I am here on my feet to reply to comments made by counsels.

I am of the view that Mr. Ben Kiernan has no way evade -- or tried to avoid coming to this Court. He has other prior commitments, and that his testimonies can be obtained or conducted through video-link. We are now doing our best to expedite the proceedings, and that if he is not available in the whole year of 2012, we have to wait until 2013. But this is not a good idea because it will be - it will take a long time and it will impact the judicial proceedings, and we would like to have the expeditious trial, and for that reason we would like to ask that the Chamber accept the request made by the Co-Prosecutors and that the video-link of Mr. Ben Kiernan's reference be conducted due to time constraints.

I would like to end my comment here and my colleague will have the floor.

[15.54.26]

MR. DE WILDE D'ESTMAEL:

Thank you, Mr. President. I shall try and be brief.

I note, first, that on the Defence side, the importance of this testimony is not contested. All three teams agree that it's important to hear his testimony, and I would agree.

Counsel Karnavas seems to state that there is no valid reason for

this expert not to appear in person. I should just add that it is up to the Chamber to give an appreciation of that kind. It is not up to the parties. The criteria should be fulfilled in terms of the assessment by the Chamber, not the parties.

[15.55.21]

Just now, Counsel Karnavas reproached us for not having leaned heavily enough on Mr. Ben Kiernan to make himself more available and to give us a longer description of his professional occupations. We did what the Chamber asked us to do, in good faith, in order to satisfy their request, in fact.

At the same time, Counsel Karnavas, in his written argument, in paragraph 14, also said that the Defence wants to take this opportunity to ask the Trial Chamber to hand down a ruling banning any kind of ex parte communication between the office of the Co-Prosecutors and the expert, and we received a copy of those arguments in writing at the end of February, and it seems interesting that the Defence should refer to such communications as being ex parte. So we're guilty both of not doing enough work and at the same time of having communications with the expert.

Well, that is the terms of the mandate we were given by the Chamber, to communicate with the gentleman in order to find arrangements that will make it possible for him to testify before this Chamber.

[15.56.58]

This is not secret, ex parte communication; it is simply doing

what we were mandated to do. Counsel Karnavas--

MR. PRESIDENT:

Would defence counsel wait until the Prosecution finishes? Because the Chamber will give some time to the Defence.

The Prosecution may continue.

MR. DE WILDE D'ESTMAEL:

Thank you.

In 2011, it was said that contact should be made with Mr. Ben Kiernan. Otherwise, why is he on the list of the Co-Prosecutors? But I just want to say quite clearly, that we had no contact with Professor Ben Kiernan in 2011. And, until we were given this mission by the Chamber, the parties do not communicate with witnesses and experts until requested to do so by the Chamber. That's the way I understand the procedure.

It was said that at 9 o'clock in the evening, the professor would be tired. Well, maybe he might, but he could also take measures to be perfectly awake and alert at that time in the evening. It's not a proposal that we made: it's a proposal which came from Professor Kiernan himself, because he thought it was probably the best way to proceed, given the fact that you have a twelve-hour time distance between the United States and Cambodia. But, you know, if we had fixed this for the afternoon, then we would have had testimony between 2 o'clock in the morning and 4 o'clock in the morning, which would have been worse.

[15.59.06]

Now, we've also been told that somebody else could replace Mr. Ben Kiernan perfectly well. The name of Craig Etcheson was quoted. But why does Counsel Karnavas want to think -- in place of the Co-Prosecutors -- why does he tell us we can replace one expert by another? We don't say to him, "One of your witnesses is totally inappropriate. Why don't you swap him for another?" This is completely irrelevant and without substance, this suggestion. We're talking about an expert proposed by the Chamber and not an expert on behalf of the Prosecution, as it's been said yet again. [15.59.50]

Concerning the Nzabonimana Affair of March 2011, the absence of intention is not a criterion in this Court. The Rwanda court has more strict measures in place than the ones that apply here. Our rules are contained in Internal Rules 26.1 and the exceptional circumstances that may justify a video-link doesn't exist here -- don't exist here. And furthermore, with the two ad hoc tribunals, there is greater leeway to oblige a witness or an expert to appear. The situation here is what it is. It is different. We have less freedom to do what we want in that respect.

As to the question of the solemnity of the courtroom, certainly we agree that it is more solemn to be here in one room with everybody present, and you can, in one glance, take in all of the parties in the room, but this is an expert who has a great many professional experiences and knows exactly who he is going to be addressing. He is going to be perfectly well aware that it is a

solemn hearing that he is addressing, and not some kind of private conversation.

[16.01.32]

And in paragraph 26 of the Ieng Sary team's answer, one sees the following; it is said that often a witness will say in private what he or she might be ashamed to say in public, in front of a solemn tribunal. But there is no such shame for an expert who knows exactly who he is going to be witnessing -- testifying in front of. And a videoconference is not some kind of private session.

That brings me to a close with my reactions, Mr. President, and we stand by what we said before, and concerning the documents and the papers that we have already filed. Thank you.

MR. PRESIDENT:

And now it is the Lead Co-Lawyers.

[16.02.24]

MS. SIMONNEAU-FORT:

Mr. President, Your Honours. I just wish to take a few moments to share some remarks.

I don't believe that it was necessary to reply to the Defence's arguments. And it's not because we want to hinder or simply -- or rather follow suite with the Prosecution. Allow me to say that such a remark is inappropriate. He's trying to state publicly that the civil parties have no role or place in these proceedings. I believe that's what the defence counsel was

saying. I will not reply to the Defence's arguments simply because I do not hear any arguments that warranted any real reply. Thank you.

MR. PRESIDENT:

Next, we now turn to the three defence counsels -- defence teams. The three defence teams have 20 minutes to make their replies to the two issues.

[16.03.42]

MR. KARNAVAS:

Thank you, Mr. President. Let me start with the civil parties. The civil parties are associated with and usually, on every single occasion, adopt the Prosecution's approach. Not on one single instance have -- do I recall -- where they deviated from them. And so, to say that they both are making the same arguments, they may be representing different interests, but they are part and parcel the same as far as we are concerned. There's no disrespect to either the lawyers or to the civil parties, but effectively, what I was trying to convey -- perhaps not as eloquently as I should have -- is that they adopt whatever the Prosecution says. So that's that.

[16.04.30]

Let me go back to the prosecutor and his remarks. We have been -- we sent a letter, I believe it was on the 9th or the 10th and then on the 13th of March, that is, of March 2012, and then on the 13th of March 2012, we sent in another -- we sent another

letter to the senior legal officer. And, in that particular letter, we noted that the Prosecution had been authorized to engage in communications with Professor Kiernan.

Now, that is an ex parte communication. That's how you would characterize it, because we're not a party to that communication. It's authorized. We didn't say that it was an unauthorized. We noted that it was for a specific purpose. And so we did not -- and we do not make any claims that somehow the Prosecution acted outside its role. But in that very same letter, we indicated that, for future purposes, that we be -- that actually -- any communications should take place between Professor Kiernan and the Trial Chamber or WESU. And the alternative, as I indicated today, or as I indicated earlier, we would have preferred to have been a party -- or at least, a representative for the Defence -- to the discussion between Prosecutor Cayley and Smith and Kiernan. Why? Not because of some nefarious reason that somehow they were going to talk him out of coming here. In fact, Professor Kiernan requested that the discussion be memorialized. They sent him a draft and he indicated some corrections. But as I indicated, and as I believe one of my colleagues indicated, it doesn't appear as if the Prosecution pressed or, shall I say, impressed upon Professor Kiernan the importance of his testimony.

[16.06.48]

Now, he's a busy professor, but so is Professor Chandler, his mentor. He's just as busy, yet he's able to find the time to come

and give evidence to these very important issues that he's written about. And we submit that, from what was able -- what the prosecutor was able to get from Professor Kiernan -- because, they didn't really press him. Tell us exactly the dates of when you are unavailable. Or tell us the events; tell us what your days are for all of these events that you describe. Perhaps, if we had that, I may not be making this argument. I would be making something else. But from what I have thus far, we have it because the Trial Chamber elected to give to the Prosecution the right to communicate with Kiernan. Now, we didn't suggest that they communicated actually with him in 2011, but at some point, we're talking about before the OCIJ was seized with the case -- and I've indicated that -- they would have talked to Kiernan.

[16.08.00]

On what basis do they put him down as a witness? Normally you would find out whether the witness is willing to testify. But in preparation of their Introductory Submission, they would have, either directly or indirectly, at some point, had communications with Mr. Kiernan.

Be that as it may, it's irrelevant. What's relevant for the discussions here, today, is that he has been put down as a witness by the prosecutor, and the prosecutor admits that it's his witness because they then say: How dare I try to substitute one of the witnesses with someone else?"

I'm not trying to substitute. I'm merely making the point that he

is not the only human being on the planet that can evidence on this issue. There are others. They are available. They're here in country, and they're just as capable of providing the limited -- or I should say, the evidence limited to -- the confines of 002/01.

[16.09.11]

And that's one of the criteria, that it would be so prejudicial to the party advancing the witness, that to exclude the testimony of the witness would be unfair to the party and to the proceedings. And we suggest, Your Honours, that there are alternatives. But it does

-- it does beg the question: this witness, who has written so much, who has travelled Cambodia, and now, in this historic occasion, he dare not come and give his evidence in Court, in situ of this very institution, and instead, says: I may be available in 2013 -- may -- but if you want me now, it has to be 9 o'clock to midnight, my time.

[16.10.08]

And I say, Your Honours, that is an insufficient reason, and perhaps the Trial Chamber should consider contacting him and pressing him some more, or, in the event the Prosecution is asked to go back to -- and talk with Professor Kiernan -- that one representative from all parties be there and be allowed to ask questions, and two, that the conversation be tape-recorded so that there is some sort of a record, lest there be any

accusations that somehow he was pressured.

That's all I have to say, Mr. President. And thank you very much.

And I just want to make sure -- just one -- finally -- we're not accusing the prosecutor of doing anything unethical. But an ex parte is usually a communication between two parties where the third party is not there. Thank you.

[16.11.15]

MR. PRESIDENT:

And now the floor is open to other defence counsels, should they wish to take the floor.

MS. GUISSÉ:

No, Mr. President, I have no further comments.

MR. PESTMAN:

Nor have I.

MR. KONG SAM ONN:

Mr. President, may I raise a suggestion -- rather, a request? We still hold our position that Mr. Ben Kiernan be called to be present in the courtroom so that the defence counsels can put questions directly to him.

We invite the Chamber to examine the grounds that are put forward in order to argue why Mr. Ben Kiernan cannot be present in this court.

[16.12.26]

And, thirdly, concerning the communication with this witness, may I suggest that the development of the communication -- or the

object of the communication be forwarded to the parties. And concerning what the Prosecution has said regarding the speeding up of the proceedings by way of hearing this witness through video-link, I would submit that by doing so this will pose prejudice to the Defence's rights. If we endeavour to expedite the proceedings by setting aside the safe-guarding of the rights of the Accused, the proceedings will be useless.

MR. PRESIDENT:

Thank you.

It is now time for the Court to adjourn for today, and we will resume our hearings on the 19th of March 2012, Monday morning. We will begin at 9 o'clock.

Security guards are now instructed to bring the three accused persons back to the detention facility and return them to the courtroom on the morning of the 19th of March 2012, by 9 o'clock in the morning.

The Court is now adjourned.

(Court adjourns at 1614H)