



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

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber
Chambre de première instance

APPEAL HEARINGS
CLOSED SESSION

Case File N° 004/1/07-09-2009-ECCC/OCIJ (PTC50)

11 December 2017

ឯកសារដើម
ORIGINAL/ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ (Date): 04-Apr-2018, 10:51
CMS/CFO: Sann Rada

Before the Judges: PRAK Kimsan, Presiding
Olivier BEAUVALLET
NEY Thol
Kang Jin BAIK
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For the Office of the Co-Prosecutors:
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SENG Bunkheang
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For Court Management Section:
SOUR Sotheavy

The Accused: IM Chaem

List of Speakers:

Language used unless specified otherwise in the transcript

Speaker	Language
The GREFFIER	Khmer
The President	Khmer
Mr. SAM Sokong	Khmer
Ms. Lyma NGUYEN	Khmer
Mr. Seng BUNKHEANG	Khmer
Mr. KOUMJIAN	English
Mr. Cóman KENNY	English

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1 P R O C E E D I N G S

2 (Beginning of closed session: 0955H)

3 THE PRESIDENT:

4 And I would like to give the floor to the lawyers for civil
5 parties to make submission.

6 (Pause)

7 Again, I would like to give the floor to the lawyer for civil
8 parties to make submission.

9 MR. SAM SOKONG:

10 May it please the Court; my name is Sam Sokong and appear for
11 civil parties in Case 004/01.

12 I thank the Pre-Trial Chamber for granting the civil party
13 applicants affected in this case the opportunity to make
14 submissions on the role of the ECCC within the Cambodian legal
15 system.

16 Our submissions today are limited to the question as to whether
17 the Co-Investigating Judges in their conclusion that Im Chaem
18 does not fall within the personal jurisdiction of the ECCC made
19 unwarranted and erroneous findings of the position of the ECCC
20 within the Cambodian legal system that went beyond the authority
21 of the Court.

22 The Closing Order's interpretation of the ECCC law as excluding
23 the power of Cambodian Courts to hear cases against its own
24 nationals for any event that occurred between 1975 and 1979 is
25 contrary to the principles of Cambodia's sovereignty. As a

1 sovereign state, the Kingdom of Cambodia is entitled to regulate
2 its own laws and the actions of its own citizens. The
3 Co-Investigating Judges' interpretation of the founding documents
4 of the ECCC also contradicts the Cambodia's obligations to
5 provide redress to victims of atrocity, crime under its laws.
6 The Closing Order did not require such an assessment of the
7 position of domestic Courts in determining the personal
8 jurisdiction of the ECCC over Im Chaem. However, now that it has
9 been raised, the question is significant to our clients, who are
10 civil party applicants and is a matter that affects the legacy of
11 the Court.

12 We ultimately asked Your Honours to address the errors in the
13 Co-Investigating Judges' findings on this issue in the Closing
14 Order under appeal.

15 I will address Your Honours on the issue of Cambodian
16 sovereignty. My learned friend, Ms. Nguyen, will address the
17 civil parties' arguments on treaty interpretation and the
18 negotiating history of the ECCC agreement and law.

19 The Closing Order's analysis on the ECCC's personal jurisdiction
20 in Section 2.1 serves to categorically bar Cambodian Courts from
21 exercising jurisdiction over any and all crimes committed between
22 April 1975 and January 1979 regardless of whether the case would
23 otherwise fall within the ECCC's own limited jurisdiction.

24 The power of Cambodian Courts to hear cases against individuals
25 that fall outside the scope of the ECCC's limited jurisdiction is

1 an issue to be determined by the Cambodian Courts themselves, not
2 the ECCC. To interpret the ECCC's jurisdiction in a manner that
3 strips Cambodian Courts of their power to prosecute any
4 individual from the Khmer Rouge period would interfere with
5 Cambodia's sovereign right to prosecute its own nationals for
6 acts committed within its own territory when no such interference
7 was intended outside the limited delegation of duties to the
8 ECCC.

9 The ECCC law and agreement was the result of years of
10 deliberation and precise language on the parameters of the ECCC's
11 jurisdiction. Any decision limiting the power of Cambodian Courts
12 should not be interpreted in the absence of any explicit language
13 otherwise.

14 Ambassador David Scheffer, who was a party to the negotiations
15 established in the ECCC, stressed the importance of Cambodian
16 sovereignty to the Royal Government of Cambodia during the
17 deliberations. Throughout the negotiations, Ambassador Scheffer
18 emphasized that the prosecution of lower level Khmer Rouge
19 perpetrators would be a matter for the Government of Cambodia to
20 address even after the creation of the ECCC.

21 The Ambassador faced no disagreement on this point. Accordingly,
22 it does not stand to reason that the UN and the Royal Government
23 of Cambodia intended the ECCC to remove all jurisdictions from
24 Cambodian Courts over this period of criminal activity, as it was
25 always intended to remain within the power of the Cambodian

1 government and Cambodian Courts to decide.

2 The Closing Order's interpretation of the ECCC law and agreement,
3 therefore, leads to an absurd result, displacing Cambodia's
4 sovereignty by surrendering its core right to regulate activities
5 within its territory and acts committed by its national without
6 Cambodia's explicit consent to do so.

7 We note that the Defence makes clear in its written submissions
8 that it accepts and essentially agrees with the civil party
9 lawyers that only domestic Courts can finally determine the
10 extent of its jurisdiction over Khmer Rouge era crimes. That is
11 the Defence submissions, paragraph 6.

12 The Closing Order admits that interpreting the ECCC's personal
13 jurisdiction in this manner amounts to impunity for virtually the
14 entire former Khmer Rouge. Such an interpretation providing
15 widespread immunity for virtually all Khmer Rouge perpetrators
16 would go against Cambodia's treaty obligations and would violate
17 the right of victims under Cambodia's Constitution.

18 Cambodia has an obligation to prosecute or extradite persons who
19 commit grave breaches under the Geneva Conventions, the Genocide
20 Convention and the Convention Against Torture, obligations that
21 were even recognized by the Trial Chamber in Case 002.

22 Any agreement that would prohibit prosecution of individuals
23 found in the territory of Cambodia for serious crimes of torture,
24 genocide or grave breaches of the Geneva Conventions would
25 violate the requirements in these treaties to prosecute or

1 extradite these individuals for these offences and amnesty for
2 all perpetrators would also violate the rights of victims under
3 the Cambodian Constitution.

4 The 1993 Constitution of Cambodia guarantees its citizens the
5 right to denounce, make complaints or claim for compensation for
6 damages caused by any breach of the law by institutions of the
7 state and recognizes the judiciary's core power to protect the
8 rights and freedoms of citizens. The Closing Order's
9 determination on the ECCC's exclusive jurisdiction stands to
10 deprive Cambodian Courts of this core function.

11 The Cambodian Constitution also explicitly incorporated
12 Cambodia's human rights obligations, including its obligations
13 under the International Covenant on Civil and Political Rights,
14 the Convention for the Protection of All Persons From Enforced
15 Disappearance and the International Covenant on Economic, Social
16 and Cultural Rights.

17 Although the Co-Investigating Judges explained that violations of
18 human rights standards may not require criminal liability, these
19 human rights standards do require access to justice for victims
20 and rights to an effective remedy when their rights such as the
21 right to life, liberty and freedom from torture and cruel
22 treatment are violated.

23 If the agreement establishing the ECCC is interpreted in a way to
24 prohibit any litigation in domestic Courts, it did so in
25 violation of Cambodia's Constitution and treaty obligations and

1 the rights of victims to seek redress or remedy in our domestic
2 Courts. Further, creating precedent for widespread immunity for
3 serious crimes in the manner set out by the Closing Order will
4 tarnish the legacy of the Court and severely impact the interest
5 of victims seeking justice and reparation for these crimes.
6 As a preliminary matter, the ECCC can only speak to the
7 jurisdiction of the ECCC, not the Cambodian Courts themselves.
8 The Trial Chamber in Case 001 has acknowledged that there is no
9 line of authority between the ECCC and national Courts, yet the
10 Closing Order's interpretation of the ECCC's jurisdiction pushes
11 this boundary between the ECCC and national Courts.
12 Even if this error has no direct effect on Cambodian Courts, it
13 must still be corrected, as it concerns the interpretation of the
14 Court's own personal jurisdiction and includes an erroneous
15 interpretation of the laws governing this Court. If this error is
16 left to stand, this could be used as persuasive authority in
17 future proceedings that can affect the claims of victims who were
18 unable to seek justice and redress before the ECCC.
19 Whether or not Cambodian Courts have the institutional and legal
20 capacity to hear these cases should be a question left to the
21 Royal Government of Cambodia and its Court system to decide. It
22 should not be decided for them by the Co-Investigating Judges,
23 particularly given the errors in the reasoning.
24 Further, if this decision is left uncorrected, it will tarnish
25 the legacy of the ECCC by indicating this Court's support for

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1 widespread immunity for the most serious crimes, immunity that
2 was not intended by the parties that established the Court.
3 Accordingly, this error in law and fact on the interpretation of
4 the ECCC personal jurisdiction must be addressed.

5 In our submission, the PTC is the only appropriate forum to
6 remedy this error and with your permission, Mr. President, my
7 colleague, Ms. Nguyen, will address the Court on this issue.

8 [10.16.40]

9 THE PRESIDENT:

10 Ms. Nguyen, yes, you have the floor.

11 MS. NGUYEN:

12 Thank you, Your Honour.

13 May it please the Court; my name is Lyma Nguyen. I appear for
14 civil party applicants alongside Mr. Sam Sokong.

15 Your Honours, the Co-Investigating Judges' interpretation of the
16 ECCC's personal jurisdiction, and that is one that displaces the
17 national Courts over any future prosecutions of crimes from the
18 Khmer Rouge era, not only goes against Cambodian sovereignty and
19 Cambodian law, as my learned friend has addressed the Court on,
20 it also runs contrary to a reasonable interpretation of the ECCC
21 law and agreement.

22 The Co-Investigating Judges have essentially concluded that the
23 ECCC law effectively excludes any personal or subject matter
24 jurisdiction by the ordinary Cambodian Courts over the events
25 under the ECCC's temporal jurisdiction. This is effectively a

1 declaration, as the CIJs themselves state, of de facto amnesty
2 for virtually all atrocity crimes committed during the Khmer
3 Rouge era.

4 These conclusions are extraneous to the Co-Investigating Judges'
5 core task of determining whether Im Chaem falls within the
6 personal jurisdiction of the ECCC. They are unwarranted, they are
7 unnecessary and they are wrong in law.

8 [10.18.07]

9 We say that the Co-Investigating Judges committed legal error on
10 the following basis.

11 Firstly, their interpretation of the ECCC's exclusive
12 jurisdiction is based on an absence of any supporting language in
13 the actual ECCC law or the ECCC agreement.

14 Secondly, the Co-Investigating Judges' interpretations are in
15 contradiction with the object and purpose of these founding
16 instruments.

17 Thirdly, the Co-Investigating Judges' conclusions run -- run in
18 contradiction with the clear intention of the parties to the
19 negotiating history of the ECCC, and that was especially to
20 provide accountability for serious crimes, not widespread
21 immunity.

22 And finally, we say that the result of such an interpretation
23 leads to an absurd notion that the United Nations, in agreeing to
24 establish the ECCC, would support an unlawful blanket amnesty for
25 serious crimes, including crimes of jus cogens violations.

1 Now, as the Defence, in their written submissions, have very
2 fairly conceded, the ECCC does not have the authority to rule on
3 the question of the jurisdiction of Cambodia's domestic Courts,
4 the war crimes committed during the Khmer Rouge era. It can only
5 rule on its own competence as to its own jurisdiction.
6 Given the manifest errors of law and fact committed by the
7 Co-Investigating Judges on this critical threshold jurisdictional
8 issue, it is incumbent on the Pre-Trial Chamber to exercise its
9 judicial powers of review to correct these errors, lest a
10 miscarriage of justice is allowed to occur.
11 On behalf of the victims and potential civil parties across this
12 and other remaining cases before the ECCC, we request that the
13 Pre-Trial Chamber remedy what we say is, in principle, a grave
14 interference with the fundamental rights of victims and potential
15 civil parties before this and other Courts. Accordingly, we ask
16 Your Honours to find, instead, that the ECCC does not displace
17 Cambodian Courts from exercising jurisdiction over individuals
18 that do not fall within the very limited jurisdiction of the ECCC
19 laws.
20 Now, Your Honour, I will move on to address the overriding issue
21 of the Pre-Trial Chamber's competence over this point of law.
22 Whilst the Defence has contended that the Pre-Trial Chamber is
23 not the appropriate forum to adjudicate questions concerning the
24 jurisdiction of Cambodia's domestic Courts, our submission is the
25 reverse. We say that the Pre-Trial Chamber is the only

1 appropriate forum to formally remedy the manifest errors in the
2 Co-Investigating Judges' Closing Order.

3 The primary reason is that this is an appeal against legal error
4 committed by the Co-Investigating Judges in their interpretation
5 of the ECCC's own law on personal jurisdiction. In this case, our
6 concern is over the errors in judicial interpretation of the
7 ECCC's very mandate.

8 The Pre-Trial Chamber is specifically designated by the laws
9 governing the ECCC as the Court of appeal to adjudicate any error
10 of law or fact made by the Co-Investigating Judges in the
11 exercise of their judicial functions. No other body has such a
12 right of judicial review over the Closing Order.

13 The significance of the Co-Investigating Judges' conclusions on
14 this threshold issue should not be understated. These findings
15 were not just passing remarks buried under footnotes. An entire
16 section of the Closing Order on applicable law spanning 26
17 paragraphs was dedicated to these findings and, as the Defence
18 themselves have pointed out, the Co-Investigating Judges'
19 findings on the jurisdiction of the national Courts was a
20 prerequisite to its ultimate finding on the ECCC's jurisdiction
21 over In Chaem, this being a decision that the International
22 Co-Prosecutor has appealed.

23 Now, although Cambodia's domestic Courts are in no way bound by
24 these findings, the Cambodian state and the Cambodian public and,
25 specifically, Cambodian victims should not be left with an

1 official ECCC position declaring that the national Courts are
2 essentially stripped of any jurisdiction to ever hear any
3 criminal cases in the future, which relate to the Khmer Rouge
4 period.

5 If this question is left unaddressed, the conclusions made by the
6 Co-Investigating Judges in the Closing Order are likely to be
7 seen as the ECCC's definitive position on this critical matter.

8 Your Honour, one of the primary grounds of our -- of our
9 submissions are that the Co-Investigating Judges' reasoning goes
10 contrary to the principles of treaty interpretation. I turn to
11 the substantive errors of their reasoning.

12 The Vienna Convention on the Interpretation -- the Vienna
13 Convention on the Law of Treaties must guide the interpretation
14 of international treaties. The key principle is enshrined in
15 Article 1 of the Convention, and it is that this treaty must be
16 interpreted based on its plain meaning taken in the context of
17 its object and purpose. This principle was specifically
18 incorporated into the ECCC agreement in Article 2.

19 We say that the plain language of the ECCC instruments do not
20 enable de facto immunity for all individuals who fall outside of
21 the ECCC's limited personal jurisdiction.

22 Now, when we look at the face of the ECCC law and agreement, we
23 see, firstly, that there's no mention of the treatment of persons
24 or crimes that fall outside of the -- of this Tribunal's limited
25 jurisdiction.

1 Secondly, there's no provision amounting to a constitutional
2 waiver of the national Court's inherent authority to hear cases
3 falling outside this jurisdiction.
4 And thirdly, no such intention is evident in the plain language
5 of any of these ECCC instruments.
6 Further, the absence of a primacy clause or a referral mechanism
7 in these instruments do not support an implied blanket immunity.
8 The Co-Investigating Judges have relied on an admission of
9 certain provisions such as a referral mechanism or a <non bis in
10 idem> or primary clauses, which are included in the statutes of
11 the ad hoc Tribunals.
12 They use this to support their conclusion on the ECCC's exclusive
13 broad jurisdiction. However, the provisions of the ad hoc
14 Tribunals are not comparative in the Cambodian context, and this
15 is because the broad jurisdiction of the ad hoc Tribunals over
16 all natural persons operates in parallel with and not in place of
17 the country's respective national Court system. This is not the
18 case with the ECCC.
19 The Co-Investigating Judges' interpretation is also contrary to
20 the object and purpose of the ECCC instruments. A plain reading
21 of the ECCC law and agreement indicates only that the ECCC was
22 designed to be a Court of limited, exclusive jurisdiction over
23 cases concerning senior leaders of the Democratic Kampuchea and
24 those most responsible for international and domestic crimes that
25 were committed between the 17th of April 1975 and 6th of January

1 1979.

2 Now, the Co-Investigating Judges' interpretation has the effect
3 of broadening the scope of the ECCC's exclusive jurisdiction and
4 entirely contradicts the express objects and purposes of the
5 agreement and the law, this being to put an end to impunity for
6 atrocity crimes and not to establish de facto immunity for
7 virtually the entire of the former Khmer Rouge as the
8 Co-Investigating Judges have determined.

9 Now, the only reasonable conclusion on the plain construction of
10 the ECCC instruments is that Cambodia's domestic Courts maintain
11 jurisdiction over crimes that do not fall within the very limited
12 scope of this Tribunal.

13 I turn now to the negotiating history of the ECCC.

14 We say that when the negotiating history is examined closely, it
15 does not support the Co-Investigating Judges' interpretations.

16 Ambassador David Scheffer, who led the U.S. efforts to establish
17 the ECCC during his time as Ambassador for War Crimes between

18 1997 and 2001, and as someone who has been deeply engaged in the
19 negotiations over the ECCC law and agreement at the highest

20 levels, has provided a statement dated the 6th of September 2017

21 in which Ambassador Scheffer expresses his disagreement with the

22 Co-Investigating Judges' conclusion regarding the impact of the
23 ECCC on Cambodian domestic Courts.

24 Recalling the negotiations over the ECCC's personal jurisdiction,

25 which was a process that involved extensive deliberations

1 spanning over several years - and this statement appears on the
2 case file -, Ambassador Scheffer's evidence should carry much
3 weight. The statement speaks for itself, but I will quote from
4 the significant parts of the statement, which support our
5 submissions.

6 Ambassador Scheffer states:

7 "During negotiations, we often talked about those falling below
8 the personal jurisdiction thresholds. There was no presumptive
9 denial of the prospect of justice for such individuals other than
10 to recognize the failure of Cambodian Courts to prosecute them in
11 the past. I recall often saying that it would be up to the
12 Cambodian state to determine the fate of the lower level Khmer
13 Rouge perpetrators and that the task of the ECCC would be to
14 prosecute the senior leaders and those most responsible. All
15 others would be left to the fate of how Cambodian law evolves and
16 the capacities of its national Court system." (As read)

17 And importantly, he says, "The Cambodian and UN negotiators did
18 not state otherwise." (As read)

19 Ambassador Scheffer also cited the preamble of the ECCC, stating
20 that the object and purpose of the establishment of this Tribunal
21 was to bring justice to the victims, to bring accountability
22 against the perpetrators, and reconciliation to a post-conflict
23 country.

24 He emphasizes, however, that such wording does not translate into
25 de facto blanket amnesties as inferred by the Closing Order.

1 Whilst the Defence has contended that the preparatory works and
2 subsequent conduct of the parties to the agreement support a
3 proposition that the Cambodian state has already determined to
4 limit its own domestic jurisdiction over Khmer Rouge era crimes,
5 it's important to note that the Defence fails to point to any
6 positive evidence that a blanket amnesty was intended during the
7 extensive deliberations over the ECCC's jurisdiction.
8 The Defence do not even address Ambassador Scheffer's statement
9 because the evidence is clear that the intent of the parties to
10 the ECCC agreement was never to displace the Cambodian Courts of
11 their jurisdiction over any cases arising from the Khmer Rouge
12 period. Rather, it was to provide international assistance over a
13 limited number of cases given Cambodia's limited judicial
14 capacities at that time.
15 As my colleague earlier said, the Royal Government of Cambodia
16 has never provided any consent to forfeit its own sovereignty
17 over its inherent rights to regulate activities within its own
18 territory or to regulate acts committed by its nationals. It
19 follows that, as Ambassador Scheffer has stated, that the correct
20 conclusion when negotiating -- when the negotiating history of
21 the ECCC is closely examined, is that anyone falling outside of
22 the limited scope of this Tribunal's jurisdiction would be left
23 to the operations of Cambodia's national system, which can and is
24 evolving in its judicial capacities.
25 Now, one of the most important points that we raise is that the

1 United Nations would never sanction wholesale immunity for jus
2 cogens violations, so perhaps one of the most astonishing parts
3 of this Co-Investigating Judges' findings is that it proffers a
4 manifestly absurd proposition, and that is that the United
5 Nations has put its stamp of approval on widespread de facto
6 immunity for the most serious crimes, including violations of jus
7 cogens norms.

8 As Ambassador Scheffer indicated in his statement to the Court,
9 the United Nations would not have ratified or put its support
10 behind an agreement that enshrined a blanket amnesty for atrocity
11 crimes.

12 The UN's consistent stance on amnesties for such serious crimes
13 are that these crimes are in breach of international law, and
14 particularly when there is no alternative form of accountability
15 to provide victims with an effective remedy such as a truth and
16 reconciliation commission.

17 Now, the ECCC has itself created jurisprudence in this area. The
18 Trial Chamber, in its decision on the invalidity of Ieng Sary's
19 amnesty by Royal Decree, had cited over 100 sources of opinio
20 juris and stated practices prohibiting blanket amnesty for
21 serious crimes when it arrived at a conclusion that such
22 amnesties would violate customary international law.

23 Further, key international instruments such as the Convention
24 Against Torture, the Geneva Conventions and the Genocide
25 Convention impose an absolute obligation to prosecute or

1 extradite perpetrators of serious mass crimes who are located
2 within the territory of the state party.

3 A state party to these treaties cannot evade these obligations
4 through official amnesty or laws designed to provide immunity for
5 serious offences. Cambodia has signed and ratified each of these
6 treaties and, in doing so, has acknowledged these international
7 obligations.

8 This point was also made by the Trial Chamber in Case 002 in its
9 determination that an interpretation of the 1996 Royal Decree as
10 granting immunity from prosecution for Ieng Sary for grave
11 breaches of the Geneva Convention and for torture and genocide
12 would go against Cambodia's absolute obligation to prosecute
13 these crimes under their treaty obligations and Article 31 of the
14 Cambodian Constitution.

15 Now, the next point I raise is that the absence of domestic
16 prosecutions does not equate to support an amnesty. The Defence
17 have failed to point to any positive evidence that a blanket
18 amnesty was intended during the extensive deliberations of the
19 ECCC's jurisdiction and, instead, relies upon the absence of
20 domestic prosecutions since the establishment of the ECCC to
21 support the Co-Investigating Judges' interpretation of this
22 Tribunal's exclusive jurisdiction.

23 We say that this argument is an unnecessary distraction for this
24 Court because the factual issue as to whether or not Cambodia
25 presently has the political will or the capacity to conduct

1 domestic prosecutions has no bearing on the point of law that we
2 asked Your Honours to adjudicate today. If anything, the absence
3 of domestic prosecutions only points to a prosecutorial policy to
4 refrain from litigating cases against Khmer Rouge perpetrators
5 and perhaps so because the ECCC is still operating. But this, in
6 no way, speaks to the domestic Court's jurisdiction over such
7 cases.

8 So the focus before the Pre-Trial Chamber must be on the legal
9 question as to whether the Co-Investigating Judges committed an
10 error of law in its determination about the impact on national
11 Courts of this Tribunals' jurisdiction.

12 When you look at the practice of parties to the ECCC, it can be
13 said that all parties have, in practice, always acknowledged the
14 possibility of future domestic prosecutions of Khmer Rouge
15 crimes. The Trial Chamber itself in Case 002 acknowledged that,
16 in principle, domestic prosecutions for Khmer Rouge era crimes
17 remain a legal possibility.

18 During evidence proceedings, the Trial Chamber allowed witnesses
19 to refrain from answering questions for fear of
20 self-incrimination, and that relates to incrimination in future
21 domestic prosecutions. The Trial Chamber also refused to give any
22 undertakings regarding prosecutions before Cambodian Courts to
23 persons who gave evidence in ECCC proceedings.

24 Both Prosecutor and Defence counsel have likewise acknowledged
25 the possibility of future domestic prosecutions by requesting the

1 same undertakings and assurances for their witnesses. Your
2 Honours can see that all parties in this Court have, in the
3 conduct of their practices to date, consistently operated on an
4 understanding that prosecutions in domestic Courts, however
5 unlikely, are still possible and remain within the realm of the
6 Kingdom of Cambodia to determine.

7 To conclude, our submission is that the ECCC law and agreement on
8 personal jurisdiction does not displace the sovereignty of the
9 Cambodian government to determine the fate of lower level
10 perpetrators for Khmer Rouge era crimes.

11 Now, this is a non-controversial issue, and even the Defence have
12 accepted that only domestic Courts can finally determine the
13 extent of their jurisdiction over Khmer Rouge era offences. The
14 fundamental rights and interests of victims and potential civil
15 parties are adversely impacted by the erroneous conclusions that
16 the Co-Investigating Judges have come to.

17 We say this is an extreme example of judicial over-reach which
18 must be remedied in the interests of justice. If left
19 unaddressed, these determinations of law on this critical
20 threshold issue will also harm the legacy of the ECCC by
21 purporting to enable an unlawful blanket amnesty for serious
22 crimes.

23 The Pre-Trial Chamber is the only appropriate forum to remedy
24 such errors of law. We ask Your Honour to address these errors in
25 the Closing Order by declaring, firstly, that the extent to which

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1 ordinary Cambodian Courts have the legal and institutional
2 capacity to adjudicate Khmer Rouge-era crimes is to be determined
3 by the Kingdom of Cambodia and by its domestic Courts and,
4 secondly, by declaring that the ECCC's jurisdiction does not
5 displace that power.

6 Your Honours, my learned friend and I have concluded our
7 submissions well within the one hour granted to us. I see that we
8 have approximately 25 minutes remaining, and I do ask that the
9 Court grant leave to use our remaining time in any responses that
10 may arise from further submissions by the other parties in this
11 matter.

12 THE PRESIDENT:

13 We notified the civil party already about a case. There is no
14 response needed from the part of the civil party.

15 And National Co-Prosecutor, could you please make submission?

16 [10.47.57]

17 MR. SENG BUNKHEANG:

18 Thank you, Mr. President.

19 Mr. President, Your Honours of the Pre-Trial Chamber, and good
20 morning all parties present in the courtroom. My name is Seng
21 Bunkheang. I am the Deputy National Co-Prosecutor representing
22 the National Co-Prosecutor, and I'm here to participate in the
23 PTC hearing according to the appeal of the International -- dated
24 9 August -- appealing the Closing Order of the Co-Investigating
25 Judges dated 10 July 2017.

1 In the appeal, the errors of law and facts were raised in the --
2 in the -- regarding the Closing Order and some arguments were
3 raised there in the appeal. And the International Co-Prosecutor
4 requests to the PTC to correct the errors of law and facts.
5 In the same appeal, the International Co-Prosecutor requested the
6 Pre-Trial Chamber to return the case to the Co-Investigating
7 Judges for reassessment if Im Chaem is within the personal
8 jurisdiction of the ECCC. Alternatively, the International
9 Co-Prosecutor requests the Pre-Trial Chamber to assess the -- to
10 reassess the case regarding the errors of law and facts as stated
11 in the appeal.
12 Now the National Co-Prosecutor would like to address some of the
13 arguments relating to the case. And first of all, the National
14 Co-Prosecutor would like to recall some of the background of the
15 case from the beginning until this stage.
16 Regarding the disagreement of the Co-Prosecutors, we observe that
17 on 18 August 2008, the National and International Co-Prosecutor
18 discussed the disagreement regarding the additional prosecution
19 of the exist -- of the new suspects in addition to the existing
20 suspects before the ECCC so that the new suspects could be
21 submitted to the Co-Investigating Judges for investigation.
22 And the International Co-Prosecutor would like -- at the time
23 submitted two additional submissions for new suspects in cases of
24 -- in Cases 003 and 004.
25 After full consideration, the National Co-Prosecutor considered

1 that there is no need to open investigations against the new
2 suspects beyond the existing charged person accused in Case 002,
3 and there was no solution between the Co-Prosecutors. For this
4 reason, the International Co-Prosecutor submitted the
5 disagreement to the Pre-Trial Chamber for further action. And
6 then, the PTC granted the opportunities for both National and
7 International Co-Prosecutors to submit their respective
8 arguments.

9 The National Co-Prosecutor presented some of the reasons,
10 including the disagreement of the supplementary submission and
11 the additional submissions, that is, the two submissions related
12 to Cases 003 and 004. The National Co-Prosecutor submitted some
13 of the supporting documents, including the founding documents of
14 the ECCC, and the National Co-Prosecutor also submitted the
15 negotiating documents concerning the establishment of the ECCC
16 before the National Assembly.

17 The National Co-Prosecutor submitted these relevant documents by
18 saying that the National Co-Prosecutor maintained the position
19 that the suspects named in the new submissions and the
20 supplementary submission, namely, Im Chaem, they are not the --
21 within the two category of individuals to be prosecuted before
22 the ECCC; that is to say, Im Chaem is not within the personal
23 jurisdiction of the ECCC.

24 [10.47.00]

25 This statement of the National Co-Prosecutor is based on the

1 founding document of the ECCC which allows the ECCC to prosecute
2 the senior leaders and those who were most responsible persons
3 for the crimes and serious violation of the Cambodian law
4 relating to the crimes -- atrocity crimes and -- as well as the
5 violation of the international conventions recognized by the --
6 by Cambodia, and also regarding the crimes between the 17 January
7 -- 17 April 1975 and 7 January 1979.

8 The National Co-Prosecutor maintained the position that the new
9 suspects are not within the personal jurisdiction of the ECCC. In
10 light of the agreement between the United Nations and the Royal
11 Government of Cambodia, the agreements said clearly the intention
12 of the establishment of the ECCC, that is, to prosecute the guilt
13 of the senior leaders and those who are most responsible person
14 for the crimes within the jurisdiction of the ECCC as stipulated
15 in the founding documents of the ECCC. This shows that the ECCC
16 law and the agreement indicates the individuals who are to be
17 prosecuted, meaning that the two category of senior leaders and
18 those who are most responsible person for Im Chaem. She is not
19 within the personal jurisdiction of the ECCC in terms of her
20 roles and position back in the period.

21 [10.49.30]

22 Allow me to inform the Pre-Trial Chamber that the decision to
23 select the suspects to be prosecuted, the two Co-Prosecutors
24 agreed to select five individuals for prosecution and submitted
25 it to the Investigating Judges. The reason that the two

1 Co-Prosecutors decided to select the five individuals for
2 prosecution, it is because the National and International
3 Co-Prosecutors consider that they are within the two categories
4 of individuals to be prosecuted against the crimes within the
5 jurisdiction of the ECCC.

6 The five suspects include Nuon Chea, Khieu Samphan, Ieng Sary,
7 Ieng Thirith and Kaing Guek Eav, alias Duch. They are considered
8 to be the senior leaders of the DK and those who are most
9 responsible persons under the law.

10 The National Co-Prosecutors consider that these people have main
11 position as follows.

12 Nuon Chea was the Deputy Secretary of the CPK and a permanent
13 member, and also members of the People Assembly of the DK. And
14 Nuon Chea had other roles as well to perform at the time.

15 For Mr. Khieu Samphan, he was the state Presidium and member of
16 the Central Committee, and also other positions in the regime.

17 [10.51.35]

18 Mr. Ieng Sary was the member of the Standing Committee and he was
19 also the Deputy Prime Minister, Minister in Charge of the Foreign
20 Affairs. And he holds -- he held other positions and roles as
21 well.

22 For Ieng Thirith, she was member of the Central Committee and
23 Minister of the Social Action of the DK and other roles to
24 perform.

25 For Kaing Guek Eav, he was the Chairman of the S-21 Security

1 Office, the unique office in the DK. And he held other roles and
2 position as well.

3 In contrary, for Im Chaem, the National Co-Prosecutor considers
4 that she did not hold the position as those senior leaders and
5 she was not a person considered to be within the personal
6 jurisdiction of the ECCC. If we turn to the goals or objectives
7 to create the ECCC laws and agreements, the agreements and the
8 ECCC laws are special laws. The laws of the ECCC and the
9 agreements limit the temporal jurisdiction and personal
10 jurisdiction. And the two laws -- the agreements and the ECCC
11 laws "does" not -- appears to -- that apply the general principle
12 of the criminal laws.

13 The criminal -- The principle of the criminal law allows the
14 application of laws to all individuals, but for ECCC law and the
15 agreements allows -- allow only the prosecution against the two
16 group of people, meaning that those who are within the
17 jurisdiction of the ECCC.

18 In addition to that, the ECCC law and the agreement is -- are
19 intended to pressure the national reconciliation and also to be a
20 legacy for the young generation to understand about the atrocity
21 regime of the DK and to avoid such atrocities to re-happen.

22 [10.54.26]

23 Moreover, in case there is needs to -- if the law -- ECCC laws
24 and agreements allow the prosecution against other individuals
25 rather than the two categories of individual, it -- the document

1 and the agreement -- the ECCC agreement and the ECCC law would
2 have indicated other individuals in those documents.

3 Looking at the history of Cambodia, the crimes happen -- did not
4 happen only in the Khmer Rouge time. It had happened before the
5 period, meaning that it also happened in the Khmer Republic.

6 In the Khmer Republic, there was bombing leading to the injuries
7 of individual, destruction of properties and also the decease of
8 our Cambodian people. So we could see that the ECCC law and the
9 agreement do not -- cannot be compared to the principle of the
10 criminal law.

11 [10.56.00]

12 And the United Nations and Cambodia have considered about the
13 security and the safety of Cambodia before they created the ECCC
14 law and the agreement. For all these reasons, the National
15 Co-Prosecutor has always considered the national reconciliation,
16 public order and securities when the National Co-Prosecutor
17 considers further prosecution.

18 For preliminary investigation by the International Co-Prosecutor
19 and the investigation by the Co-Investigating Judge, the National
20 Co-Prosecutor still maintains the position that the suspect in
21 this case is not within the personal jurisdiction of the ECCC.

22 That is why the National Co-Prosecutor did not participate in the
23 preliminary inquiry by the International Co-Prosecutor, and she
24 also stated the disagreements against the International
25 Co-Prosecutor.

1 [10.57.35]

2 After the National Co-Prosecutor submitted her arguments for
3 consideration for PTC to consider and when the case is seized by
4 the PTC, there is no -- there was no decision on the case because
5 there was no majority vote against the case. This means that the
6 Closing Order did not receive a majority vote of the PT, and the
7 Closing Order was made under Rule 71.4 of the Internal Rules.

8 The National Co-Prosecutor still maintains the position that the
9 accused named in this case is not within the jurisdiction of the
10 ECCC. This finding is consistent with the decision of the
11 International Co-Investigating Judges -- Co-Investigating Judges,
12 rather, that Im Chaem is not within the jurisdiction of the ECCC.

13 [10.59.16]

14 To conclude, the National Co-Prosecutor has maintained clear
15 position based on the ECCC law and the agreement between the
16 National and Royal Government of Cambodia and United Nations that
17 only the existing accused in the previous cases are within the
18 personal jurisdiction of the ECCC.

19 Because of the above-mentioned arguments, the National
20 Co-Prosecutor has maintained the agreement -- the disagreement in
21 this case. And the National Co-Prosecutor would like to state
22 that there is no clear principle for the decision on whom should
23 be the senior leaders and those who are most responsible persons.
24 When we consider the press release -- press statement of the
25 International Co-Prosecutor, the International Co-Prosecutor

1 indicates that the International Co-Prosecutor will not initiate
2 any other suspects for investigation. This can show that there is
3 no principle in terms of the decision to select those to be
4 prosecuted.

5 For all the arguments as stated in our submissions, the ECCC
6 should focus on the existing accused to complete its mandate
7 because the ECCC law and the agreement foresee already the
8 prosecution against a small group of individuals. In particular,
9 in the preface which reference to the resolutions by the United
10 Nations dated 2002 in relation to the prosecution of crimes under
11 the Cambodian law which were committed under the Khmer Rouge
12 regime, the United Nations recognized the real concerns which are
13 the legitimate concerns by the Cambodian government and its
14 people in seeking justice, national reconciliation, stability,
15 peace and security.

16 [11.02.25]

17 Arising out of these concerns, the law of the establishment of
18 the ECCC as well as the agreement required the Co-Prosecutors to
19 select the only two types of individuals for the prosecution,
20 namely, those who were senior leaders of the Democratic
21 Kampuchea, and those who were most responsible for the crimes and
22 the grave breaches of the Cambodian criminal law as well as the
23 violations of the international humanitarian law and the
24 conventions recognized by Cambodia which was committed between 17
25 April 1975 to 6 January 1979.

1 For that reason, the National Co-Prosecutor considers that Im
2 Chaem does not fall under the personal jurisdiction of this
3 Court; and, for that reason, I urge the Presiding Judge and Your
4 Honours of the Pre-Trial Chamber to affirm the decision to
5 dismiss the case of Im Chaem according to the law.

6 Thank you.

7 THE PRESIDENT:

8 For the morning session, we will adjourn and we will resume in
9 the afternoon at 1.30.

10 So let we adjourn now. Thank you.

11 (Court recesses)

12 (Court resumes)

13 [13.29.34]

14 THE PRESIDENT:

15 Please, be seated.

16 Now, let me invite the International Co-Prosecutor to make
17 submission. You may now proceed.

18 MR. KOUMJIAN:

19 Thank you, Mr. President, and good morning, Your Honours. Good
20 morning to members of the Defence and the civil parties and to my
21 colleagues in the Office of the Co-Prosecutors.

22 Your Honour, let me begin by making it clear that it is my belief
23 that Im Chaem is among those most responsible for the crimes of
24 the DK regime within the meaning of the establishment law and the
25 UN agreement with the Royal Government of Cambodia and that is

1 because of the seriousness of her conduct and the gravity of the
2 effects of her crimes, the gravity of how those affected the
3 victims; the many thousands of victims of her crimes.

4 And I just wish to make it clear that I do believe it is in the
5 interest of justice and in the interest of reconciliation that
6 she be held accountable for what she did. I think her indictment
7 would serve justice and serve reconciliation just as the trials
8 of Nuon Chea, Khieu Samphan, and Duch helped to further justice.
9 And the legacy -- as my colleague Mr. Seng Bunkheang said, the
10 importance of the legacy of this tribunal for future generations
11 for young people and future generations of Cambodians so they
12 make sure that crimes like this brutal regime committed never
13 occur again.

14 [13.31.42]

15 But this appeal is not about what I believe as far as who is most
16 responsible. That is not the issue in this appeal. In this
17 appeal, we know that both Co-Investigating Judges made a decision
18 that, in their view, Im Chaem is not among those most
19 responsible. Neither senior leader (inaudible) and not among
20 those most responsible.

21 We're not appealing simply because I disagree with that judgment
22 of the Co-Investigating Judges, and that should be clear by the
23 fact that when the Closing Order first came out, you will recall,
24 it had no very cursory reasons. The judges said that they would
25 provide reasons later. And when we were asked if we would appeal,

1 we asked Your Honours for more time to read the reasons behind
2 the decision to understand what was the basis.

3 It was only after reading the basis of the decision that's
4 contained in the Closing Order reasons that we identified certain
5 errors of law and a couple of errors of fact which, in our view,
6 clearly -- and I'll -- as I will explain -- affected the judgment
7 of the Co-Investigating Judges as to whether or not Im Chaem fit
8 that criteria "most responsible".

9 [13.33.14]

10 So it was clear that they based their decision, at least in part,
11 upon erroneous interpretations of the law and on factual findings
12 -- a couple of factual findings regarding her positions that we
13 say no reasonable trier of fact could have made those factual
14 findings for reasons, again, I will explain.

15 So this affects, very much, what the standard of review is on
16 appeal which the Defence talked about a lot in their response.

17 The Prosecution appeal does not go to that aspect. That is within
18 the discretion of the Co-Investigating Judges to judge whether or
19 not she is most responsible. We recognize the Supreme Court's
20 discussion of the most responsible criteria in the Duch appeal
21 judgment. They talked about it not having such clear boundaries
22 and that it is a matter of professional judgment. They said while
23 it could be appealed if there was an abuse of professional
24 judgment, they talked about the fact that this was a matter of
25 judgment where there are not such clear boundaries.

1 [13.34.38]

2 But discretionary decisions that are based upon incorrect
3 interpretations of law or clearly incorrect findings of fact are
4 invalid and they can be invalidated and that is your duty as the
5 Appeal Chamber, in this case, hearing the appeals of the
6 Co-Investigating Judges' decisions to make those findings because
7 the Co-Investigating Judges have ignored some of the law that's
8 both set internationally and some of the law that you,
9 yourselves, have recognized in prior decisions.

10 There's basically three different criteria under which a
11 discretionary decision can be overturned and many cases talk
12 about that; for example, in the <Seselj> decision on disclosure
13 of 17 April 2007 at the ICTY in paragraph 14, the Appeals Chamber
14 said that it would only overturn a Trial Chamber exercise of
15 discretion when it was found to be based: 1) On an incorrect
16 interpretation of governing law or 2) Based on a patently
17 incorrect conclusion of fact.

18 [13.35.56]

19 In the -- At the ICTR, the Rwanda Tribunal, in the case of
20 Uwinkindi, a decision on the indictment of 16 November 2011, in
21 paragraph 6, the Appeals Chamber said that, again, it -- the
22 Chamber will overturn a Trial Chamber discretionary decision
23 where it is found to be: 1) Based on an incorrect interpretation
24 of governing law, -- You, as the Appeal Chamber, decide what the
25 law is. No deference is owed to a lower court on the law; on

1 facts, yes -- 2) It is based on a patently incorrect conclusion
2 of fact, -- Again, on conclusions of fact, some deference should
3 be shown to the lower court. It has to be shown, we would agree,
4 that it was the only -- that the decision was one that no
5 reasonable fact finder could make which is our position on her
6 positions as I and my colleague will explain that the
7 Co-Investigating Judges incorrectly found her positions -- or 3)
8 The third criteria was that the discretionary decision was so
9 unfair or unreasonable as to constitute an abuse of Trial
10 Chamber's discretion.
11 That's not the basis that we've laid out in our sixth round of
12 appeal. It's not on an issue of the abuse of discretion. Our
13 appeal is based upon errors of law on the first four grounds and
14 these factual errors on her positions.
15 [13.37.33]
16 Even the Im Chaem response, we think it correctly states this
17 issue of what kind of standard of appeal there is for
18 discretionary decisions. In paragraph 13 of the response that
19 they filed, they quote your own decision -- your -- the Pre-Trial
20 Chamber's decision in Case 002 of 12 November 2009. That's
21 D164/3/6. And, in paragraph 26, you said that, in reviewing an
22 exercise of discretion, the question's not whether the Appeals
23 Chamber agrees or disagrees, but rather whether the Trial Chamber
24 has correctly exercised its discretion reaching that decision.
25 In order to challenge the decision, the appellants must

1 demonstrate that the Trial Chamber either misdirected itself as
2 to the principle to be applied or the law, which is relevant to
3 the exercise of its discretion, or failed to give weight or
4 sufficient weight to relevant considerations or made an error as
5 to the facts upon which it exercised its discretion, but I've
6 said so far on the basis of our appeal, errors of law and fact.
7 But you went on to say, or if the Trial Chamber's decision was so
8 unreasonable or plainly unjust that the Appeals Chamber is able
9 to infer that the Trial Chamber must have failed to exercise its
10 discretion properly.

11 That last criteria is not the basis of our appeal. We say that,
12 in the errors of law that we described and the factual errors
13 about her positions, these invalidate the decision.

14 Why do I say that? Because if you look at how the
15 Co-Investigating Judges describe their job and how they would
16 evaluate whether Im Chaem or someone else who was among those
17 most responsible, there are a couple of things they look at. They
18 described this in paragraphs 38 and 39 of the Closing Order
19 reasons. They said first, they look at her conduct; what is
20 criminal in her conduct, how grave is her conduct? And secondly,
21 they looked at the effects of those -- that criminal conduct upon
22 the victims.

23 [13.40.18]

24 And then, in paragraph 39, they go on to say, of course, the
25 positions she held or any person -- suspect holds is relevant

1 because the higher the position, the more likely that they are
2 able to exercise influence over policies and decisions.

3 So we agree with that approach of the Co-Investigating Judges. Is
4 what she did criminal? The judges have to find. If so, what was
5 her role in the crime? How did she act criminally? How directly?
6 And then, what effect did those crimes have on the victims? How
7 did they suffer? What -- do they continue to suffer? Does it
8 continue to have an effect upon Cambodian society today?

9 We say that the errors that the <Trial Chamber (sic)> made, such
10 as failing to consider the effects of crimes like the purge in
11 the Northwest Zone, where I believe we say 2,000 approximately --
12 1,000 -- 1,000 cadres were purged in the Northwest Zone, that's
13 something that the Co-Investigating Judges, in our view, were
14 seized with and should have evaluated in determining whether or
15 not she was most responsible.

16 Another issue which is raised in our appeal, forced marriages.

17 The Co-Investigating Judges did discover evidence -- direct
18 evidence from witnesses about forced marriages and about Im Chaem
19 having a role in forced marriages.

20 [13.42.14]

21 And it's interesting the Co-Investigating Judges found Im Chaem
22 was responsible -- and the evidence would show that she was
23 responsible to the satisfactory degree for a closing -- for an
24 indictment -- for enslavement including in Spean Sreng. In Spean
25 Sreng, we also had evidence -- direct evidence from a victim of

1 forced marriage. That was Sen Sophon. He witnessed people being
2 married during the reign of Im Chaem in that area.

3 And also, a victim, Thang Thoeuy, said that she, herself, was
4 forced to get married in a ceremony involving 85 couples then in
5 Spean Sreng. She was threatened with execution if she refused to
6 get married and her unit chief told her that couples would be
7 spied upon to ensure that they consummate the marriage and that
8 those who refused would be killed.

9 Now, to me, this kind of choosing spouses for people and telling
10 them: "This is who you're going to marry. This is who you're
11 going to procreate, have children with" is the ultimate
12 manifestation of enslavement. Enslavement under international law
13 is defined as exercising the powers of ownership over human
14 beings. What clearer manifestation of enslavement than to tell
15 someone: "You have to marry this stranger. You have to have
16 children with this stranger". This was the -- an -- clear example
17 of the Khmer Rouge engaging in enslavement of the population.
18 And that's -- and enslavement was found by the Co-Investigating
19 Judges. Im Chaem was notified of charges involving enslavements
20 in Sreng and, in the Closing Order, they found that that crime
21 did occur in that location when she was in charge.

22 [13.44.20]

23 But if you read the Closing Order, you do a word search for
24 "marriage"; you'll get <no> results. Never in the Closing Order,
25 at no point, did the Co-Investigating Judges even consider forced

1 marriage and the effect upon people like Thang Thoeuy and other
2 victims of that crime. That is an error of law that we say
3 invalidates the decision.

4 And what about these positions? We say that the Co-Investigating
5 Judges made two errors of fact regarding positions. My colleague
6 will talk more about this, Mr. Corman Kenny.

7 But the evidence, in our view, is clear that Im Chaem was the
8 secretary of Koh Andet District and that she was a member, at one
9 point, of the Sector 13 Committee.

10 [13.45.28]

11 Now, we recognize, again, the high burden to prove factual errors
12 by the Co-Investigating Judges. It is true; we have to show no
13 reasonable <trier> of fact could have failed to find that she had
14 held those positions. That is what we think the evidence shows
15 because, as my colleague will talk about, we have her own
16 statement on audiotape when she was interviewed by DC-Cam where
17 she talked about these positions and she made statements. The
18 only reasonable inference from those statements -- the only
19 reasonable inference is that she was Koh Andet's secretary and
20 she was a member of the Sector 13 Committee. She admitted she
21 replaced her boss, the sector chief, on the committee. There's no
22 reason, especially to the extent needed for indictment, to -- to
23 believe that she did not hold that position. And as for being the
24 secretary -- district secretary of Koh Andet, she admitted she
25 was on that committee and she said that <Ta San> was her deputy.

1 Now, we know from all of the investigations that have been done
2 at this Court of the Khmer Rouge hierarchy and how they organized
3 throughout the country, a committee has three members and there's
4 -- only one person has a deputy. The -- There's the secretary and
5 if someone has a deputy then they are -- they are the secretary.
6 There's a secretary, deputy secretary, and member.
7 When Im Chaem told DC-Cam that <Ta San> was her deputy, the only
8 reasonable inference in that is that she is the secretary because
9 no one else on a district committee has a deputy other than the
10 district secretary.
11 Again, these positions are relevant to the issue of personal
12 jurisdiction, the issue of whether she's most responsible,
13 because as the Co-Investigating Judges talked about in paragraph
14 39, on -- positions are relevant to whether or not she can have
15 an effect on policy.
16 (Inaudible), Your Honour?
17 I was going to read that paragraph 39, but I'm sure you can do
18 that yourselves. I'm paraphrasing, but what it clearly says is
19 that the higher the position that something -- the position in
20 the hierarchy is something that the Co-Investigating Judges must
21 take into account. We agree with that because the higher up they
22 are -- even though following orders is not a defence, the higher
23 up they are, the more likely they ought to be most responsible
24 because of their potential influence on policies.
25 [13.48.32]

1 So what then is the remedy for these errors of law and errors of
2 facts? Well, in the <Halilovic> decision at the ITCY, which I
3 think is just representative of many decisions, -- This is a
4 decision on interlocutory appeal concern -- concerning the
5 admission of the interview of the Accused -- so it's dated 19
6 August 2005, paragraph 64, the ICTY Appeals Chamber said that the
7 Appeals Chamber may substitute the exercise of its own discretion
8 for that of the Trial Chamber if it considers it appropriate to
9 do so. In the ordinary case involving an evidentiary question
10 before a Trial Chamber, the Appeals Chamber may consider sending
11 the matter back to the lower court with an order that (inaudible)
12 consider the factors identified as relevant to your -- to the
13 Appeals Chamber decision and consider its discretion afresh.
14 In the < Milošević > decision of 18 April 2002, in paragraph 6, the
15 Appeals Chamber said, "Once the Appeals Chamber is satisfied
16 there is an error in how the Trial Chamber exercised its
17 discretion that's prejudiced the party which complains, it will
18 review the order made and, if appropriate and without fetter,
19 meaning without hesitation, substitute its own discretion for
20 that of the Trial Chamber or lower court."

21 [13.50.15]

22 So what we say is that these -- the case law clearly sets out two
23 possible remedies. If you agree with us and find these clear
24 errors of fact and errors of law that were the basis -- formed at
25 least part of the basis of the Co-Investigating Judges' decision,

1 then you either could re-evaluate, on your own, the issue of
2 whether Im Chaem is among those most responsible and satisfies
3 the personal jurisdiction of the Court or lay out your findings
4 about the errors of law and fact and send it back to the
5 Co-Investigating Judges for them to exercise their own discretion
6 afresh, correcting the errors that they made.
7 Now, the first ground of appeal -- I'm going to move on to that
8 -- that is discussed in our appeal concerns the issue of whether
9 or not, in the Closing Order, the Co-Investigating Judges should
10 review all of the facts of which they are seized by the
11 introductory and supplementary submissions or whether they can
12 ignore some of these facts and issue no reasoned decision on this
13 because they had not, themselves, charged the suspect with those
14 crimes.
15 [13.51.50]
16 Your Honours know better than me that Cambodia has an
17 investigative-judge system. It's different from that of
18 common-law countries. It's different from that of many
19 continental countries such as Germany which don't use
20 investigative judges like they -- you do in Cambodia and in
21 countries like France that your system originally derived from
22 and it is a fundamental principle in the system that you have
23 here -- in this investigative judge system -- that the Co -- the
24 investigating judges are seized with facts from the Prosecutors'
25 submissions. They have an obligation -- They do not have any

1 discretion to ignore those facts. They have an obligation to
2 investigate those facts and provide a reasoned decision as to
3 whether or not the evidence shows the Accused responsibility,
4 whether those facts are true or not, whether crimes occurred or
5 not. Even Rule 55 of the Internal Rules makes this clear. A
6 judicial investigation is compulsory for crimes within the
7 jurisdiction of the ECCC.

8 And there's much jurisprudence from France. I believe we passed
9 out some French decisions of the Court of Cassation -- and
10 forgive my pronunciation. Let's basically talk about this. The
11 first one that we included was a case going all the way back to
12 1969. That appeal -- an appeal number of 69-91612. And we have
13 three decisions there and they all make the same basic point.
14 They have paragraphs in them that are almost identical in each of
15 the three decisions.

16 In the first one, it's the third from the bottom, -- and I hope
17 rather than make everyone suffer with me trying to read the
18 French, I'm going to paraphrase in English what these paragraphs
19 said -- it said the Appeals Chamber or the Court of Accusation,
20 which I understand is sometimes called the "Chamber of
21 Accusation" that hears appeals from the Co-Investigating Judges'
22 decisions, said that the indict -- excuse me -- the Appeals
23 Chamber above that court said the Indictment Chamber -- the Court
24 -- Chambre d'Accusation should have overturned the enacted
25 decision insofar as it failed to rule on the facts challenged by

1 the civil party. And then pursuant to the criminal procedure
2 code, they should have either transferred the case back to the
3 Co-Investigating Judges or using Articles 201, 202, and 204 of
4 the French code basically investigated -- completed the
5 investigation themselves of those facts.

6 [13.55.03]

7 So again, this is the Court of Cassation saying that the
8 Indictment Chamber should have reversed the decision when the
9 Co-Invest -- when the investigating judges were judged (sic) had
10 not ruled on all of the facts in this case alleged by the civil
11 party.'

12 Another decision we include happens 30 years later in 1999.

13 Again, the Court of Cassation -- and this is a decision from 16
14 November 1999 --, it says almost the same thing. I won't repeat
15 it because it's so identical. Where the Co-Investigating Judges
16 -- or excuse me, the investigating judge in that case had failed
17 to investigate facts that the civil party had alleged, that was
18 an error of law. And the remedy was that the Court of Accusation,
19 the Indictment Chamber, should have either sent it back to the
20 investigative judge to rule on those facts; to investigate them
21 and make factual findings or the Indictment Chamber should itself
22 have taken advantage of its own powers to complete the
23 investigation. And the third decision from 1993 says the same
24 thing.

25 In your decision on the appeal of the Duch Closing Order, Case

1 001, you called the Closing Order the decision that concludes the
2 whole investigation. You said that it contains various
3 conclusions in fact -- of fact and law with regard to all the
4 acts that were subject to investigation. That is the obligation -
5 clearly, the obligation of courts in Cambodia and at the ECCC,
6 and this is an important precedent. One of the reasons this
7 matter should be handled by Your Honours and should be handled
8 very carefully as we all know that the ECCC, itself, is often
9 looked to by other courts in Cambodia for guidance as to what the
10 law should be and the correct procedures.

11 [13.57.24]

12 You certainly don't want to set a precedent for the Cambodian
13 courts that, in Closing Orders, judges can ignore facts of which
14 they were seized, fail to rule on them, and make their decisions
15 without ever giving a party an opportunity to be heard on those
16 facts and considering those facts.

17 We think the exception that proves the rule, the rule being that
18 judges are obligated by the initial submission and supplementary
19 submission to investigate these facts and come to reasoned
20 conclusions on these facts, the exception that proves the rule is
21 the recent amendment -- fairly recent amendment to the Internal
22 Rules for Rule 66 bis.

23 Now, Rule 66 bis was an acknowledgment of the unique nature of
24 this Court -- this Tribunal where we are dealing with crimes of
25 such massive scale that if we investigated every crime committed

1 by the Khmer Rouge or many of these cases even in particular
2 areas committed by Khmer Rouge forces, we would never complete
3 our mandate. So, an exception was carved out with certain clear
4 protections and the protections were -- and recall this was a
5 matter of quite a bit of debate in the plenary on how to ensure
6 that this did not violate these fundamental principles that
7 investigative judges are seized with facts and have to deal with
8 all the facts they are seized with. The final rule that was
9 passed said that this could only occur at the end of the
10 investigation.

11 [13.59.09]

12 It also said that it could only happen after the Co-Investigating
13 Judges gave notice to the parties and heard from the parties in
14 regard to those facts. And it could only happen -- and if it
15 happened, any party could then appeal the decision to Your
16 Honours. So all these safeguards were built in.

17 Now, what the Co-Investigating Judges have done and what the
18 Defence argues in their response to our appeal is that if the
19 Co-Investigating Judges, during the investigation, have not
20 provided a notification of a crime, it will never be dealt with.
21 They don't have to ever talk about it in the Closing Order and
22 they don't consider it in the Closing Order. Now that clearly is
23 an error. The result of that is the Co-Investigating Judges never
24 gave the Prosecution an opportunity to be heard or the civil
25 parties about what -- about these facts that are not found in the

1 investigation and are not discussed. There are no factual
2 findings.

3 Now, the Defence argues that the Prosecution should have appealed
4 the notification of crimes which didn't include every crime that
5 was in the initial and supplementary submissions. That's not
6 practical for a couple of reasons. First of all, an investigation
7 is ongoing. As Im Chaem was told in the notification, more
8 charges could have followed at any time.

9 [14.00.53]

10 Secondly, if you look at the notification in this case or in any
11 case at this Court, including Case 001, Case 002, the
12 notifications of charges are not reasoned. They're not decisions
13 with -- that discuss what the evidence is, that supports charging
14 one crime and not charging another. There's no discussion.
15 The Defence points out that they appealed Judge Harmon's decision
16 to charge Im Chaem in absentia. They did. That was a legal issue;
17 can you charge a person in absentia? The actual notification --
18 the crimes that she was charged with was just an annex to that
19 and that was not a subject of Im Chaem's appeal. Like all the
20 other notifications of charges at this Court, it was not
21 reasoned. It didn't say why she's being charged with this crime
22 of enslavement at Spean Sreng, for example, and why she wasn't
23 charged with the killings of Northwest Zone cadres, for example.
24 There was no discussion of the evidence in this case, nor in Case
25 001 or Case 002 the notification -- because a notification's not

1 an order or decision; it's putting -- just a notification. It
2 puts a person on notice of where they are and it has certain
3 procedural significance as far as giving the Defence, for
4 example, access to the case file.

5 The Defence position that crimes that were not charged that are
6 clearly seized facts of which the Co-Investigating Judges are
7 clearly seized don't have to be discussed in the Closing Order
8 violates this fundamental principle that the Closing Order must
9 be reasoned. Internal Rule 67.4 says, "The Closing Order shall
10 state the reasons for the decision."

11 [14.02.57]

12 In your decision, again, on the appeal of the Closing Order in
13 Case 001, in the Duch case, you said that you recalled it is an
14 international standard that all decisions of judicial bodies are
15 required to be reasoned. This was paragraph 38 of your decision.
16 You said, "The Co-Investigating Judges' decision to either
17 dismiss acts or indict the charged person shall be reasoned as
18 provided in Internal Rule 67.4."

19 Now, Your Honours, another point I want to make is that the
20 Defence is not, in any way, prejudiced by the Co-Investigating
21 Judges when they make their Closing Order hearing from the
22 Prosecution, hearing from the civil parties about all facts of
23 which they were seized and making their decision as to whether or
24 not these facts were proven or not. There's a couple of things to
25 keep in mind. One -- One piece of evidence that shows the Defence

1 was not in any way misled about this; that that was their own
2 interpretation all the way up until the Closing Order was issued,
3 is some of their own actions in defending their client as they
4 should.

5 In a filing they did, D283, in paragraph 2, it concerned their
6 request for a disclosure of unredacted transcripts from the Case
7 002, of witnesses and their names, of everything that was
8 relevant to Im Chaem. That's what they said in paragraph 2.

9 [14.05.09]

10 In paragraph 3, they said, "This request is made necessary in
11 order to safeguard Miss Im Chaem's fair trial rights to
12 adequately facilitate the preparation of a defence and examine
13 witnesses against her." And the ICJ (sic) granted that request.
14 Well, on the issue of Trapeang Thma Dam, it was not among the
15 locations of which Im Chaem was then charged. She was not
16 charged, but the Defence nevertheless understood and saw that she
17 could be -- that it could be -- she could be indicted for crimes
18 at Trapeang Thma and they saw evidence that would possibly be
19 exonerating for her even though it had not been charged.

20 Even two months after the close of the investigation in this
21 case, Im Chaem filed a request to the Co-Investigating Judges
22 seeking annulment of interviews related to that same site and
23 also to Wat Chamkar Khnol Security Office, and this was a filing
24 D298.4.

25 She argued there that these interviews should be annulled and

1 removed from the case file. And she said: "Any inference drawn
2 therein is prohibited and the Co-Prosecutors' final submission,
3 should it mention any parts of the interview -- interviews
4 annulled, becomes void." So clearly, in that filing, Im Chaem was
5 anticipating that the -- at least the International Co-Prosecutor
6 would deal with these sites that were not charged, and Im Chaem
7 asked that these interviews that were part of the investigation
8 of these uncharged sites be annulled because she recognized that
9 she could be indicted for those and was defending -- the Defence
10 was defending their client on these potential charges.

11 [14.07.31]

12 Your Honour, the best example, I think, that a suspect and a
13 charged person can be indicted for crimes of which they are not
14 charged is your own decision in Duch on the Duch appeal. And in
15 paragraph 106, you dealt with certain crimes that had not been
16 charged. Those were violations of the domestic law for murder and
17 torture.
18 Even though Im Chaem -- excuse me, Duch had not been charged with
19 those crimes, you first made an analysis and said this -- these
20 domestic crimes contained distinct elements that separate them
21 from the crimes against humanity of which she had been charged by
22 the -- or indicted by the Co-Investigating Judges. And you made a
23 determination then to yourselves amend the indictment to include
24 charges -- include these crimes even though she had not -- never
25 during the investigation been notified of the charges under these

1 -- the national code for murder and torture.

2 What you said in paragraph 106 is: "The Internal Rules clearly
3 envisage..." Excuse me. "The Internal Rules clearly envisage the
4 possibility that the legal characterization of the acts might
5 change even during the trial. The addition of legal offences at
6 this stage of the proceedings does not affect the charged person,
7 the right of the charged person, to be informed of the charges
8 provided for in Article 35 new of the ECCC law as he will have
9 the opportunity to present his defence on these specific offences
10 during the trial."

11 [14.09.39]

12 And that's clear. That's important to keep in mind, of course.

13 All we're talking about here with the Closing Order is the
14 Closing Order can serve as an indictment. Indictment are the
15 charges that the Defence use to prepare for trial.

16 In many legal systems, such as the one I come from, the Defence
17 has no opportunity to participate at all until there's an
18 indictment and, once the person is indicted, then the Defence
19 begins to participate in the proceedings. So their right to be
20 informed of the charges is satisfied by the indictment or the
21 Closing Order.

22 Moreover, under ECCC procedure, when the Accused get access to
23 the case file, as they did here when Im Chaem was charged, they
24 see the Prosecution's introductory and supplementary submissions
25 and they are aware then of the scope of the investigation and the

50

1 potential crimes of which they may have to eventually defend. So
2 there's no violation of the accused person's rights.

3 [14.10.48]

4 So our position is that the Co-Investigating Judges erred by not
5 considering crimes of which Im Chaem was not charged, but of
6 which they were seized. They erred in failing to issue any
7 reasoned decision as to why these crimes were not considered and
8 this is one of the grounds upon which you should correct this
9 error of law which is important -- very important for the
10 jurisprudence of this Court and even important to the
11 jurisprudence, I believe, in other Cambodia's courts and make
12 sure that judges cannot simply ignore crimes of which they were
13 seized during the investigation without a reasoned decision. This
14 clearly would affect the issue of personal jurisdiction because,
15 as the Co-Investigating Judges said, they have to consider the
16 gravity of the criminal conduct and the gravity of the effects of
17 the crimes on the victims.

18 Now, thank you. My colleague, Mr. Corman Kenny will continue, and
19 at -- and at any time ,if you have any questions, I'm happy to
20 answer or he will.

21 (Short pause)

22 [14.12.37]

23 MR. KENNY:

24 Good afternoon, Mr. President, Your Honours, and to all those in
25 the courtroom. My name is Corman Kenny and I will address the

1 remainder of the International Co-Prosecutor's appeal; that is,
2 the grounds of error, the errors of law and fact in grounds 2
3 through 6 of the International Co-Prosecutor's appeal.

4 Your Honours, grounds 2 -- ground 2 relates to the
5 Co-Investigating Judges' failure to address a number of serious
6 allegations of which they were seized by the introductory and
7 supplementary submissions. These allegations include Im Chaem's
8 responsibility for the crimes resulting from the purge of the
9 Northwest Zone, forced marriages, persecution of the Vietnamese
10 and Khmer Krom and other crimes at specified sites.

11 Given the time available, I will only discuss the first two of
12 these points today; namely, crimes resulting from the purge and
13 forced marriages.

14 The latter two points are covered in our written appeal
15 submissions and details of the evidence that supports finding Im
16 Chaem responsible for these crimes can be found in the
17 International Co-Prosecutor's final submission.

18 [14.13.55]

19 And firstly, the Co-Investigating Judges did not consider Im
20 Chaem's responsibility for the results of the purge of the
21 Northwest Zone in reaching their decision as to whether she was
22 among those most responsible for the crimes of the DK regime. The
23 cloning -- Closing Order contains a series of findings in
24 relation to the purge, but ultimately, the Co-Investigating
25 Judges only considered the purge as a narrative detail in Im

1 Chaem's transition from the Southwest Zone to the Northwest Zone.
2 The Co-Investigating Judges failed to weigh and consider the most
3 significant aspect of their findings which is the crimes that
4 resulted from the purge. The Closing Order includes no discussion
5 of the gravity of these crimes, no estimates of the numbers of
6 people killed, nor for example, the use of torture against
7 victims of the purge despite the Co-Investigating Judges being
8 seized in <rem> with these allegations.
9 Now, Im Chaem acknowledges at paragraph 55 of her response that
10 the Closing Order found that she led the transfer of Southwest
11 Zone cadres to the Northwest Zone. Im Chaem claims at paragraph
12 56 of her response that the Co-Investigating Judges dismissed the
13 claim that she played a key role in the crimes that resulted.
14 But, Your Honours, there was no such finding in the Closing Order
15 because the Co-Investigating Judges simply did not consider the
16 crimes which resulted from the actions of Im Chaem and the
17 Southwest cadres that she led.
18 Now, this was not, as Im Chaem framed it, a mere transfer of
19 people between zones. The Co -- Co-Investigating Judges found at
20 paragraph 156 of the Closing Order that Im Chaem led a group of 5
21 to 600 families and between 3 and 500 soldiers from Takeo to the
22 Northwest Zone with a stop in Phnom Penh where leading cadre were
23 addressed by Pol Pot.
24 [14.16.17]
25 Im Chaem has, in her interviews, highlighted her relationship

1 with Pol Pot stating that Pol Pot had asked to meet her in person
2 during that stop in Phnom Penh. This admission and others, such
3 as Im Chaem claiming that Pol Pot had protected her from arrest,
4 belie Im Chaem's claim at paragraphs 5 and 89 of her response
5 that there were over 100 other cadres of equivalent rank to her,
6 as well as her assertion in her response to the International
7 Co-Prosecutor's final submission that she was prevented by her
8 gender from holding any position of real power.
9 The Closing Order lays bare how the takeover of the Northwest
10 Zone was achieved. The Co-Investigating Judges found at paragraph
11 153 that, after the arrival of Im Chaem and the Southwest cadres,
12 Northwest Zone military and civilian cadres were arrested and
13 detained in security centres throughout the Northwest Zone and in
14 S-21 in Phnom Penh, that they were sent to work sites throughout
15 the Northwest Zone for refashioning, or they were killed.
16 The Closing Order continued at paragraph 185 that Im Chaem and
17 the Southwest cadres carried out: "a systematic campaign of
18 arrests targeting Northwest cadres at the cooperatives, commune,
19 districts, and sector levels".
20 [14.17.58]
21 Now, Your Honours, we know what happened to many of these cadres
22 that were arrested due to contemporaneous S-21 records. As my
23 colleague mentioned, the number of cadres sent from the Northwest
24 Zone to S-21 alone was approximately 1,000 individuals with the
25 -- with the majority of those people recorded as having entered

1 S-21 between June 1977 and May 1978 which is the period after Im
2 Chaem led the purge.
3 Nhem <En>, who was a photographer at S-21, was asked by the
4 Co-Investigating Judges why he had previous -- previously told
5 DC-Cam that Im Chaem had killed thousands of people in
6 Battambang. He told the Co-Investigating Judges at D119/124,
7 answer 6, and I quote, "I said that because Yeay Chaem was a
8 leader in that place and many people died in the place she
9 controlled. In S-21, I learned that many people were sent from
10 Sector 5. At that time, there were many more arrests in the
11 Northwest Zone and the East Zone than other zones where the
12 Southwest cadres had gone as replacements."
13 We also know from S-21 records specifically what happened to the
14 individuals that Im Chaem, herself, replaced at the district and
15 sector levels. At the district level, as the Co-Investigating
16 Judges found at paragraph 158 of the Closing Order, Ta Maong who
17 was the Preah Net Preah District Secretary was arrested and
18 brought to S-21 after Im Chaem's arrival. Among the surviving
19 S-21 records, we have Ta Maong's so-called confession and
20 important to note in this regard, the Co-Investigating Judges
21 referred at paragraph 110 of the Closing Order to the Trial
22 Chamber's finding in Case 002/01 that confessions of prisoners
23 detained in S-21 are presumed to have been made under torture.
24 We also have the S-21 list showing that Ta Maong was executed in
25 October 1977 having endured about four months in S-21.

1 [14.20.43]

2 Your Honours, the Co-Investigating Judges made no reference to
3 Sam-At who was the Preah Net Preah Deputy Secretary, but we know
4 from surviving records that Sam-At was also sent to S-21 shortly
5 after Im Chaem's arrival. An S-21 interrogation report of Sam-At
6 dated 1st of August 1977 states, and I quote: "The torture has
7 been quite harsh in the past and his health is quite weak, but he
8 still pretends to the maximum extent to know not much of
9 anything". At the sector level, the Co-Investigating Judges
10 referred at paragraph 162 of the Closing Order to the evidence
11 that Sector 5 member Ta Hoeng was arrested by Im Chaem and Ta
12 Mok. Again, we know from surviving records that Ta Hoeng entered
13 S-21 on the 22nd of June 1977. We also have a so-called
14 confession of Ta Hoeng dated three months after his entering the
15 prison.

16 Additionally, the Closing Order finds at paragraph 163 that,
17 after the removal of Sector 5 Secretary Ta Rin, that Im Chaem
18 became deputy secretary of Sector 5. From S -- S-21 records, we
19 know that Ta Rin was interrogated, gave a so-called confession,
20 and was executed at S-21.

21 [14.22.27]

22 Now, the evidence establishes that many other Northwest Zone
23 cadres were arrested, disappeared, or killed in the Northwest
24 Zone itself. For example, Pum Kho, who was the only member of the
25 Preah Net Preah District Committee to survive Im Chaem's cull,

1 told the Co-Investigating Judges at D219/23, answers 47 and 52 to
2 53, that the Southwest group arrested Northwest cadres at the
3 zone, sector, district, and commune levels, accused them of
4 treason, and sent them away. He added that the arrested cadres
5 never returned.

6 Iv Mara, who worked in the mobile unit in Preah Net Preah, told
7 the Co-Investigating Judges at D119/154, answer 30, that
8 Northwest cadres who had been the village and commune chairmen
9 were arrested and taken to be killed by the Southwest cadres and
10 Lat Suoy, a mobile unit worker at Trapeang Thma Dam worksite,
11 told the Co-Investigating Judges at D119/144, answer 47 -- 37,
12 pardon me, that the Northwest cadres were accused of being
13 traitors and: "were all arrested by the Southwest cadres to be
14 killed. After that, their wife and children were also collected
15 to be killed".

16 [14.24.16]

17 Your Honours, the Co-Investigating Judges did not take any
18 consideration of these many grave findings in the Closing Order.

19 Im Chaem defends this failure of the Co-Investigating Judges to
20 weigh her responsibilities for the results of the purge by
21 arguing at paragraph 56 of her response: "The details of the
22 crimes, as opposed to their essential characteristics and <nexus
23 to Ms. Im Chaem> were of marginal relevance in determining
24 personal jurisdiction".

25 Im Chaem does not explain why she considers that arrests,

1 unlawful detention, enforced disappearances, inhumane treatment,
2 torture, and extrajudicial killing are only a detail of marginal
3 relevance to assessing her responsibility. Im Chaem is basically
4 arguing that, if you acknowledge an individual's participation in
5 criminal activity, that you don't need to attribute the criminal
6 results to them. But any real effort to judge who is most
7 responsible and within the ECCC's jurisdiction must consider both
8 the role of the individual and the gravity of the crimes.
9 The Co-Investigating Judges' myriad of findings on how Im Chaem
10 participated in the purge, coupled with the complete failure to
11 consider the criminal results when assessing her responsibility
12 for the purposes of personal jurisdiction, is a glaring error
13 that must be rectified.

14 [14.26.00]

15 Your Honours, the second set of very serious allegations of which
16 the Co-Investigating Judges were seized, but did not consider in
17 the Closing Order relates to Im Chaem's responsibility for the
18 crime of forced marriage as another inhumane act. The
19 International Co-Prosecutor's final submission details Im Chaem's
20 involvement in the commission of forced marriage. However, as my
21 colleague stated, <The Closing Order does not contain a single
22 reference to the crime or to the allegation>.

23 Im Chaem suggested at paragraph 61 of her response that: "the
24 Co-Investigating Judges were well within their discretion to
25 accord little or no probative value to the evidence implicating

1 Im Chaem in forced marriages." But the Co-Investigating Judges
2 did not make any such finding. Im Chaem invents this finding in
3 order to avoid the <point> of the Co-Prosecutor's appeal and that
4 is the failure of the Co-Investigating Judges to even consider
5 the evidence of which they were <validly> seized.
6 Now, given this failure, the only reasonable interpretation is
7 that the Co-Investigating Judges did not take this evidence into
8 account when making their personal jurisdiction decision.
9 Your Honours, a number of witnesses give clear and compelling
10 accounts regarding Im Chaem's involvement in the commission of
11 forced marriages. First, Thang Thoeuy, who was mentioned by my
12 colleague earlier, worked in the mobile unit at Spean Sreng and
13 told the Co-Investigating Judges at D119/131, answer 65 "I was
14 forced to get married to my husband. I never knew him before.
15 There were 85 couples during that marriage in 1977".
16 At answer 70 of the same interview, Thang Thoeuy, who was just a
17 teenager at the time, stated: "Yeay Chaem supervised the whole
18 wedding".
19 Thang Thoeuy told the Co-Investigating Judges at answer 73 that
20 she was threatened with execution if she refused to get married
21 and also stated at answers 77, 80, and 81 that she was told by
22 her unit chief that Im Chaem had ordered that wedded couples be
23 spied upon in order to ensure that marriages were consummated and
24 that those who refused were to be killed.
25 [14.29.05]

1 Thang Thoeuy told the Co-Investigating Judges at answer 78:

2 "There were two or three women taken by the militia to be killed
3 because they did not consummate".

4 Now, Im Chaem disparages the evidence of forced-marriage victim
5 Thang Thoeuy suggesting at paragraph 60 that no reasonable
6 tribunal could have relied upon it. It is worth noting then that
7 the Co-Investigating Judges clearly found Thang Thoeuy's Written
8 Record of Interview to be credible. The Co-Investigating Judges
9 relied on this evidence on five separate occasions in the Closing
10 Order for its findings in relation to conditions at Trapeang Thma
11 Dam, that militiamen were under Im Chaem's control and for Im
12 Chaem's authority to order executions, but not once did the
13 Co-Investigating Judges referred to Thang Thoeuy's evidence about
14 being a victim of forced marriage.

15 [14.30.20]

16 Im Chaem also claims at paragraph 60 of her response that this
17 evidence of Thang Thoeuy was not sufficiently consistent,
18 serious, or corroborated to support the allegations against her.
19 However, Thang Thoeuy's evidence is patently serious and entirely
20 consistent. This is a victim's Written Record of Interview. It is
21 a first-hand account of the forced marriage and rape of a
22 teenager.

23 Im Chaem's implication that the testimony of such victims must be
24 corroborated by other witnesses to be worthy of belief is totally
25 at odds with international jurisprudence wherein even a

1 conviction at trial can be based upon the evidence of a single
2 witness.

3 Your Honours, the sworn evidence of eyewitnesses and victims is
4 clearly more than capable of meeting the standard of probability
5 applicable to the indictment stage of proceedings. What's more,
6 other witnesses give similarly damning evidence. Sen Saphon, who
7 like Thang Thoeuy worked in the mobile unit at Spean Sreng, told
8 the Co-Investigating Judges at D219/506, answer 51, that he
9 witnessed people in his unit being forced to marry and: "that
10 happened under Yeay Chaem".

11 He further told the Co-Investigating Judges at answer 53 that
12 people could not refuse to get married because they would be
13 confused -- would be accused -- pardon me -- of being an enemy.
14 Now, Sen Saphon provided the same account of witnessing forced
15 marriage at Spean Sreng work site when he testified before the
16 Trial Chamber in Case 002/1.

17 [14.32.30]

18 The Co-Investigating Judges relied on the evidence of Sen Saphon
19 four times in the Closing Order for its findings that Im Chaem
20 regularly visited and inspected Spean Sreng Canal work site, for
21 the arrest of Sector 5 mobile unit leader Ta Val by the Southwest
22 cadres and for disappearances at Spean Sreng, and yet the
23 Co-Investigating Judges did not refer to Sen Saphon's evidence
24 about forced marriage at Spean Sreng.

25 Now, Im Chaem attempts at paragraph 58 of her response to

1 diminish Sen Saphon's sworn statement in this case and his sworn
2 evidence in Case 002 as merely the evidence of a single party -
3 <single-party (sic)> civil applicant, but this is a transparent
4 attempt to discount relevant and highly incriminating evidence
5 against her.

6 Additionally, Sok Rum, who was sent to Sector 5 of the Northwest
7 Zone in 1977, told the Co-Investigating Judges at D119/108,
8 answer 108, that women in her unit attended meetings where Im
9 Chaem instructed them to get married, often to soldiers who had
10 lost their legs.

11 When asked what happened to those who refused to get married, Sok
12 Rum responded at answer 110:

13 "If someone defied such a proposal, they would definitely be
14 arrested."

15 [14.34.07]

16 Now, the Co-Investigating Judges relied on Sok Rum evidence on
17 two occasions in the Closing Order for its findings <that> Im
18 Chaem attended a meeting in the Southwest Zone discussing the
19 impending purge of the Northwest Zone and in relation to Wat
20 Chamkar Khnol being an execution site in Sector 5 of the
21 Northwest Zone. But, again, the Co-Investigating Judges did not
22 refer to Sok Rum's evidence about forced marriage. Im Chaem
23 claims at paragraph 51 of her response that Sok Rum's evidence is
24 incapable of possessing any meaningful relevance or probative
25 value, but as with her assessment of other witnesses' statements,

1 this amounts to an unsustainable denial of the evidence against
2 her.

3 While Im Chaem tries to dismiss each individual witness as
4 uncorroborated, she fails to address how these different
5 witnesses give similar accounts of her <participation> in the
6 crime of forced marriage. Three witnesses, three different
7 incidents, yet all pointing to Im Chaem's participation in forced
8 marriage and forced consummation from organization to direct
9 participation and oversight. Im Chaem's involvement in forced
10 marriages as <an> other inhumane act must be considered in
11 evaluating whether she falls within the personal jurisdiction of
12 the Court. The Co-Investigating Judges' failure to do so is a
13 clear error of law.

14 Your Honours, Grounds 3 and 4 of the International
15 Co-Prosecutor's appeal deal with the Co-Investigating Judges'
16 error of not applying the well-settled and defined law as it
17 relates to the crime of extermination in Ground 3 and the crime
18 of enforced disappearance as another inhumane act in Ground 4.

19 [14.36.35]

20 Im Chaem claims in her response at paragraphs 22 and 92 that the
21 International Co-Prosecutor is challenging the definitions of
22 these crimes, but the International Co-Prosecutor is not
23 challenging definitions. Our argument is one of mis-application
24 of the existing law.

25 Turning first to Ground 3, which is the Co-Investigating Judges'

1 failure to hold Im Chaem responsible for the crime of
2 extermination at Phnom Trayoung Security Centre, the
3 Co-Investigating Judges' erred in law at paragraph 288 of the
4 Closing Order by introducing an <ex ante> mens rea intent to the
5 crime of extermination. The Co-Investigating Judges found that,
6 because executions at Phnom Trayoung Security Centre did not
7 occur in one single instance and were committed by different
8 physical perpetrators, that it was unclear if the executions
9 were:

10 "Carried out with the <ex ante> intent to kill on a massive
11 scale."

12 However, the ECCC's Supreme Court Chamber in the Case 002/01
13 Appeal Judgement at paragraphs 551 to 552 and 554, as well as the
14 ICTY and ICTR Appeals Chamber, have held that the requirement of
15 killings on a large scale can be met through a series of killings
16 or a course of conduct.

17 It follows that, because extermination can be proven through
18 separate acts of killing, that there is no legal basis to require
19 that the perpetrator forms the intent to kill a massive number at
20 the beginning of such a series of killings as opposed to any
21 point during those killings.

22 [14.38.40]

23 The Co-Investigating Judges' introduction of an <ex ante> mens
24 rea raises the intent required for extermination to something
25 akin to a premeditated or preconceived plans that killing on a

1 large scale take place.

2 Now, similar attempts to change the mens rea definition of
3 extermination have been rejected at this Court. The Trial Chamber
4 in the Case 002/01 Trial Judgement at paragraphs 418 to 419 and
5 the Supreme Court Chamber in the Case 002/01 Appeal Judgement at
6 paragraph 528, rejected the argument that an accused must be
7 aware that deaths form part of a vast murderous enterprise in
8 order to constitute extermination.

9 Nothing in the jurisprudence of the ECCC or international courts
10 includes a requirement that the intent of the crime for
11 extermination be premeditated. Even for the crime of genocide,
12 which is somewhat analogous to the crime of extermination but has
13 a stricter mens rea, the ICTR Appeals Chamber in the Simba Appeal
14 Judgement at paragraph 266 held that the enquiry is not whether
15 the specific intent was formed prior to the commission of the
16 acts.

17 And, similarly, in the Krstic Trial Judgement at paragraph 572,
18 the ICTY Trial Chamber held that genocidal acts need not be
19 premeditated, stating, and I quote:

20 "It is conceivable that although the intention at the outset of
21 an operation may not be destruction of a group, it may become the
22 goal at some later point during the implementation of that
23 operation."

24 [14.40.40]

25 Your Honours, the Supreme Court Chamber in the Case 002/01 Appeal

1 Judgement held at paragraph 525 that extermination is generally
2 defined as killing on a large scale and that this is reflected in
3 both the actus reas and the mens rea:

4 "Killings must occur on a large scale and the perpetrator must be
5 aware of the killing on large scale."

6 There is simply no requirement that the perpetrator intend
7 killing on a large scale before any such killing occurs.

8 Now, Im Chaem suggests at paragraph 80 to 84 of her response that
9 the crime of extermination requires an <ex ante> intent element
10 to be proven depending on the circumstances of the case, but this
11 is not supported by any jurisprudence. Crimes under international
12 criminal law do not have different definitions depending on the
13 context. Such a situation would effectively create two different
14 standards within one mode of liability, thereby flouting the
15 application, the equal application, of the law.

16 It is clear that if the Co-Investigating Judges had applied the
17 correct definition of the elements of extermination that they
18 would have found that Im Chaem had the intention to kill on a
19 massive scale in Phnom Trayoung.

20 Looking at the Closing Order, this is the only legal conclusion
21 consistent with the Co-Investigating Judges' factual findings.

22 The Co-Investigating Judges conservatively estimated that between
23 mid-1977 and January 1979, that more than 2,000 prisoners were
24 executed by the prison guards and that hundreds more died of
25 starvation, of illness, of overwork and mistreatment.

1 [14.43.00]

2 Your Honours, these killings and deaths were not unconnected.

3 They were not random incidents. They happened at one location and
4 as the Co-Investigating Judges found at paragraphs 288 of the
5 Closing Order, people were executed for the same reason:

6 "Behaviour contrary to the ideology and the policies of the CPK."

7 The Co-Investigating Judges found at paragraphs 208 to 209 that
8 executions at Phnom Trayoung were routine and that guards bragged
9 among themselves as to who would killed more prisoners.

10 Now, the Closing Order makes clear that nothing happened at Phnom
11 Trayoung without Im Chaem. The Co-Investigating Judges found that
12 Im Chaem had overall authority at Phnom Trayoung and oversaw its
13 operation, that Im Chaem appointed Tum Soeun to be chief of Phnom
14 Trayoung and that he reported directly to Im Chaem, that Im Chaem
15 held regular meetings with cooperative chiefs and Tum Soeun to
16 determine who would be sent to Phnom Trayoung Security Center,
17 that Im Chaem ordered militia men to conduct these arrests, that
18 Im Chaem decided on a categorization of prisoners as serious
19 offenders, and also that Im Chaem ordered Tum Soeun to execute
20 prisoners.

21 Now, Tum Soeun only admitted to being ordered to execute four
22 prisoners by Im Chaem. The Co-Investigating Judges held at
23 paragraph 212 of the Closing Order that Tum Soeun had ulterior
24 motives to:

25 "Downplay the extent of executions."

1 It is also abundantly clear from the evidence of the extent of Im
2 Chaem's authority that it was Im Chaem who decided on the fate of
3 detainees at Phnom Trayoung.

4 [14.45.29]

5 Your Honours, the Co-Investigating Judges found at paragraph 288
6 of the Closing Order that the more than 2,000 killings and deaths
7 at Phnom Trayoung reached the threshold of massiveness required
8 for the crime of extermination. Thus, if not for the
9 Co-Investigating Judges' legal error of requiring proof of an <ex
10 ante> intent, their factual findings unequivocally show that Im
11 Chaem is responsible for the crime of extermination at Phnom
12 Trayoung.

13 Moving to Ground 4 which is the Co-Investigating Judges' error in
14 law by failing to find Im Chaem responsible for the crime of
15 enforced disappearance as another inhumane act at Spean Sreng
16 work site.

17 Your Honours, the Co-Investigating Judges applied the wrong legal
18 definition for the elements of this crime. The crime at issue is
19 enforced disappearance as another inhumane act and, as such, the
20 applicable legal elements are the elements of other inhumane
21 acts, meaning that it must be an act or omission that causes
22 serious bodily or mental harm and is of a similar nature and
23 gravity to other enumerated crimes against humanity.

24 [14.47.00]

25 Now, the Co-Investigating Judges did not apply this definition.

1 Instead, at paragraph 75 to 76 of the Closing Order, the
2 Co-Investigating Judges relied on the definition of enforced
3 disappearance set down by the Trial Chamber in the Case 002/01
4 Trial Judgement, ignoring the fact that the Supreme Court Chamber
5 subsequently held that the Trial Chamber had erred in law in its
6 definition of enforced disappearance.

7 The Trial Chamber defined the other inhumane act of enforced
8 disappearance by reference to the elements of the modern crime of
9 enforced disappearance instead of by -- instead of by reference
10 to the elements of other inhumane acts.

11 In the Trial Chamber's definition, authorities must refuse to
12 disclose information about the fate or whereabouts of disappeared
13 persons. The Co-Investigating Judges applying this definition in
14 the Closing Order found at paragraph 302 that, while there is
15 ample evidence of disappearances and little doubt that families
16 of those disappeared were unable to determine the fate or
17 whereabouts of those who had disappeared, that there was no
18 evidence that enquiries were made to authorities at the site.

19 The Co-Investigating Judges concluded:

20 "For this reason alone, the evidence does not allow us to
21 conclude that the crime against humanity of other inhumane acts
22 by enforced disappearance was committed at Spean Sreng canal work
23 site."

24 [14.48.55]

25 Now, the Supreme Court Chamber in the Case 002/01 Appeal

1 Judgement at paragraph 653 addressed this Trial Chamber
2 requirement that authorities refused to disclose information on
3 the whereabouts of disappeared persons and found that it was
4 irrelevant to the question of whether the elements of other
5 inhumane acts were fulfilled.

6 The Supreme Court Chamber at paragraph 589 describes the Trial
7 Chamber's approach to enforced disappearances which was the
8 approach followed by the Co-Investigating Judges in the Closing
9 Order as:

10 "Anachronistic and illegally incorrect."

11 The Co-Investigating Judges expressly stated at paragraph 10 of
12 the Closing Order that while there is no doctrine <of stare
13 decisis> at the ECCC, that it would nonetheless be undesirable
14 from the point of view of uniformity and clarity of the law if
15 lower-court judges were to refuse to follow Supreme Court
16 Chamber's jurisprudence unless there were exceptional reasons to
17 do so.

18 Now, given that there was no reference to the Supreme Court
19 Chamber's judgement, let alone any exceptional reasons given for
20 not following its ruling, it seems that the Co-Investigating
21 Judges' reliance on the Trial Chamber's definition of enforced
22 disappearance was an oversight rather than an intention to depart
23 from Supreme Court Chamber jurisprudence. But either way,
24 however, it is a legal error.

25 [14.50.49]

1 Your Honours, had the Co-Investigating Judges applied the correct
2 legal definition, it is clear they would have found Im Chaem
3 responsible for enforced disappearance at Spean Sreng.
4 Im Chaem claims at paragraph 98 of her response that it cannot be
5 assumed that the disappearances caused serious mental or physical
6 suffering, but the Co-Investigating Judges' factual findings <as
7 to> what occurred at Spean Sreng make it clear that both those
8 who disappeared and the family that remained suffered greatly.
9 Looking at the Closing Order, the Co-Investigating Judges made
10 the following findings in relation to Spean Sreng work site.
11 Armed and unarmed guards watched over the workers to prevent
12 their escape and arrested those who committed mistakes. Labourers
13 were forced to work under the threat of being killed if work was
14 not done according to instructions. There was a general climate
15 of fear at the work site. Arrests and disappearances of workers
16 were common occurrences. Reasons for arrests included not meeting
17 work quotas and family connections, and those who disappeared may
18 have been executed at Phnom Trayoung Security Centre. In
19 addition, families were unable to determine the fate or
20 whereabouts of those who disappeared.

21 [14.52.29]

22 MR. PRESIDENT:

23 Let me invite the International Deputy Co-Prosecutor to pause for
24 two or three minutes to change the CD recording system.

25 MR. KENNY:

1 Of course, Mr. President.

2 (Short Pause)

3 [14.53.52]

4 MR. PRESIDENT:

5 You may now proceed.

6 MR. KENNY:

7 Thank you, Mr. President.

8 Your Honours, given the Co-Investigating Judges' findings, the
9 only reasonable inference is that severe mental and physical
10 suffering was caused to those taken away, as well as to those who
11 were connected to them and left behind.

12 Were it not for the Co-Investigating Judges' legal error of
13 applying the wrong elements of the other inhumane act of enforced
14 disappearance, the Co-Investigating Judges' findings clearly show
15 that Im Chaem is responsible for enforced disappearance at Spean
16 Sreng work site.

17 Your Honours, any proper assessment of whether Im Chaem meets the
18 personal jurisdiction of this Court can only be based on an
19 accurate assessment of the crimes for which she is responsible
20 and for her role therein.

21 Grounds 5 and 6 of the International Co-Prosecutor's Appeal
22 address the Co-Investigating Judges' factual errors of failing to
23 find that Im Chaem was Koh Andet District secretary in Ground 5
24 and that Im Chaem was a Sector 13 committee member in Ground 6.

25 The Co-Investigating Judges' factual findings regarding Im

1 Chaem's position disregarded the evidence of the person who best
2 knew what position she held. That is Im Chaem herself. In her own
3 statements recorded by DC-Cam and available to listen to on the
4 Case File, Im Chaem makes it clear that she was the secretary of
5 Koh Andet District and that she was a Sector 13 committee member.
6 Im Chaem does not address the contents of her admissions in her
7 response <asides the absurd> claim in paragraph 109 that the
8 multiple interviews she voluntarily gave to DC-Cam were somehow
9 taken in violation on the right against self-incrimination.

10 [14.55.49]

11 Now, Im Chaem's admissions were corroborated by the statements of
12 witnesses interviewed by the Co-Investigating Judges. The Closing
13 Order wrongly concluded at paragraph 143 that Im Chaem's only
14 position in the Southwest Zone was chief of the Sector 13 women's
15 association.

16 The Co-Investigating Judges seemingly proceeded on the
17 assumption, the basis of which they never explain, that no person
18 could simultaneously hold more than one position at the same
19 time, something that we know is incorrect as there are many
20 examples of individuals in the DK regime holding multiple
21 positions at the same time. The Co-Investigating Judges failed to
22 consider that the evidence, when wholly and properly assessed,
23 can only be reconciled with the fact that Im Chaem held more than
24 one position simultaneously. No reasonable fact-finder could have
25 arrived at the same conclusion as the Co-Investigating Judges.

1 Taking Ground 5 first, the Co-Investigating Judges erred in fact
2 on finding at paragraph 144 of the Closing Order that the
3 evidence did not support the contention that Im Chaem was Koh
4 Andet District secretary.

5 Your Honours, Im Chaem has said that she was the Koh Andet
6 District secretary. The following is part of Im Chaem's third
7 interview with DC-Cam, and if we could please play Clip 1.

8 (Audio-Video presentation (video) Clip 1)

9 [14.58.12]

10 MR. KENNY:

11 Your Honours, were you able to view that clip and hear that clip?

12 [14.58.50]

13 [Interpretation from Khmer]

14 "Q. Why was the committee in Koh Andet removed?

15 A. There were different conflicts amongst the committee. They did
16 not agree on the work. When I arrived there, the chairman was
17 transferred to <Kirivong>.

18 Q. So who was in charge of Koh Andet at the time?

19 A. It was <Sieng>. <Sieng> passed away.

20 Q. <Sieng>?

21 A. Yes.

22 Q. Was <Sieng> transferred to <Kirivong>?

23 A. Yes. When I was there, there were three people, a male member,
24 my deputy was Ta Mok's younger brother-in-law, and me.

25 Q. Who assigned Ta Mok's younger brother-in-law?

1 Q. So while you were in Koh Andet, there was you, <Ta San> and?

2 A. Also Ta Chan, but he was very old."

3 [End of interpretation from Khmer]

4 (End of Audio-Video presentation (video) Clip 1)

5 [14.59.30]

6 MR. KENNY:

7 In the same interview, Im Chaem states that she was first
8 assigned to Angkor Chey District by Pol Pot and Ta Mok, and when
9 asked the question "Why were you transferred from Angkor Chey to
10 Koh Andet?", Im Chaem answered:

11 "Because I could fulfil the plan."

12 The Closing Order refers to Im Chaem's admission about her
13 position as District secretary at paragraph 146 and nonetheless
14 concludes that Im Chaem worked in Koh Andet District by virtue of
15 being chief of the Sector 13 women's association. No reasonable
16 trier of fact could have interpreted Im Chaem's statement in this
17 way. Im Chaem clearly knew her own position. She unambiguously
18 states that <Sieng> who was the secretary of Koh Andet was
19 transferred away from the district and then there were three
20 people, namely Im Chaem, her deputy <Ta San>, and Ta Chan as a
21 member.

22 There can be no doubt that Im Chaem was the Koh Andet District
23 secretary. Im Chaem's admissions regarding her position are
24 corroborated by several witnesses. The Co-Investigating Judges
25 failed, however, to properly assess this evidence.

1 Witness Neang Ouch alias <Ta San> is the individual that Im Chaem
2 twice names in her DC-Cam interviews as being her deputy in Koh
3 Andet. At least three witnesses confirmed to the Co-Investigating
4 Judges that Neang Ouch alias <Ta San> was on the Koh Andet
5 District committee.

6 Im Chaem told DC-Cam:

7 "Uncle San, my deputy, was in charge of Boeng District near the
8 Vietnamese territory."

9 [15.01.49]

10 When this statement was put to Neang Ouch alias <Ta San> by the
11 Co-Investigating Judges, he did not deny being Im Chaem's deputy.

12 He told the Co-Investigating Judges at D119/82, answer 48:

13 "Yes, that is correct. I went to work at Boeng Prek Lpov and
14 Thung Lech building canals."

15 Neang Ouch alias <Ta San> went on in his statement to claim that
16 he did not know his own position in an obvious attempt to
17 distance himself from the commission of crimes. As he had done
18 during his testimony in Case 002/01, when unsuccessfully denying
19 his position as a Tram Kak Case 002 -- pardon me -- when
20 unsuccessfully denying his position in the Tram Kak District
21 committee.

22 And Neang Ouch alias <Ta San> also told the Co-Investigating
23 Judges at answer 27 that Ta Chan -- and that is the individual
24 named by Im Chaem as being the very old member of the Koh Andet
25 District committee when she was a secretary. So <Ta San> says to

1 the Co-Investigating Judges that Ta Chan was on the Koh Andet
2 district committee when he, <Ta San>, was himself in Koh Andet,
3 thus further corroborating Im Chaem's admission. And yet despite
4 all of this, the Co-Investigating Judges relied on Neang Ouch's
5 evidence to suggest that Im Chaem was only chief of the Sector 13
6 women's association.

7 [15.03.45]

8 The Co-Investigating Judges treatment of this evidence does not
9 make sense. The Co-Investigating Judges do not address the
10 obvious inconsistency of their finding, which effectively
11 suggests that Neang Ouch alias <Ta San> was deputy of the Sector
12 13 women's association which is simply not a credible position.
13 Pech Chim, who was Tram Kak deputy secretary, told the
14 Co-Investigating Judges at D118/259, answer 41, that there were
15 three women in charge of the Sector 13 women's association, Im
16 Chaem, Yeay Bau and Yeay Phorn.

17 Additionally, the Co-Investigating Judges failed to consider the
18 evidence of Sok Rum who was a worker in Koh Andet in 1976 and
19 told the Co-Investigating Judges at D119/108, answer 105, that Im
20 Chaem was the Koh Andet District secretary and that she held
21 large meetings of men and women in Koh Andet. And there is no
22 indication in the Closing Order why this highly relevant evidence
23 was not considered. Indeed, the Co-Investigating Judges relied on
24 Sok Rum's evidence elsewhere, demonstrating that they considered
25 her Written Record of Interview to be credible.

1 Im Chaem claims at paragraph 117 of her response that it was not
2 necessary for the Co-Investigating Judges to include Sok Rum's
3 statement as they were not required to refer to every piece of
4 evidence on the record. However, it is simply incorrect to
5 suggest that a fact-finder can entirely omit from consideration
6 credible evidence which completely undermines its conclusion.

7 [15.06.07]

8 The Co-Investigating Judges also failed to consider the evidence
9 of Riel Son and Kao Chheng and failed to properly consider the
10 evidence of Ul Hoeun. Each of these three witnesses gave
11 corroborating evidence that Im Chaem was a district secretary in
12 Sector 13.

13 Now, Im Chaem claims at paragraph 110 of her response that the
14 International Co-Prosecutor studiously avoided addressing the
15 Co-Investigating Judges' reliance on the evidence of Bun Thoeun
16 and Pech Chim, but nothing could be further from the truth.

17 First, Bun Thoeun told the Co-Investigating Judges at D119/149,
18 answer 30, that he never went to Koh Andet District. Im Chaem

19 claims at paragraph 110 that Bun Thoeun stated that Im Chaem
20 never attended meetings at Angkor Chey as a district secretary,
21 but this is not correct. Bun Thoeun told the Co-Investigating

22 Judges that he attended a sector-level meeting in Angkor Chey at
23 which Im Chaem was present and where all commune secretaries were
24 arrested. He told the Co-Investigating Judges at D6.1.688, ERN

25 00384406:

1 "Im Chaem was talking with her colleagues about arresting those
2 secretaries. She said that they were connected to Yuan."

3 So Bun Thoeun's evidence looks relevant to Im Chaem's position at
4 the sector level and for her targeting on Vietnamese in areas
5 under her control but is silent on the question of her position
6 as Koh Andet district secretary.

7 And, second, Pech Chim told the Co-Investigating Judges at
8 D118/259, answer 39, that the Koh Andet district committee
9 comprised Chaem as district secretary and <Ta San> as deputy,
10 thus Pech Chim's evidence does not take account of the
11 composition of the district committee after <Sieng> was
12 transferred which was when Im Chaem admitted to becoming Koh
13 Andet District secretary. Pech Chim also confirms that <Ta San>
14 alias Neang Ouch was the Koh Andet deputy secretary, thus further
15 corroborating Im Chaem's admission about her position in Koh
16 Andet.

17 [15.09.12]

18 When properly assessed and in totality, the evidence is patently
19 clear that Im Chaem was district secretary of Koh Andet and no
20 reasonable fact-finder could have found otherwise.

21 Your Honours, turning to Ground 6, which is the final ground of
22 the International Co-Prosecutor's Appeal, the Co-Investigating
23 Judges erred by finding in paragraph 144 of the Closing Order
24 that Im Chaem was not the Sector 13 committee member. Now, again,
25 Im Chaem admitted to being the Sector 13 committee member. Im

1 Chaem told DC-Cam the following. If we could please play Clip 2.

2 (Audio-Video presentation (video) Clip 2)

3 [15.10.14]

4 [Interpretation from Khmer]

5 "A. When my chairman Uncle <Saom> became sick, I was promoted to

6 (inaudible) but I did that for a short time, around one year,

7 then they transferred me to Battambang.

8 Q. Then you went to Preah Net Preah, didn't you?

9 A. Yes, in Preah Net Preah."

10 [End of interpretation from Khmer]

11 (End of Audio-Video presentation (video) Clip 2)

12 [15.10.47]

13 MR. KENNY:

14 Im Chaem described this promotion in the following terms.

15 If we could please play Clip 3.

16 (Audio-Video presentation (video) Clip 3)

17 [Interpretation from Khmer]

18 "A. No, I succeeded my chairman, I was just a member.

19 Q. Sector member?

20 A. Yes."

21 [End of interpretation from Khmer]

22 (End of Audio-Video presentation (video) Clip 3)

23 [15.11.25]

24 MR. KENNY:

25 Im Chaem also stated that it was Ta Mok who transferred her to

1 Takeo to work on the sector committee. Im Chaem thus admitted to
2 being promoted member of the Sector 13 committee and that she
3 held the position for a year before being transferred to the
4 Northwest Zone which, as the Co-Investigating Judges found, was
5 when she was sent by Ta Mok to conduct the purge of that zone.
6 The problematic approach taken by the Co-Investigating Judges to
7 the evidence is exemplified by their noting Im Chaem's admission
8 regarding her position at paragraph 147 on the Closing Order,
9 then making no further reference to this admission and failing to
10 explain why it was discounted.
11 As in Ground 5, the Co-Investigating Judges erred not only when
12 assessing Im Chaem's admissions but also with regard to
13 corroborating witness evidence.
14 The Co-Investigating Judges concluded at paragraph 148 of the
15 Closing Order that a higher number of witnesses provided specific
16 evidence that Im Chaem was chief of the women's association
17 rather than being the Sector 13 committee member. But there is no
18 reason to believe that one position excluded the other, and the
19 overwhelming majority of the statements on the Case File indicate
20 that Im Chaem led the women in the sector at the same time that
21 she was a Sector 13 committee member.
22 For example, Moeng Vet, who was a cadre in Sector 13, told the
23 Co-Investigating Judges at D119/83, answer 18:
24 "Im Chaem was a deputy in the Sector 13 committee and was in
25 charge of the women in the sector. We could say that she was a

1 member of the Sector 13 standing committee."

2 Moeng Vet also stated at answer 20 that while attending a Sector
3 13 committee meeting he saw writing on the back of a letter that
4 Ta San had sent to Im Chaem which said, "To Comrade Chaem, Sector
5 13 Standing Committee".

6 [15.14.06]

7 <Pech Chim> who was a deputy of Tram Kak told the
8 Co-Investigating Judges at D118/259, answer 40, that people
9 thought Im Chaem:

10 "Was on the sector committee and in charge of women because she
11 always went to work in all the districts in Sector 13."

12 Im Chaem tries to undermine Pech Chim's evidence by suggesting at
13 paragraph 127 of her response, but the International

14 Co-Prosecutor disregarded that Pech Chim told the
15 Co-Investigating Judges that Im Chaem was not sector secretary.

16 However, the International Co-Prosecutor is not claiming that Im
17 Chaem was a sector secretary, but that she was the Sector 13
18 committee member, and Pech Chim's evidence corroborates this.

19 Bun Thoeun who was a Sanlong commune committee member told the

20 Co-Investigating Judges at D118/274, answer 29:

21 "During that time, everything was secret. I just heard that after
22 <Ta San's> removal, Im Chaem perhaps became the member of Sector
23 14 because I always saw her presence during every meeting of the
24 sector."

25 Two things about this statement, Your Honours. First, it is clear

1 from the questions and answers that when Bun Thoeun refers to
2 Sector 14 that he meant Sector 13. Indeed, there was no Sector 14
3 at the time and <Ta San> was a Sector 13 secretary.

4 And secondly, this statement mirrors exactly what Im Chaem admits
5 to, that when <Ta San> left his position, Im Chaem became the
6 member of the sector.

7 [15.16.16]

8 On Sopheap, who was a CPK soldier, told the Co-Investigating
9 Judges at D118/78, answer 8:

10 "I know that Im Chaem was a Sector 13 committee because I saw her
11 photo in a magazine during the Khmer Rouge regime. In the photo,
12 she was wearing simple black clothes and standing alone. Under
13 the photo, it was written "Im Chaem, Sector 13 committee."

14 Suon Mot, a Southwest cadre who transferred to the Northwest Zone
15 with Im Chaem's purge forces, told the Co-Investigating Judges at
16 D219/37, answer 17, that Im Chaem was a member of the Sector 13
17 committee. Suon Mot told the Co-Investigating Judges at answer
18 18:

19 "I knew and saw her because she came to chair meetings and work
20 where I lived."

21 Suon Mot added in answer 25 of the same interview that Im Chaem
22 controlled many small sections under the sector including the dam
23 building branch, the canal building branch and the economics
24 branch.

25 Chaem Chreav, who was a mobile unit worker in Angkor Chey in

1 District -- pardon me -- in Sector 13 told the Co-Investigating
2 Judges at D119/13, answer 6, that Im Chaem:

3 "Had a position in the Takeo provincial committee."

4 Chaem Chreav knew this because Im Chaem:

5 "Always had me call people in the villages and commune to a
6 meeting at a mobile work site."

7 Muol Eng, who worked in Tram Kak District, told the

8 Co-Investigating Judges at D193/8.2, answer 10:

9 "Im Chaem ranked third in Sector 13. <Ta San> ranked first, Ta
10 Mok was second, and Ta Keav was third. Im Chaem, Im Chaem
11 replaced Ta Keav."

12 [15.18.56]

13 Your Honours, in addition to these witnesses whose evidence was

14 not properly considered by the Co-Investigating Judges, the

15 Co-Investigating Judges simply failed to consider the evidence of

16 Moul Eng who was the <Bavel> District secretary during the DK.

17 Moul Eng told the Co-Investigating Judges at D219/294, answer

18 127:

19 "I know Im Chaem was from Takeo and that she had been a member of
20 Sector 13."

21 The Co-Investigating Judges also referred -- also failed to refer

22 and consider the evidence of Suok Rum and Khoem Vai.

23 Sok Rum, who worked in Koh Andet, told the Co-Investigating

24 Judges at D119/108, answer 45:

25 "Im Chaem was Sector 13 committee. Im Chaem was in charge of the

1 children, women and men's unit in Sector 13."

2 Khoem Vai was a sector messenger in Takeo Province and told the
3 Co-Investigating Judges at D219/636, answer 38:

4 "Ta Keav and Im Chaem were on the Sector 13 committee."

5 Even Im Chaem at paragraph 130 of her response acknowledges that
6 Khoem Vai provided direct evidence of probative value to Im
7 Chaem's position as Sector 13 committee member and, yet, the
8 Co-Investigating Judges disregarded this evidence without any
9 explanation for doing so.

10 [15.21.02]

11 Your Honours, to reach the Co-Investigating Judges' conclusion
12 that Im Chaem was not Sector 13 committee member, we have to
13 dismiss Im Chaem's own admission about her position and disregard
14 the statements of at least 10 witnesses who provided
15 corroboration that Im Chaem held a position in the Sector 13
16 committee, independent and separate from her role as chief of the
17 women's association.

18 What's more, this does not count the civil party <statements>
19 that corroborate that Im Chaem was on the Sector 13 committee as
20 a member.

21 So, on the balance of probabilities, which is <the standard at>
22 the indictment stage of proceedings, what is more probable? That
23 Im Chaem was mis-remembering or burnishing her role in the Khmer
24 Rouge and a couple of witnesses who never claimed that she was
25 not Sector 13 committee member but who can only speak to her

1 position in the women's association are correct, or that Im Chaem
2 knew her own position and admitted to DC-Cam that she was on the
3 Sector 13 committee independent of her role as chief of the
4 women's association as corroborated by at least 10 judicially
5 tested Written Records of Interview.

6 No reasonable fact-finder, having properly and totally assessed
7 the evidence, could have come to the same conclusion as the
8 Co-Investigating Judges.

9 That concludes the International Co-Prosecutor submissions on
10 appeal against the Closing Order.

11 Your Honours, the International Co-Prosecutor requests that the
12 transcript of this Hearing be made public at the first available
13 opportunity and if there are no questions from the Bench, then I
14 thank Your Honours for your time and your attention.

15 (Judges deliberate)

16 [15.24.15]

17 MR. PRESIDENT:

18 Co-Prosecutors, could you confirm that you already concluded your
19 submissions?

20 MR. KOUMJIAN:

21 Yes, thank you, Mr. President. Yes, we have concluded our
22 submissions. We are available if you -- Your Honours have any
23 questions.

24 MR. PRESIDENT:

25 Do you wish to "make" any questions? If not, then this conclude

1 your part. And we would like to thank you.

2 Thank you, and let me conclude our - let me adjourn for today's
3 proceeding and we will resume tomorrow starting from 10.00 a.m.

4 (Court adjourns at 1525H)

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